

Court No. - 4

Case :- SECOND APPEAL No. - 275 of 2003

Appellant :- Smt. Mohammadi And 6 Ors.

Respondent :- Ahmad Ali

Counsel for Appellant :- Mohd. Arif Khan,Atiya Abid,Girija Shankar Tripathi,Mohammad Abid Ali,Mohammad Tauseef Siddiqui

Counsel for Respondent :- R.K. Sharma,Faisal Ahmad Khan

Hon'ble Rajnish Kumar,J.

1. Heard Sri Girija Shankar Tripathi learned counsel for the appellants and Sri Faisal Ahmad Khan learned counsel for the respondent and perused the records.

2. Learned counsel for the appellants submits that the appellants had moved an application for amendment in the written statement at the appellate stage to incorporate the plea that the land in dispute is not situated in Gata nos.607 and 1140 but the amendment has been rejected while deciding the appeal recording erroneous and perverse findings and the issue raised by the appellant-defendant could have been raised in the earlier suit for cancellation of sale deed filed by him bearing Suit no.33 of 1975, whereas at that time, it was not in issue. He further submits that the amendment could have been allowed and after affording opportunity to the parties leading evidence on the same, the issue could have been decided. He relies on ***Harcharan vs State of Haryana; 1982 3 SCC 408.***

3. He further submits that an additional issue was framed at the appellate stage in regard to the mesne profits which was decided against the appellant. However, while deciding the issue and appeal Rs.200/- per month has been directed to be paid as damages but without payment of court fee, relief has been granted on the ground that the court fee would be paid before execution, which could not have been done.

4. On the basis of the aforesaid submissions, learned counsel for the appellants submits that the impugned judgment and orders are not sustainable and liable to be set aside.

5. Per contra, learned counsel for the respondent submits that the suit for cancellation of sale deed in regard to the property in dispute was filed by the appellant-defendant bearing Regular suit no.33 of 1975. The plea which was sought to be pleaded in

the written statement by way of amendment could have been taken in the said suit but it was not taken, therefore, it is barred by constructive res-judicata. The plea, otherwise also is misconceived and not tenable because the boundaries of the land in dispute were one and the same in the earlier suit and in the present suit. The earlier suit filed by the appellant-defendant was dismissed and First Civil Appeal filed against the same and the second appeal filed before this Court was also dismissed by means of order dated 06.10.2018, therefore, the issue has become final. Thus, submission is that the application for amendment has rightly and in accordance with law been rejected. He further submits that mesne profits has rightly been awarded and the direction for payment of court fee before execution has rightly been made in view of provision made in Order 20 Rule 12 of Civil Procedure Code and the respondent-plaintiff shall pay the requisite court fee accordingly. Thus, the submission of learned counsel for the respondent is that grounds taken by the appellant are misconceived and not tenable and no substantial question of law arises in this appeal.

6. Having considered the submissions of learned counsel for the parties, I have perused the records.

7. The suit for permanent injunction and possession was filed by the respondent/plaintiff. An application for amendment of the written statement was filed by the appellant at the appellate stage. The amendment was sought to the effect that the land in dispute does not fall in Gata nos.607 and 1140. The application for amendment filed under Order 6 Rule 17 has been dismissed recording the finding that earlier suit no.33 of 1975 was filed by the appellant/defendant for cancellation of sale deed in regard to the property in dispute, in which a categorical finding of possession of respondent/plaintiff has been recorded. The boundaries of the property in dispute given in the earlier suit and in the present suit are one and the same, therefore, the contention of the appellant/defendant is misconceived and not tenable. Even otherwise, the plea sought to be taken through the amendment of the written statement could have been taken and decided in the earlier suit, therefore, it is barred by constructive res-judicata also. The judgment and decree passed in the earlier suit had become final up to the High Court because the Second Appeal no.495 of 1977 was dismissed by this Court by means of the order dated 06.10.1980. This Court is of the view that there is no illegality or error in the findings recorded by the first appellate court.

8. So far as the judgment relied by learned counsel for the appellant, in the case of ***Harcharan vs State of Haryana (supra)*** is concerned, the same is not applicable on the facts and

circumstances of the present case because in the said case, the amendment was rejected on the ground of delay whereas in the present case, the amendment has not been rejected on the aforesaid ground.

9. The plea of non-payment of court fee in regard to the mesne profits allowed by the appellate court is also misconceived and not tenable because the appellate court has recorded finding that in view of Rule 12, it can be got deposited at the time of its execution. The Order 20 Rule 12 of C.P.C provides the decree for possession and mesne profits, which is extracted hereinbelow:-

"12. Decree for possession and mesne profits.—(1) Where a suit is for the recovery of possession of immovable property and for rent or mesne profits, the Court may pass a decree—

(a) for the possession of the property;

1[(b) for the rents which have accrued on the property during the period prior to the institution of the suit or directing an inquiry as to such rent.

(ba) for the mesne profits or directing an inquiry as to such mesne profits;]

(c) directing an inquiry as to rent or mesne profits from the institution of the suit until—

(i) the delivery of possession to the decree-holder,

(ii) the relinquishment of possession by the judgment-debtor with notice to the decree-holder through the Court, or

(iii) the expiration of three years from the date of the decree, whichever, event first occurs.

(2) Where an inquiry is directed under clause (b) or clause (c), a final decree in respect of the rent or mesne profits shall be passed in accordance with the result of such inquiry.

10. In view of the aforesaid Rule 12, the inquiry can be made in regard to the mesne profits from the institution of the suit until the delivery of possession to the decree holder or relinquishment of possession by the judgment debtor with notice to the decree holder through the Court or the expiration of 3 years from the date of decree whichever, event first occurs and accordingly a final decree in respect of the rent or mesne profits shall be passed, as per sub rule (2), in accordance with the result of such inquiry. Therefore, it can be determined only in terms of the said Rule at the time of execution of the judgment and decree and the court fees can be got deposited by the respondent/plaintiff and as admitted by learned counsel for

the respondent/plaintiff, it shall be deposited accordingly.

11. In view of above, this Court is of the view that there is no illegality or error in the findings recorded by the first appellate court and allowing the appeal and confirming the judgment and decree passed by the trial court and no substantial question of law arises in this second appeal.

12. The appeal is, accordingly, **dismissed**. No order as to costs.

(Rajnish Kumar,J.)

Order Date :- 28.2.2024

Harshita