Neutral Citation No. - 2023:AHC-LKO:72391

RESERVED

Case :- SECOND APPEAL No. - 346 of 1986

Appellant :- Shampu And Anothers
Respondent :- Bhagwat And Anothers
Counsel for Appellant :- R.S.Tripathi
Counsel for Respondent :- Nirmal Tiwari,Kaushal Kishore

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Hon'ble Jaspreet Singh,J.

1. This is the defendants' second appeal against the judgment of reversal passed by the Lower Appellate Court dated 19.03.1986 passed in Civil Appeal No.113/1983 by which the appeal preferred by the defendants under Section 96 CPC was dismissed and the Cross Objection filed therein by the plaintiffs came to be allowed, as a result, the suit of the plaintiffs-respondents came to be decreed in its entirety.

2. The instant second appeal was admitted by this Court by means of the order dated 15.07.1986 on Ground No.7 as enumerated in the memo of second appeal, which read as under:-

> "Whether the learned Appellate Court committed an error of law in not considering the case of the defendants-appellants under Section 9 of the U.P. Act No.1 of 1951 inasmuch as the Courts below have failed to consider the evidence on record to the effect that the house of the defendants-appellants existed prior to commencement of U.P. Act No.1 of 1951 and as such the defendants-appellants perfected their rights by adverse possession as the defendants-appellants are entitled to protection under Section 123 of the U.P. Act No.1 of 1951."

3. In order to appreciate the controversy involved in the instant second appeal, certain brief facts giving rise to the instant appeal are being noticed

first.

4. At the outset, it may be noticed that the original plaintiffs and the defendants had expired during pendency of the proceedings, however, upon applications moved, the legal heirs of the respective parties have been brought on record. However, for the sake of convenience, the Court shall be referring to the parties as they were impleaded before the trial Court.

5. The original plaintiffs namely Bhagawat and Ram Bharosh filed a regular suit No.104/1977 seeking a decree of perpetual injunction and mandatory injunction in respect of sirdari Plot No.1772, measuring 22 biswas, 12 dhoor, situate in Village Dadupur, Ransingh, Paragana, Tehsil and District Pratapgarh. The suit was filed against Sampu and Mewa Lal with the averments that the property in question shown by letters G, H, I, J, K, L and G admeasuring 4 Biswas, 13 Biswansi of Plot No.1772 corresponded to the Old Plot No.1651 of the second settlement and corresponding to Plot No.881 in the first settlement situate in Village Dadupur, Ransingh, Paragana, Tehsil and District Pratapgarh was in the ownership of plaintiffs, who were its Bhumidhar and they had their trees and bamboo clumps. The defendants, who allegedly constructed the house shown by letter H-1 sometimes in the year December, 1975 and a dalan which was shown by letter D-1 in December, 1976 and the defendants further opened a new door on the western side of dalan, one hut towards the western side sometimes in April, 1977 over the land in dispute for which the plaintiffs claimed possession including demolition of the illegal construction. It was also alleged that the defendants had cut the bamboo clumps during pendency of the suit for which additional prayer seeking

damages of Rs.300/- was also sought.

6. The suit came to be contested by the defendants wherein they had taken a plea that the property in dispute belonged to their common ancestors and as such Plot No.1772 was the grove of the family since the time of Tulsi i.e. the common ancestor. It was also stated that the constructions as alleged were raised much prior to the abolition of the Zamindari and moreover the land came to be vested with the defendants in terms of Section 9 of the U.P. Z.A. & L.R. Act, 1950, hence, the defendants being co-tenure holders of the remaining part, hence, the suit could not be decreed.

7. Upon exchange of the pleadings, the trial Court framed five issues. However, the relevant issues were **(i)** Whether the plaintiffs are the bhumidhar of the disputed property and **(ii)** Whether the disputed property is the abadi of the defendants. The parties led their evidence and the trial Court by relying upon the Commissioner's report bearing Paper No.Ga-38 and its map bearing Paper No.Ga-39 found that the land shown by letters G, H, I, J, K, L fell on the Plot No.1772 which was the bhumidhar of the plaintiffs. It also noticed that some constructions had been raised by the defendants which has been shown by letters H-1 and D and the door which was opened on the western side was shown by letter D-1.

8. After considering the entire evidence, the trial Court noticed that the plaintiffs were only the bhumidhar in respect of an area shown by letters LL, GG which was of the plaintiffs, remaining was the abadi of the defendants and in this fashion, the suit of the plaintiffs came to be partly decreed by means of the judgment and decree dated 24.01.1983.

9. The trial Court further directed that the defendants within a period of one month would hand over the possession of the area shown in the Commissioner's report and map as shown by letters LL and GG.

10. Being aggrieved against the judgment and decree dated 24.01.1983, the defendants preferred a regular civil appeal before the District Judge, Pratapgarh registered as Civil Appeal No.113/1983. Since, the suit of the plaintiffs was decreed in part, accordingly, the plaintiffs also filed their cross objections which came to be registered as CO-13-AI. Both the appeal filed by the defendants and the cross objections filed by the plaintiffs were considered by the Second Additional District Judge, Pratapgarh and by means of the judgment and decree dated 19.03.1986, the appeal of the defendants was dismissed while the cross objections filed by the plaintiffs bearing No.CO-13-A1 was allowed, as a result, the regular Suit No.104/1977 was decreed in its entirety for possession and directed the defendants to demolish the unauthorized house which was shown by letter H-1, Dalan shown by letter D-1 and any hut lying on the western side of dalan which was situate in the land shown by letters G, H, I, J, K, G that too in Plot No.1772. Also a decree of damages to the tune of Rs.300/- was decreed by the lower appellate Court. Being aggrieved, the defendants preferred the instant second appeal.

11. Shri R.S. Tripathi, learned counsel appearing for the appellants has submitted that the lower Appellate Court went on a tangent in failing to notice that the defendants were entitled to the benefit of Section 123 of the U.P. Z.A. & L.R. Act, 1950. It has further been urged that there was ample material on record including the evidence to indicate that the defendants

were entitled to the ownership and had perfected their rights and the suit of the plaintiffs could not be decreed. It has also been urged by the learned counsel for the appellants that any person who has been in possession being a landless labourer is entitled to the benefit of Section 123 and this aspect has not been considered by any of the two Courts below despite a specific plea raised in the written statement and thus the judgment and decree passed by the two courts without noticing the plea of Section 123 of the Act No.1 of 1951 is bad in the eyes of law. It is also submitted that this was primary question which was urged at the time of admission and it gives rise to the substantial question of law.

12. Shri Kaushal Kishore, learned counsel appearing for the respondents submits that the plaintiffs had established their rights over the property in dispute by cogent evidence, however, plea raised by the defendants insofar as Section 123 is concerned, the same is bad in the eyes of law especially when the defendants had taken a mutually destructive plea in their written statement. It has further been submitted that the lower Appellate Court had properly dissected the controversy and had framed four points for determination and considering the evidence in this regard decreed the suit of the plaintiffs in its entirety and as such the lower Appellate Court while doing so it recorded findings of fact which are not liable to be disturbed in exercise of powers under Section 100 CPC. Accordingly, the appeal deserves to be dismissed.

13. Having heard learned counsel for the parties and also perused the material on record.

14. At the outset, it will be relevant to notice the provisions of Section

122-C of the U.P. Z.A. & L.R. Act, 1950. From a perusal of the aforesaid provisions, it would be clear that the said provisions is a beneficial piece of legislation relating to persons who are enumerated in Section 122-C sub-section (3) and at this stage it will also be relevant to take a glance at Section 122-C of the Act of 1950 which read as under:-

> "**122C. Allotment of land for housing site for members of Scheduled Castes, agricultural labourers, etc.** - (1) The Assistant Collector in charge of the sub-division on his own motion or on the resolution, of the Land Management Committee, may earmark any of the following classes of land for the provision of *abadi* sites for the members of the Scheduled Castes and [the Scheduled Tribes and the Other Backward Classes and the persons of General Category living below poverty line] and agricultural labourers and village artisans-
>
> (a) lands referred to in clause (i) of sub-section (1) of Section 117 and vested in the Gaon Sabha under that section;
>
> (b) lands coming into possession of the Land Management Committee under Section 194 or under any other provisions of this Act;
>
> (c) any other land which is deemed to be or becomes vacant under Section 13, Section 14, Section 163, Section 186, or Section 211;
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> (d) where the land earmarked for the extension of abadi and reserved as abadi site for Harijans under the U.P. Consolidation of Holdings Act, 1953, is considered by him to be insufficient, and land earmarked for other public purposes under that Act is available, then any part of the land so available.
>
> (2) Notwithstanding anything in Sections 122-A, 195, 196, 197 and 198 of this Act, or in Sections 4, 15, 16, 28-B and 34 of the United Provinces Panchayat Raj Act, 1947, the Land Management Committee may with the previous approval of the Assistant Collector in charge of the sub-division allot for purposes of building of houses, to persons referred to in sub-section (3)-
> (a) any land earmarked under sub-section (1);
> (b) any land earmarked for the extension of abadi sites for Harijans under the provisions of the U.P. Consolidation of Holdings Act, 1953;
> (c) any abadi site referred to in clause (iv) of sub-section (1) of Section 117 and vested in the Gaon Sabha;
> (d) any land acquired for the said purposes under the Land Acquisition Act, 1894.
> (3) The following order of preference shall be observed in making allotments under sub-section (2)-
> (i) an agricultural labourer or a village artisan residing in the village and belonging to a Scheduled Caste and Scheduled Tribe;
> (ii) any other agricultural labourer or village artisan residing in the village;
> (ii) any other person residing in the village and belonging to a Scheduled Caste or Scheduled Tribe.
> *Explanation I.* - The expression "agricultural labourer" shall have the same meaning as in Section 198.
> [*Explanation II.* - The expression 'village artisan' means a person who does not hold any agricultural land and whose main source of livelihood is manufacture or repair of traditional tools, implements and other articles or things used for agriculture or purposes ancillary thereto and includes a

carpenter, weaver, potter, blacksmith, silversmith, goldsmith, barber, washerman, cobbler or any other person who normally earns his livelihood by practising a craft either by his own labour or by the labour of any member of his family in any rural area :
Provided that no person shall be deemed to be a village artisan whose total income (including income of his or her spouse and minor children) exceeds two thousand four hundred rupees in a year.]
[*Explanation III* - Preference shall be given to a person who either holds no house or has insufficient housing accommodation considering the requirements of his family.
(4) If the Assistant Collector-in-charge of the sub-division is satisfied that the Land Management Committee has failed to discharge its duties or to perform its functions under sub-section (2) or it is otherwise necessary or expedient so to do, he may himself allot such land in accordance with the provisions of subsection (3).
(5) Any land allotted under this section shall be held by the allottee on such terms and conditions as may be prescribed.
(6) The Collector may of his own motion and shall on the application of any person aggrieved by an allotment of land under this section inquire in the manner prescribed into such allotment, and if he is satisfied that the allotment is irregular, he may cancel the allotment, and thereupon the right, title and interest of the allottee and of every other person claiming through him in the land allotted shall cease.
(7) Every order passed by the Assistant Collector under sub-section (4) shall, subject to the provisions of sub-section (6) and every order passed by the Collector under sub-section (6) shall be final, and the provisions of [Section 333 and Section 333-A] shall not apply in relation thereto.
(8) [* * *]
[(9) In Rule 115-L of the U.P. Zamindari Abolition and Land Reforms Rules, 1952, sub-rule (2) shall be deemed always to have been omitted.]"

15. Having notice the aforesaid provisions, it will be relevant to take a glance of the pleadings of the parties. The plaintiffs clearly stated that they were sirdar of the Plot No.1772 and later they acquired bhumidhar rights. It was also stated that the house of the defendants was on the northern side of the disputed property. The defendants forcibly occupied the portion by letter shown H-1 sometimes in December, 1975 and they had made a dalan shown by letter D-1 and that a new door was opened on the western side while made a thatch hut on the southern side. It is for the aforesaid reason that the suit came to be filed which came to be contested by the defendants wherein a clear plea was taken that the land claimed by the plaintiffs was not part of Plot No.1772. It was stated that the major part on the eastern side of the abadi of Plot No.1772. It was further stated that the decree

which was referred to by the plaintiffs where their rights were allegedly upheld did not bind the defendants and further that the land with the defendants was abadi prior to the year 1951 and even otherwise the defendants had acquired the right by adverse possession and also that the defendants were harijans and landless persons and were entitled to the benefit of Section 123 of the Act of 1950.

16. It will be relevant to notice that the primary contention of the defendants before this Court in appeal is that the defendants were entitled to the benefit of Section 123 which has not been considered nor granted by the two Courts.

17. What this Court finds is that as a matter of fact, the defendants did raise this plea in his written statement and it is equally true that no issue in this regard was framed.

18. Be that as it may, it is also equally true that the defendants also did not make any application before the trial Court in terms of the order 14 Rule 5 CPC requesting the trial Court to frame any additional issue relating to Section 123 of the Act of 1950.

19. It is also borne out from the record that the suit of the plaintiffs was partly decreed by the trial Court only in respect of an area which was shown by letters LL and GG which was said to be part of Plot No.1772 and for all other reliefs, the suit was dismissed.

20. During pendency of the first appeal, the defendants did not make any application before the lower Appellate Court to incorporate or frame additional issue regarding the plea of Section 123 of the Act of 1950.

However, on the basis of the submissions made by the respective parties including noticing the cross objections filed by the plaintiffs, the lower Appellate Court framed the following points that arose for determination which reads as under:-

> (i) Whether the land in dispute shown by letters G, H, I, J, K, L, G lies in Plot No.1772?
>
> (ii) Whether the defendants-appellants are co Bhumidhar of Plot No.1772 where the defendants constructed the house shown by letter H-1 in December, 1975, Dalan shown by letter D-1 in December, 76 and opened a new door on the western side and made a thatch hut in April, 1977 and if so its effect?
>
> (iii) Whether the defendants had cut the bamboo clumps of the plaintiffs and if so its effect?

21. The record does not suggest that the defendants at any point of time ever urged the plea of Section 123 of the Act of 1950 before the lower Appellate Court.

22. Learned counsel for the appellant though has vehemently urged that Section 123 of the Act of 1950 was beneficial and even if not specifically claimed it was right which vested with the defendants and, therefore, it was the duty of the Courts to have considered the effect of Section 123 of the Act of 1950 and having failed to do so it has materially affected the two judgments and decrees and thus the appeal deserves to be allowed.

23. The submission of the learned counsel for the appellant may sound

attractive at the first blush but as apparently is quite fallacious. As the provisions of Section 123 and Section 122-C of the Act of 1950 have been noticed in the preceding paragraphs, it would indicate in order to claim the benefit a person must be on one of the categories which have been enumerated in Section 122-C of the Act of 1950. Apparently, the defendants in his written statement pleaded that they were harijans and landless persons but what is more interesting to know is that the defendants in his written statement had given a pedigree and had claimed co-tenancy rights with the plaintiffs and sought to project that they were within the pedigree of a family of descendant of common ancestors of Tulsi.

24. In order to buttress, the defendants had also given a family tree to claim the benefit of co-tenancy. The two pleas as set up by the defendants that one claiming co-tenancy and the other claiming benefit of Section 122 of the Act of 1950 are mutual destructive inasmuch as co-tenancy is based on the premise that the parties were of the same family and descendant through the common ancestors had acquired the rights in the property in dispute whereas the plea of Section 123 of the Act of 1950 is based on completely different premise and was available to only such persons who were allegedly labourers and had constructed the house over the land of some bhumidhar and it was in terms of the beneficial legislation vested with such landless persons. On one hand, the defendants claiming rights of co-tenancy and on the other hand raised a plea of Section 123 of the Act of 1950 which in the humble opinion of the Court is not permissible.

25. It will be relevant to point out that the defendants have not been able to establish their rights as a landless labourer and moreover was also unable

to establish that they had raised their house over the land belonging to bhumidhar. In order to claim benefit of Section 123 of the Act of 1950, it will have to be established by the defendants that they had raised their house in bhumidhar land and in this way if the house was constructed on Plot No.1772 then impliedly the defendants admitted the claim of the plaintiffs that they were the bhumidhar. However, this is no the case rather the defendants stated that the construction was on the abadi which was on the eastern side and fell on Plot No.1771. Thus, the plea of Section 123 of the Act of 1950 is not available to the defendants nor during the entire trial they had led any evidence to substantiate the said plea. Thus, for the reasons aforesaid, the plea was not established and same fails.

26. Be that as it may, having taken note of the decision rendered by the lower Appellate Court and the record available before this Court, it indicates that Shri Gaya Prasad, Advocate Commission, who conducted the survey on 16.12.1979 and 27.01.1980. Another inspection was done on 05.03.1981 and noticing the report and the map appended therewith, it would indicate that the western portion of the land in dispute was in Plot No.1772 and the remaining was on Plot No.1771.

27. The record further indicates that there were serious objections to the report, consequently, another survey was conducted as noticed above on 05.03.1981. The additional report along with map indicates that the major portion of the disputed house which is shown by letter H-1 and the entire dalan shown by letter D-1 was located over the land of Plot No.1772 which belongs to the plaintiffs-respondents.

28. Though the defendants had claimed co-tenancy and it also brought a

pedigree as set up by them claiming rights from the common ancestors of Tulsi. The plaintiffs in order to prove their case had filed a copy of the plaint of the earlier suit filed under Section 229-B of the Act of 1950 instituted by one Ram Das against Raghubir and others which also impleaded the plaintiffs-respondents. The plaintiffs pedigree as set up by the defendants and one set up by the defendants are quite different and since it was the claim of the defendants that they were claiming co-tenancy, thus, the burden was on them to establish the same which could not be done.

29. From the material available on record and noticing the consent degree which indicated the Plot No.1772 belonged to the plaintiffs and their possession was also duly recorded in the Fasli Year 1996 to 1387 which were substantiated vide Exhibit-4 which were the extract of Khasra. Even while raising the plea of co-tenancy, the defendants ought to have led unequivocal evidence to prove, which they failed to do so.

30. At this stage, it will be relevant to notice the decision of this Court in **Jagdamba Singh & Ors. v. Dy. Director of Consolidation & Ors., reported in 1984 (2) LCD Page 398 [LB]** which was followed by this Court in **Dropadi Devi and others Vs. Shiv Chandra Dixit, 2020 SCC Online All**.

31. In the aforesaid decision, the issue regarding co-tenancy, joint family property was considered by this Court at length including the requirement of law to prove such a plea but from the record of the instant case, it would reveal that no such evidence was led by the defendants to prove the same. Accordingly, neither the pedigree nor the plea of co-tenancy was

established.

32. In light of the above, once the issue of title stood affirmed in favour of the plaintiffs being the owner of Plot No.1772 and as per the report of the survey commission largely the house and the dalan was found to be on Plot No.1772 which belonged to the plaintiffs and the said findings are based on proper appreciation of evidence, hence, this Court in exercise of powers is not inclined to interfere with the same. This Court finds that the plea raised by the defendants is not made out and the lower Appellate Court has rightly decreed the suit.

33. In view of the aforesaid, the judgment and decree passed by the lower Appellate Court dated 19.03.1986 is affirmed and the second appeal is dismissed. In the facts and circumstances of the case, there shall be no order as to costs.

34. The record of trial Court concerned shall be returned forthwith.

Order Date :- 3rd November, 2023
Rakesh/-

Digitally signed by :-
RAKESH PRAJAPAT
High Court of Judicature at Allahabad,
Lucknow Bench