

A.F.R.

Reserved On: 16.07.2019

Pronounced On: 26th July, 2019

Court No. - 22

Case :- SECOND APPEAL No. - 111 of 2005

Appellant :- Babu Lal & Anr.

Respondent :- Bas Dev

Counsel for Appellant :- Dev Kumar Tripathi, Dev Kumar Tripathi

Counsel for Respondent :- Gajendra Yadav, Manoj Kumar

Gupta, Sampurna Nand Shukla

Hon'ble Ved Prakash Vaish, J.

1. Heard Sri Dev Kumar Tripathi, learned counsel for the appellants and Sri Manoj Kumar Gupta, learned counsel for the respondent.

2. The appellants, who were defendants in the original suit, have filed the present second appeal against the judgment and decree dated 08.12.2004 passed by learned Additional District Judge, Pratapgarh in Civil Appeal bearing No.135 of 1998, whereby the appeal filed by the respondent herein was allowed.

3. Succinctly stated that the facts of the present case are that the respondent herein, Bas Dev filed a suit for permanent injunction bearing Original Suit No.401 of 1991. The case of the respondent/plaintiff was that the disputed land is a part of Gata No.19, situated at Gosainpur, District Pratapgarh is an ancestral abadi land, which is shown as ABCD in the site plan prepared by Sri Abdul Wahab Khan, Advocate/Commissioner, which is a part of the plaint; forefathers of the respondent/plaintiff had been using the disputed land prior to the commencement of Uttar Pradesh Zamindari Abolition & Land Reforms

Act, 1950 (hereinafter referred to as "U.P.Z.A. & L.R. Act) and the disputed land is being used for cattles and for sitting purposes. It was also alleged by the respondents that the partition took place between him and his brothers, northern side of the abadi fell to his share and the disputed land is situated in his share, the respondent/plaintiff planted a *neem* tree; the respondent/plaintiff is in occupation of the disputed land and the appellants/defendants have no right to interfere in his possession; the appellants/defendants were never in possession of the disputed land. The house of defendants is at one *bigha* away from the disputed land and they are residing in Ghatampur. It was also alleged that the appellants/defendants tried to install handpump and putting soil after cutting *neem* tree and intent to take forcible possession after opening the door. In July, 1991, the defendants tried to demolish western wall of plaintiff.

4. The appellant/defendants contested the suit by filing written statement and denied the allegations made in the plaint.

5. In the additional statement, the appellants/defendants stated that the suit is bad for non-joinder of necessary party as Sri Mahadev and Sri Vishwanath were necessary parties; the house of respondent/plaintiff is at a long distance from the disputed land, the respondent/plaintiff got a part of western side of his house and exit of the respondent/plaintiff is towards western side of his house. On the southern side of the disputed land *sariya* and *dalan* belong to Sri Mahadev are situated, door of which is on southern side and northern side of house of the respondent fell to share of Sri Mahadev and he had opened door on the northern side; respondent/plaintiff had no right in the disputed land and he was never in occupation of the disputed land. Defendants are in possession over the disputed land prior to the commencement of U.P.Z.A. & L.R. Act so they are owner of the disputed land; the *neem* tree is planted by defendant No.2.

6. On the pleadings of the parties, following issues were framed by learned trial court:-

1. क्या वादी विवादित सम्पत्ति का मालिक व काबिज है ?
2. क्या प्रतिवादीगण विशेष हर्जा पाने के अधिकारी हैं ?
3. उपषम ?"

7. In support of his case, the respondent/plaintiff, Sri Bas Dev examined himself as PW-1, Sri Baijnath as PW-2. The appellant/defendant examined Sri Babu Lal as DW-1 and Sri Gaya Prasad as DW-2.

8. Vide judgment and decree dated 29.07.1998, the suit was dismissed by learned 6th Additional Civil Judge (Junior Division), Pratapgarh. Against the said judgment and decree, the respondent/plaintiff filed a Civil Appeal bearing No.135 of 1998 (Bas Dev vs. Babu Lal and others), the said appeal was allowed by learned Additional District Judge, Pratapgarh vide judgment and decree dated 08.12.2004.

9. Feeling aggrieved by the judgment and decree dated 08.12.2004, the appellants/defendants has filed the present second appeal.

10. Vide order dated 22.03.2005, my learned Predecessor admitted the appeal on the following substantial question of law:-

"Whether the appellate court has allowed the appeal without reversing the findings of the trial court."

11. Learned counsel for the appellants submitted that neither the respondent/plaintiff nor his forefathers was in occupation on the disputed land prior to the commencement of U.P.Z.A. & L.R. Act, the disputed land did not vest to the plaintiff/respondant. He also submitted that when the respondent/plaintiff appeared as PW-1 and he stated that he was aged about 6-7 years when his house was constructed and in 1991 when he filed the suit he was aged about 42 years, which shows that the house of respondent/plaintiff was constructed in 1955-56. The land did not vest with the respondent before 01.07.1952.

12. Learned counsel for the appellants also submitted that neither respondent was in occupation on the disputed land nor he is in possession. He also submitted that the respondent/plaintiff is not owner of the disputed land.

13. Learned counsel for the appellants has relied upon the judgments in the cases of '**Maharaj Singh vs. State of Uttar Pradesh and others**', (1977) 1 SCC 155, '**Laliteshwar Prasad Singh and others vs. S.P. Srivastava (D) through LRs**', 2017 (35) LCD 7, '**Basti Ram vs. Nagar Nigam, Ghaziabad and others**', 2000 (18) LCD 138 and '**Yasin alias Dhondhey and others vs. Mohammad Ali and others**', 2005 (23) LCD 278.

14. On the other hand, learned counsel for the respondent submitted that the predecessor of the respondent was using the land in Gata No.19, on partition the disputed land fell to the share of the respondent; the respondent is in occupation prior to the commencement of U.P.Z.A. & L.R. Act and the land vested with the respondent/plaintiff.

15. According to learned counsel for the respondent, the respondent is in occupation on the disputed land and appellants have no right to interfere in his possession. Learned counsel for the respondent has relied upon the judgments in the cases of '**Sunkamma (Dead) by L.Rs. vs. S. Pushparaj (Dead) by L.Rs.**', 2018 (139) RD 565 and the judgment of this Court in Second Appeal No.341 of 2017 titled as '**Anil Singh and another vs. Naumi Yadav and 2 others**' decided on 09.03.2017.

16. I have carefully considered the submissions made by learned counsel for both the parties. I have also carefully gone through the material available on record.

17. At the outset, it may be mentioned that in the plaint, the respondent/plaintiff had described the disputed land as ABCD in the site plan prepared by Sri Abdul Wahab Khan, Advocate/Commissioner, but it is not clear who had appointed Commissioner before filing of the suit.

18. It is settled principle of law that this Court will not sit as it is considering the regular first appeal so as to examine the entire matter on facts and law both. The scope of second appeal under Section 100 of the C.P.C. is very limited and this Court shall enter upon only when there is a substantial question of law.

19. It is also settled rule of law that in a suit for injunction the plaintiff is only required to prove his lawful possession of the suit property. The Hon'ble Supreme Court in the case of '**Sunkamma (Dead) by L.Rs. vs. S. Pushparaj (Dead) by L.Rs.**', 2018 (139) RD 565 observed that the touchstone upon which the suit has to be decided is "lawful possession" and not "ownership".

20. In the case of '**Anathula Sudhakar vs. P. Buchi Reddy (Dead) By LRS. and others**', (2008) 4 SCC 594, the Hon'ble Supreme Court summarized the legal position in a suit for prohibitory injunction as follows:-

"21. To summarise, the position in regard to suits for prohibitory injunction relating to immovable property, is as under:

(a) Where a cloud is raised over the plaintiff's title and he does not have possession, a suit for declaration and possession, with or without a consequential injunction, is the remedy. Where the plaintiff's title is not in dispute or under a cloud, but he is out of possession, he has to sue for possession with a consequential injunction. Where there is merely an interference with the plaintiff's lawful possession or threat of dispossession, it is sufficient to sue for an injunction simpliciter.

(b) As a suit for injunction simpliciter is concerned only with possession, normally the issue of title will not be directly and substantially in issue. The prayer for injunction will be decided with reference to the finding on possession. But in cases where de jure possession has to be established on the basis of title to the property, as in the case of vacant sites, the issue of title may directly and substantially arise for consideration, as without a finding thereon, it will not be possible to decide the issue of possession.

(c) But a finding on title cannot be recorded in a suit for injunction, unless there are necessary pleadings and appropriate issue regarding title (either specific, or implied as noticed in Annaimuthu Thevar [Annaimuthu Thevarv.Alagammal, (2005) 6

SCC 202]). Where the averments regarding title are absent in a plaint and where there is no issue relating to title, the court will not investigate or examine or render a finding on a question of title, in a suit for injunction. Even where there are necessary pleadings and issue, if the matter involves complicated questions of fact and law relating to title, the court will relegate the parties to the remedy by way of comprehensive suit for declaration of title, instead of deciding the issue in a suit for mere injunction.

(d) Where there are necessary pleadings regarding title, and appropriate issue relating to title on which parties lead evidence, if the matter involved is simple and straightforward, the court may decide upon the issue regarding title, even in a suit for injunction. But such cases, are the exception to the normal rule that question of title will not be decided in suits for injunction. But persons having clear title and possession suing for injunction, should not be driven to the costlier and more cumbersome remedy of a suit for declaration, merely because some meddler vexatiously or wrongfully makes a claim or tries to encroach upon his property. The court should use its discretion carefully to identify cases where it will enquire into title and cases where it will refer to the plaintiff to a more comprehensive declaratory suit, depending upon the facts of the case."

21. Recently, a similar question cropped up before the Hon'ble Supreme Court in the case of '**Jharkhand State Housing Board vs. Didar Singh and another**', 2019 SAR (Civil) 37, in the said case, the Hon'ble Supreme Court observed as under:-

"10. The issue that fall for our consideration is: "Whether the suit for permanent injunction is maintainable when the defendant disputes the title of the plaintiff?"

11. It is well settled by catena of Judgments of this Court that in each and every case where the defendant disputes the title of the plaintiff it is not necessary that in all those cases plaintiff has to seek the relief of declaration. A suit for mere injunction does not lie only when the defendant raises a genuine dispute with regard to title and when he raises a cloud over the title of the plaintiff, then necessarily in those circumstances, plaintiff cannot maintain a suit for bare injunction.

12. In the facts of the case the defendant Board by relying upon the land acquisition proceedings and the possession certificate could successfully raise cloud over the title of the 6 plaintiff and in those circumstances plaintiff ought to have sought for the relief of

declaration. The Courts below erred in entertaining the suit for injunction."

22. In the instant case, the respondent/plaintiff had filed a mere suit for injunction on the allegation that the forefathers of the respondent/plaintiff were owner and in occupation of the disputed land and during partition the disputed land fell to his share. Whereas the appellant/defendant denied that the disputed land fell to the share of the respondent/plaintiff or he is owner thereof. A specific issue regarding ownership was framed by learned trial court.

23. In view of the law laid down by the Hon'ble Supreme Court in the case of '**Jharkhand State Housing Boards**' case (supra), there was a genuine dispute with regard to title of the respondent/plaintiff and, therefore, a suit for injunction simplicitor is not maintainable. Applying the aforesaid law to the facts and circumstances of the present case, the suit filed by the respondent/plaintiff is not maintainable.

24. Consequently, the appeal is **allowed** and the impugned judgment and decree dated 08.12.2004 passed by learned Additional District Judge, Pratapgarh, in Civil Appeal No.135 of 1998, deserves to be set aside and the same is hereby set aside.

25. No order as to costs.

26. Interim application, if any, stands disposed.

27. Lower court record be sent back forthwith.

(Ved Prakash Vaish)
Judge

Order Date :- 26th July, 2019
cks/-