

Reserved

Neutral Citation No. - 2023:AHC-LKO:72388

Court No. - 19

Case :- SECOND APPEAL No. - 429 of 1990

Appellant :- Musammat Qulsoom And Others

Respondent :- Abdul Rehman

Counsel for Appellant :- M.A.Siddiqui,M.A. Siddiqui

Counsel for Respondent :- Upendra Singh,A.K.Verma,Ashutosh Mishra,Rakesh Kumar,Satya Prakash Dubey

Hon'ble Jaspreet Singh, J.

1. Heard Shri M. A. Siddiqui, learned counsel for the appellants and Shri Satya Prakash Dubey, learned counsel appearing for the respondent.
2. This is defendants second appeal assailing the judgment of reversal passed by the 4th Additional District Judge, Barabanki in Civil Appeal No.14 of 1989 whereby the suit of the plaintiffs for injunction which was dismissed by the trial court was decreed by the lower appellate court.
3. The instant second appeal was admitted by this Court on 15.10.1990 on the questions of law which reads as under:-

"(G) Whether the unregistered deed of partition could be read in evidence and defendants being not signatory to the same they could be held bound by the same?"

(H) Whether there being no reference of the land in suit in 1967 partition agreement a finding on the basis of said agreement could be recorded on surmises and conjectures?"

4. Before advertng to the aforesaid questions of law certain brief facts giving rise to the instant appeal are noticed hereinafter.
5. The original plaintiff, namely, Abdul Rahman instituted a suit before Munsif, Barabanki registered as Original Suit No.212 of 1981 against six defendants, namely, Allarakhu, Ashiq Ali, Sadiq Ali, Munna, Anwar Ali and Chunna. It was specifically pleaded by the plaintiff-respondent herein that

the plaintiff is the owner in possession of the property shown by letters A, B, C, D, which was part of his Sehan and was located on the northern side of his house. It was further pleaded that the same has been in the possession of the plaintiff since the time of his forefather and that now it vested with him and he had acquired rights in terms of Section 9 of the U.P. Z.A. & L. R. Act, 1950 (hereinafter referred to as the Act 1950). An alternate plea was also raised stating that the plaintiff is in possession since last over 15 years and have also acquired and perfected his rights by adverse possession. It is in the aforesaid backdrop, it was stated that since the defendants were attempting to encroach upon the land of the plaintiff and creating disturbance. The suit for injunction was filed restraining the defendants from creating any disturbance or interfering in the peaceful possession of the appurtenant land shown by letters A, B, C and D which was being utilized by the plaintiff from the time of his forefather and also for his ingress and egress, tying of domesticated animals, drying of cow-dung and keeping agricultural implements.

6. The defendants contested the suit denying the allegations as made by the plaintiff and specifically stated that the defendants were the owner of Plot No.1233 which was the house of the defendants and over Plot No.1235 the defendants had their Sehan. It was also stated that earlier the plaintiff had his ingress and egress towards the souther side of his house but a little prior to the institution of the suit the plaintiff opened a door on the northern side and as such the plaintiff did not have a right to seek injunction as the same was in the possession and the property belonged to the defendants, accordingly it was the defendants who had a right in terms of Section 9 of the Act of 1950 and not the plaintiff and in the aforesaid circumstances

where the plaintiff already had his ingress and egress from the southern side and thus the suit was liable to be dismissed.

7. Upon the exchange of the plaintiff, the trial court framed 8 issues. However, the relevant issues on which the suit came to be contested was primarily issues no.2, 3 and 5 as framed by the trial court which reads as under:-

- (i) Whether the plaintiff is the owner of the disputed property and has been his appurtenant land over which he is in possession and is using the same as his Sehan?
- (ii) Whether the disputed land is the plaintiff appurtenant land which has been in his possession prior to the abolition of Zamindari and whether he has acquired right in terms of Section 9 of the Act 1950?
- (iii) Whether the plaintiff always had his door ingress and egress as stated in the pleadings?

8. The trial court Upon consideration of the oral as well as documentary evidence noticed that the plaintiff in order to establish his case had relied upon certain documentary evidence which related to the proceedings under Section 145 Cr.P.C. but it did not give any benefit to the plaintiff. Moreover, the plaintiff relied upon a partition deed marked as exhibit no.6 to state that in 1967 partition had taken place between the plaintiff exclusively but the trial court noticed that the same did not clearly establish that it related to the property in question. The trial court also noticed that the defendants had filed a document relating to the year 1912 and since then there was change in the circumstance but nevertheless the entry of 1912 which was prior to the abolition of Zamindari and was in the name of forefather of the defendants, consequently it was found that the land belonged to the defendants and the plaintiff had no right to seek injunction,

accordingly the suit of the plaintiff came to be dismissed by means of judgment and decree dated 20.12.1988.

9. The plaintiff being aggrieved preferred regular civil appeal under Section 96 CPC bearing Civil Appeal No.14 of 1989 and the lower appellate court reappraising the documentary as well as oral evidence found that the plaintiff was able to establish both his right as well as his possession and he was also entitled to the benefit of Section 9 of the Act of 1950, accordingly the lower appellant court allowed the plaintiff's first appeal by means of judgment and decree dated 29.08.1990. It is this judgment and decree of the lower appellate court dated 29.08.1990 which is under challenge before this Court on the questions of law which has been noticed hereinabove.

10. Shri M. A. Siddiqui, learned counsel for the appellants has taken the Court through the provision of Section 9 read with Section 7 of the U.P. Z.A. & L. R. Act 1950. It is further pointed out that the land in question belonged to the defendants and they had permitted the plaintiff to stay. The plaintiff house was on the southern side and his ingress and egress was also from the south. A few days prior to the institution of the suit the plaintiff had open the door on the northern side towards the Sehan of the plaintiff and in the aforesaid circumstances where the plaintiff could not establish his prior possession and right over the disputed property, hence the lower appellate court committed an error in decreeing the suit.

11. Learned counsel for the appellants further submits that lower appellate court while arriving at the conclusion dealing with the Section 9 of the Act of 1950 also noticed that the plaintiff had filed a

partition deed dated 30.10.1967 to corroborate that the said land was always with the plaintiff and his forefather and further a private partition had taken place between the plaintiff and his brother and the disputed property came in the share of the plaintiff.

12. It is urged that the said document was not proved in accordance with law. Moreover, the same could not be made binding on the defendants as they were not a party and by relying upon the same and giving a finding based on the said document, the suit of the plaintiff was incorrectly decreed and thus the appeal deserves to be allowed.

13. Shri M. A. Siddiqui, learned counsel for the appellants has relied upon the following decisions in support of his submissions:

(i) Algoo Vs. Ram Phal, 1989 (7) LCD page 36.

(ii) Nagua Vs. Brijrak Kishore, 1980 ACJ page 94.

(iii) Mahesh Vs. Ram Adhar, 1983 ACJ page 59.

(iv) Amrit Ram and others Vs. Gauri Shanker Singh, 1983 ACJ, page 156.

(v) Chhadami and another Vs. Udain and others, 1983 ACJ, page 197.

14. Learned counsel appearing for the respondent while controverting the aforesaid submissions submits that the plaintiffs have been in possession of the property A, B, C, and D which was their Sehan on the northern side of their house and the same also corroborated by the Commissioner's Report which was on record which clearly indicated the possession of the plaintiff especially the Neem tree which have been planted by the plaintiff. Reference was also made to the documents filed by the plaintiff relating to the

proceedings under Section 145 Cr.P.C. in between the parties to corroborate that the possession of the plaintiff was prior in time and that they had been using the Sehan for their own parts.

15. It has also been pointed out that the defendants contesting the suit before this Court had also appeared in proceedings under Section 145 Cr.P.C. where their statements were recorded. The defendants gave three separate statements in the proceedings under Section 145 Cr.P.C. but nevertheless what is important to note is that even in the said proceedings it was the admitted case that the plaintiff had the door on the northern side and thus to state that the door was opened few days prior to the institution of the suit is patently erroneous. Even the defendants witnesses corroborated the fact that the Neem tree which was present on the disputed land also belonged to the plaintiff and in the aforesaid circumstances it stood corroborated by the partition deed which also related to the property in question for which no declaration or challenge was raised by the defendants in the proceedings, accordingly the lower appellate court considered the effect of the said document including the oral evidence and then decreed suit which did not require any interference.

16. Learned counsel for the plaintiff-respondent further submits that the defendants attempted to rely upon a Khasra entry relating to the year 1912. This entry could not be adequately proved; inasmuch as in light of the oral evidence led by the defendants it was belied that the name of the defendants from the time of their forefather was recorded and whether with the passage of time there had been various changes which could not be explained, thus, for all the aforesaid

reasons, the lower appellate court reversed the finding of the trial court and decreed the suit which is under the realm of the first appellate court to reappraise the evidence and records its independent finding and are pure questions of fact which do not require any interference, hence the appeal deserves to be dismissed.

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

18. In light of the two questions which have been framed, it would be seen that the partition deed which was placed on record dated 30.10.1967 is a registered document. The same was in fact between Abdul Rahman the plaintiff of the instant suit and his brother Abdul alias Abdul Kadir. The said document though not signed by the defendants and may not be directly binding on the defendants but nevertheless it is a document which can through light over the controversy and definitely was admissible in evidence. What can be the effect of such a document is to be seen and since reliance has been placed by the lower appellate court on the said document, it will also have to be seen whether the lower appellate court committed an error in noticing and considering the said document.

19. In order to examine the aforesaid aspect, it will be relevant to notice the basic pleading of the parties. The plaintiff clearly stated that the plaintiff had his house and on the northern side the land was in his possession being treated as his Sehan and is being utilized for the beneficial use as is a appurtenant land over which there was a Neem tree planted by the father of the plaintiff and the plaintiff had acquired rights in terms of Section 9 of the Act 1950. This plea was

sought to be negated by the defendants on the ground that the defendants are in owner in possession of the aforesaid property and they had their house which was ancestral on Plot No.1233 and their Sehan over the Plot No.1235 and the same was being utilized by the defendants who had their ingress and egress on the eastern side. It was also stated that the Khasra entry relating to year 1912 clearly indicated the rights of the defendants and in the aforesaid backdrop, it cannot be said that the plaintiff had a right over the same as it was part of the defendants plot.

20. The record would also show that Shri Dina Nath Advocate was appointed as a Commissioner who had visited the property in question and also plotted the entire topography in the site-plan which was annexed with the Commissioner's Report bearing paper No.Ga.9/1 T O, Ga.9/4. The record would further indicate that another commission was carried out on 28.04.1983 and the said Commissioner also located the disputed land which was drawn on scale of one inch equalling five gatha.

21. In so far as the location and boundaries of the disputed property is concerned, there is no dispute between the parties. However, what is relevant to note is that the defendants had clearly stated that their house was on Plot No.1233 whereas their Sehan was on Plot No.1235. From the perusal of the aforesaid maps and the Commissioner's Report another fact which is evident is that apparently there is a Rasta between the disputed property which falls on the eastern side of the Rasta whereas the house of the defendants is on the western side of the said Rasta. The said disputed property is

on the northern side of the plaintiff's house and on the eastern side of the plaintiff's house is the house of Abdul Gani and a platform (Chabutra of Abdul Gani). On the southern side of the disputed property i.e. on the northern side of the plaintiff's house, there is a wall which was broken at certain places and in the area shown by the letters N, P, D and E as shown in the site plan No.Ga.9/4 there was remains of bricks, tin shed and other mound of mud and bricks and this was connected by the plaintiff who indicated that earlier they had their varandha (Barotha) which had fallen down over the years and the remains and debris were that of the said varandha. The disputed property also had Khuta (Peg) and Nadh (Trough for animals) and Neem tree and the same was in the control of the plaintiff.

22. Taking a note of the location as depicted in the Commissioner's Report, it would be seen that there is an intervening road between the house of the defendants and the disputed property which falls on the northern side of the plaintiff's house. The Commissioner Shri Krishna Kant Mishra, Advocate also noticed that on both sides of the Rasta was the Abadi Plots No.1241, 1235, 1233, 1316, 1313 and 1309 which were also plotted and depicted. Taking an overall view from the maps submitted by two Advocate Commissioners and the other evidence available on record. What the defendants could not point out is the fact that if the plaintiffs were in possession of the land which was shown in the map submitted by Shri Krishna Kant Mishra Advocate by letters E, F, G and H and on the western side thereof is Plot No.1233 and on the eastern side is Plot No.1235, in such a situation, the defendants would not have a clear

right of access of Plot No.1235 which was said to be their Sehan as the property and house of the plaintiff was intervening. The evidence would go to show that the defendants who appeared in the witness-box also admitted the facts that the Rasta between the defendants' house and the disputed property was a public road which was utilized by all and sundry.

23. It is also relevant to note that there was a Nali which also runs in the north south direction on the western side of the disputed property and the Nali emanating from the defendants' house also meets and merges in the said land. The road intervenes and demarcates the house of the defendants and the disputed property and on the southern side of the disputed property is the house of the plaintiff.

24. In light of the aforesaid factual position coupled with the fact that the plaintiff had filed documents relating to proceedings under Section 145 Cr.P.C. which was initiated in the year 1981 and the statement of defendants witnesses who also in the said deposition indicated three different version that is to say Akbar Ali stated that the door opened by the plaintiff on the northern side was about the year and the half earlier. He disputed the existence of the Neem tree over the disputed land while Munna who was a defendant stated that Abdul Rahman had opened the door on northern side with the consent of the defendants' father Allarakhu. However, this was not a plea taken by the defendants in the written statement. The third version came from Sadiq Ali who stated that when the plaintiff had opened the door on the northern side, Sadiq Ali and his father Allarakhu had

objected to the same.

25. From the above one fact which clearly emerges in the fact that the defendants had opened the door on the northern side and apparently it was not few days prior to the institution of the suit which was the case set up by the defendants in their written statement.

26. Another factor to be noticed is that the Advocate Commissioner who visited the property and submitted his report bearing paper No.Ga.9 clearly indicated the remains of the fallen down structure of varandha including a mound of bricks and mud, tin-sheds and this was also not explained by the defendants whereas it was the case of the plaintiff that they had been residing and at their varandha which had fallen down. It is in the aforesaid backdrop, that the findings have been recorded by the lower appellate court in favour of the plaintiff. The possession of the plaintiff could not be disputed by the defendants and it is in furtherance thereof that the partition deed dated 30.10.1967 was also placed on record to corroborate the fact that though the suit came to be filed in the year 1981 but the plaintiffs have been in possession since a number of years earlier and the land in question which was partitioned privately between the plaintiff and his brother and the land came in the exclusive share of the plaintiff is corroborated and substantiated the case of the plaintiff. The lower appellate court while relying upon the aforesaid document has not returned any findings that the said partition deed was binding on the defendants, rather it has been taken as a piece of evidence alongwith the other documents including the

proceedings under Section 145 Cr.P.C., deposition made by the defendants witness in the proceedings under Section 145 Cr.P.C. and in contrast to the deposition given in the instant regular suit.

27. It is relying upon the same that the lower appellate court has returned a finding regarding the use of the appurtenant land which was with the plaintiff since much prior to the institution of the suit. The evidence of the plaintiff and his witnesses also corroborated the user of the plaintiff and thus a finding was positively returned in favour of the plaintiff that he had acquired the right in terms of Section 9 of the Act of 1950. Despite raising a plea that the land bearing No.1233 as the house of the defendants and Plot No.1235 has been the Sehan but this was not explained as to how the defendants could have an access from 1233 to 1235 when there was a public Rasta intervening between the two plots and the house and the Sehan of the plaintiffs also intervene, this could not give unfettered access to the defendants over the disputed property. It is in the aforesaid backdrop that the lower appellate court has recorded findings in favour of the plaintiffs which are pure findings of fact.

28. The suit of the plaintiff for permanent injunction and possession which was taken as an alternate plea came to be decreed by the lower appellate court and this Court does not find that there is any error committed by the lower appellate court while recording such findings. On the contrary, the trial court had placed sufficient reliance on the Khasra entry of 1912 but failed to notice that since 1912 there were large changes and there has been no continuity of the defendants from 1912 onward till the Zamindari was abolished.

Moreover, once the defendants knew that the plaintiffs were claiming the rights in terms of Section 9 of the Act of 1950 yet the defendants did not seek any counter claim either of their rights or possession and as such once the lower appellate court recorded a finding in favour of the plaintiff, the defendants could not claim a right contrary unless the defendants had sought a counter claim or filed a separate suit seeking their declaration in respect of property in question [*see Anathula Sudhakar Vs. P. Buchi Reddy (Dead) by LRS. & others, 2008 (4) SCC 594*]

29. In so far as the decision in *Algoo (supra)* is concerned, it merely explains the concept of appurtenant land and in the instant case if the same is seen, it would be found that the plaintiff has claimed the said land was for his beneficial use and was appurtenant land to his house and as seen from the Commissioner's Report and map, the defendants has to indicate as to how he exercise his rights of Sehan over the land in question whereas there was admitted Rasta between the defendants' house and the property in question, thus the said decision does not come to the aid of the appellants.

30. In the case of *Mahesh (supra)*, it was noticed by a Co-ordinate Bench that it is the land which is a appurtenant to the tenure holder can be settled in terms of Section 9 of the Act of 1950 and in which the use and beneficial enjoyment is to be proved. The proposition is not disputed but its applicability in the instant case at the behest of the defendants upon examination becomes doubtful.

31. In *Amrit Ram (supra)*, the Court has echoed similar sentiments regarding what would be the appurtenant land and how the

same is to be construed so also in the case of *Chadami (supra)*.

32. Having examined the matter in a holistic fashion, this Court does not find that there is any error committed by the lower appellate court while decreeing the suit; inasmuch as the possession of the plaintiff was established and in order to assess the juridical possession of the plaintiff, *prima facie*, semblance of the title having acquired by the plaintiff in terms of Section 9 of the Act 1950 was also seen and the findings returned by the lower appellate court appears to be sound and does not require any interference.

33. In view of the aforesaid, this Court is not inclined to interfere with the judgment and decree dated 29.08.1990 passed in Civil Appeal No.14 of 1989 which is affirmed. Accordingly, the second appeal is devoid of merit and is dismissed. There shall be no order as to costs. The lower Court record shall be remitted forthwith.

Order Date :- 3rd November, 2023
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