

Reserved

Neutral Citation No. - 2023:AHC-LKO:85853

Court No. - 19

Case :- SECOND APPEAL No. - 145 of 1991

Appellant :- Smt.Sampada Kumari And Another

Respondent :- Custodian Of Enemy Property Union Of India And Others

Counsel for Appellant :- Hari Om Singh, Abdul-Razzaque Khan, Anurag Narain, B.K. Misra, Rajesh Datt Singh, Samarth Saxena, Shkeel Ahmad, Syed Ahmad Jamal, Vivek Sonkar

Counsel for Respondent :- G.S. Tripathi, C.S.C., Deepanshu Dass, V.K. Shukla

Hon'ble Jaspreet Singh, J.

1. The instant second appeal has been filed by the plaintiff assailing the judgment of reversal passed by the Special/Additional District Judge, Kheri in Civil Appeal No.74 of 1986 as a result the suit of the plaintiffs for possession, which was decreed by the trial court dated 28.08.1986 in Suit No.101 of 1983, has been dismissed.

2. The instant appeal was admitted by this Court on 27.03.1991 but at the relevant time, no substantial question of law was framed. It is later on 05.07.2007, two questions of law were framed which read as under:-

"(i) Whether a person, who basis his title on adverse possession, without providing by unequivocal evidence that his possession was hostile to the real owner and amounted to denial of the title of the property claimed, can be said to have perfected his title by adverse possession?"

"(ii) Whether the State can be said to be in adverse possession over a piece of land owner by its subject?"

3. Once again on 01.12.2017, a Co-ordinate Bench of this Court framed an additional question of law which reads as under:-

"Whether the lower appellate court has committed manifest illegality in not formulating the points of determination as required under Order XLI Rule 31 CPC and whether it would lead to non-sustainability of the impugned judgment?"

4. In order to appreciate the contention of the parties as well as for answering the question of law, it will be necessary to take a glance at the facts of the case.

5. The plaintiff-appellants, namely, Smt. Sampada Kumari and Smt. Lalit Kumari instituted a suit bearing No.101 of 1983 impleading the Custodian of Enemy Property, the Superintendent of Police, Lakhimpur Kheri and the District Magistrate, Lakhimpur Kheri as defendants. It was stated that Kunwar Mahesh Brahm and Kailash Brahm was the Zamindar of Mauja Pyarepur and Naurangabad, District Lakhimpur Kheri. Upon their death, they were survived by their sole legal heir Smt. Sampada Kumari plaintiff no.1 and Smt. Lalit Kumari plaintiff no.2. They had received the estate by virtue of Will executed by Kunwar Mahesh Brahm and Kailash Brahm. It was also stated that the disputed property in question was located within the municipal limits of Nagar Palika, Lakhimpur Kheri and since the U.P. Z.A. and L.R. Act 1950 as well as Uttar Pradesh Urban Zamindari Abolition Act, 1955 were not applicable, hence the plaintiffs continued to be the zamindar of the said land.

6. In paragraph-3 of the plaint, it was specifically pleaded that the disputed land in question refers to plot No.400-A measuring 0.70 acre and plot No.400-B measuring 1.23 acre which remained in possession of the plaintiffs till June 1980. It was specifically stated that they were certain other plots, namely, plots No.1319, 1320, 1321, 1322, 1325, 1326 situate in Mauja Lakhimpur which was recorded in the name of Raja Mahmoodabad. It was further urged that since Raja Mahmoodabad had left for Pakistan, accordingly his entire estate was declared as enemy property and it vested with the Custodian of

Enemy Property. It was also pleaded that the list of plots belonging to Raja Mahmoodabad were duly published in the Government Gazette and it was taken over by the State of U.P. for public purposes and it raised construction on 19.02.1963 and at present there is the office of Public Works Department. It was also stated that there was some construction over the plot No.1325 and 1326 and the same was taken over as the resident of the Superintendent of Police. However, the plot No.400-A and 400-B were never part of the property of Raja Mahmoodabad nor it was ever published in the official gazette as such.

7. It was specifically pleaded that in June 1980 the then Superintendent of Police encroached upon the land of plot No.400-A and 400-B and it was used by him as his property. Since the land of the plaintiffs was adjacent to the property of Raja Mahmoodabad but it fell in a different hamlet but nevertheless the Superintendent of Police Lakhimpur Kheri who was in possession of the land belonging to erstwhile Raja Mahmoodabad encircled the land of the plaintiffs and it is in the aforesaid backdrop that the plaintiffs came to know about the act of the defendants, hence the suit for possession was filed.

8. The suit was contested by the defendants by filing a written statement wherein the plaint averments were denied. It was further stated that the land in question was always included in the plot Nos.1325 and 1326 and was being utilized as the residence of the Superintendent of Police, Lakhimpur. In the additional pleas, it was stated that right from the first settlement of 1863, the land of Gram

Pyarepur Plot No.400 and plot Nos.332 and 332 was part of the land belonging to an European Priest Lieutenant Colonel Marshall who by a registered sale deed dated 01.06.1886 sold it to Raja Mahmoodabad, who has been its owner since.

9. It was further stated that the plaintiffs had no right over the said property and the same was always part of the residence of the Superintendent of Police which as per the sale deed of 01.06.1886 was sold by Lieutenant Colonel Marshall to Raja Mahmoodabad and as such the suit of the plaintiffs deserves to be dismissed.

10. The matter went to trial and the trial court after exchange of the pleadings framed seven issues. The main issues upon which the suit was contested was **(i)** Whether the plaintiff is the owner of the disputed property and whether the defendant no.2 had forcibly acquired the said land as alleged by the plaintiff; **(ii)** Whether the suit was barred by Sections 38 and 41 of the Specific Reliefs Act, 1963; **(iii)** Whether the defendant had perfected their rights by adverse possession.

11. After the parties led evidence, the trial court by means of judgment and decree dated 28.08.1986 found that in so far as plot Nos.400-A and 400-B is concerned, the same belonged to the plaintiffs as the said plots were located in a different village of Pyarepur. The said property was never that of Raja Mahmoodabad and the defendants could not have acquired the same. It also found that since the property was contiguous to the property of the defendants, hence it was in their possession but nevertheless they had no right over it and it was a different property than the one purchased

by Raja Mehmoodabad. The trial court further noticed that the plea of adverse possession cannot be claimed by the State against the land belonging to its subject, hence the suit was decreed.

12. The defendants preferred a regular civil appeal under Section 96 CPC which was heard by the Special Additional District Judge, Kheri and by means of judgment and decree dated 21.12.1990, the defendant's appeal was allowed and the suit of the plaintiffs was dismissed. It is in the aforesaid backdrop that the plaintiffs have approached this Court by means of the appeal under Section 100 CPC.

13. Shri Anurag Narain, learned counsel appearing for the appellants has submitted that admittedly the property in question was easily identified as plots No.400-A and 400-B of Gram Pyarepur. It is stated that specific averments were made in the plaint that these properties always belonged to the predecessor of the plaintiffs, namely, Kunwar Mahesh Brahma and Kailash Brahma. It was also submitted that the copy of the gazette was also brought on record to indicate that amongst the properties belonging to Raja Mahmoodabad which was taken over by the Custodian of Enemy Property. The said notification did not indicate the plots No.400-A and 400-B of Gram Pyarepur. It is also urged that Raja Mahmoodabad did not possess any property in Gram Pyarepur rather his property was in Lakhimpur. Once the aforesaid fact was not in dispute, it was not open for the lower appellate court to have given a contrary finding and that too without upsetting the finding recorded by the trial court which was based on material evidence. Witnesses were examined both on behalf

of the plaintiffs and the defendants and it was established that the properties belonging to the plaintiffs was different and that Raja Mahmoodabad did not have any property in Gram Pyarepur. In light of the aforesaid evidence also considering the Commissioner's report, the trial court had clearly noticed that the property belonging to the plaintiffs was different but the defendant had encircled the same within their own land which has created the dispute but since the defendant did not have any right to do so, accordingly the suit was rightly decreed but incorrectly dismissed by the lower appellate court.

14. It is also urged that the defendants who are the State and its instrumentality it cannot plead adverse possession against the property of its subject. It is also stated that the very fact that the State has taken a plea of adverse possession then some how it also admits the title of the plaintiffs. Since the plea of adverse possession is a plea against equity and has an impact of depriving a lawful owner of its right, the same has to be strictly construed and unless and until there are appropriate pleading and proof till then the said plea cannot be sustained apart from the fact that a State cannot plead adverse possession against the land of its subject.

15. It has also been urged that at no point of time, the defendant had ever acquired the property of the plaintiffs and thus they are not entitled to withhold the same and the lower appellate court ignoring the aforesaid aspect including the Commissioner's report has allowed the appeal which is against the settled legal principles, hence the judgment of reversal dated 21.12.1990 passed in Civil Appeal No.74

of 1986 deserves to be set aside and the second appeal deserves to be allowed.

16. Per contra, Shri Deepanshu Das, learned counsel appearing on behalf of the Custodian of the Enemy Property has submitted that the land in question was always under the possession and of the Superintendent of Police, Kheri. The predecessor in interest of the defendant was Lieutenant Colonel Marshall who in the year 1886 sold the property to Raja Mahmoodabad who upon migrating to Pakistan rendered the property liable to be taken over by the Custodian of Enemy Property and thereafter it had been taken over by the State as the residence of the Superintendent of Police, Kheri. It was also urged that the said properties were utilized by Lieutenant Colonel Marshall. The boundaries of the property as mentioned in the sale deed marked as exhibit A indicates that the eastern boundary is extended upto the road while the disputed property is towards the west. If the boundaries are compared with the spot position, it would indicate that the bungalow of the Superintendent of Police extends upto the road in the east and since the property in dispute is on the west and is part of the outhouses, it always remained with the predecessor of the defendants.

17. Shri Das further submits that as per the case of the plaintiffs, they were in possession of the disputed property and only in the month of June 1986, they were deprived of the possession. However, there is no material on record to establish that the plaintiffs were in possession of the disputed property till June 1986. There is also no evidence on record to indicate that the plaintiffs were forcibly

dispossessed rather the material evidence on record indicates that the property in question has been in possession since long as earlier it was in possession of an European Priest and later it was sold to Raja Mahmoodabad in 1886 which came in the custody of the Custodian Enemy Property, hence the plaintiffs had no right and the suit has rightly been dismissed by the lower appellate court and as such the judgment of the lower appellate court does not require any interference and the appeal deserves to be dismissed.

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

19. From the perusal of the substantial question of law which have been framed upon which the instant second appeal has been heard, it would indicate that questions no.1 and 2 relate to the plea of adverse possession. Before proceedings further, it will be relevant to succinctly refer to the law relating to adverse possession. This Court had the occasion to consider the law on adverse possession in the case of *Abdul Salam and others Vs. Imrana Siddiqui and others, 2019 SCC OnLine All 3924* wherein this Court considered the entire conspectus of law on adverse possession with the aid of the decision of the Apex Court in paragraphs 34 to 44 of the aforesaid report. It was culled out that in order to arrive at a finding regarding adverse possession it is absolutely essential for a person raising such a plea to plead and prove the following ingredients:-

- (a) on what date, he came into possession;
- (b) what was the nature of his possession;
- (c) whether the factum of possession was not known to the other party;
- (d) how long his possession has continued; and

(e) his possession was open and undisturbed.

20. Now applying the aforesaid principle to the instant case, it would be found that feable plea of adverse possession was raised by the defendants. However, no evidence on the aforesaid point was led by the defendant. At this juncture, it will also be relevant to notice that the person who raises the plea of adverse possession must indicate that who was the true owner and apparently in the instant case as the defendants have raised the plea of adverse possession then tacitly, the defendant admits the title of the plaintiffs. It is also for the person who pleads adverse possession to prove by cogent evidence that he was able to dispossess the true owner or he has been in uninterrupted possession for 12 years in the knowledge of the true owner and his possession is hostile to the true owner and holding out to the entire world. Apparently, there are no such pleading nor there is any evidence in this regard led by the defendants and moreover the defendant witness did not in any manner support the ingredients of the plea of adverse possession. It will also be relevant to mention at this stage that State is not entitled to raise a plea of adverse possession against its subject.

21. Having noticed the settled legal position and also considering that there was no evidence led by the defendant to support the plea of adverse possession in the manner as required in law hence the defendant could not be permitted to succeed on the aforesaid plea, hence the finding recorded by the lower appellate court that the defendants have perfected their title by adverse possession is

apparently erroneous and such a finding cannot be sustained and is liable to be set aside.

22. Having answered the first two question of law as aforesaid. The next question of law which falls for consideration is whether the lower appellate court has committed a manifest illegality in not formulating the points of determination. As far as this question of law is concerned, this also stands settled in light of the decision of this Court in the case of ***Dalla Vs. Nanhu, reported in 2019 (1) ADJ page 246*** wherein this Court considering the aforesaid aspect regarding non-framing of point of determination as held as under:-

"The spirit of the provision is to ensure that the appellate Court must record reasons for the decisions and is to focus attention of the Court to rival contentions of the parties which arise for determinations and also to offer the litigating parties an opportunity of knowing and understanding the grounds upon which the decision is founded in a view to enable them to know the basis of decision and if they think proper and so advised to avail the remedy of second appeal conferred by Section 100 CPC.

Applying the ratio of the aforesaid judgments as mentioned above, if the judgment passed by the lower appellate court is perused, it indicates that the lower appellate Court has discussed the narration of facts of the case of the parties to the lis, the submission urged by the parties, the legal principles applicable and involved and has also given its finding in support of its conclusions".

"In order to successfully canvass the point of non-compliance of Order XLI Rule 31 CPC, it is not mere non framing of points of determination alone, but consequent failure of justice must also be established occasioned to a party.

The purpose and object of incorporating Section 99 CPC is to prevent mischief, which may be caused by the reversal of the decree in a case of this kind. Thus, unless and until the non-compliance of Order XLI and Rule 31 CPC is of such a nature that it affects the merits of the case or the jurisdiction of the Court or the soul of the provision is robbed by not discussing the bare facts, issues arising therefrom, the rival points urged and recording of reasons upon which the

judgment is based, till then minor infraction of the aforesaid provision will not give a latitude to a party to assail a judgment and seek its reversal only on this infraction under Section 100 CPC."

23. Thus, it would be seen that merely for non-framing of points of determination the judgment may not be set aside provided it otherwise must comply with the requirements of law as required of an appellate court in terms of Order 41 Rule 31 CPC read with Section 96 CPC.

24. In the aforesaid backdrop, if the judgment of the lower appellate court is seen, it would reveal that it has taken note of the pleading of the respective parties thereafter it has also referred to the evidence and has given his finding. It is not the case of the appellants before this Court that certain arguments which were raised by them as respondents before the lower appellate court have not been considered.

25. Learned counsel for the appellants also could not dispute the fact that no prejudice was caused merely for non framing of points for determination and that the arguments made before the lower appellate court were noticed by the lower appellate court.

26. Rather the contention which has been raised by the counsel for the appellants is that the lower appellate court has not considered the evidence in a correct prespective and even while giving his findings he has not properly exercised its jurisdiction as if expected from a court of first appeal under Section 96 CPC which in a sense is the final court of both law and fact.

27. Noticing this submissions and taking a look at the judgment passed by the lower appellate court, this Court finds that the lower appellate court while returning its finding has appropriately dealt with the Commissioner's report, and the evidence led by the plaintiffs. In this regard, it will be relevant to notice that the trial court had clearly held that in so far as plot Nos.400-A and 400-B is concerned, they were recorded in the name of predecessor of the plaintiffs. The said plots were never included in the Government Gazette whereby the land and property of Raja Mahmoodabad was acquired by the Custodian of Enemy Property. There was evidence available on record including the Commissioner's report bearing paper No.Ga-26 which had made a survey and found that plot Nos.400-A and 400-B was located in Gram/Village Pyarepur. However, the land which was acquired by the custodian was located in Gram Lakhimpur.

28. This Court also perused exhibit-23 which is a map of Gram Lakhimpur and Pyarepur and it would indicate that plots no.465, 463,400, 401, 388, 389, they are all contiguous plots and fall in village Pyarepur and the same has been demarcated by red line. The plots which fell in Lakhimpur are plots No.1331, 1330, 1328, 1329, 1326, 1325 amongst other and all these plots are on western side from the red line which demarcate and shows boundary of village Pyarepur and village Lakimpur. Comparing the boundaries as mentioned in the sale deed of 1886, it would indicate that the eastern boundary extends upto the road now called Suhagra Road. It also reveals that living quarters of the servant and outhouses had collapsed and its debris are

still present. This is supported by the evidence of the witnesses examined on behalf of the defendants.

29. Further the other defendant witness had stated that he had always seen the bungalow of the Superintendent of Police but he had never entered in the said property. Akhtar Husain who was examined as D.W.6 stated that he had inspected property with D.W.7 and found that the bungalow of the Superintendent of Police was encircled by a boundary wall. However, he further admitted that the property which is claimed by the plaintiffs at that end that there is no wall. He further stated that after the boundary wall there is an indication of a drain and thereafter is the Suhagra road. The bungalow is situate right in the centre and it houses the residence of Superintendent of Police, Lakhimpur Kheri.

30. Apparently, the lower appellate court has also taken note of the evidence and it disagreed with the finding recorded by the trial court and has given his own finding which are pure findings of fact. This Court in exercise of power under Section 100 CPC is not required to enter into evidence of fact unless they are shown to be perverse in the sense that it is based on inadmissible evidence or is based on no evidence or on the basis of the evidence on record, the conclusion arrived at by the Court is such that no reasonable person could arrive at such findings. The lower appellate court noticed the documentary evidence and also the statement of P.W.1 Rakesh Bhram, wherein he admitted that a partition had taken place between the four brothers, namely, Mahesh Bhram, Kailash Bhram, Sabker Singh and Vishwa Bhram. A partition by village arbitrator was made the documents

which indicated the share of Mahesh Bhram, and Kailash Bhram, therein the bungalow of Kapton (referring to Superintendent of Police) is mentioned over plot No.400-A and 400-B.

31. Significantly, the Munsif had also visited the property on 15.07.1986 and found that the entire disputed property was part of the residence of the Superintendent of Police.

32. During the pendency of the first appeal defendants had filed documentary evidence relating to the partition which came to be decided on 10.06.1941 and in respect of plots No.400-A and 400-B- it mentioned Kothi of Kapton Sahib. Thus, even in 1941 the existence of the bungalow over land of plots No.400-A and 400-B was present and hence the contention that the defendants had taken over the disputed land in June 1980 does not appear to be correct.

33. It is also undisputed that the said land has been recorded as Abadi but the possession of the plaintiffs upto June 1980 has not been established. This is to be seen in context with the allegation that the plaintiffs had made complaints to the incumbent Superintendent of Police who only assured but did not give up possession to plaintiffs could also not be established by evidence.

34. It is also to be seen that there were clear averments regarding the comparative of the Khasra number of 1st, 2nd and 3rd settlement which indicated that plot No.400 was earlier a different Khasra number and there were entries that the disputed land was leased out and thus the bungalow of Superintendent of Police was present but none of the aforesaid aspect were considered by the trial court.

35. Significantly, the plaintiffs are said to have inherited the rights in the property in question on the basis of a Will but neither the Will was filed on record thus it could not be proved. Moreover, even if the plaintiffs claimed rights on the property in question then the title had to be proved by the plaintiffs but it was not done. Neither the two plaintiffs entered into the witness box nor any attempt was made to get their statement recorded on Commission. Thus being the plaintiffs it was their duty to have proved their title before the suit for possession could be decreed.

36. In light of the above, the basic facts required to be proved by the plaintiffs in order to complete the cause of action was not done. The plaintiffs have to prove their own case on its own strength and cannot derive any benefit from the weakness of the defence. Thus the approach of the trial court that since the plot Nos. 400-A and 400-B were in Gram Pyarepur and the defendants had taken over the land of Raja Mahmoodabad which was situate in Gram Lakhimpur hence decreed the suit, this in itself is not sufficient to decree the suit.

37. The lower appellate court having taken note of the evidence filed during appeal has arrived at findings which are of fact, hence in absence of any perversity this Court is not inclined to intervene.

38. Having considered the entire contention in a holistic fashion and also noticing that the plaintiffs has to stand on his own leg and cannot take any benefit from the weakness of the defence, it was incumbent upon the plaintiffs to have clearly pleaded and proved the boundary as well as the extent of the land available with them as well as the possession till June 1980 as they are alleged to have been

dispossessed and the land was taken over by the Superintendent of Police. There is no answer to this nor any explanation which could be proved by the plaintiffs.

39. In view of the aforesaid, this Court is of the clear view that in so far as the plea of adverse possession is concerned, neither the defendants could have taken such a plea against the plaintiffs nor the said plea was even other wise established in light of the settled legal principle which have been noticed above.

40. In so far as the third question of law is concerned, this Court finds that the judgment cannot be said to be bad merely for non-framing of points for determination whereas the contention, the facts as well as the evidence which were led and referred has been taken note of and a finding of fact has been recorded which is not perverse, hence this Court is not inclined to interfere in the decision. Hence for the reasons recorded hereinabove, the appeal is **dismissed**. The judgment and decree dated 21.12.1990 is passed by the Special/3rd Additional District Judge is affirmed. Costs are made easy. The record of the trial court be returned forthwith.

Order Date :- December 22, 2023
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