

Equivalent citations: AIR 1986 Pat 78

Bench: S Sandhawalia, S K Jha

Raghubar Dayal Prasad vs Ramekbal Sah on 24/5/1985

JUDGMENT

S.K. Jha, J.

1. This appeal has been placed before a Division Bench for testing the correctness of a decision of a learned single Judge in the case of Ramchandra Sah v. Chotam Sah 1971 BUR 186. The fate of this appeal hinges on a pure question of law. But before I take up the question of law for determination, the relevant facts first.

2. The plaintiff in the action is the appellant here having come up against a judgment of reversal. The suit was decreed by the trial court. On appeal by the defendant-respondent the plaintiff-appellant lost in the court of appeal below and the suit was dismissed. The facts no longer in controversy and based either on the admitted case of the parties or on concurrent findings of fact of both the courts below, may conveniently be culled here.

3. The plaintiff-appellant instituted the suit for realisation of arrears of rent and eviction of the defendant-respondent from the house standing on holding Nos. 195 and 196 (new) ward No. 2 circle No. 10 situate in mohalla Sahebganj within the municipal limits of Chapra. The appellant claimed to be the owner of the land in question along with the house as it fell to his share on partition of the ancestral properties of both the parties. He further pleaded that the defendant was inducted as a tenant in 1949 at the rate of Rs. 73A per month. He paid that for some time. Thereafter he ceased to pay and became a defaulter. On these allegations he claimed the relief for eviction and a decree for realisation of arrears of rent as already stated earlier.

4. The case of the defendant-respondent was that the house in question was an ancestral property which, on partition of the joint family properties, was allocated to the share of the plaintiff-appellant. From the year 1949, however, for various reasons not relevant to recite here, he came to occupy the premises in question and he made a declaration put to that effect that he had become the owner of the premises and he shall not deliver possession of the house to the plaintiff. Since the year 1949, therefore, the defendant-respondent was in occupation of the premises as an owner under a title hostile to the plaintiff and he had perfected his title by prescription and adverse possession. The relationship of landlord and tenant between the parties was denied.

5. The trial court held that there was no relationship of landlord and tenant between the parties and, therefore, the plaintiff could not have any decree for realisation of arrears of rent. The possession of the defendant-respondent was merely permissive or as a licensee. The defence of acquisition of title by adverse possession was, therefore, negatived. Since, however, the plaintiff proved his subsisting title he was entitled to a decree for eviction on the basis of his title as a true owner, even though the case of landlord and tenant, as set up by the plaintiff, was not accepted. The suit for eviction was accordingly decreed as the plaintiff was held to be entitled on the findings to an equitable relief under Order 7 Rule 7 of the Code of Civil Procedure.

6. In the appeal by the defendant-respondent before the lower appellate court the same facts and the legal position emerging therefrom were canvassed. The court of appeal below held that : --

"(1) The suit house is an ancestral property.

(2) It was partitioned in the year 1943.

(3) It was allotted to the share of the plaintiff.

(4) The defendant continued in occupation of the suit house."

The defendant's possession over the suit house was held to be merely permissive or that of a licensee and the plaintiff had a subsisting title to the suit properties. The defendant's case of acquisition of title by adverse possession was also negated. The court of first appeal, however, repelled the argument put forth on behalf of the plaintiff-appellant (respondent in the lower appellate court) that the order of eviction had rightly been passed by the trial court in view of the provisions of Order 7 Rule 7 of the Code of Civil Procedure (hereinafter referred to as the Code). It was of the view that since the court could not make out a third case for the parties and since the questions of payment of ad valorem court-fee on the market value of the house in question and the pecuniary jurisdiction of the trial court were involved, no decree could be granted to the plaintiff specially when his case of relationship of landlord and tenant between the parties had been rejected.

7. When this appeal came up for hearing before a learned single Judge of this Court, the counsel for the appellant relied upon the decision in Ramchandra Sah's case (1971 BLJR 186) (supra). The learned single Judge on a first impression relying upon a well settled principle of law that the court cannot make out a new case for the parties as that would amount to a variance between pleading and proof. Hence this case before the Division Bench.

8. Having given my anxious consideration on the point involved in this appeal in all its ramifications, I am firmly of the view that this Court's decision in the case of Ramchandra Sah (supra) is based on a sound principle of law and must be held to be good law. The reasons are to follow.

9. Order 7, Rule 7 of the Code runs thus : --

"Every plaint shall state specifically the relief which the plaintiff claims either simply or in the alternative, and it shall not be necessary to ask for general or other relief which may always be given as the Court may think just to the same extent as if it had been asked for. And the same rule shall apply to any relief claimed by the defendant in his written statement."

The portion underlined has been so done by me for the sake of emphasis. This rule statutorily incorporates an equitable relief to be granted in such cases to the parties concerned, it has the definite object of avoiding unnecessary multiplicity of suits in cases where relief can be granted on the facts and in the circumstances of a particular case even if not so distinctly pleaded nor a relief sought on such facts. This provision of the Code has been the subject matter of consideration, discussion and decision in a large number of cases, some of which I shall refer hereinafter.

10. In the case of Abdul Ghani v. Musammat Babni (1903) ILR 25 All 256 (FB) the matter came up for consideration before a Full Bench of that Court. The facts were shortly these. The plaintiff came into Court alleging that the defendant had, about eight years previously, hired from him at a monthly rent of one rupee, but latterly had failed to pay the rent, and that the plaintiff had given the defendant notice to quit the house. The plaintiff claimed possession and damages, but not arrears of rent. The defendant denied the tenancy alleged by the plaintiff, and asserted that she had been in adverse possession for a period of seventeen years. She also asserted that she had purchased the land upon which the house stood and had herself built the house. The findings by the first appellate court were that the plaintiff was the owner of the house, and that the defendant occupied the house as a friend with the permission of the plaintiff; that the defendant had never before this asserted her title to the house, and that her possession was permissive. On these facts it was held that the plaintiff was entitled to a decree for possession notwithstanding that his case had been that the defendant was his tenant. While repelling the argument of counsel for the defendant-respondent that notwithstanding these findings the plaintiff had not established the case which he set up, namely, that there had been previously a subsisting tenancy and, therefore, his suit must fail, the Full Bench held that it was clear that the defendant was not taken by surprise. She clearly understood the case which she had to meet, namely, the case set up by the plaintiff that he was the owner of the house. It was further held that the case of this kind

must be decided according to the circumstances of each particular case and if there was nothing in the claim and in the issues which were raised which could possibly have taken the defendant by surprise, the technical difficulty which had been relied upon could not be allowed to defeat the plaintiff's claim. While so deciding the matter the decree passed by the trial court in favour of the plaintiff was held to be correct and the decree of the lower appellate court was set aside, even though no reference was made to the provisions of Order 7 Rule 7 of the Code.

11. A similar matter came up for consideration in another case by a Full Bench of that very Court in the case of *Balmukundv. Dalu* (1903) ILR 25 All 498. In that case the plaintiff came into Court alleging (1) that he was a proprietor of a certain building and (2) that he has leased a part of the said building to the defendant who, however, ceased to pay the rent after a few months from the date of creation of the tenancy and refused to vacate the premises. The relief claimed was for recovery of possession of the premises occupied by the defendant. To be more specific, on the pleading two distinct claims were made, one for recovery of possession as owner and the other for recovery of a trifling sum of rent in respect of letting part of the premises which had been determined by notice to quit. On the pleadings and the evidence led by the parties the Full Bench held that even though the plaintiff had failed to make out his case as to the letting, he nevertheless should get a decree on his title unless the defendant could show a better one. The fact that no distinct issue as to the plaintiff's title had been framed could not be so construed as to defeat the plaintiff's claim for recovery of possession having subsisting title to the suit premises. As the issue as to title had not been decided by the lower appellate court the case was referred to the lower appellate court to decide that issue.

12. In the case of *Md. Mian v. Jugeshwar* (1948) ILR 27 Pat. 554 which came up for decision before a Division Bench of this Court, a specific reference was made to Order 7 Rule 7 of the Code. That arose from a suit for ejectment of a monthly tenant and the plaintiff failed to prove the relationship of landlord and tenant. The court of first appeal, however, gave the plaintiff a decree of ejectment on the basis of his title. That decree having been challenged, it was held by the Division Bench that it is an equitable relief, entirely within the discretion of the court, under the provisions of Order 7 Rule 7 of Civil P.C. 1908. The court in such cases is entitled to grant such a relief where the question of title is raised and fairly tried between the parties, provided the plaintiff has done nothing to disqualify him from receiving an equitable relief. The Full Bench decisions of the Allahabad High Court aforementioned were noticed and relied upon by this Court in the case of *Md. Mian* (supra). Principles laid down in those cases have been held by this Court in *Md. Mian's* case (supra) as being based on principles of equitable relief as envisaged by Order 7 Rule 7 of the Code. It is a different matter that on the facts and in the circumstances of the case of *Md. Mian* it was held that the question of title had not been fairly tried between the parties as there was no finding of the lower appellate court based upon the evidence on record that the plaintiff had proved his title. The finding of the lower appellate Court in that case was held to be based on the evidence on record and insufficiency of the evidence on the point induced the learned Judges to dismiss the plaintiff's suit.

13. In *Ramchandra's* case (1971 BLJR 186) (supra), a single Judge decision of this Court in the case of *Gauri Sao v. Ramkishun Sao* 1968 BLJR 467 laying down the same principle, has been noticed and relied upon. Although in the judgment of a learned single Judge in *Ramchandra's* case no reference is made to another Division Bench decision of this Court in the case of *Smt. Kasturi Devi v. Shripal Singh* AIR 1954 Pat 128, that Division Bench decision is worthwhile noticing here. In *Kasturi Devi's* case (supra) it was held on a construction of the provisions of Order 7 Rule 7 and Order 6 Rule 2 that where in a suit by the plaintiff for ejectment of the defendant on the allegation that he is a tenant, the defendant sets up a title in himself and the Court on evidence comes to the conclusion that the story of the defendant is false and that he is a licensee, though not a tenant as alleged by the plaintiff, the Court can give the plaintiff a decree for ejectment on the basis of his title. The court should not drive the plaintiff to file another suit for ejectment on the ground that the defendant was a licensee. Although *Shearer, J.* had taken a contrary view in the case of *Seetha Beharani v. A. Jagannath* AIR 1944 Pat 312, the Division Bench in *Kasturi Devi's* case having noticed the two Full Bench decisions of the Allahabad High Court and the Division Bench decision of this Court in *Md. Mian's* case (1948 ILR 27 Pat 554) (supra) did not think it necessary to re-examine the matter as the point had been well

settled by the two Full Bench decisions of the Allahabad High Court and the Division Bench decision of this Court.

14. Mr. Angad Ojha, learned counsel for the respondent placed reliance on a decision of the Supreme Court in the case of Bhagwati Prasad v. Chandramaul AIR 1966 SC 735. On a close examination of the principles laid down by the Supreme Court in that case I think even the Supreme Court has taken the view on this question of law in consonance with the decisions of the High Courts. It was in the first instance held by the Supreme Court that undoubtedly if a party asks for a relief on a clear and specific ground, and in the issues or at the trial, no other ground is covered either directly or indirectly or by necessary implication, it would not be open to the said party to attempt to sustain the claim on a ground which is entirely new. But in considering the application of this doctrine to the facts of a particular case Court must bear in mind the other principle that considerations of form cannot override the legitimate considerations of substance. Elaborating the last part of the previous sentence it has been laid down ultimately that if a plea is not specifically made and yet it is covered by an issue by implication and the parties knew that the said plea was involved in the trial, then the mere fact that the plea was not expressly taken in the pleadings would not necessarily disentitle a party from relying upon it if it is satisfactorily proved by evidence. The general rule no doubt is that the relief should be founded on pleadings made by the parties. But where the substantial matters relating to the title of both parties to the suit are touched, though indirectly or even obscurely, in the issues, and evidence has been led about them, then the argument that a particular matter was not expressly taken in the pleadings would be purely formal and technical and cannot succeed in every case. What the Court has to consider in dealing with such an objection is did the parties know that the matter in question was involved in the trial, and did they lead evidence about it? If it appears that the parties did not know that the matter was in issue at the trial and one of them has had no opportunity to lead evidence in respect of it, that undoubtedly would be a different matter. To allow one party to rely upon a matter in respect of which the other party did not lead evidence and has had no opportunity to lead evidence would introduce considerations of prejudice, and in doing justice to one party the Court cannot do injustice to the other. That case before the Supreme Court arose from a suit for ejectment wherein the defendant admitted the title of the plaintiff in regard to the plot and pleaded that he was to remain in possession of the house until the amount spent by him in its construction was returned by the plaintiff. The plaintiff led evidence about the tenancy set up by him and the defendant led evidence about the agreement on which he relied. Both the pleas were clear and specific and the common basis of both the pleas was that the plaintiff was the owner and the defendant was in possession by his permission. In such a case the relationship between the parties would be either that of a landlord and tenant, or that of an owner of property and a person put into possession of it by the owner's licence. No other alternative was logically or legitimately possible.

15. The principles followed in the various cases of the High Courts can now be said to be set at rest by the stamp of approval affixed to them by the Supreme Court in Bhagwati Prasad's case (AIR 1966 SC 735) (supra).

16. It would bear repetition to note that in the instant case the plaintiff set up his title as an owner and claimed that there was a relationship of landlord and tenant between him and the defendant. On the contrary, the defendant while admitting that he was initially occupying the house in question as a co-owner before 1943 did accept the factual position that in the year 1943 on a partition of the joint family properties this particular item of property fell to the share of the plaintiff-appellant. In substance, therefore, the original title of the plaintiff was admitted. The only relevant plea taken in the defence was that the assertion of the defendant's title as hostile to that of the plaintiff started from the year 1949. From that date onwards the defendant claimed a title in himself which was perfected by prescription and adverse possession. A specific issue with regard to acquisition of defendant's title by adverse possession was framed by the trial court and both the parties fully knowing that the question of ownership was involved did lead evidence on the plea of adverse possession set up by the defendant. Both the courts below concurrently found the plaintiff to be the true owner of the property having subsisting title thereto, while negating the case of tenancy having been created in favour of the defendant. Both the courts below, in effect and substance, held that although corpus possidendi of the defendant was admitted by the parties, the case of animus possidendi as set up by the defendant was not found

to be the true. The prerequisites of nec vi nec clam nee precario as set up by the defendant was not accepted (Illegible) of either of the below. Both in form and in substance the issues of title either as true owner or acquisition of title by prescription were included in the specific issue framed in the suit as to whether the defendant had acquired title by adverse possession. The defendant was never taken by surprise. No prejudice whatsoever was caused to him as both the parties had led evidence on the point. There is no significant fact to hold that the plaintiff had made himself disentitled to the equitable relief under Order 7 Rule 7 of the Code. There is thus no reason as to why the relief for recovery of possession be not allowed to the plaintiff-appellant on the basis of his title which was found to be a subsisting one not extinguished by any period of limitation.

17. Thus I hold that the decision of the learned single Judge in Ramchandra Sah's case (1971 BLJR 186) (supra) is based not only on sound principles of law but also supported by high authority.

18. This then takes us to an incidental question involved in suits of this nature. The effect of the provisions of section 11 of the Suits Valuation Act and the Court-fees Act have also been gone into in the majority of the decisions cited above. The judicial consensus on this point also is the same as has been expressed by this Court in Ramchandra Sah's case (supra). In that case it was held having regard to this matter that "although the question of court fee is no bar to the grant of equitable relief, the plaintiffs cannot have that relief in this litigation unless they pay ad valorem court fee on the market value of the suit property. When the case goes back to the court of appeal below on remand it should determine the market value of the property first, ask the plaintiffs-appellants to pay the ad valorem court fee on such value and then to proceed to hear the appeal on merits. It would not be necessary for the lower appellate Court to direct the return of the plaint merely because value of the suit would be beyond the pecuniary jurisdiction of the learned Munsif who tried it. Relying upon the principle of law engrafted in Section 11 of the Suits Valuation Act and the decision of the Supreme Court in Kiran Singh v. Chaman Paswan AIR 1954 SC 340 I hold that there is no prejudice caused to the respondent and hence the lower appellate Court will be under no obligation to return the plaint. On payment of the deficit court fee as indicated above the court of appeal below will hear the title appeal afresh and find out as to whether the plaintiffs have succeeded in proving their title and subsisting title in regard to the suit property, if it decides, the question in their favour it will have to decree their suit for eviction." As to how this matter has to be dealt with in the instant case, I shall give the direction hereinafter.

19. Both the courts below have concurrently found in favour of the plaintiff that although he had failed to prove the relationship of landlord and tenant between the parties he had a subsisting title qua owner of the property and the defendant had not been in adverse possession at all but merely with permission of the plaintiff and as his licensee. In that view of the matter, on remand to the lower appellate Court it is not necessary to make any direction to go into the question of title over again as was done in Ramchandra Sah's case (1971 BUR 186) (supra). It has to go back to the court of first appeal merely for the purpose of determining the market value of the properties involved in the suit and to demand the payment of ad valorem court fee from the plaintiff on the plaint and the memorandum of appeal in this Court. On payment of such court fee the suit shall stand decreed on the findings already recorded.

20. In the result this appeal is allowed and the plaintiffs suit is decreed. The case is remanded to the lower appellate Court with a direction to fix the proper market value of the property and to demand payment of ad valorem court fee from the plaintiff as indicated above. In the circumstances of the case, however, I direct that the contesting parties shall bear their own costs throughout.

S.S. Sandhawalia, C. J.

21. I agree.