

CASE NO.:
Appeal (civil) 5353 of 2006

PETITIONER:
Ramji Rai & Another

RESPONDENT:
Jagdish Mallah (Dead) through L.Rs.& Another

DATE OF JUDGMENT: 04/12/2006

BENCH:
ARIJIT PASAYAT & S.H. KAPADIA

JUDGMENT:
J U D G M E N T
(Arising out of SLP (C)No.19322 of 2004)

KAPADIA, J.

Leave granted.

Plaintiff (appellant no.1 herein) instituted Civil Suit No.202/77 for permanent injunction in the court of Additional Munsif Magistrate-VII, Ballia, against defendants-respondents. In the said suit appellant sought permanent injunction restraining the defendants from interfering in the possession of the land in dispute or from raising boundary wall. In the suit it was alleged that the appellants owned a house from the time of their ancestors; that their sehan was towards the south of the said house; that the said sehan was in their possession even prior to the enactment of U.P. Zamindari Abolition and Land Reforms Act, 1950; and that their cattle, palanis and troughs etc. existed on the said land which was utilized by the appellants for different household purposes. The appellants further alleged that the disputed land was unbounded and that they had started construction of the boundary wall after leaving a small passage between their house and the sehan. The appellants further stated that they could not complete the boundary wall as they had to go to Bombay where they were employed; that when they came back from Bombay to the village they started the work of reconstruction which was obstructed by the respondents and, therefore, they were compelled to file the suit for a permanent injunction restraining the respondents from interfering in the possession of the land in dispute as also from interfering in the construction of the boundary wall.

The respondents denied the above allegations. They contended that the disputed land belonged to them; that the disputed land was used by them for different household purposes; that they had been in possession of the land in dispute for several years; that there was a passage between the house of the appellants and the disputed land in question; that the respondents had constructed a wall which could not be completed on account of the temporary injunction order obtained by the appellants in the present suit. The respondents further contended that the appellants were not tilling their agricultural land; that the appellants had let out their agricultural land to others and, therefore, there was no need of keeping any cattle or agricultural equipment on the disputed land as claimed by the appellants.

After framing the issues the trial court decreed the suit. The trial court held that the appellants were the owners and

they were in possession of the disputed land.

Aggrieved by the decree passed by the trial court, the respondents herein carried the matter in appeal vide Civil Appeal No.84 of 1979 in the court of Additional District Judge, Ballia.

By judgment and order dated 21.9.1981, A.D.J. came to the conclusion that the plaintiff-appellants had failed to prove that the disputed land was his sehan land; that appellant no.1 had admitted in his statement that one Raghunath Rai was the real brother of his father; that separation had taken place in the family between the appellants and Raghunath Rai; that prior to the separation, the appellants and Raghunath Rai were joint; that at that time they had a common sehan land and that the appellants sehan, at the time when the family was joint, was towards the east of his house. The lower appellate court further found that both the appellants and the respondents were claiming the disputed land as an area appurtenant to their building. However, the lower appellate court came to the conclusion that the boundary wall was constructed by the respondents and not by the appellants. The lower appellate court further found that the appellants had no direct access to the land in question; that there was a lane running between the appellants' house and the disputed land in question; that the appellants were not using the disputed land as his sehan from the time of their ancestors; that the appellants had admitted that before the partition the present house of the appellants was used for keeping cattle and that the sehan of the appellants before the partition was towards the east and not towards the south of the house as claimed by the appellants. The lower appellate court further found that the respondents were using the land in dispute; they were keeping their cattle on the disputed land; they were keeping fodder and other agricultural equipments on the disputed land and in the circumstances the lower appellate court came to the conclusion that the suit land was being used by the respondents for their household purposes and they were in possession of the said land. In the circumstances, the suit was dismissed by the lower appellate court.

Aggrieved by the judgment delivered by the lower appellate court, the appellants carried the matter in second appeal to the High Court. By the impugned judgment, Second Appeal No.2839 of 1981 was dismissed on 2.4.2004. Hence this civil appeal.

As stated above, the lower appellate court vide judgment dated 21.9.1981 dismissed the suit filed by the appellants. While dismissing the suit the lower appellate court held as follows:

"On consideration on the entire materials on record, as discussed above, I find that the plaintiff has totally failed to establish that the disputed land was ever possessed by him as his sahan land. He has also failed to establish that the construction upto the time of the filing of the suit was got raised by him. That being so, the plaintiff is not proved to be the owner of the disputed land. Therefore, he is not entitled to get any relief as claimed. In the result, the appeal succeeds and it must be allowed with costs."

(underlined by us)

Dr. R.G. Padia, learned senior counsel appearing on behalf of the appellants, submitted that the lower appellate court and the High Court had erred in holding that the appellants were not in possession of the suit land as their sehan land. It was further argued that the boundary wall was under construction by the appellants and not by the respondents. Learned counsel submitted that in any event the lower appellate court had erred in stating that the appellants have failed to prove that they were the owners of the disputed land. It was urged that the present suit was only for permanent injunction. It was urged that the appellants had never sought a declaration of ownership and, therefore, lower appellate court had erred in holding that the appellants had failed to prove their title to the disputed land.

On the finding of facts, we do not wish to interfere. There is no reason to reverse the concurring findings. However, suffice it to state that the lower appellate court should have dismissed the suit filed by the appellants only on the ground that the appellants had failed to prove that they were in possession of the disputed lands. Under Section 38 of the Specific Relief Act, 1963 an injunction restraining disturbance of possession will not be granted in favour of the plaintiff who is not found to be in possession. In the case of a permanent injunction based on protection of possessory title in which the plaintiff alleges that he is in possession, and that his possession is being threatened by the defendant, the plaintiff is entitled to sue for mere injunction without adding a prayer for declaration of his rights [See: Mulla's Indian Contract and Specific Relief Acts, 12th Edn., page 2815]

In the case of A.L.V.R. Ct. Veerappa Chettiar v. Arunachalam Chetti and others \026 AIR 1936 Madras 200, it has been held that mere fact that the question of title may have to be gone into in deciding whether an injunction can be given or not is not any justification for holding that the suit is for a declaration of title and for injunction. There can be a suit only for an injunction. The present suit is only for permanent injunction and, therefore, the lower appellate court should have, on the facts and circumstances of this case, confined itself to its dismissal only on the ground that the appellants have failed to show that they were in possession. This has been done but the declaration that the appellants are not the owners, was not necessary.

Subject to above clarification, the appeal stands dismissed with no order as to costs.