

Court No. 19

Case :- SECOND APPEAL No. - 350 of 1986

Appellant :- Chhatthidin And Others

Respondent :- Kamla And Others

Counsel for Appellant :- S.K. Mehrotra, Ajay Pratap Singh, I.D. Shukla, Puttan Singh

Counsel for Respondent :- O.P. Srivastava, O.P. Srivastava

Hon'ble Jaspreet Singh, J.

1. This is the plaintiff's second appeal preferred under Section 100 C.P.C. assailing the judgment and decree dated 15.02.1986 passed in Civil Appeal No. 136 of 1982 by 2nd Additional District Judge, Faizabad dismissing the appeal which was filed against the judgment and decree dated 24.02.1982 in Original Suit No. 136 of 1981 by 4th Additional Munsif Magistrate, Faizabad, as a result, the suit of the plaintiff-appellant which was dismissed has been affirmed by the Lower Appellate Court prompting the appellants to approach this Court.

2. The record further indicates that the instant second appeal was admitted by means of order dated 02.09.1986 on the solitary substantial questions of law:-

(i) Whether in absence of specific denial by the defendants in the pleadings and in particular in the written statement regarding the plea of the plaintiffs that the house in dispute continued to remain in the exclusive possession of the plaintiff and was not a part of the property that was put to partition, the defendants could succeed in their defence in the court below?

3. Before advertng to the aforesaid questions of law, it will be worthwhile to take a look at the facts giving rise to the instant appeal.

4. The original plaintiffs/the appellant herein, filed a regular suit No. 136 of 1981 before Munsif Sadar, Faizabad seeking a relief of partition. It was the case of the plaintiff that the property in question which was a house shown by the letters A, B, C and D in the site plan annexed and forming part of the plaint was situate in Mauja Ajasa, Pargana Haveli, District Faizabad (Now Ayodhya) bearing No. 206.

5. It was urged that the said house was constructed by the ancestor namely Sarju. The number of the said house earlier was 121 which was situate in Ahata No. 273 in the Abadi of Mauza Azasa. It was stated that after the death of Sarju, his sons Rachit Ram, Ram Prasad were living jointly and they had come in possession over the disputed house jointly.

6. Sri Abhay Dutt and Visheshwar sons of Sarju Deen had died issueless. After the death of Ram Prasad, Udit and Dukhi, Smt. Kaushalya @ Banhusara became the owner of this house and they started living jointly. After the death of Rachit Ram, his sons Udit and Dukhi and Smt. Kaushalya entered into a family settlement in terms whereof the old house was given to Smt. Kaushalya and while Dukhi and Udit who had constructed a new house over the sehan and abadi land. After the death of Smt. Kaushilya who died issueless, the entire property of Smt. Kaushilya came in the share of Udit and Dukhi. After the death of Dukhi, his entire property went to the plaintiffs and the disputed house in which Kaushilya was living also came in possession of Dukhi and Udit. Dukhi had only a daughter and after the death of Dukhi, a settlement of his property was made in favour of his nephews i.e. the plaintiffs and they came into possession over the property of Dukhi.

7. It was urged that the defendants have got their separate house and as they were having muscle power, they were trying to encroach upon the rights as well as the property of the plaintiffs while denying the ownership and attempting to dispossess the plaintiff which prompted the plaintiff to file a suit seeking half share in the house and further sought a relief of partition.

8. The suit came to be contested by the defendants who categorically denied the plaint allegations and they also stated that there was no partition amongst Kaushilya, Udit and Dukhi. It was also urged that after the death of Kaushilya, her last rites were performed by Udit and Dukhi jointly and they continued to live jointly.

9. There was a partition between Udit and Dukhi of the entire property of Sarjudeen and each got a half share. After the death of Udit his heirs came into possession and Smt. Narain Dei, the plaintiff no. 3 came in to possession over the property of Dukhi. It was urged that there was no ancestral property which was un-partitioned and as such the suit deserves to be dismissed.

10. Upon the exchange of pleadings, the Trial Court framed three issues, however, the core and solitary issue which was relevant was whether the plaintiff had half share in the disputed property and was entitled to get the same by partition.

11. The Trial Court while dealing with issue no. (i) after considering the oral as well as the documentary evidence noticed that from the perusal of the documents filed as Exhibit 1 to Exhibit 6, it clearly indicated there was a partition between the parties earlier. On behalf of the defendant who had

filed a voter's list, it only indicated that which of the parties were residing in which house. Since the plaintiff could not establish the fact that no partition had taken place rather on the contrary, it was established that a partition had taken place between Udit and Dukhi during their lifetime, accordingly, the suit was dismissed by means of judgment and decree dated 24.02.1982.

12. The plaintiffs' thereafter preferred a regular civil appeal and the Lower Appellate Court while noticing whether the plaintiff had half share in the property concurred with the findings recorded by the Lower Appellate Court and dismissed the appeal by means of judgment and decree dated 15.02.1986 which has led the plaintiffs to approach this Court in the instant second appeal.

13. Sri Ajay Pratap Singh, learned counsel for the plaintiff-appellant submitted that both the courts below had committed an error in appreciating the evidence especially as the defendants in their pleadings did not take a specific plea that the house in dispute continued to remain in the exclusive possession of the plaintiffs and it was not a part of the property that was put to partition, in this view of the matter, the suit of the plaintiffs for partition could not be dismissed.

14. It is further urged that as per the version of the plaintiffs, the house in dispute had devolved on Udit and Dukhi on the death of Kaushilya and the inherited the same jointly and there was no division once in the written statement, it was admitted to the defendants that the house was constructed by the Sarjudeen who was the common ancestor and it was also admitted that in a mutual partition, the same was allotted to Smt. Kaushalya Devi

and Sri Udit and Dukhi got a new constructed house, accordingly, after the death of Smt. Kaushilya, the property which was allotted to her was inherited by Udit and Dukhi and it was not open for the Courts to have ignored this and as such the suit for partition was liable to be decreed.

15. It was further submitted that the two courts have not considered the pleadings and the evidence in correct perspective, hence, the two judgments and decrees are liable to be set aside.

16. Having heard the learned counsel for the appellants and from the perusal of the material on record, the core issue which is involved in the instant appeal is as to whether the plaintiffs are entitled to a decree of partition in respect of half share of the disputed house bearing No. 206 situate in Maujza Anzana, Pargana Haweli Awadh , Tehsil and District Faizabad (now Ayodhya).

17. From the pleadings, it would reveal that the plaintiffs had stated that the house no. 206 was constructed by Sri Sarjudeen and that Udit, Dukhi and Ram Prasad (deceased and his widow Kaushilya) continued to stay in the said house as a part of the Joint Hindu Family.

18. It has also been pleaded that in terms of oral settlement, the old house fell in the share of Smt. Kaushilya and the Abadi sehan and its land came in the share of Udit and Dukhi. Later, Udit and Dukhi had raised a new construction and continued to reside therein jointly.

19. It is in the aforesaid backdrop that it was urged that after the death of Smt. Kaushilya, the share was jointly inherited by Udit and Dukhi and as such since there was no partition amongst them, consequently, the decree of partition be granted.

20. Upon perusal of the evidence led by the plaintiffs, P.W. 1 Damodar Das in his cross-examination he stated that after the death of his grandfather, his father came to the village and started living therein in the place where Dukhi was residing. It was also admitted that even at the time of filing of the suit and leading of the evidence, the plaintiffs were residing in the same house where Dukhi used to reside. It was clarified by him that the disputed house is adjacent to the house where the plaintiffs were residing on the southern side and after the death of Dukhi, the plaintiffs are residing therein.

21. It was also stated that there is a wall between the house where the plaintiffs are residing and the house which is disputed. Both the houses are separate and there is door opening and this gives an impression that during the lifetime of Udit, there was a partition between the parties. The plaintiffs denied the suggestion that he did not know when the partition took place between Dukhi and Udit and he also could not tell whether the house wherein Dukhi was residing was given to him in a partition, however, he further stated that the house which was given to Dukhi was quite old and it had fallen and the father of the plaintiffs had raised constructions.

22. What is important to note is that Damodar Das was examined as P.W. 1 while no person was produced as a witness who could give any statement as to whether any partition had taken place as alleged by the defendants. It is also relevant to notice that plaintiff no. 3 Smt. Narain Dei was very much alive and being plaintiff no. 3 an aged lady, she would have been the best person to depose regarding the factum of partition, however, she was not examined nor she entered into the witness box.

23. Significantly, the father of the plaintiffs also was not examined as a witness rather the plaintiff who was merely 28 years of age was examined as a witness who himself had no knowledge regarding the partition as shall be evident from his testimony.

24. In so far as the P.W. 2 Ram Dularey Pandey is concerned, he also could not establish the case of the plaintiffs rather in his cross-examination, he stated that he was not aware that the parties had their separate living and mess. While P.W. 2 was cross-examined, he clearly stated that he did not know when the mess and living was separated. He further gave contradictory statements and from a perusal of his testimony, it indicated that he had not much knowledge.

25. On the contrary, the evidence of the defendants was scrutinized and though they admitted the family tree but stated that a partition had taken place between Dukhi and Udit during the lifetime and as such further partition was not warranted. He clearly deposed that till the time Kaushilya was alive, the parties were residing together but after the death of Smt. Kaushilya, the parties had separated and since then they were living separately in terms of the settlement and partition, the house on the northern side was given to Udit whereas Dukhi got the portion on the southern side. From the perusal of the same, it was clarified and explained that there was a partition between the parties.

26. This aspect was also noticed by the Lower Appellate Court and it was observed that the burden lay on the plaintiff to prove the case as set up in the plaint.

27. In so far as the controversy is concerned, the issue of partition

claimed by the plaintiffs was denied by the defendants. The plaintiff did not examine their mother Smt. Narayan Dei who was alive and moreover the father Sri Ram Sunder was alive who was also not examined as a witness.

28. It could not be fathomed that while Ram Sunder was alive so also Smt. Narain Dei who would have been the best witnesses yet they were not examined nor they entered into the witness box. No explanation was given as to why Smt. Narain Dei and Ram Sunder could not be produced as a witness. A fleeting statement was given that Ram Sunder was not well but there is nothing to indicate that what was the illness and why the statement of Ram Sunder or Narayan Dei could not be recorded on a commission. The witness which was produced on behalf of the plaintiff was barely 27 years of age and he himself stated that he had no idea regarding the partition.

29. The Lower Appellate Court also scrutinized the evidence led by the plaintiff and his witnesses and has drawn an inference that the partition had already taken place between the parties and the plaintiff was unable to establish his case.

30. The statement of P.W. 1 and P.W. 2 was noticed and it also reflected that they were living separately as some partition had taken place. Apart from Narain Dei and Ram Sunder, the plaintiff also did not attempt to produce any independent witness from the Village who could have thrown some light over the said issue.

31. Apparently, the findings recorded by the two courts are based on appreciation of evidence and are pure findings of fact.

32. This Court in exercise of powers conferred under Section 100 C.P.C.

will be slow in upsetting the concurrent findings of fact unless it can be shown that the findings recorded by the two courts is against the weight and material available on record, i.e. to say that the findings have been recorded on the basis of inadmissible evidence or there was no evidence at all or the court has arrived at a conclusion which no prudent person could have reach.

33. Having satisfied itself, this Court is of the clear opinion that the findings of fact recorded by the two courts do not suffer from any perversity which may persuade this Court to intervene in the instant appeal which is sans merit and is dismissed. In the facts and circumstances, there shall be no order as to costs. The judgment and decree dated 15.02.1986 passed in Civil Appeal No. 136 of 1982 by 2nd Additional District Judge, Faizabad as well as the judgment and decree dated 24.02.1982 in Original Suit No. 136 of 1981 by 4th Additional Munsif Magistrate, Faizabad is affirmed. The records of the court below be returned forthwith.

Order Date :- 21st December, 2023

Asheesh

(Jaspreet Singh, J.)