

RESERVED

Neutral Citation No. - 2023:AHC-LKO:85057

Case :- SECOND APPEAL No. - 345 of 1983

Appellant :- Ram Sumer

Respondent :- Sukan

Counsel for Appellant :- R.S.Pandey, Ankit Pande, P.C. Agarwal, Virendra Bhatt

Counsel for Respondent :- S.C. Srivastava, D.K. Srivastava, M.A. Siddiqui

Hon'ble Jaspreet Singh, J.

1. Heard Dr. R.S. Pande, learned Senior Counsel assisted by Shri Virendra Bhatt, learned counsel for the appellant and Shri M.A. Siddiqui, learned counsel for the respondent.

2. This is the defendant's second appeal assailing the judgment of reversal passed by the lower Appellate Court dated 08.03.1983 passed in Civil Appeal No.169/1980, as a result, the suit of the plaintiff-respondent which was dismissed by the trial Court has been decreed by the lower Appellate Court.

3. The instant second appeal was admitted by this Court by means of the order dated 25.04.1983 on the substantial questions of law as framed in the memo of appeal, which are reproduced as under:-

"1. Whether the appellate Court has misread the pleadings and the evidence on record?

2. Whether the lower Appellate Court could decree the plaintiff's suit even after recording the finding that right of easement has not been pleaded by him?"

4. In order to appreciate the contention of the parties as well as the controversy involved, it will be relevant to take a look at the facts giving rise to the instant appeal.

5. The original plaintiff Sukan filed a suit for permanent injunction

against the original defendant Ram Sumer stating that the disputed house in property in dispute has been the sehan of the plaintiff since prior to the abolition of Zamindari and the door of the plaintiff always opened towards the north. The property in dispute was always the sehan of the plaintiff which included the sitting area. There was also a well and the sehan land was also utilized for tying the domestic animals, for drying cow dung and as such was for the beneficial use of the plaintiff. It was also pleaded that the plaintiff has been reaching his house utilizing this land and there is a 10 ft. wide 'Rasta' on the north-east which has been shown in the site plan with red colour lines. It was further pleaded that the plaintiff has been utilizing the same without any interference and as such the defendant did not have any right to create any interference or obstruction. It was alleged that the defendant was working in the shop of a 'halwai' and since his house had been demolished and he required a space to live while he was raising his construction, accordingly, he was permitted to reside in the area which has been shown by the letters Ya, Ee, La, Va and he also started tying his animals. It was further stated that since the intention of the defendant turned hostile hence, his permission to stay was revoked and the plaintiff filed the suit seeking a decree restraining the defendant from creating any nuisance or to interfere in the peaceful possession of the rights of the plaintiff in respect of the property in dispute.

6. The suit came to be contested by the defendant, who filed his written statement and primarily in Paragraph-15, it was stated that the house of the plaintiff and his sehan was always in the north-east, however, he denied that the disputed property was the sehan of the plaintiff. It was further

pleaded by the defendant that his old house was on the east side of the disputed land which has been shown by the plaintiff as khandahar/'dilapidated structure' and the sehan of the defendant was always on the north-eastern side of his old house and on the western side towards the southern side and the defendant had his 'sariya' and his sitting area. It was also stated that the house of the defendant had been washed out in a flood in the year 1955 and since then that the defendant was residing on his sehan on the western side which is being utilized by the defendant where he had also made thatch hut and planted 'Neem Tree'. It was pleaded that the defendant has been utilizing the same as his sehan and in the aforesaid circumstances, the suit was liable to be dismissed.

7. Upon exchange of the pleadings, the trial Court framed seven issues, however, the relevant issues on which the suit was contested was **(i)** whether the plaintiff is the owner of the disputed land as stated in the plant; **(ii)** whether the defendant is the owner of the disputed land as stated in Paragraph-18 of his written statement and **(iii)** whether the area shown by letters Ka, Kha, Ga and Gha in the site plan was given by the plaintiff to the defendant as a licensee and its effect.

8. After leading the evidence, the trial Court making an assessment of the oral evidence found that the plaintiff could not establish his right over the property in dispute and in light of the fact that the plaintiff also admitted that the house of the defendant was on the eastern side, consequently it dismissed the suit by means of the judgment and decree dated 07.03.1980.

9. The plaintiff being aggrieved preferred a regular civil appeal under

Section 96 CPC bearing Civil Appeal No.169/1980 and the lower Appellate Court after reassessing the evidence found that it was a case of misreading of the evidence and, therefore, it reversed the findings of the trial Court and held that the plaintiff may not have been able to prove an easement right over the disputed Rasta but the existence and its user of the plaintiff was there and since its settled with the plaintiff as his sehan, consequently, the suit was decreed holding that the defendant was a licensee whose licence had been terminated. It is this judgment and decree passed by the lower Appellate Court dated 08.03.1983 which has been assailed in the instant second appeal.

10. The submission of the learned Senior Counsel for the appellant is that the lower Appellate Court failed to consider that in case if the plaintiff was claiming any right of sehan in terms of Section 9 of the U.P. Z.A. & L.R. Act, 1950 and before the suit could be decreed, the plaintiff himself had to establish that the disputed land over which he claimed the right was essential for the enjoyment of the house. It is only when it is established that the land which is contiguous to the plaintiff's building and was necessary for the beneficial use of the house and has been in his control, possession and use from a very long as sehan and courtyard only then can a suit for injunction be decreed relating to rights under Section 9 of the U.P. Z.A. & L.R. Act.

11. It is further submitted that in the instant case there was no documentary evidence and the suit was contested primarily on the basis of the oral evidence. In such cases where there is only oral evidence before the Court, the lower Appellate Court must be slow in unsettling the view taken

by the trial Court inasmuch as the trial Court has the benefit of observing the witnesses and their demeanor which is not available to the lower Appellate Court and in case of any discrepancy, the view generally taken by the trial Court must be upheld unless it can be shown that the findings of the trial Court are erroneous or perverse. It is thus, submitted that in the instant case, the trial Court had formed an opinion that the plaintiff could not establish his right of sehan and by merely stating that the plaintiff had a right of easement would not automatically enure to the benefit of the plaintiff and in such circumstances, the trial Court having taken a view and it dismissed the suit in such a case, it was not open for the lower Appellate Court to have reversed the findings.

12. Learned Senior Counsel for the appellant has further urged that the findings recorded by the lower Appellate Court are primarily based on surmises and inferences which actually do not emerge from the evidence and in such circumstances the exercise of jurisdiction by the lower Appellate Court is patently erroneous. In the aforesaid circumstances, the appeal deserves to be allowed.

13. Learned Senior Counsel for the appellant in support of his submission has relied upon the following decisions:-

"(a) Fateh Singh (Dead) through LRs, v. Hari Chand and others, (2017) 5 SCC 175; (b) Madhusudan Das v. Smt. Narainbai (Deceased) by LRs and others, (1983) 1 SCC 35 and (c) Gafoor and others v. Abdul Rashid and others, 1980 All. LJ 838."

14. Shri M.A. Siddiqui learned counsel for the respondent has filed written submissions and stated that he does not wish to make and submissions, hence, the written submissions were taken on record, wherein he has specifically stated that first question of law does not arise in the instant appeal. Moreover, it has been stated that the findings recorded by the lower Appellate Court are based on proper appreciation of evidence and it has also been stated that it is incorrect to state that the plaintiff was unable to prove the easementary right in the disputed Rasta and that there is no such averments in the pleadings. On the contrary there were clear averments in the plaint and this was also noticed by the trial Court wherein it was observed that the plaintiff had acquired the right of easement and as such the findings of the lower Appellate Court do not require any inference. It has also been stated that in terms of Chapter-IX Rule 9 of the Allahabad High Court Rules, 1952 in cases of appeals, the ground of appeal has to be certified which have not been done and as such, the appeal cannot be entertained and deserves to be dismissed.

15. Learned counsel for the respondent in support of his written submission has relied upon the following decisions:-

"(a) Roop Singh v. Ram Singh, (2000) 3 SCC 708; (b) Kallu Ram v. Shri Nath Das, (2000) 3 SCC 576; (c) Commissioner Hindu Religious and Charitable Endowment v. P. Shanmugama and others, 2005 (98) RD 620 and (d) Govind Raju v. Mariamman, 2005 (98) RD 731."

16. The Court has heard learned counsel for the parties and also perused the material on record.

17. Before dealing with the substantial question of law, this Court proposes to deal with the substantial question of law framed at S.No.2 regarding "whether the lower Appellate Court could decree the plaintiff's suit even after recording the finding that right of easement has not been pleaded by him?"

18. This may not detain this Court for long inasmuch as from the perusal of the plaint in suit, it would indicate that in Paragraph-3 and 4, there are clear pleadings that the plaintiff has been using the said land for reaching his house which is situated on North-East and Western side which is 10 ft. Rasta which has been shown by red colour lines in the site plan. It was also pleaded that the same has been in the use without any interference or disturbance from the defendant for the last 20 years. Even though they may not have been a clear usage of word easement or easementary right but the fact remains that in context with the pleadings and the manner in which it has been expressed in Paragraph-3 and 4 of the plaint read with other paragraphs of the plaint as a whole, there is a clear indication that the land was being utilized and the plea of user has been taken by the plaintiff. It cannot be said that there is no clear statement that the plaintiff has not claimed or could not prove the right of easement and yet the suit has been decreed.

19. To that extent, this Court is of the clear opinion that there is ample material in shape of pleadings regarding the aforesaid issue as to be user of the land by the plaintiff and it is not quite correct for the learned counsel for the defendant to state that there were no adequate pleadings regarding easementary right and yet the suit has been decreed. To the aforesaid

extent, the Court turns down the plea of the learned Senior Counsel for the appellant.

20. Having said that, the issue now that attracts the attention of the Court is as to whether the findings recorded are based on misreading of evidence. In this regard, it cannot be disputed by the learned counsel for the respective parties that no documentary evidence was filed rather the entire suit has been contested and decided on the basis of oral evidence.

21. It is a settled and cardinal principles of law that the plaintiff has to stand on his own legs and cannot derive any benefit from the weakness of the defence. It has also to be seen that the instant suit was filed by the plaintiff seeking a decree of injunction which apparently is a relief in personam against an invasion of personal right at the behest of the defendant.

22. In the aforesaid backdrop and noticing the pleadings where the plaintiff had claimed the land to be in his use and treating it to be his sehan land, hence, whether the ingredients required for proving the same have been satisfied.

23. In this regard, the decision of this Court in **Gafoor** (supra) wherein the Court has considered the issue regarding sehan and courtyard in Paragraph-10 and 11 and it will be gainful to refer to it thus the same is being reproduced hereinafter:-

"10. In **Maharaj Singh v. State of U.P. (1977 Rev Dec 7 : (AIR 1976 SC 2602)**, the Supreme Court had occasion to deal with the question as to the connotation of the word 'appurtenant' as used in Section 9 of U.P. Act 1 of 1951. Krishna Iyer, J. speaking for the court observed as follows:

“Appurtenance”, in relation to a dwelling, or to a school, college ...

includes all land occupied therewith and used *for the purposes thereof* (*Words and Phrases Legally Defined* — Butterworths, 2nd Edn.): “The word ‘appurtenances’ has a distinct and definite meaning ... Prima facie it imports nothing more than what is strictly appertaining to the subject' *matter of the devise or grant*, and which would, in truth, pass without being specially mentioned. Ordinarily, what is necessary for the enjoyment and has been used for the purpose of the building, such as easements, alone will be appurtenant. Therefore, what is necessary for the enjoyment of the building is alone covered by the expression ‘appurtenance’. If some other purpose was being fulfilled by the building and the lands, it is not possible to contend that these lands are covered by the expression ‘appurtenances’. Indeed it is settled by the earliest authority, repeated without contradiction to the latest, that land cannot be appurtenant to land. The word ‘appurtenances’ includes all the incorporal hereditaments attached to the land granted or demised, such as rights of way, of common ... but it does not include lands in addition to that granted' ” (*Words and Phrases*,).

In short, the touchstone of “appurtenance” is dependence of the building on what appertains to it for its use as a building. Obviously, the *hat*, bazar or mela is not an appurtenance to the building. The law thus leads to the clear conclusion that even if the buildings were used and enjoyed in the past with the whole stretch of vacant space for a *hat* or mela, the land is not appurtenant to the principal subject granted by Section 9 viz. buildings.

11. On the test laid down in the aforesaid decision it is clear that before a person is entitled to claim settlement of land under Section 9 of U.P Act 1 of 1951 it must be found that the land was necessary for the enjoyment of the building of which it was claimed to be appurtenant. In the instant case, the lower appellate Court has examined the evidence on record and, after making an inspection of the site in dispute on the prayer made by the parties, concluded that the plaintiff had been able to make out a case under Section 9 of U.P Act 1 of 1951. The lower appellate Court observed thus:

The land falls just in front of the main door of the appellant. The contention of the respondents is that the appellant was allowed only recently to open his door and windows towards the land in suit.....It is very much clear from the testimony of the respondent Abdul Gafoor that the door of the appellant towards the land in suit has been in existence for more than 20 years. In this connection it is notable that the level of the door and the level of the land in suit which is in the shape of raised platform is on equal height....." "It is not disputed that the Imambara in which the Tazia is kept on the 10th day of Moharram after Fatman lies just in front of the chabutra in suit with only a narrow passage in between. The constructed portion of the Imambara in which the tazia is kept is in the back and towards south of it and there are two kotharies which are admittedly part of the Imambara. After the kotharies there is one chabutra in the shape of an open land which also is admittedly the part of the Imambara. It is this chabutra of the Imambara which faces the chabutra in suit with the rasta in between. According to the appellant actually this chabutra of the Imambara is the place where

Gumbad is kept on the tazia after it is shifted again to the Imam chowk nearby. The contention of the appellant appears to be quite reasonable and probable. It does not appeal to reason that leaving this chabutra of the Imambara useless the respondents and other Muslims would have elected to use the frontage of the appellant as the place to put the gumbad over the tazia. Respondents have not been able to explain anything as to how this chabutra of the Imambara is utilised. This fact coupled with the fact that from every point of view, such as situation, location, extent and direction the chabutra in suit appears to be a land appurtenant to the house of the appellant totally defeats the contention of the respondents."

24. If the evidence is perused and applying the principles as noticed in the case of Gaffur (supra), apparently, it is evident that the plaintiff has not been able to substantiate the aforesaid ingredients. Apparently, there is a contradiction where the plaintiff states that he had given the disputed area to the defendant as his old house had been washed out in a flood. It is also a case that the house of the defendant was on eastern side and then it has also been stated by the plaintiff that the defendant was working in a shop of a 'Halwai' and he gave his premise as a licensee. In this regard, it was the duty of the plaintiff to have established these facts, however, no clear evidence was led to establish it. This theory of the plaintiff indicating the defendant as a licensee could not be established.

25. On the other hand, the defendant clearly stated that his old house was there which had been washed out and thereafter the defendant had kept a thatch hut on the western side of his old house which was part of his sehan and has been in possession thereof.

26. In the instant case, there are minor discrepancies in the statements of both the plaintiff and the defendant witnesses but the manner in which the appellate Court is required to look into and test the evidence has been noticed by the Apex Court in **Madhusudan Das** (supra) and in Paragraph-8

and 9 of the said report can be given gainful referred for the ease of reference:-

"8. The question whether the appellant was in fact adopted by Jagannathdas and Premwati has been determined essentially on the basis of oral testimony, and reference has been made to a few documents only in supplementation of the oral evidence. At this stage, it would be right to refer to the general principle that, in an appeal against a trial court decree, when the appellate court considers an issue turning on oral evidence it must bear in mind that it does not enjoy the advantage which the trial court had in having the witnesses before it and of observing the manner in which they gave their testimony. When there is a conflict of oral evidence on any matter in issue and its resolution turns upon the credibility of the witnesses, the general rule is that the appellate court should permit the findings of fact rendered by the trial court to prevail unless it clearly appears that some special feature about the evidence of a particular witness has escaped the notice of the trial court or there is a sufficient balance of improbability to displace its opinion as to where the credibility lies. In this connection, reference may usefully be made to *W.C. Macdonald v. Fred Latimer* [AIR 1929 PC 15, 18 : 29 Mad LW 155 : 112 IC 375] where the Privy Council laid down that when there is a direct conflict between the oral evidence of the parties, and there is no documentary evidence that clearly affirms one view or contradicts the other, and there is no sufficient balance of improbability to displace the trial court's findings as to the truth of the oral evidence, the appellate court can interfere only on very clear proof of mistake by the trial court. In *Watt v. Thomas* [LR 1947 AC 484, 486 : (1947) 1 All ER 582 : 176 LT 498] it was observed: "...it is a cogent circumstance that a judge of first instance, when estimating the value of verbal testimony, has the advantage (which is denied to courts of appeal) of having the witnesses before him and observing the manner in which their evidence is given." This was adverted to with approval by the Privy Council in *Sara Veeraswami alias Sara Veerraju v. Talluri Narayya* [AIR 1949 PC 32 : 75 IA 252 : 1948 All LJ 479] and found favour with this Court in *Sarju Pershad v. Raja Jwaleshwari Pratap Narain Singh* [1950 SCC 714 : 1950 SCR 781, 783 : AIR 1951 SC 120 : 1950 SCJ 583]. It seems to us that this approach should be placed in the forefront in considering whether the High Court proceeded correctly in the evaluation of the evidence before it when deciding to reverse the findings of the trial court. The principle is one of practice and governs the weight to be given to a finding of fact by the trial court. There is, of course, no doubt that as a matter of law if the appraisal of the evidence by the trial court suffers from a material irregularity or is based on inadmissible evidence or on a misreading of the evidence or on conjectures and surmises the appellate court is entitled to interfere with the finding of fact. Our attention has been drawn by the respondents to the *Asiatic Steam Navigation Co. Ltd. v. Sub-Lt. Arabinda Chakravarti* [AIR 1959 SC 597 : 1959 Supp 1 SCR 979 : 1959 SCJ 815] but nothing said therein detracts, in our opinion, from the validity of the proposition

enunciated here.

9. The judgment of the trial court shows that it analysed the testimony of each material witness and in reaching its conclusions on the issues of fact it relied in some instances upon its own appraisal of the manner in which the witnesses present before it rendered their testimony and weighed with great care the probative value of the evidence in the context of established fact and probability. On the central issue whether the appellant had been adopted by Jagannathdas and Premwati it commenced logically with an examination of the circumstances in which an adoption could be envisaged. Jagannathdas and Premwati were without issue. The wife was suffering from tuberculosis for about eight to ten years without any possibility of improvement and her health was fast deteriorating. There was no hope that she would bear a child. Jagannathdas admittedly belonged to an old respected family steeped in tradition and orthodox belief. He was the owner of considerable property. It was natural that Jagannathdas and Premwati should conceive the need for adopting a son. Jagannathdas was, on the evidence, a sickly man of weak mind and of weak will and of little education, and in the administration of his affairs Mankuarbai, his father's sister, and Narsinghdas, his uncle's son, played a prominent role. Premwati was aware of her husband's limitations and handicaps and quite understandably was anxious that a son should be adopted. The husband and wife were devoted to each other, and all the circumstances point to the conclusion that if Premwati desired the adoption of a son Jagannathdas would readily go along with the idea. He would willingly agree to whatever she wanted. There is evidence that Mankuarbai, who lived with Jagannathdas, knew of Premwati's desire to adopt a son. The desire to adopt a son was known to others also, and they included Narsinghdas. For it was first decided to consider the adoption of his son Gopaldas. There is clear evidence that the child spent six months to a year in the house of Jagannathdas, spending the day with Premwati and sleeping during the night with Mankuarbai. For some reason, however, it was decided not to adopt him. There is a suggestion in the evidence that his horoscope indicated an early death, but the trial court has not relied on this. The desire to adopt a son continued and it was in the circumstances only natural to consider one of the sons of Seth Jamnadas, the only other brother of the father of Jagannathdas. The appellant, Madhusudandas, was then a boy studying in college and the choice alighted on him. The trial court relied on the evidence of, among others, Narayanibai, mother of Jagannathdas, in reaching this conclusion. It has also referred to material clearly showing that when Premwati went to Panchmarhi in the summer of 1951 and stayed there for about two months with Narayanibai it was decided to send for Madhusudandas and have him stay with them for some time in order to determine whether, by his deportment and behaviour and the manner of his living, he was a suitable boy for adoption. The trial court found that the appellant did go to Panchmarhi and stayed with Premwati for some days. The trial court has also analysed the testimony of witnesses deposing to the contrary, and has given good reason for discarding that testimony. It inclined to the view that the appellant had found favour

with Jagannathdas and Premwati and that they decided to adopt him."

27. Apparently, in this context if the judgment of the lower Appellate Court is seen, it would be found that the lower Appellate Court has drawn his inferences which does not materially flow from the evidence on record.

28. The lower Appellate Court has noticed that the version of the defendant has been improved, therefore, the same cannot be noticed and it found that the statement of the plaintiff was much more convincing. The lower Appellate Court held that the evidence, led, clearly indicated that the defendant was unauthorized occupant and even the right claimed by the plaintiff for the Rasta was decreed. It held that the house of the plaintiff is ancient and more than 20 years, but it has incorrectly been mentioned that the plaintiff may not have been able to prove an easementary right or Rasta, but the fact remains that the existence of the Rasta and its user by the plaintiff is established, thus, facts have to be properly scrutinized and the trial Court having examined the same could not come to the conclusion that the plaintiff had adequately proved his contention.

29. This Court for the purposes of satisfying itself has taken a glance at the evidence and it finds that inasmuch as the plaintiff is concerned, the ingredients required to meet out the plea in terms of Section 9 of the U.P. Z.A. & L.R. Act and the right of user could not be adequately proved.

30. This Court is in agreement with the findings returned by the trial Court and does not find that there is any adequate material for the lower Appellate Court to have give a contrary findings while reversing the findings of the trial Court to decree the suit. This Court further finds that

the lower Appellate Court has drawn its own inference which in the given facts and circumstances was not justified.

31. Insofar as the decision cited by the learned counsel for the respondent is concerned though they relate to the jurisdiction of the High Court in terms of Section 100 CPC which is confined to framing of substantial question of law. The proposition as laid down in the said decisions, apparently cannot be disputed as it is only too well settled but at the same time what is to be noticed is the fact that there is difference between substantial question of law and substantial question of law of general importance.

32. Any issue between the contesting parties which goes to the root of the matter or is germane to the controversy and upon the evidence is decided and if the finding on the said issue is shown to be bad and perverse or if the evidence is considered and it gives rise to a different conclusion then such a situation would give rise to a substantial question of law.

33. Applying the principle, it would be seen that the issue between the parties was of sehan land for which the plaintiff had to prove its case and in case at hand it could not be proved as per the legal requirement set out in the case of **Gafoor (supra)**. The lower Appellate Court did not appreciate the evidence in the correct perspective and for inadequate reasons it set aside the judgment of the trial Court which is not in sound exercise of powers and it misread the evidence, accordingly, the same cannot be sustained. [See: **Baldev Krishan v. Satya Narain, (2013) 14 SCC 179; State Bank of India and others v. S.N. Goyal, (2008) 8 SCC 92; Santosh Hazari v. Purushottam Tiwari, (2001) 3 SCC 179**].

34. In view thereof, the decision cited by the learned counsel for the respondent actually do not have any bearing on the controversy rather it relates to the jurisdiction and as already noticed the instant second appeal was already admitted in the year 1983 on the substantial question of law which were formulated and are being decided by this Court.

35. So far as the issue raised regarding non certifying the grounds is concerned, it is only a technical and is only noticed to be rejected since the appeal is of the year 1983 and at this stage it will not appropriate to reject the same on such technical ground where the Court while admitting the appeal had already framed the substantial questions of law. Thus, the said arguments pales into insignificance.

36. For the aforesaid reasons, this Court is satisfied that the judgment and decree passed by the lower Appellate Court dated 08.03.1983 passed in Civil Appeal No.169/1980 cannot be sustained and is accordingly set aside. The judgment and decree passed by the trial Court dated 07.03.1980 in Regular Suit No.83/1973 is affirmed.

37. In the result, the appeal is **allowed**. In the facts and circumstances, there shall be no order as to costs. The record of the trial Court be returned expeditiously.

Order Date :- 22.12.2023
Rakesh/-