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v.

JOHNSON

(Civil Appeal No. 1892 of 2020)

MARCH 02, 2020

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[INDIRA BANERJEE AND A. S. BOPANNA, JJ.]

Suit – Permanent prohibitory injunction – Claim for – Plaintiff -respondent filed suit for permanent prohibitory injunction in respect of the suit property – The defendant-appellant disputed the claim of the plaintiff – The Trial Court decreed the suit – The First Appellate Court on reappreciating the matter, set aside the judgment of the Trial Court and remanded the suit to the Trial Court for fresh disposal in terms of Or. 41 r. 23A CPC – However, the High Court restored the judgment and decree passed by the Trial Court and held that the suit was for bare injunction and found that the exercise to identify the property with reference to the ownership was not justified – On appeal, held: In the instant case, the dispute had arisen when the plaintiff was seeking to put up a construction of the wall and the defendants had objected to the same – The defendants had in the written statement referred to the manner in which the right to property had flowed ever since the partition through the deed and the measurements – The location of the shares enjoyed by the parties is referred and the right as claimed by the plaintiff is disputed – The Trial Court had framed the issues referring to the identity of the property as also the ownership and possession – The plaintiff did not object to the said issues – Instead, the evidence was tendered based on the issues – The Trial Court answered the issues referring to the identity to the property, ownership and possession in favour of plaintiff – In that background, the defendant questioned the conclusion reached by the Trial Court – Thereafter, the First Appellate Court held that the said issues needed reconsideration and in the background of the additional evidence and opportunity was provided to the defendant – Therefore, in the facts and circumstances of the present case the High Court was not justified, but the conclusion of the First appellate Court was the appropriate course.

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A Allowing the appeal, the Court

HELD: 1. The issues No.1 and 2 framed by the trial court refers to the identity of the property as also the ownership and possession thereof. The plaintiff did not object to the said issues nor did the plaintiff file any application under Order 14 Rule 5

- B CPC seeking amendment or to strike out the said issues. On the other hand, the evidence was tendered based on the issues and the Issue Nos.1 and 2 were considered by the trial court and was answered in favour of the plaintiff wherein it is held that the plaintiff is in ownership and possession of the plaint schedule property.
 - C In that background when the defendant had questioned such conclusion reached by the trial court and had put forth the contention and also sought for an opportunity to produce additional evidence by filing an application under Order 41 Rule 27 CPC and in that background when the lower appellate court was of the opinion that the said issues need reconsideration in the
 - D background of the additional evidence and opportunity being provided to the defendant the appropriate course was to remand the matter to the trial court and provide opportunity which was accordingly done. [Para 13][981 B-F]

2. If the above aspects are kept in view the observations

- E made by the High Court relating to the consideration required being only of possession since the suit was for perpetual injunction is without reference to the nature of contentions put forth in a suit, the issues that had been raised for consideration and the conclusion that had been reached by the trial court as also the lower appellate court in that background. Hence, this Court is of the opinion that in the facts and circumstance of the present case the High Court was not justified, but the conclusion of the lower appellate court to set aside the judgment and decree of the trial court and remand the matter for reconsideration by the trial court was the appropriate course. [Para 14][1981 F-H]

G *Ravinder Kaur Grewal & Ors. v. Manjit Kaur & Ors.*
(2019) 8 SCC 729 – referred to.

Case Law Reference

(2019) 8 SCC 729

referred to

Para 9

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CIVIL APPELLATE JURISDICTION: Civil Appeal No. 1892 A
of 2020.

From the Judgment and Order dated 14.11.2014 of the High Court of Kerala at Ernakulam in FAO (RO) No. 229 of 2014.

P. A. Noor Muhamed and Abdul Rahiman, Advs. for the Appellant.

C. N. Sreekumar, Sr. Adv., Prakash Ranjan Nayak and Amit Sharma, Advs. for the Respondent.

The Judgment of the Court was delivered by

A. S. BOPANNA, J.

1. Leave granted.

2. The appellant herein is before this Court assailing the judgment dated 14.11.2014 passed by the High Court of Kerala in FAO (RO) No.229/2014. Through the said judgment the High Court allowed the appeal, set aside the judgment dated 31.03.2014 passed by the First Appellate Court in AS No.186/2011 and restored the judgment and decree passed by the Trial Court in O.S. No.288/2009. Since the rank of the parties was described differently in the said proceedings the parties will be referred in the rank assigned to them in the trial court in the original suit for the sake of convenience and clarity. The appellant herein was the defendant, while the respondent herein was the plaintiff in the suit. They will be referred accordingly.

3. The chronology of the events is that the plaintiff filed the suit bearing O.S. No.288/2009 in the Court of the Munsiff at Aluva seeking for judgment and decree of permanent prohibitory injunction in respect of the suit schedule property. The defendant appeared and filed detailed written statement disputing the claim of the plaintiff. Based on the rival pleadings the trial court framed issues, the parties tendered evidence and the trial court decreed the suit through its judgment dated 26.08.2011. The defendant claiming to be aggrieved by the same preferred an appeal under Section 96 of Civil Procedure Code ('CPC' for short) in A.S. No.186/2011. The First Appellate Court on reappreciating the matter, through its judgment dated 31.03.2014 set aside the judgment dated 26.08.2011 passed by the trial court in O.S. No.288/2009 and remanded the suit to the trial court for fresh disposal in terms of the directions issued. Since it was a remand in terms of order 41 Rule 23A CPC, the plaintiff preferred an appeal to the High Court in FAO (RO) No.229/

A 2014 as contemplated under Order 43 Rule 1(W) of CPC. The High Court through its judgment dated 14.11.2014 has allowed the appeal and restored the judgment and decree passed by the trial court. The defendant, therefore, claiming to be aggrieved is before this Court in this appeal.

4. The brief facts are that the plaintiff claimed right in respect of

- B the property bearing Resurvey No.371/5 (old Survey No.517/7, 517/1 in Block 28 measuring 15 'Are' in Vadakkumbhagom, Aluva Taluk, Sreemoolanagaram Sub District, Ernakulam under a Partition Deed No.2617 of 2007 being a cousin of the defendant No.1, the fathers of the plaintiff and defendant No.1 being brothers. The cause for the suit was stated to be the obstruction caused by the defendants when the plaintiff on 19.06.2009 was in the process of constructing a wall on the eastern side. The nature of the incident is referred and, in that background, prayed for permanent prohibitory injunction. The plaintiff examined himself and relied upon the documents at Exhibits A1 to A6. The Report of the Court Commissioner and the sketch were marked as
- C Exhibits C1 and C1(a). The defendant did not tender any evidence or produce documents.

5. The trial court while answering the issues has held that the property is identifiable and the plaintiff is the owner in possession of the suit schedule property. In that light on answering the issues in favour of

- E the plaintiff has decreed the suit. In the appeal filed by the defendant the lower appellate court while reappreciating the evidence has taken into consideration the contention put forth by the defendant with regard to the nature of the property and the manner in which the property had been partitioned in the year 1964. The Court had also taken note that in such circumstance the plaintiff had not made any effort to identify the F property nor was the defendant provided sufficient opportunity to prove their claim. The lower appellate court also took note that an application in I.A. No.349/2013 had been filed by the defendant under Order 41 Rule 27 for producing the certified copy of the Partition Deed No.651/ 1964. Further it was concluded that the suit was tried in a hurry without G appropriately identifying the property along with its measurement. In that circumstance, the lower appellate court on finding that the matter requires reconsideration had set aside the decree and remanded the matter.

6. In the appeal filed by the plaintiff before the High Court, the

- H High Court on taking note that the suit was for perpetual injunction only

and in that light since the possession of the plaintiff not being in serious dispute, was of the opinion that the title to the property was not relevant. In that circumstance, the High Court was of the opinion that the learned Judge of the lower appellate court was not justified in arriving at the conclusion that the property is to be measured on the basis of the title deed. In that view, the High Court has set aside the judgment of the lower appellate court and restored the decree passed by the trial court.

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7. Heard Shri P.A. Noor Muhamed, learned advocate for the appellant, Mr. C.N. Sreekumar, learned senior advocate for the respondent and perused the appeal papers.

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8. As noted the lower appellate court has set aside the judgement, remanded the matter and permitted the defendant to file the application under Order 41 Rule 27 CPC before the trial court and has permitted the parties to tender further evidence so as to enable the identification of the plaint schedule property with the assistance of the Taluk Surveyor and thereafter arrive at the conclusion. Per contra, the High Court on taking note that the suit is for bare injunction has found that the exercise to identify the property with reference to the ownership is not justified.

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9. The learned senior advocate for the plaintiff while submitting in support of the conclusion reached by the High Court would contend that the law is well established that in a suit for bare injunction the proof of title would not be necessary and the relevant circumstance would only be the possession relating to the property. Among others, the learned senior advocate has relied on the decision of this Court in the case of *Ravinder Kaur Grewal & Ors. vs. Manjit Kaur & Ors.* (2019) 8 SCC 729 wherein the relevance of possession including the possession claimed adverse to the interest of the owner is also considered. In that light, it is contended by the learned senior advocate that in such circumstance when the possession had been established before the trial court, the trial court was justified in granting the decree. The High Court, therefore, has appropriately restored such decree and the same does not call for interference in this appeal is his contention.

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10. The learned advocate for the defendant would however contend that the very nature of the rival contentions put forth in the suit would indicate that the very claim to the property relating to the portion wherein the wall was being constructed was disputed by the defendant and in that light when appropriate issues were framed by the trial court,

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- A the manner in which the wall was being constructed cannot be considered as being on a property where the plaintiff was in lawful settled possession. The very fact that the plaintiff had not sought for declaration of his right over the property when his right was under challenge would make the suit itself not maintainable. It is further contended that the lower appellate court in that light had appropriately remanded the matter so that the appropriate consideration would be made and such judgment ought not to have been interfered by the High Court.

- 11. In the backdrop of the contentions put forth, though there could be no cavil to the position relating to the relevance of possession
 - C being the prime consideration in a bare suit for injunction as contended by the learned senior advocate for the plaintiff, each case will have to be examined on its own merits keeping in view the nature of the pleading put forth before the trial court and the understanding of the case with which the parties have gone to trial. If this aspect is kept in view the very nature of the plaint averments would indicate that the parties to the
 - D suit are related to each other and the property which was being commonly enjoyed by their predecessors was partitioned under the Deed No.2617/2007. The present dispute had arisen when the plaintiff was seeking to put up a construction of the wall and the defendants had objected to the same. The prayer in the plaint reads as hereunder:

- E “(a) issue a permanent prohibitory injunction restraining the defendants and their people from trespassing into the plaint schedule property or questioning the right of the plaintiff or obstructing the enjoyment of the plaintiff or committing waste trespassing into the plaint schedule property or destroying the peaceful life of the plaintiff.”

F (Emphasis supplied)

- 12. The emphasised portion in the prayer would provide an indication that the defendant had challenged the right of the plaintiff and not merely interference with the lawful possession as claimed by the
 - G plaintiff and as such the prayer was sought. Further the averments raised by the defendants in the written statement refers to the manner in which the right to the property had flowed ever since the partition through the Deed No.651/1964 and the measurement thereof. The location of the shares enjoyed by the parties is referred and the right as claimed by the plaintiff is disputed. In the background of the contentions raised in the
 - H rival pleadings the trial court had framed the following issues:

"Basing on the above contentions the following issues are raised: A

1. whether plaint schedule property is identifiable?
2. whether plaintiff is in ownership and possession of property?
3. whether suit is bad for non-joinder of necessary parties?
4. whether cause of action alleged is true and correct? B
5. whether plaintiff is entitled for injunction as prayed for?
6. Reliefs and costs."

13. The Issues No.1 and 2 framed by the trial court refers to the identity of the property as also the ownership and possession thereof. The plaintiff did not object to the said issues nor did the plaintiff file any application under Order 14 Rule 5 CPC seeking amendment or to strike out the said issues. On the other hand, the evidence was tendered based on the issues and the Issue Nos.1 and 2 were considered by the trial court and was answered in favour of the plaintiff wherein it is held that the plaintiff is in ownership and possession of the plaint schedule property. In that background when the defendant had questioned such conclusion reached by the trial court and had put forth the contention and also sought for an opportunity to produce additional evidence by filing an application under Order 41 Rule 27 CPC and in that background when the lower appellate court was of the opinion that the said issues need reconsideration in the background of the additional evidence and opportunity being provided to the defendant the appropriate course was to remand the matter to the trial court and provide opportunity which was accordingly done.

14. If the above aspects are kept in view the observations made by the High Court relating to the consideration required being only of possession since the suit was for perpetual injunction is without reference to the nature of contentions put forth in a suit, the issues that had been raised for consideration and the conclusion that had been reached by the trial court as also the lower appellate court in that background. Hence, we are of the opinion that in the facts and circumstance of the present case the High Court was not justified, but the conclusion of the lower appellate court to set aside the judgment and decree of the trial court and remand the matter for reconsideration by the trial court was the appropriate course.

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- A 15. In that view, the judgement dated 14.11.2014 passed by the High Court of Kerala in FAO (RO) No.229/2014 is set aside. The judgment dated 31.03.2014 passed by the Additional District Judge, North Paravur in A.S. No.186/2011 is restored.
- B 16. The appeal is accordingly allowed. In the facts and circumstances of the case, the parties to bear their own costs. Pending application, if any, shall stand disposed of.

Ankit Gyan

Appeal allowed.