Shri Bhagwan Sharma vs Smt. Bani Ghosh on 22 July, 1992

Equivalent citations: AIR1993SC398, 1993SUPP(3)SCC497, AIR 1993 SUPREME COURT 398, 1992 AIR SCW 3255, 1993 (3) SCC(SUPP) 497, (1993) 1 APLJ 55

Bench: Lalit Mohan Sharma, S. Mohan

JUDGMENT

1. Heard the learned Counsel for the parties. Special leave is granted.

2. The appeal arises out of a suit filed by the appellant for a declaration that on the strength of his possession over the suit property for a long period and certain other facts as mentioned in the plaint. According to him he acquired a statutory right described as 'thika tenancy' under the provisions of Calcutta Thika Tenancy (Acquisition and Regulation) Act, 1981. Hence he is liable not to be disturbed therefrom. He also prayed for permanent injunction restraining the respondent from interfering with his possession.

3. The defendant denied the averments as pleaded by the plaintiff and contended that the suit was fit to be dismissed. The trial court accepted the defendant's case and dismissed the suit. On appeal by the plaintiff-appellant the first appellate court reconsidered the evidence led by the parties and recorded findings of fact in favour of the plaintiff-appellant, and on that basis decreed the suit. The respondent moved the High Court by way of Second Appeal under Section 100 of the CPC. It was urged that the findings of fact in favour of the plaintiff in the judgment under challenge before the High Court were illegal. The High Court agreed with the defendant, allowed the second appeal and dismissed the plaintiff's suit by the Judgment which is impugned in the present appeal.

4. The High Court correctly appreciated that the effect of the litigation was dependent on the findings of fact that they have been recorded by the first appellate court in favour of the plaintiff. Proceeding further, however, it was observed that the first appellate court had "overlooked certain vital facts which have their bearing on the legal effect of the findings of the fact made by the lower appellate court". The judgment then points out four such errors which according to the High Court vitiated the findings of fact. The Courts, however, did not proceed to consider the other evidence on the records of the case and abruptly closed the matter by saying that the plaintiff can succeed only on the strength of his case and not on the weakness of defence and the court below ought to have, therefore, dismissed his suit. The second appeal was in these terms allowed and the suit was finally dismissed.

5. The High Court was certainly entitled to go into the question as to whether the findings of fact recorded by the first appellate court which was the final court of fact were vitiated in the eye of law on account of non-consideration of admissible evidence of vital nature. But, after setting aside the findings of fact on that ground the Court had either to remand the matter to the first appellate court

for a re-hearing of the first appeal and decision in accordance with law after taking into consideration the entire relevant evidence on the records, or in the alternative to decide the case finally in accordance with the provisions of Section 103(b) of the CPC which reads as follows:

> 103. Power of High Court to determine issue of fact.
>
> In any second appeal, the High Court may, if the evidence on the records is sufficient, determine any issue necessary for the disposal of the appeal,-
>
> (a)....
>
> (b) which has been wrongly determined by such Court or Courts by reason of a decision on such question of law as is referred to in Section 100.

If in an appropriate case the High Court decides to follow the second course, it must bear the parties fully with reference to the entire evidence on the records relevant to the issue in question and this is possible if only a proper paper book is prepared for hearing of facts and notice is given to the parties. The grounds which may be available in support of a plea that the finding of fact by the court below is vitiated in law, does not by itself lead to the further conclusion that a contrary finding has to be finally arrived at on the disputed issue. On a reappraisal of the entire evidence the ultimate conclusion may go in favour of either party and it cannot be prejudged, as has been done in the impugned judgment. We, therefore, allow this appeal, set aside the impugned judgment as also the judgment of the first appellate court and remit the entire matter to the first appellate court for fresh decision of the appeal filed before it, in accordance with law. The cost will abide the final result in the case.