

Court No. - 1

Case :- SECOND APPEAL No. - 599 of 1976

Appellant :- Mata Prasad And Another

Respondent :- Mst. Bhagni And Others

Counsel for Appellant :- K.M.L. Srivastava, ,B.B.P. Singh,Chandra Kumar Rai,Navneet Shankar Rai,Rajesh Maurya,Sudhir Singh

Counsel for Respondent :- .,A.K. Rai,A.K. Singh,Anil Kumar Rai,V.K. Singh,Vishnu Singh

Hon'ble Jayant Banerji, J.

1. The aforesaid second appeal was filed by the plaintiffs on 7.4.1976 against the judgment and decree dated 14.2.1976, passed by the Additional Civil Judge, Azamgarh in Civil Appeal No. 344 of 1973 arising out of Original Suit No. 52 of 1968.

2. On 7.4.1976, the appeal was admitted and notices were directed to be issued. It appears that later, several substantial questions of law were prepared by the learned counsel for the appellants, who sought to incorporate them in the memorandum of appeal by means of Civil Misc. Amendment Application No. 257605 of 2017 which application came to be allowed on 14.9.2017. It is stated that the amendments made in the Code of Civil Procedure in the year 1976 came into effect from 1.2.1977 and therefore this second appeal would lie on questions of law.

3. The plaintiff-appellants filed Original Suit No. 52 of 1968 seeking a decree of possession in respect of a house on plot No. 1170/2, Mauza Piariya, Pargana Atraulia, district Azamgarh and also for restraining the

defendants from constructing any house over the property in dispute and from removing any soil from the property in dispute. After filing of the written statement, six issues were framed by the trial court as follows:-

1. Whether the plaintiff is the owner of the house in dispute?
2. Whether the defendant is licensee of the plaintiff and is liable to be ejected?
3. Whether the plaintiff is owner of plots in suit and trees standing thereon?
4. Whether the suit is barred by time?
5. Whether the suit is barred by estoppel.?
6. to what relief, if any, is the plaintiff entitled?

4. The trial court after noticing the evidence on record noted that the plot number in suit was given as 1170/2 while its old number was 903/1. The Court Commissioner in his report had mentioned 903/1 as the number given to the plot in suit. The trial court noted that evidence on record reflects that the plot in suit previously belonged to a Zamindar, while later on, it was acquired by the plaintiff from them with their permission. It was noted from the testimony of PW-1, Ram Raj Pandey, that his elder brother, with permission of the then Zamindar, planted trees over the land and constructed a house, which statement was supported by relevant revenue entries. It was noted that defendants could not tell either the source of the land or its previous owner except to assert that the defendant had availed it from his ancestors. The trial court further noted that DW-2, Murli stated that he saw the defendants over the land and in exclusive possession of the same, but that did not create ownership in the defendants. An enmity

between the DW-2 and the plaintiff was noticed by the trial court and, therefore, it observed that DW-2 being an interested person, not much reliance could be placed on his testimony. The trial court relied upon Exhibit A-1 that was filed by the defendants at the stage of argument which showed that Bhulan (the defendant) had plot No. 903/2. The trial court also referred to the map prepared by the Advocate Commissioner which showed, that the disputed house is in Plot No. 903/1. Referring to the documentary evidence, the trial court observed that the evidence of the defendants cannot be relied upon. Accordingly, it was held that the plaintiff is owner of the house as well as plot in suit No. 1170/2.

5. While deciding issue no.2, the trial court referred to the report of the Court Commissioner, in which it was observed that the house on the spot is 10 or 11 years old, which conclusion, it is stated, had been admitted by the counsel for the defendant and the plaintiff. The trial court observed that the house is hardly 10 to 11 years old and had been made when the defendant had been given that land to live and, therefore, it was concluded that the defendant is a licensee of the house in suit.

6. As regard issue no. 3, the trial court noted that in the testimony of PW-1-plaintiff it was stated that all the trees had been planted by his elder brother on the plot in the suit about 60 years back and he had been availing of fruits of the trees over there. He had also stated that he had cut two trees of Jamun and one tree of Mahuwa and used them in his house about 32 years back which supported the plaint case also. It was observed that PW-2

and PW-3 also supported the case of the plaintiffs. The trial court noticed that defendant as DW-1 had stated that trees were planted by his ancestors while few of them were planted by himself. DW-2 also supported the contention of the defendants. However, the trial court concluded that the statement of the plaintiff seemed more convincing. The testimony of DW-2 was sought to be rejected on the ground that DW-2 did not go to the spot to know about nature and quality of the trees which was unnatural and against human instinct. Also noticed was that DW-2 was an interested witness on account of his enmity with the plaintiff. Accordingly, the issue no.3 was decided in favour of the plaintiff.

7. All other issues were decided in favour of the plaintiffs and the suit was decreed.

8. The defendants filed an appeal against the judgment and decree dated 9.12.1972 passed in O.S. No. 52 of 1968. The appellate court formulated the following points for determination of the appeal.

- (1) Whether the respondents are owner of plot in suit and house in suit?
- (2) Whether the appellants are licensee of respondents in the house in suit? If so are they liable to be evicted?

During pendency of the appeal, the defendant-appellant, Bhulan, died and his legal representatives were substituted.

9. The appellate court noted that the defendant-appellants had claimed only 10 biswas land on which their house, sehan and khalihan area were

situate. It was stated by the learned counsel before the first appellate court that the land claimed by the appellants is upto the cattle troughs towards the north of the house of the appellants, upto the gaddha (ditch) towards the east, upto the blackline towards the south and upto the agricultural plots towards the west. The appellate court also noticed that the case of the plaintiff-respondents was that they were the owner of grove no.1170/2 having an area 0.738 acres. In the khatuani extract for year 1375 to 1377 fasli (exhibit-1) and khasra extract for the year 1375F (exhibit-2), the original plaintiffs were recorded grove holders of Plot No.1170/2. The same entry was in the khasra extract for the year 1361F (Exhibit-8), khatauni extract for the year 1372F, khatauni extract for the year 1360F and khasra extract for the year 1366F. It was noted that Plot No.1170/5 area 0.379 acre was recorded abadi vide khatauni extract for the year 1375 to 1377F. The appellate court noticed that the confirmed survey map of the Commissioner showed that Plot No.1170/2 or 1170/5 had not been demarcated and Plot no.1170 was a big plot in which grove of Jadunandan, houses of Khurmulli and Puranmasi and house in suit were situate. It was noted that the respondents have also not claimed the entire Plot No.1170. It was noted that khatauni extract for the year 1348F (Exhibit-10) showed that Plot Nos.1170-Kha, 1170-Pha, 1170-Sa, 1170-Sad, 1170-Ja, 1170, 1170-To, 1170-Ain, 1170-Da, 1170-Ka, 1170-La, total area 0.693 acres were recorded in the names of Udai Raj and Ram Raj and the duration of the possession was given as six years. It was noticed that the plaintiff-respondents had not filed comparative table of the settlement (bandobast)

of 1348F. As such, it cannot be ascertained from which old plots the present plot no.1170/2 was carved out.

10. The appellate court further noted that in khatauni extract for the year 1347F (Exhibit-23) showed that plot no.903/1 total area 0.953 acre was recorded in the name of Udai Raj and Ram Raj and the duration of possession was given 5 years. The confirmed map of the Commissioner paper no. 42/A-2 showed that old plot no.903/1 had been demarcated. It further showed that some portion of old plot no.903/1 did not lie in plot no. 1170. It again showed that there were as many as eleven sub-divisions of plot no.903/1. It was noted that there was no document on record to show that all sub-divisions of plot no.903/1 were in the ownership of original plaintiffs, Udai Raj and Ram Raj.

11. The appellate court observed that though the respondents had filed the Parcha Bandobast (Exhibit-13 to Exhibit-22) which showed that some portions of Plot No.903/1 were included in the present Plot No.1170 but since the comparative table had not been filed, it could not be ascertained that sub plots 903/1 to 903/1/11 were included in the new plot no.1170/2. It was further observed that the Parchas did not help the respondents. It was noted that the plaintiff-respondents had claimed plot no.1170/2 and not the portion of plot no.1170 mentioned in the above Parchas Bandobast (Exhibits 13 to 22). Accordingly, it was held that the trial court wrongly presumed that new plot no.1170/2 was carved out of old plot no.903/1. The area of plot no.1170/2 was also found to differ from that of the old plot no.903/1 shown in the ownership of the original plaintiffs in khatauni

extract for the year 1347F. The trial court had not considered that the plaintiffs had not claimed entire plot no. 903/1. The finding of the trial court was held to be not sustainable.

12. The appellate court noticed that the defendant-appellants have linked themselves with one Dhondha. The khasra partition for the year 1333F (1929 A.D.) (Exhibit-A/1) showed that there was house and sehan of Dhondha over plot no.903/2. It was found that there were no other houses of the original defendants or of Dhondha in Plot no.903 except the house in suit.

13. The appellate court then considered whether the house in suit was constructed by Udai Raj, the original plaintiff, as stated by Ram Raj (P.W.-1). The testimony of P.W.-1 was noted that the trees of the grove in suit were planted by Udai Raj and the house in suit was constructed after plantation of trees for having watch and care of trees. It was noted that the khatauni extract for the years 1347F and 1348F showed the duration of the grove as 5 - 6 years respectively. The appellate court observed that that being so, the trees were planted over plot no.903/1 for the first time in the year 1342F or 1935-36 A.D. and the house in suit was constructed after 1935. The appellate court noticed that P.W.-1 had, however, stated that the house in suit was constructed 50 years ago. His testimony was recorded in the year 1972 which implied that the house in suit was constructed around the years 1922 -1923. The P.W.-1 had further stated that when the trees in the grove were planted, he was aged about ten years and he had given his age during his testimony as 88 years. It was, therefore, held that the house

in suit was constructed much prior to 1342F (1935 A.D.) and that the house in suit was in existence before the plantation of trees in old plot no.903/1 by Udai Raj and thus it was not constructed by Udai Raj.

14. It was further noted that the house in suit was a full fledged house having 5 rooms and 'Osara' as admitted by the plaintiffs' witnesses which showed that the house in suit was not constructed for keeping watch over grove in the suit. Discrepancy in evidence of the P.W.-1 and P.W.-3 was noted as the P.W.-3 had stated that the house in suit was 'Chhaoni' of original plaintiffs, where they used to keep their cattle, khalihan etc. and in and near the house in suit. The appellate court noted that admittedly the appellants are in possession over the house in suit and land towards north, east and south of it and if the original plaintiffs were using the house in suit for the purposes stated by the P.W.-3, then they would have not spared it for the original defendant, Bhulan. It was held that the facts and circumstances and evidence on record do not prove that the plaintiffs were owners of the house in suit. It was held that evidence on record shows that the house in suit is the ancestral property of the appellants and they are living in it from a considerable long time and not only for ten years as alleged by the respondents. It was further held that the plaintiffs and their witnesses could not satisfactorily prove that Bhulan was 'Halwaha' of the plaintiffs because of which the house in suit was given to him in lieu of it. It was held that the fact that Bhulan and the substituted appellants had opened new door in the house towards the east and had extended their user by fixing cattle troughs and planting trees again showed that Bhulan and

appellants are not mere licencees of the respondents and their ancestors. The testimony of the P.W.-1 was noted by the trial court that Bhulan had left his 'Halwahi' some ten years ago, and none of the appellants were doing 'Halwahi' and in case Bhulan left his 'Halwahi' nearly 10 years and he extended his user around the house in suit, then it was but natural for the original respondents to have regained possession either forcibly or through court of law. It was held by the appellate court that the original plaintiffs had kept silent for about 6 - 7 years, and it was inferred that the house in suit were not given to Bhulan on licence and the finding of the trial court contrary to it could not be sustained.

15. The appellate court noticed that the plaintiffs had also sought relief for permanent injunction in respect of other portions of Plot no.1170/2 and the plaintiff-respondents had not claimed the area of plot in suit lying towards east of 'gaddha', towards south of black line, towards west of agricultural plot and towards north of cattle troughs as shown in the map of the Commissioner. It was held by the appellate court that that being so, the claim of the plaintiffs in respect of remaining land was admitted to the defendant-appellants and, therefore, the plaintiffs can be safely held owners of the remaining area of the plot in suit excluding the area which was not in user of the appellants. It was held that the plaintiff-respondents are owners of land other than the land shown with letters A, B, C, D, E, F, G in the map of the Commissioner, paper no.42/A-2, and that the defendant-appellants are owners in possession of the land shown with letters A, B, C, D, E, F, G. The points for consideration were answered

accordingly. The appeal was partly allowed and partly dismissed. The suit for possession over the house and land shown with letters A, B, C, D, E, F, G in confirmed map of the Commissioner, paper no.42/A-2, was dismissed. The appeal in respect of the remaining portion of plot no.1170 was dismissed and the decree of the trial court was modified accordingly.

16. The contention of the learned counsel for the appellants is that the first appellate court had ignored the Parchas Bandobast that were filed with regard to the plot no.903/1 over which the names of the original plaintiffs were recorded. It is stated that plot no.1170/2 belongs to the appellants and the first appellate court had recorded a perverse finding. It is stated that perusal of the map of the Commissioner that was confirmed, clearly supported the finding recorded by the trial court which has been wrongly reversed by the appellate court. No other arguments were raised by learned counsel.

17. Shri Vishnu Singh, learned counsel appearing for the respondents has submitted that a clear finding has been recorded by the first appellate court that the plaintiffs had not filed comparative table of the settlement of 1348F and as such it could not be ascertained from which old plot, the present plot no.1170/2 was carved out. It has been argued that there were as many as 11 sub-divisions of plot no.903/1 but there was no document on record filed by the plaintiffs to demonstrate that all sub-divisions of plot no.903/1 were in the ownership of the original plaintiffs. It is stated that the plaintiffs had claimed plot no.1170/2 and not the portions of plot no.1170 mentioned in the Parchas Bandobast (Exhibits 13 to Exhibit-22).

It is stated that the appellate court had correctly found that the house in suit was existing from much prior to the grove and that Bhulan, the original defendant, had left his 'halwahi' some 10 years ago and none of the appellants were doing 'halwahi' and the first appellate court had correctly held that it could not be said that the house was given to the original defendant to look-after the grove. It is stated that the first appellate court's judgment is equitable and the rights of both the plaintiffs and the defendants have been protected and, therefore, it requires no interference.

18. I have perused the record as well as the map of the Commissioner, which is paper no.42/A-2. On the map, the letters A, B, C, D, E, F, G have been marked and the line 'B' 'C' has been drawn in red. The line 'B' 'C' is to the east of the house in suit and is just west of 'gaddha'. The agricultural plot of Udai Raj and others is shown further east of the gaddha. The first appellate court has dealt with the matter comprehensively and exhaustively. The analysis and finding of the first appellate court are corroborated by the documents on record. The Hindi translations of the Parchas Bandobast are on record, which have also been perused. I find no error or illegality or perversity in the findings of fact recorded by the first appellate court that would lead the Court to reverse any finding recorded by the first appellate court. The submissions of the learned counsel for the appellant are not supported by the record.

19. A ground has been raised regarding death of Smt. Akali, wife of Late Udai Raj Pandey, on 14.1.1976, who was substituted in place of Udai Raj Pandey in the suit by an order of the trial court dated 16.10.1971, and

who was arrayed as respondent no. 1 in the first appeal. It is stated that she died before arguments were heard but her name is still shown in the decree and hence the decree of interference is vitiated by law.

A perusal of the orders-sheet in the first appeal shows that an application 29C2 was filed on 17.01.1976 stating that Smt. Akali respondent is dead and her heirs are Jhinkoo alias Mata Prasad and Brij Kumar who are already respondents. Therefore, the name of Akali be deleted and the word 'deceased' be written against her name and the remaining respondents be written as 1 and 2.

On 27.1.1976, the application 29C2 was allowed and it was directed that the amendment be made on that day itself. The appeal was fixed for hearing on 10.2.1976.

A perusal of the memorandum of the first appeal reveals that an endorsement of 'deceased' is made against the name of Smt. Akali on 27.1.1976 itself. It is pertinent to state here that in the judgment of the appellate court dated 14.2.1976, in the array of respondents, it is mentioned "Jhinkoo and other (Legal representative of Smt. Akali and Ram Raj). However, in the first appeal's decree made on 20.2.1976, the array of respondents shows the name of Smt. Akali as respondent no. 1. It is clearly an accidental slip which can be corrected under Section 152 CPC. Therefore, the decree is not vitiated.

Similarly, ground no. 9 raised in this appeal reflects that name of Brij Kumar is wrongly written in the first appeal's decree as Brij Kishore, which can also be corrected under Section 152 CPC. It is pertinent to

mention here that the name of Brij Kumar was added as respondent no. 2 by an amendment application Paper No. 26A2 in which his age is shown as about 22 years. The application 26A2 sought amendments in a previous application dated 28.1.1975 purportedly filed for substituting the legal representatives of respondent no. 2. Application 26A2 was allowed on 12.3.1975 and amendment was incorporated in Paper No. 23A2. Therefore, it is not correct to impute that Brij Kumar was minor when the appeal was decreed.

20. This second appeal lacks merit and is, accordingly, **dismissed**.

Date :19.10.2023

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(Jayant Banerji, J)