

**HIGH COURT OF UTTARAKHAND**  
**AT NAINITAL**

**Second Appeal No.73 of 2008**

Khajan Singh (Deceased) ... Appellant

Vs.

State of Uttarakhand through Collector, Udham Singh  
Nagar and Others

... Respondents

Advocate: Mr. Pulak Agarwal and Mr. Bharat Tewari, learned counsel  
for the appellant.  
Mr. I.P. Kohli, learned Standing Counsel for the State/  
respondent nos.1 to 3.

**Hon'ble Sharad Kumar Sharma, J.**

It is a plaintiff/appellant's Second Appeal, under Section 100 of the CPC, putting challenge to the impugned judgment dated 28.08.2008, as rendered by the Court of Civil Judge (S.D.) Rudrapur, District Udham Singh Nagar in Civil Appeal No.35 of 2007, "State of Uttarakhand Vs. Khajan Singh", whereby the learned Appellate Court, in a judgment of reversal, has set aside the judgment of the learned trial Court dated 23.11.2007, as it has been rendered in Civil Suit No.65 of 2001, "Khajan Singh Vs. Prabhagiya Van Adhikari, Tarai Van Prabhag and Others". As a result thereto, the suit of the plaintiff/appellant has been dismissed. Consequently, the instant Second Appeal has been preferred.

2. The facts of the case, as it emerges for consideration, are that the plaintiff/appellant herein had instituted a Civil Suit by invoking the provisions contained under Section 9 of the CPC on 08.07.2001, praying for grant of a decree of permanent injunction, by way of a restraint against the defendants to the suit, for not to forcefully interfere over their possession in their *bhoomidhari* land claimed to be lying in Khasra No.79/1/1, having a land of an area of 20 bighas, situated in Village Pehsaini, Pargana Nanakmatta, Tehsil Sitarganj, District Udham Singh Nagar, the *chauhdi* of which has been more particularly described therein in the relief clause to the suit.

3. Upon issuance of the notices over the suit in question, the respondents have put in appearance and had filed their written statement on 17.10.2001 and they have taken a plea that the disputed land lies in the area of Tarai Purvi Van Prabhag in the Ransali Block, over which the plaintiff/appellant is said to be not having any possession. But in the written statement thus filed by the defendants on 17.10.2001, absolutely a contradictory stand has been taken by the defendants in paragraph no.19 of their written statement, that the aforesaid land in dispute, was a land, which was contended to have been leased out to the plaintiff by the defendants and the plaintiff was occupying the same under the terms of the

lease. It was further contended that, after expiry of the term of the lease, the plaintiff's possession over the property would be treated as to be an unauthorized occupant.

4. In fact, this plea taken by the defendants, as a defence, qua the relief sought by the plaintiff, for the decree in the suit. If it is own case of the defendants, that the plaintiff was in possession over the property, on the basis of the lease and the terms of which has been expired, in that eventuality, it would be the defendants' admitted case that the plaintiff was in a permissive possession and not in an adverse possession or an unauthorized possession, over the property in question. As such, the plea raised in paragraph no.19 of the written statement would be absolutely contrary to the plea raised by the defendants in paragraph no.18, that the plaintiff was not in possession.

5. Apart from it, there had been no evidence which was ever adduced by the defendants to show, as to what would have been the modalities for grant of a lease over the forest land to the plaintiff in the absence of any proof to it and after the expiry of its term, what steps have been taken by the defendants, in terms of the lease, to seek an eviction of the plaintiff from the property claimed by the defendants to be of the forest land, which they contend, that it was leased by them. In that

eventuality, the plaintiff's permissive possession over the disputed property was an admitted fact, at the behest of the defendants, in the suit in question.

6. The learned trial Court proceeded with the suit, thus numbered as Suit No.65 of 2001 and, after considering the rival contentions, the learned trial Court has framed the issues, to the effect that, as to whether the plaintiff is in possession over the property in question and is the owner of it?

7. The second issue, which would be of more concern, was as to whether the plaintiff was in possession in his individual rights over the disputed land, as described in paragraph no.4A of the Suit No.65 of 2001, by the plaintiff, the *chauhdi* of which was given therein. In order to establish the factum of possession during the pendency of the suit itself, a Commissioner's report was called for and the Commissioner on 07.08.2002, has submitted his inspection report, wherein the *chauhdi* of the property was described in paragraph no.2 and in paragraph no.3, the description was given with regards to the standing trees of different types, which were standing on the land in question. The Commissioner has given a report that, over the land in dispute, there is no agricultural activity being carried by the plaintiff.

8. The learned trial Court proceeded with the suit and while deciding issue no.1, the Court has considered the statement recorded by the plaintiff, who appeared in the witnesses box as PW1 and has produced an oral testimony of PW2 Tulsa Ram, as well as the documentary evidence of the Khatauni (Paper No.7Ga), Khasra (Paper No.9Ga) and such other documentary evidence to show, that they were in possession over the property in question, which was the subject matter of the suit.

9. The defendants too led their evidences. They produced DW1 R.N. Pandey, DW2 Hayat Singh Kunwar and DW3 Iftekar Ahmed. But what is important to observe is that if the documentary evidence, which was adduced by the defendants, is considered they have adduced a Gazetted Notification (Paper No.40Ga/1-11) as well as the Xerox copy of the list of leases granted by them i.e. paper no.46Ga, but had not proved the same as per law of evidence.

10. The learned trial Court, while deciding issue no.1 and which would be of more concern, as far as the instant Second Appeal is concerned, had after considering the evidence and, particularly, in the context of the Commissioner's report, after taking into consideration the written statement i.e. Paper No.19Ka/1 and paragraph no.2 of the same, in particular, the defendants rather in paragraph no.2 of their written statement had admitted the

ownership and the *bhoomidhari* rights of the plaintiff and has, subsequently, observed with regards to their rights, the defendants had raised a contrary plea in the written statement. Thus, the trial Court arrived at a conclusion that, on the basis of the Commissioner's report i.e. Paper No.28Ga/1 to 28Ga/3, as well as Ex.Kha-1 and Ex.Kha-2, the statement of the Commissioner, who was produced in the witness box, has proved his report and it was observed that the disputed land was treated as to be the land, which was alleged to be belonging to the defendants.

11. But, the said fact cannot be taken as to be correct, for the reason being, that the observations which were made therein were pertaining to the plea taken by the defendants was contrary to their own statement. The learned trial Court after considering the rival contentions has decreed the suit of the plaintiff/appellant herein.

12. The defendants/ respondents had taken the issue to the learned First Appellate Court. The First Appellate Court by the impugned judgment of 28.08.2008 had allowed the Civil Appeal No.35 of 2007, "State of Uttarakhand and Others Vs. Khajan Singh" and subsequently, dismissed the suit of the plaintiff, it is this judgment, which has been put to challenge by the plaintiff/ appellant, herein in the second appeal herein.

13. In the Second Appeal, which was thus preferred, the plaintiff / appellant, had come up with the case, that the observations, which has been made in the judgment of reversal by the learned Appellate Court with regards to the findings recorded qua the ownership, in fact, is without an application of mind and contrary to the own evidence of defendants. For the reason being, that in a judgment of reversal, it was the duty of the Appellate Court to have reversed the findings of facts recorded, based on the evidence with regards to the ownership having been vested with the plaintiff, which was a fact admitted by the defendants themselves in paragraph no.2 of the written statement, coupled with the fact, that the challenge was also given to the impugned judgment by the appellant, on the ground, that there was a non-compliance of the provisions contained with regards to the demarcation of the boundaries of Khasra No.79/1/1 i.e. the property in dispute and the non-compliance of the provisions contained under Section 101 and Section 114 of the Indian Evidence Act.

14. The appellant before the Second Appellate Court had formulated the following substantial question of law, which is extracted hereunder:-

*“A. Whether the learned lower Appellate Court was justified in ignoring the provisions of section 101 and 114 of the Indian Evidence*

*Act while dismissing the suit of the plaintiff/appellant?*

*B. Whether the learned lower Appellate Court was justified in recording the finding without considering the evidence of the parties?*

*C. Whether the learned lower Appellate Court was justified in holding that the property in dispute is unidentified even when the plaintiff / appellant had mentioned and proved the boundaries in respect of which he had claimed the relief of injunction?*

*D. Whether the learned lower Appellate Court was justified by partly accepting the Survey Report?"*

15. When the appeal was admitted, the same was admitted by the Co-ordinate Bench on the following question of law, which is extracted hereunder:-

*"Whether the lower appellate court has erred in law in holding that the burden to prove as to the identifiability of the land in question (plea raised by the defendant) wrongly shifted on the plaintiff ignoring the provisions contained in Section 101 read with Section 114 of the Indian Evidence Act, 1872?"*

16. Primarily, the Second Appeal stood admitted on a simplicitor question, as to whether the Appellate Court while holding the burden of proof regards the identifiability of the land in question, has been wrongly shifted to the plaintiff ignoring the provisions contained under Section 101 and 114 of the Indian Evidence Act.

17. As per the provisions contained under Section 101 of the Indian Evidence Act, the burden

to prove has had to be established by the party to the proceedings, who takes the defence with regards to the subject matter of the suit and, if the defendants were taking a plea, that the land was lying in Khasra No.79/1/1, and it falls to be part of the land of the forest, where they would be entitled to undertake the process of plantation, then it was rather the burden, which was required to be discharged by the defendants and not by the plaintiffs.

18. Since the plea of the land belonging to the forest, was a plea raised by the defendants, then they were rather required to prove the same and they have not done so, for the reason being, that and as it has been observed by the trial Court in paragraph no.2, the title over the property was not a subject matter disputed by the defendants in the written statement and a very peculiar plea has been taken by them in paragraph no.19, which was a fact, though not established by them, yet again during the course of the trial Court, i.e. with regards to the plea taken in paragraph no.19 of the written statement, which is extracted hereunder:-

*“19- यह कि वादी पूर्व में विवादित भूमि का प्रतिवादीगण से लीज पर लिया था और लीज होल्डर की हैसियत से काबिज रहा। परन्तु लीज अवधि समाप्त होने के बाद वादी कई बार अवैध कब्जा करने का प्रयास किया जिसे विभाग द्वारा विफल कर दिया गया।”*

19. This plea in itself demolishes the case of the defendants particularly when they take a

contrary plea, that it was a land belonging to the forest. Simultaneously, in paragraph no.19, they have come up with the case, that the plaintiff was leased out with the property and they were in possession and the term of the lease has expired. If this was a defence, then it leads to a negative conclusion:-

- 1) That the defendants admit the execution of the lease by them in favour of plaintiff.
- 2) They admit that plaintiffs are in possession of the property.
- 3) If defendants contend, that the term of the lease has expired, in that eventuality, the entire issue was required to be established by leading evidence by the defendants themselves by bringing on record the terms of the lease deed and the manner, in which, upon the expiry of the term of the lease, the action of eviction could be taken by the Forest Department, which was not a subject matter, which was ever attempted to be established by the defendants before the learned trial Court or even before the learned Appellate Court nor even they ever got any such issue formulated by invoking the provisions

contained under Order 14 Rule 3 and 4 with regards to the impact of the alleged lease, which is said to have been executed by the defendants in favour of the plaintiff/ appellant.

- 4) Even the alleged lease was not placed on record, nor proved by them.

20. If the defendants had taken a plea in defence, in that eventuality, there could not have been a presumption, in the absence of evidence, as per the spirit of the provisions contained under Section 114 of the Indian Evidence Act. Because presumption has had to be based upon a sound evidence to be led in a civil proceedings for establishment of a right or denouncing a right claimed by the plaintiff in the suit. In that eventuality, with a harmonious reading of Section 101 to be read with Section 114 of the Indian Evidence Act, the defendants had failed to establish by evidence, that the so-called philosophy of grant of lease was ever an issue agitated by them before the learned trial Court.

21. The learned counsel for the plaintiff has submitted that this Court should exercise its power under Sub-section(4) of Section 100 of the CPC by formulating an issue, as to whether the judgment of the Appellate Court dated 28.08.2008 suffers from the vices of non-compliance of the provisions contained under Order 41 Rule 31 of the CPC.

22. In answer to this, learned counsel for the respondents contended that, in fact, being a judgment of reversal, the Appellate Court did comply with the aforesaid provision and, particularly, he referred to the observations made in internal page no.5 of the impugned judgment, where the Appellate Court has confined the consideration, as to whether the learned trial Court has appropriately decided issue no.2 or not.

23. This answer given by the defendants/respondents with regards to the compliance of the provisions under Order 41 Rule 31 of the CPC is not satisfactory, because the determination, which was, primarily, made by the learned trial Court, was on the findings, which were already recorded while deciding issue no.1 and 2 and not with regards to the simplicitor adjudication made on issue no.2 by the learned trial Court.

24. If the language used under Order 41 Rule 31 of the CPC, are taken into consideration, it's opening part observes that the Appellate Court owes a responsibility, that a point of determination was required to be framed on all the controversial issues, which were raised before the learned Appellate Court where the decree in appeal is reversed already.

25. Thus, non-formulation of a point of determination, in the context of issue no.1, which

was touching the very foundation of the rival contentions and claim itself vitiates the judgment, as such, while answering the substantial questions in favour of the plaintiff/ appellant:-

- 1) That the defendants' case itself is self-contradictory to its pleadings in the written statement.
- 2) That the plaintiff was in permissive possession based over the land of forest, as disputed on the lease, as per the case of the defendants.
- 3) The lease, as it was alleged to be granted by the defendants, was never a part of the documents, which were on record as an evidence before the learned trial Court, to prove their rights.
- 4) If it was a case of the defendants, that the term of the lease has expired, it is not a case of the defendants as to what process they have adopted for eviction of the plaintiff from the land in question.
- 5) The entire contention, qua the plea raised in paragraph no.19 of the written statement about the impact of the lease, is contrary to paragraph no.2 of the written statement, where the title of the plaintiff has been

admitted by the defendants over the property in question.

26. In that eventuality, the Second Appeal would stand allowed. The impugned judgment, as it has been rendered by the learned Appellate Court on 28.08.2008, would hereby stand quashed, consequently, affirming the judgment rendered by the learned trial Court on 23.11.2007 in Civil Suit No.65 of 2001, “Khajan Singh Vs. Prabhagiya Van Adhikari, Tarai Van Prabhag and Others”.

**(Sharad Kumar Sharma, J.)**

07.12.2023

Sukhbant/