THE HIGH COURT OF SIKKIM : GANGTOK

(Civil Appellate Jurisdiction)

SINGLE BENCH: THE HON'BLE MR. JUSTICE BHASKAR RAJ PRADHAN, JUDGE

RSA No. 03 of 2019

1. Shri Raju Prasad,
   S/o late Ram Das Prasad,
   R/o Rangpo,
   East Sikkim – 737132.

2. Ms Asha Devi,
   D/o late Ram Das Prasad,
   R/o Rangpo Bazaar,
   P.O & P.S. Rangpo,
   East Sikkim – 737132. ..... Appellants

Versus

1. Ram Janam Prasad,
   S/o late Laxmi Prasad,
   R/o Rangpo Bazaar,
   P.O & P.S. Rangpo,

2. The Secretary,
   Urban Development & Housing Department,
   Government of Sikkim,
   P.O. Gangtok,
   East Sikkim. ..... Respondents

Appeal under section 100 of the Code of Civil Procedure, 1908.

Appearance:

Mr. Zangpo Sherpa, Advocate for the Appellant.
Mr. Jorgay Namka, Advocate (Legal Aid Counsel) for the respondent no. 1.
Mr. S.K. Chettri, Government Advocate for the respondent no.2.

Date of hearing : 09.07.2021
Date of judgment: 17.07.2021

J U D G M E N T

Bhaskar Raj Pradhan, J.

1. This is a regular second appeal. Ram Janam Prasad, the respondent herein was the original plaintiff in Title Suit No.

10 of 2014 filed against Ram Das Prasad and the Secretary, Urban Development & Housing Department, Government of Sikkim, the original defendants. The suit was styled as suit for declaration, injunction and consequential reliefs. After the trial, the learned Trial Court decreed the suit vide judgment and order dated 31.08.2017. The learned Trial Court had framed two issues. The first issue was decided in favour of the plaintiff. The second issue was decided against the plaintiff. The findings of the learned Trial Court with regard to issue no.2 was not assailed by the plaintiff. The defendant no.1, however, assailed the judgment and decree passed by the learned Trial Court. In Title Appeal No. 13 of 2017 (*Ram Das Prasad vs. Ram Janam Prasad & Another*), the learned District Judge, Special Division-I at Gangtok, East Sikkim (Appellate Court), examined the title appeal *vis-à-vis* issue no.1, framed by the learned Trial Judge which was: "(i) *Whether the suit property measuring 40' x 15' was first occupied by the father of the plaintiff thereby giving the plaintiff a right over the suit property after the death of his father? (onus on plaintiff)*". The learned Appellate Court on examination of evidence led by the parties held that there was no doubt that the defendant no.1 who is and has to be regarded as the owner of the '*ekra*' house comprised in the suit properties. It was held that the plaintiff had not put forward anything worthy which could establish that it was his late father who had constructed the '*ekra*' house except making a bald claim. The learned Appellate Court opined that

though the claim of the plaintiff and his witnesses were not categorically denied during cross-examination, the defendant no.1 had been denying this fact right since inception. In both his pleadings and his evidence on affidavit, he had also pleaded that it was him who had built the *'ekra'* house which fact was neither denied nor cross-examined by the plaintiff. Thus, it was held that the plaintiff had failed to prove his case with positive evidence and instead sought to take advantage of the weakness of the defendant no.1 in not effectively controverting his bald claim. These findings against the plaintiff with regard to issue no.1 have not been assailed by the plaintiff. The learned Appellate Court, however, while examining the defendant no.1's title appeal limited to issue no.1 only, also examined a purported partition deed styled as *'ansha banda'* (partition document) (Exhibit-1). He held that it could not qualify as a partition deed. However, the learned Appellate Court was of the opinion that it would however amount to an irrevocable licence in favour of the plaintiff by which he was given certain portions in the *'ekra'* house by the defendant no.1. The learned Appellate Court opined that under section 52 of the Indian Easements Act, 1882, no particular form or considerations was required for such irrevocable licence; it can either be express or implied and it is also not required to be created by a registered document. He, thus, decided to grant the relief prayed for by the plaintiff in prayer (viii)(b) of his plaint. Accordingly, the relief was granted in favour of the plaintiff while

examining the title appeal filed by the defendant no.1. Prayer (viii)(b) of the plaint reads thus;

> *"(viii) A permanent injunction:*
>
> *(a) .....*
> *(b) Restraining the defendant no.1 from interfering with the peaceful possession and enjoyment of the plaintiff over 10' x 14' from the ground floor to the third floor."*

2. This relief granted in favour of the plaintiff in the title appeal preferred by the defendant no.1, without any cross-appeal by the plaintiff, led to the filing of the present regular second appeal and the formulation of the substantial question of law as under:-

> "*1) Whether relief of permanent injunction could be granted by the appellate court in favour of the plaintiff based on Exhibit-1 which was asserted to be a partition deed by the plaintiff, interpreting the same as a licence, which was neither the case of the plaintiff nor of the defendants and therefore no issue was framed or evidence led by either side and the trial court had also not considered this aspect at all*?"

3. During the pendency of the regular second appeal, the original defendant no.1, i.e., Ram Das Prasad, expired and was substituted by his son Raju Prasad and daughter Asha Devi, as the present appellants.

4. Heard Mr. Zangpo Sherpa, learned counsel for the defendant no.1/appellants and Mr. Jorgay Namka, learned counsel for the plaintiff/respondent no.1. Also heard Mr. S.K. Chettri, Government Advocate, for the defendant no.2/respondent no.2.

5. In ***Bachhaj Nahar vs. Nilima Mandal and Another***[1] relied upon by Mr. Zangpo Sherpa, the Supreme Court examined the judgment of the High Court in a similar second appeal. The High Court had allowed the second appeal holding that the plaintiff had failed to make out title to the suit property. It, however, held that the plaintiffs had made out a case based on easementary right in respect of the suit property, as they had claimed in the plaint that they and their neighbour had been using the suit property and the first defendant and his witness had admitted such user. The High Court was of the view that the case based on easementary right could be considered even in the absence of pleading or issue relating to an easementary right, as the evidence available was sufficient to make out easementary right over the suit property. The High Court, therefore, granted a permanent injunction restraining the first defendant from interfering with the plaintiffs' use and enjoyment of the right of passage over the suit property. While examining the appeals arising out of the judgment of the High Court, the Supreme Court held as under:-

> ***"10.*** *The High Court, in this case, in its obvious zeal to cut delay and hardship that may ensue by relegating the plaintiffs to one more round of litigation, has rendered a judgment which violates several fundamental rules of civil procedure. The rules breached are:*
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> *(i) No amount of evidence can be looked into, upon a plea which was never put forward in the pleadings. A question which did arise from the pleadings and which was not the subject-matter of an issue, cannot be decided by the court.*

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[1](2008) 17 SCC 491

(ii) A court cannot make out a case not pleaded. The court should confine its decision to the question raised in pleadings. Nor can it grant a relief which is not claimed and which does not flow from the facts and the cause of action alleged in the plaint.

(iii) A factual issue cannot be raised or considered for the first time in a second appeal.

11. *The Civil Procedure Code is an elaborate codification of the principles of natural justice to be applied to civil litigation. The provisions are so elaborate that many a time, fulfilment of the procedural requirements of the Code may itself contribute to delay. But any anxiety to cut the delay or further litigation should not be a ground to flout the settled fundamental rules of civil procedure. Be that as it may. We will briefly set out the reasons for the aforesaid conclusions.*

12. *The object and purpose of pleadings and issues is to ensure that the litigants come to trial with all issues clearly defined and to prevent cases being expanded or grounds being shifted during trial. Its object is also to ensure that each side is fully alive to the questions that are likely to be raised or considered so that they may have an opportunity of placing the relevant evidence appropriate to the issues before the court for its consideration. This Court has repeatedly held that the pleadings are meant to give to each side intimation of the case of the other so that it may be met, to enable courts to determine what is really at issue between the parties, and to prevent any deviation from the course which litigation on particular causes must take.*

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18. *A perusal of the plaint clearly shows that entire case of the plaintiffs was that they were the owners of the suit property and that the first defendant had encroached upon it. The plaintiffs had not pleaded, even as an alternative case, that they were entitled to an easementary right of passage over the schedule property. The facts to be pleaded and proved for establishing title are different from the facts that are to be pleaded and proved for making out an easementary right. A suit for declaration of title and possession relates to the existence and establishment of natural rights which inhere in a person by virtue of his ownership of a property. On the other hand, a suit for enforcement of an easementary right relates to a right possessed by a dominant owner/occupier over a property not his own, having the effect of restricting the natural rights of the owner/occupier of such property.*

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23. *It is fundamental that in a civil suit, relief to be granted can be only with reference to the prayers made in the pleadings. That apart, in civil suits, grant of relief is circumscribed by various factors like court fee, limitation, parties to the suits, as also grounds barring relief, like res judicata, estoppel, acquiescence, non-joinder of causes of action or parties, etc., which require pleading and proof. Therefore, it would be hazardous to hold that in a civil suit whatever be the relief that is prayed, the court can on examination of facts grant any relief as it thinks fit. In a suit*

> *for recovery of rupees one lakh, the court cannot grant a decree for rupees ten lakhs. In a suit for recovery possession of property 'A', court cannot grant possession of property 'B'. In a suit praying for permanent injunction, court cannot grant a relief of declaration or possession. The jurisdiction to grant relief in a civil suit necessarily depends on the pleadings, prayer, court fee paid, evidence let in, etc."*

6. In ***Shankar Popat Gaidhani vs Hira Umaji More (Dead) by LRS. And Others[2],*** the Supreme Court examined a civil appeal arising from a civil suit in which the plaintiff had not also challenged the judgment passed against him either by filing an appeal or by preferring any cross objection and the original defendant no.1 had alone preferred an appeal. However, the High Court had while dismissing the appeal granted relief in favour of the plaintiff in the appeal filed by the defendant no.1. The Supreme Court held as under;

> *"**12.** The plaintiff, as noticed hereinbefore, did not question the judgment and decree passed by the trial court. Evidently, the court did not grant a decree for recovery of possession so far as the suit land is concerned. In that view of the matter, the High Court, in our opinion, committed a serious error in granting a relief in favour of the plaintiff in an appeal filed by Defendant 1, purporting to modify Relief (a), as aforementioned; particularly in view of the fact that amongst others, the appellant claimed himself to be in physical possession of the lands in question. The appellant, indisputably, was not a party to the said agreement for sale."*

7. In the plaint, the plaintiff had pleaded that in the year 1982, a government land measuring 40' x 15' was lying vacant which was captured by his father who constructed a three storied *'ekra'* house from his own hard earned money as well as

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[2](2003) 4 SCC 100

with a loan from Central Bank of India. It was the further case of the plaintiff that as his father was suffering from gout he used to go to his native place at Bihar and when he had gone out in the month of January 1984, the defendant no.1 got allotted the scheduled property in his own name. On his return from Bihar, he had come to know about this fact and questioned the defendant no.1 about it. He further pleaded that on 10.04.1998, a partition took place between the plaintiff and the defendant no.1 in the presence of the members of Vyapari Sangh and Gram Panchayat. The partition deed was exhibited as Exhibit-1. The plaintiff pleaded that as the allotment was in the name of the defendant no.1, he retained the major portion of the suit property while the plaintiff was given one shop from the ground level up to the third floor with the use of latrine/bathroom and it was further agreed that a space at the back of the varandah would be given to the plaintiff to build a staircase to go to the second floor and other floors. It was the case of the plaintiff that he was entitled to half share of the scheduled property but the defendant no.1 due to his greed agreed to give only the portion which was in the possession of the plaintiff. The plaintiff pleaded that the defendant no.1 had harassed him by not transferring the portion of scheduled property in the plaintiff's name and as such the plaintiff now claimed half portion of the scheduled property to which he was legally entitled. On the narration of the above fact, the plaintiff had approached for several reliefs. The learned Trial

Court had granted the reliefs prayed for in prayers (i), (ii), (iii) and (iv) in favour of the plaintiff deciding issue no.1 in his favour. The learned Trial Court, as stated above, had decided issue no.2 against the plaintiff which issue was - "*Whether the defendant no.1 by misleading the defendant no.2 got the suit property allotted to him vide an order in 1984 and another in 1985?*" The learned Trial Court had, thus, rejected all other prayers including the prayer (viii)(b) above, as held earlier. This rejection was not assailed by the plaintiff.

8. It is noticed, as rightly pointed out by Mr. Zangpo Sherpa, the plaintiff had averred that Exhibit-1 was a partition deed and further had not claimed any right arising out of it. The pleadings in the plaint do not even suggest that the partition deed (Exhibit-1) was an irrevocable licence in favour of the plaintiff. In such circumstances, there was no occasion for the learned Appellate Court to revisit the partition deed (Exhibit-1) while examining issue no.1 upon a plea which was never put forward in the pleadings and make out a case which was not even pleaded. The learned Appellate Court, with respect, should have confined his decision to the question arising from issue no.1. The defendant no.1 had preferred an appeal limited to issue no.1 and therefore, it was necessary for him to confine his examination to the pleadings before him. Issue no.1 was confined to whether the suit property was first occupied by the father of the plaintiff thereby giving the plaintiff a right over the suit

property after his father's death. The making of the partition deed (Exhibit-1) being a subsequent event, there was no occasion for the learned Appellate Court to examine it while deciding issue no.1. It is further noticed that although before the learned Trial Court the defendant no.1 had raised the issue of non-registration of the partition deed (Exhibit-1) relied upon by the plaintiff, neither the learned Trial Court nor the learned Appellate Court examined the effect of non-registration and decided to examine it. This was also not correct. Consequently, the learned Appellate Court's finding that the owner of the '*ekra*' house was the defendant no.1 standing unassailed, the suit filed by the plaintiff must be dismissed as both the issues have been held against the plaintiff.

9. The regular second appeal is thus allowed. The question raised in this regular second appeal is held in favour of the defendant no.1 and against the plaintiff. It is held that the relief of permanent injunction could not have been granted by the learned Appellate Court in favour of the plaintiff based on Exhibit-1, which was asserted to be a partition deed by the plaintiff, interpreting the same as licence which was neither the case of the plaintiff nor of the defendants and therefore, no issue was framed or evidence led by either side and the learned Trial Court had also not considered this aspect at all.

10. The findings of the learned Appellate Court in the impugned judgment on the partition deed (Exhibit-1) as well as the grant of relief as prayed for by the plaintiff in the plaint as prayers (viii)(b) and the consequential decree, are set aside.

11. No order as to costs.

(Bhaskar Raj Pradhan)
Judge

Approved for reporting: **Yes/~~No~~**
Internet : **Yes/~~No~~**

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