

Neutral Citation No. - 2024:AHC-LKO:33618

AFR

Reserved

Court No. - 5

Case :- SECOND APPEAL No. - 457 of 1986

Appellant :- Smt. Gyanwati And Others

Respondent :- Sarseti Devi And Others

Counsel for Appellant :- H.S.Sahai,I.D. Shukla,Ishwar Dutt

Shukla,S.C.Shukla,S.K. Mehrotra

Counsel for Respondent :- Mohd. Haneef,Alka

Verma,D.C.Mukharji,Ishwar Dutt Shukla,Manoj Kumar Mishra,P.K.

Mishra,Santosh Kumar Mehrotra,Shailen Verma

Hon'ble Rajnish Kumar,J.

1. The plaintiff-respondent filed a suit bearing No.181 of 1981; Shiv Das Vs. Ram Pratap and Others, for permanent injunction against the defendant-appellants alleging that he is residing in the Village- Bhairavpur since the time of his ancestors and in the house of his ancestor. The land in dispute situated in the east of the house of the plaintiff marked as A B C D in the site plan was obtained by him through Ijzatnama dated 21.05.1947 from the defendant no.3 in the suit namely Avdhesh Pratap Singh; the then Zamindar. Thereafter he constructed mud house (Kachha Makan) on some portion, which fell in the flood of 1955. However, he is using the land in dispute as his abadi and raised a wall of bricks in the year 1977 and constructed a room with tin shed on the southern side of the land in dispute and filled the plinth on the northern side. The house and shop of the defendant nos.1 and 2 are at a distant place from the said place.

2. It has further been alleged that the plaintiff is in possession on the land in dispute since prior to 1947, therefore he has got the title on the same under Section 9 of the U.P. Zamindari Abolition and Land Reforms Act, 1950 (here-in-after referred as the Act of 1950). The defendants are threatening to make the possession on the land in dispute.

3. It was also alleged that the defendants had got a Regular Suit No.269 of 1978 filed against the defendants and some other persons by the defendant no.3 in regard to the land in dispute and the adjacent lands. In the said suit the plaintiff had got himself impleaded by making an application but the defendant no.3 made a compromise with the defendants of the said suit and got the name of the plaintiff deleted from the array of the parties and accordingly got the suit decided, on account of which the defendants morals are high in this regard. With the aforesaid pleas/ allegations the suit for permanent injunction was filed.

4. The defendant nos.1 and 2 only filed the written statement denying averments made in the plaint. They stated that the plaintiff was never in possession on the land in dispute. The alleged Ijazatnama dated 21.05.1947 is illegal and ineffective because the same is not registered, whereas the same was required to be registered, therefore it was in violation of the transfer of property act.

5. It was further alleged that the plaintiff had never been in possession on the land in dispute nor such house had fallen in the year 1955. The defendant nos.1 and 2 further claimed in the written statement that they are putting their animals, fodder and making dung cake(kanda) on the land in dispute since prior to the zamindari abolition, therefore the defendants have got the necessary rights under Section 7 (AA) of the Act of 1950. The room on the land in dispute is of the defendant nos.1 and 2 in which they are running a shop and the remaining portion is under construction, on which they have put their lock. Thus, they are in possession. Further objection of deficiency of court fees and non impleadment of necessary parties was also taken.

6. On the basis of the pleadings of the parties, four issues were framed. 1- क्या वादी विवादित भूमि का स्वामी है व काबिज है? 2- क्या वाद में आवश्यक पक्षकार न बनाये जाने का दोष है, यदि हाँ तो प्रभाव? 3- क्या वाद का

मूल्यांकन कम किया गया है एवं प्रदत्त न्यायशुल्क अपर्याप्त है? 4- क्या वादी किसी अनुतोष का अधिकारी है? यदि हाँ, तो क्या?

7. The plaintiff filed the original copy of Ijazatnama. The plaintiff Shiv Das got himself examined as PW-1, Ram Awadh Singh as PW-2 and Abhay Raj Singh as PW-3. The defendants also filed certain documents which includes certified copy of compromise and decree on the basis of compromise in Original Suit No.279 of 1978 and copy of Pariwar Register. The defendant no.1 Ram Pratap got himself examined as DW-1, Taj Mohammad as DW-2 and Ram Pyare as DW-3. The trial court after considering the pleadings of the parties, evidence and material on record recorded a finding that since the Ijazatnama was required to be registered under Stamp Act and Registeation Act in view of cost of land in dispute disclosed by PW.2 and it was not registered, therefore it can not be read in evidence and since the witnesses of plaintiff showed ignorance in regard to certain things and construction on the land in dispute and contrary to it, whereas defendants witnesses have given clear description of property and it's construction, therefore the plaintiff is not owner and in possession on the land in dispute and this issue i.e. issue no.1 goes in favour of defendants and against the plaintiff and accordingly dismissed the suit. The plaintiff filed an appeal under Section 96 of Civil Procedure Code(here in after referred as CPC), which has been allowed by means of the judgement and order dated 03.05.1986 by the 3rd Additional District Judge, Faizabad (now Ayodhya) and suit of the plaintiff-respondent has been decreed. Hence the present second appeal under Section 100 CPC by defendants appellants no.1 and 2. has been filed.

8. The instant appeal was admitted on the following substantial questions of law:-

"1. Whether the lower appellate court confirming the finding recorded by the trial court that the basis of title of the plaintiff's

claim for Izazatnama being unregistered and there being no description of the property was not relevant, the lower appellate court could further proceed to consider the plaintiff's title when no case on any other ground was pleaded in the plaint?

2. Whether the lower appellate court without considering the extent of the land in dispute and without considering the fact that there is no door in the plaintiff's house towards the land in dispute, the findings recorded by the lower appellate court being contrary to law as laid down by the Hon'ble Supreme Court in Maharaj Singh versus State of U.P. (A.I.R. 1976 S.C.2602), the findings recorded by the lower appellate court stand vitiated?

9. Heard Sri I.D. Shukla learned counsel for the appellants and Sri P.K. Mishra learned counsel for the respondent no.1/3. None appeared on behalf of other respondents despite sufficient service.

10. Learned counsel for the appellants submitted that the plaintiff respondent who had filed the suit for permanent injunction, could not prove his case and weakness of the case of defendants-appellants can not be a ground for allowing the suit in favour of plaintiff-respondent. He further submitted that the plaintiff-respondent was claiming the rights on the land in dispute on the basis of an Ijazatnama dated 21.05.1947 issued by the defendant no.3 in the suit, which was not registered in accordance with Stamp Act and Registration Act, therefore no rights could have been accrued on the basis of it. Even otherwise since it was issued after 08.08.1946, therefore it is void under Section 8 of Act of 1950.

11. He further submitted that the two independent witnesses produced by the plaintiff-respondent could not prove his possession, whereas the possession of the defendant-appellants was proved not only by the witnesses of the defendants-appellants but on the basis of a compromise decree between the defendants-appellants with other defendants and the defendant no.3 of the suit in a suit for eviction of the defendants-appellants instituted by the defendant no.3, which was decreed on the basis of compromise between the parties. The plaintiff-respondent had got himself impleaded by filing an application for impleadment, however, he was deleted from the said suit before the

compromise and the revision was filed by him against the same, which was also dismissed.

12. He further submitted that since there was cloud on the title of the plaintiff-defendant and title can not be decided in a suit for injunction, therefore suit for permanent injunction without prayer for declaration was not maintainable and it was liable to be dismissed on this ground alone. It has also been submitted that the commission report can not be proof of possession. Thus, the submission is that if the foundation goes superstructure also goes, therefore since the suit itself was not maintainable, therefore no relief could have been granted in the said suit. Accordingly, the suit filed by the plaintiff-respondents was rightly and in accordance with law dismissed by the trial court. However, the appellate court, after confirming the findings recorded by the trial court, exceeded in its jurisdiction and further proceeded to consider the case of the plaintiff-respondent without any other ground set up by him and allowed the appeal, which could not have been done. Thus the submission is that the judgment and decree passed by the lower appellate court suffers from gross illegality, which is liable to be set-aside and this second appeal is liable to be allowed.

13. He relied on **Rahmullah and Others Vs. The District Judge, Siddharth Nagar and Others; 1999 (90) RD 1, Tirumala Tirupati Devasthanam Vs. K.M. Krishnaiah; 1998 (3) SCC 331, Madhukar D. Shende Vs. Tarabai Aba Shedage; 2002(2) SCC 85, Ram Bhool and Another Vs. Bhudev Prasad and Another; 2013 (11) ADJ 276, Nisar Husain & Another Vs. Board of Revenue U.P. at Allahabad & Others; 2016 (34) LCD 2672, Paras Ram Vs. Sukhdeo Prasad and Another; 1980 (6) ALR 586, Budhan Singh Vs. Nabi Bux and Another; 1970 ALJ 903, Parashuram Vs. D.D.C. and Others; 2012 (115) RD 175, Shri Ram Prakash Vs. Mohammad Ali Khan; 1973 RD 187, Karam Pal and others Vs. Joint Director of Consolidation and Others; 2022 (40) LCD 1880, Anathula Sudhakar Vs. P. Buchi**

Reddy (Dead) by Lrs. and Others; 2008 (26) LCD 923, Jharkhand State Housing Board Vs. Didar Singh and Another; 2018 (36) LCD 2759, Chairman-cum-Managing Director, Coal India Limited and Others Vs. Ananta Saha and Others; (2011) 5 SCC 142, Sayed Muhammed Mashur Kunhi Koya Thangal Vs. Badagara Jumayath Palli Dharas Committee and Others; (2004) 7 SCC 708 and Jagdish Prasad Patel (Dead) through Legal Representatives and Another Vs. Shivnath and Others; (2019) 6 SCC 82.

14. Per contra, learned counsel for the respondents submitted that the suit filed by the plaintiff-respondent was dismissed by the trial court in a casual manner without considering the whole case put forth by him, evidence and material on record and proved before the trial court. The learned trial court had failed to consider the case of the plaintiff-respondent that he is in possession on the land in dispute since prior to abolition of Zamindari, therefore it has settled with him under section 9 of the Act of 1950. The provisions of Section 8 of the Act of 1950 were also not considered. He further submitted that the trial court had failed to consider that at the time of commission, lock put on the land in dispute was opened by the plaintiff-respondent. Though the objection was filed by the defendants-appellant that their son had opened the lock, but it could not be proved. The appellate court has recorded findings on the basis of pleadings, evidence and material on record after thorough scrutiny. He further submitted that the first appellate court has to consider the whole case as a trial court and has to decide the appeal after considering the pleadings, evidence and material on record. Accordingly the first appellate court has considered the case and allowed the appeal by passing a reasoned and speaking order. There is no illegality or error in the judgment and order passed by the first appellate court, which may call for any interference by this Court. Thus, this second appeal is misconceived

and devoid of any merit because no substantial questions of law, what to say of the substantial questions of law on which it was admitted arise in this appeal, therefore it is liable to be dismissed with cost.

15. I have considered the submissions of learned counsel for the parties and perused the records.

16. The suit for permanent injunction was filed by plaintiff-respondent claiming that he had got the land in dispute with the permission of the defendant no.3 in the suit namely Avadhesh Pratap Singh through Ijzatnama dated 21.05.1947. He had further pleaded that he is in possession and his house was situated on some portion of the land in dispute since prior to abolition of Zamindari, therefore the same has settled in his favour under Section 9 of the Act of 1950. The trial court, while considering the issue no.1 as to whether the plaintiff is owner and in possession of the land in dispute, recorded that the main ground of suit of the plaintiff is Ijzatnama exhibit 1 and considered the same and held that in view of evidence of PW-2 the cost of land in dispute was 400-500 rupees in the year 1947, therefore registration of the same was necessary under the Registration Act and Stamp Act and in absence of registration it can not be read in evidence. Further on the basis of evidence of PW-2 and PW-1 recorded a finding that since they have deposed that the plaintiff-respondent has also taken the land on the southern side of the road for his carpet business and house for livelihood and since no boundaries have been given in the Ijzatnama, therefore the possibility that it may be of any of the said land can not be denied but without considering the evidence and material on record and plea of the plaintiff-respondent that the land in dispute was settled with him under Section 9 of the Act of 1950. However a finding has been recorded that the plaintiff-respondent has failed to prove his possession considering the evidence of two witnesses only on the ground that the witnesses of plaintiff-respondent could not properly tell about the land in dispute

and they could not give the correct position of construction etc. and defendant -appellants have proved their possession on the land in dispute without evaluating and appreciating the whole pleadings, evidence and material on record and held that the plaintiff-respondent is not the owner and in possession of the land in dispute. Thus it is apparent that the trial court in a casual manner considered only some evidence and also failed to consider the plea of the plaintiff-respondent that the land in dispute was settled with him under Section 9 of Act of 1950. The appellate court considered the pleadings of the respective parties, evidence adduced by them, material on record, relevant provisions of U.P. Tendency Act, 1939 and the relevant laws including Act of 1950 and held that the appellate court is in agreement with the conclusion of the trial court that the ownership of the plaintiff-respondent, on the basis of Izazatnama, is not proved. However held that the land in dispute is settled with the plaintiff-respondent under Section 9 of the Act of 1950. Therefore now question arises as to whether after confirming the findings of the trial court in regard to the claim of the plaintiff-respondent on the basis of Ijazatnama, the appellate court could have proceeded further and held that the land in dispute was settled with him under Section 9 of the Act of 1950 as pleaded in the plaint or not in view of first substantial question of law framed in this appeal.

17. Section 107 of the Code of Civil Procedure, 1908 (here-in-after referred as C.P.C.) provides the powers of appellate court, which is extracted here-in-below:-

"107. Powers of Appellate Court.—(1) Subject to such conditions and limitations as may be prescribed, an Appellate Court shall have power—

(a) to determine a case finally;

(b) to remand a case;

(c) to frame issues and refer them for trial;

(d) to take additional evidence or to require such evidence to be

taken.

(2) Subject as aforesaid, the Appellate Court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by this Code on Courts of original jurisdiction in respect of suits instituted therein."

18. According to the aforesaid Sub-Section 2 of Section 107 subject to the provision made in sub-section(1), the appellate court shall have the same powers and duties as are conferred and imposed on the courts of original jurisdiction of suits instituted therein. Thus, the first appellate court has all the powers of the trial court while deciding the appeal, therefore the appellate court is required to consider all the pleadings of the parties, evidence and material available on records while deciding the appeal. Therefore if any plea or evidence has not been considered by the trial court, the first appellate court is required to consider the same also and record the findings accordingly while deciding the appeal.

19. Order-XLI, Rule-31 of C.P.C. provides the contents etc. of judgment of appellate court, which is extracted here-in-below:-

31. Contents, date and signature of judgment.—*The judgment of the Appellate Court shall be in writing and shall state—* been recorded

(a) the points for determination;

(b) the decision thereon;

(c) the reasons for the decision; and

(d) where the decree appealed from is reversed or varied, the relief to which the appellant is entitled, and shall at the time that it is pronounced be signed and dated by the Judge or by the Judges concurring therein.

Allahabad.— *At the end of the rule, substitute a semi-colon for the full stop and add the following:*

"Provided that where that presiding Judge pronounces his judgment by dictation to a shorthand-writer in open court, the transcript of the judgment so pronounced shall, after such revision as may be deemed necessary, be signed by the Judge and shall bear the date of its pronouncement."

20. In view of above, the appellate court is required to record its reasons for the decision and it can reverse or vary the decree against which the appeal has been preferred and in such case the relief to which the appellant is entitled, therefore the appellate court can not only reverse the findings of the trial court but also take a different view and it can be done after considering the pleadings, evidence and material on record as a trial court and also considering the findings recorded by the trial court and as to whether the same have rightly and in accordance with law been recorded or not after evaluating the pleadings, evidence and material on record as a trial court. It is for the reason that if any plea or evidence has been left to be considered by the trial court, it may appropriately be considered by the first appellate court to avoid injustice to either of the parties. Thus the first appeal is in continuation of trial.

21. The Hon'ble Supreme Court, in the case of **Vasant Ganesh Damle Vs. Shrikant Trimbak Datar and Another; (2002) 4 SCC 183**, has held that the appeal is considered to be an extension of a suit because under Section 107 of the Code of Civil Procedure, the appellate court has the same powers as conferred by the code or codes of original jurisdiction in respect of suits situated therein. The relevant paragraph-9 is extracted here-in-below:-

"9. The appeal is considered to be an extension of the suit because under Section 107 of the Code of Civil Procedure, the appellate court has the same powers as are conferred by the Code on courts of original jurisdiction in respect of suits instituted therein. Such a power can be exercised by the appellate court "as nearly as may be" exercised by the trial court under the Code. If the powers conferred upon the trial court are under a specified statute and not under the Code, it has to be ascertained as to whether such a power was intended to be exercised by the appellate court as well. Such a position can be ascertained by having a reference to the specified law by keeping in mind the legislative intention of conferment of power on the appellate court either expressly or by necessary implication."

22. Similar view was taken by the Hon'ble Supreme Court in the case of **Sarju Prasad Vs. Raja Jwaleshwari Pratap Narain Singh**

and Others; 1950 SCC 714. The relevant paragraph 8 of which is extracted here-in-below:-

"8. The question for our consideration is undoubtedly one of fact, the decision of which depends upon the appreciation of the oral evidence adduced in the case. In such cases, the appellate court has got to bear in mind that it has not the advantage which the trial Judge had in having the witnesses before him and of observing the manner in which they deposed in court. This certainly does not mean that when an appeal lies on facts, the appellate court is not competent to reverse a finding of fact arrived at by the trial Judge. The rule is--and it is nothing more than a rule of practice --that when there is conflict of oral evidence of the parties on any matter in issue and the decision hinges upon the credibility of the witnesses, then unless there is some special feature about the evidence of a particular witness which has escaped the trial Judge's notice or there is a sufficient balance of improbability to displace his opinion as to where the credibility lies, the appellate court should not interfere with the finding of the trial Judge on a question of fact.

23. The Hon'ble Supreme Court, in the case of **Malluru Mallappa (Dead) through Legal Representatives Vs. Kuruvathappa and Others (2020) 4 SCC 313**, has held that it is a settled position of law that an appeal is a continuation of the proceedings of the original court. Ordinarily, the appellate jurisdiction involves a re-hearing on law as well as on fact and is invoked by an aggrieved person. The first appeal is a valuable right of the appellant and therein all questions of fact and law decided by the trial court are open for re-consideration, unlike second appeal under Section 100 CPC. Therefore, the first appellate court is required to address itself to all the issues and decide the case by giving reasons. The court of first appeal must record its findings only after dealing with all issues of law as well as fact and with the evidence, oral as well as documentary, led by the parties. The relevant paragraphs 10 to 14 are extracted here-in-below:-

"10. Section 96 of the CPC provides for filing of an appeal from the decree passed by any court exercising original jurisdiction to the court authorized to hear the appeals from the decisions of such courts. In the instant case, the appeal from the decree passed by the trial court lies to the High Court. The expression 'appeal' has not been defined in the CPC. Black's Law Dictionary (7th Edn.) defines an appeal as "a proceeding undertaken to have a decision reconsidered by bringing it to a higher authority." It is a

judicial examination of the decision by a higher court of the decision of a subordinate court to rectify any possible error in the order under appeal. The law provides the remedy of an appeal because of the recognition that those manning the judicial tiers too commit errors.

11. In *Hari Shankar v. Rao Girdhari Lal Chowdhury* 1 it was held that a right of appeal carries with it a right of re-hearing on law as well as on fact, unless the statute conferring a right of appeal limits the re-hearing in some way as has been done in second appeal arising under the CPC.

12. In *Shankar Ramchandra Abhyankar v. Krishnaji Dattatreya Bapat*² it was held thus:

5. In the well known work of Story on Constitution (of United States), Vol. 2, Article 1761, it is stated that the essential criterion of appellate jurisdiction is that it revises and corrects the proceedings in a cause already instituted and does not create that cause. The appellate jurisdiction may be exercised in a variety of forms and, indeed, in any form in which the Legislature may AIR 1963 SC 698 1969 (2) SCC 74 choose to prescribe. According to Article 1762 the most usual modes of exercising appellate jurisdiction, at least those which are most known in the United States, are by a writ of error, or by an appeal, or by some process of removal of a suit from an inferior tribunal. An appeal is a process of civil law origin and removes a cause, entirely subjecting the fact as well as the law, to a review and a retrial.....”

13. It is a settled position of law that an appeal is a continuation of the proceedings of the original court. Ordinarily, the appellate jurisdiction involves a re-hearing on law as well as on fact and is invoked by an aggrieved person. The first appeal is a valuable right of the appellant and therein all questions of fact and law decided by the trial court are open for re-consideration. Therefore, the first appellate court is required to address itself to all the issues and decide the case by giving reasons. The court of first appeal must record its findings only after dealing with all issues of law as well as fact and with the evidence, oral as well as documentary, led by the parties. The judgment of the first appellate court must display conscious application of mind and record findings supported by reasons on all issues and contentions [see: *Santosh Hazari v. Purushottam Tiwari (Deceased)* By Lrs.³, *Madhukar and others v. Sangram and Others*⁴, *B. M. Narayana Gowda v. Shanthamma (Dead)* By Lrs. and Another⁵, *H. K. N. Swami v. Irshad Basith (Dead)* By Lrs.⁶ and *M/s. Sri Raja Lakshmi Dyeing Works v. Rangaswamy Chettiar*⁷].

14. A first appeal under Section 96 of the CPC is entirely different from a second appeal under Section 100. Section 100 expressly

bars second appeal unless a question of law is involved in a case and the question of law so involved is substantial in nature."

24. In view of above, the appeal is in continuation of trial, all the facts and law are open to be considered by the first appellate court, therefore it not only can reverse the findings of the trial court after considering the evidence but record its own findings also and also consider the case which has been left to be considered by the trial court, but of course, recording it's reasons on the basis of the pleadings, evidence and material on record. Therefore, the appellate court even after confirming the findings recorded by the trial court could proceed further to consider the plaintiffs title if any other ground was pleaded and also if the pleadings, evidence and material on record have not been considered and/ or appreciated giving due weight to the evidence. Thus, the appellate court has rightly and in accordance with law after confirming the findings of the trial court proceeded further to consider the case of the plaintiff-respondent because the whole case, evidence and material on record was not considered by the trial court and it was decided in a casual manner.

25. The appellate court, after considering and examining the respective pleadings of the parties, evidence and material on record and appreciating them came to the conclusion that the plaintiff-respondent was in possession since prior to the abolition of zamindari and his mud house(Kuchha Makan) was on it up to 1955 and the defendant- appellants have failed to give any contrary cogent evidence against it.

26. The appellate court, while considering the plea of the plaintiff-respondent that the construction on the land in dispute and the possession is of his, which was denied by the defendant-appellants, considered the pleadings of parties and evidence adduced by them and while evaluating them found that the trial court has failed to consider the commission report which was conducted on 26.05.1981 on an

application moved by the plaintiff-respondent alongwith the suit on 11.05.1981. The appellate court further recorded that in the said commission, which was conducted in presence of the parties, the lock of the land in dispute was opened by the plaintiff-respondent and got inspected to both the parties alongwith the Commissioner and objection to the Commissioner report was called but the defendants appeared only on 04.09.1981 on the ground that they had no knowledge and even thereafter filed the objection on 14.10.1981, whereas when inspection was made in presence of the defendants on 26.05.1981 and if the lock was opened by his son and he was in possession, why he put appearance on 04.09.1981 with such delay, therefore his plea is concocted and an after thought. The trial court also found that PW-1 Shiv Das has stated in his evidence that his lock remains on the said house and the DW-1 Ram Pratap has not specifically denied it in his statement. Thus the contention of the plaintiff-respondent that his possession is on the land in dispute has been found to be correct by the appellate court.

27. The appellate court also found that PW-1 Shiv Das has given the description of the land in dispute and as to how the construction was made and from where the bricks were obtained, whereas the case of the defendant-appellants could not be supported by their witnesses. The defendant-appellant no.1 states that he is doing a shop in a room but he could not prove running of shop on the land-in-dispute. The appellate court also found that the trial court has wrongly and illegally not relied the evidence of the plaintiff-respondent only on the ground that he could not give proper description of the property-in-dispute and construction thereon, whereas it was given and after evaluating evidence and pleadings of both parties found that the case of the defendant-appellants is concocted and falls.

28. The appellate court also found that the defendant-appellants have taken a plea in his objection to the application for injunction

filed on 21.09.1981 that after obtaining Ijazatnama he is in possession on the land in dispute since then whereas in his written statement he has stated that he used to keep his animals, cutting and keeping fodder and making Kanda(dung-cake) on the land in dispute since prior to the abolition of zamindari and has got Haq -Ashaira on the land in dispute in any case, but it could not be proved. The defendant Ram Pratap has also stated in his evidence about the receipt of the land but neither it was stated in his written statement nor put it on record, therefore the claim of the defendants-appellants on the land in dispute is not acceptable.

29. In regard to the compromise dated 09.04.1981 in Civil Suit No.279 of 1978 and the compromise decree dated 02.07.1981, the appellate court has recorded a finding that the compromise was made by the power of attorney holder of the defendant no.3 Ram Awadh Singh with six defendants of the said suit and got the suit dismissed and removed the defendant no.7 Shiv Das from array of parties, whereas he himself had got himself impleaded by moving an application, therefore it is apparent that he was alert about his rights on the land in dispute since the beginning but since he was got deleted, therefore it would have no effect on the present case. This Court, on perusal of the compromise decree dated 02.07.1981 passed on the basis of the aforesaid compromise (Paper No.40 GA 1/2 to 1/4), found that in the said suit and in the compromise decree in Original Suit No.279 of 1978 filed by Avadhesh Pratap Singh, there are only six defendants i.e. Ram Roop Verma and Ram Narain Verma sons of Baijnath Verma, Dhawar Verma and Ram Bahadur Verma sons of Ram Asrey, Pratap Baniya son of Ram Saran and Girdhar Shyam Baniya son of Ram Lal but the defendant no.1 Ram Pratap son of Mahavir Bakkal is not a party in the said suit. However the Ram Pratap son of Mahavir had appeared as DW-1 in the present suit and stated that they have got the land in dispute from his ancestor and

whatever is made in the same is his. Therefore when Ram Pratap was not a party in the aforesaid suit, it cannot be said that his possession was admitted by the defendant no 3 on the basis of which the said compromise decree was passed in the said suit, though it may be with his cousin brother, whereas in regard to his possession nothing has been specifically said by him in his evidence and he has not appeared in witness box to adduce evidence.

30. Adverting to the second substantial question of law, this Court found that the plaintiff-respondent has pleaded that he is in possession of the land in dispute since prior to abolition of zamindari on the ground that it has been settled with him under Section 9 of the Act of 1950. Section 9 of Act of 1950 provides regarding settlement of wells, trees in abadi and all buildings situate within the limits of an estate belonging to or held by an intermediary or tenant or other person whether residing in the village or not and the site of the wells or the buildings within the area appurtenant thereto shall be deemed to be settled with him by the State Government. It is admitted position in the case that the land in dispute is on the eastern side of the house of the plaintiff-respondent and the house of the defendant-appellants is at a distance on the southern side of the land in dispute. The 'appurtenance' has been considered by the Hon'ble Supreme Court, in the case of **Maharaj Singh versus State of U.P. and others; (1976) 1 SCC 155**, and has held that the 'appurtenance' is dependence of the building on what appertains to it for its use as a building. The relevant paragraphs 27 and 28 are extracted here-in-below:-

27. "Appurtenance", in relation to a dwelling, or to a school, college includes all land occupied therewith and used for the purpose 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 those 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 incorporeal 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 Phrase, supra).

28. *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 s. 9, viz., buildings. This conclusion is inevitable, although the contrary argument may be ingenious. What the High Court has granted, viz., 5 yards of surrounding space, is sound in law although based on guess-work in fact. The appeal fails and is dismissed but, in the circumstances, without costs.*

31. The Hon'ble Supreme Court, in the case of **Budhan Singh Vs. Nabi Bux and Another (supra)**, has held that it is true that the legislature could have used the word "lawfully held" in place of the word "held" in section 9 but as mentioned earlier one of the dictionary meanings given to the word "held" is, "lawfully held". The expression "held" has been used in various other sections to connote possession by legal title.

32. In view of above and considering the pleadings of the parties, evidence and material on record it is apparent that merely because there is no door of the house of the plaintiff-defendant towards the land in dispute it cannot be said that the findings recorded by the lower appellate court are contrary to the judgement of the Hon'ble Supreme Court in the case of **Maharaj Singh versus State of U.P.**

and others (supra). Even Otherwise if it could have been a reason for vitiating findings recorded by the lower appellate court, then the defendant-appellants can not claim their right on the land in dispute in any manner as their house is admittedly situated at a distance and they have failed to prove their case as discussed in detail by the first appellate court after considering the pleadings of parties and evidence adduced by them.

33. The Hon'ble Supreme Court, in the case of **Rahmullah and Others Vs. The District Judge, Siddharth Nagar and Others (supra)**, has held that the scope and extent of the purpose of inspection is prescribed in Order-39, Rule-7 of C.P.C. and it is not meant for ascertaining possession. The Hon'ble Supreme Court has also held that as to whether there is any possession or not is a question which has to be determined on the basis of evidence. In the present case the first appellate court after considering the pleadings, evidence and the commission report and other material facts and circumstances of the case has recorded a finding of possession and ownership of plaintiff-defendant and it can not be said that the finding has been recorded on the basis commission only, therefore the submission of learned counsel for the appellant in this regard is misconceived and not tenable

34. The Hon'ble Supreme Court, in the case of **Tirumala Tirupati Devasthanam Vs. K.M. Krishnaiah (supra)**, has held that a previous judgment not inter parties is admissible in evidence under section 13 of the Evidence Act as evidence of an assertion of a right to property in dispute. The similar view has been taken by the Hon'ble Supreme Court in the case of **Madhukar D. Shende Vs. Tarabai Aba Shedage (supra)**, **Ram Bhool and Another Vs. Bhudev Prasad and Another (supra)** & **Nisar Husain & Another Vs. Board of Revenue U.P. at Allahabad & Others(supra)**. The aforesaid cases are not applicable on the facts and circumstances of the present case

because firstly the Ram Pratap, defendant no.1 was not a party to the earlier suit in which a compromise was arrived at between the parties,, therefore his rights were not determined and secondly the plaintiff-respondent Shiv Das had got himself impleaded by moving an application and filed his objection but by the compromise decree he was got removed from the array of parties. Even otherwise once the trial court, after considering the compromise decree in the previous court alongwith evidence adduced in the present suit has recorded finding of possession and ownership, there is no illegality or infirmity in the order passed by the lower appellate court. It is also to be noticed that no decision in regard to the title and possession of the defendants-appellants was on merit in the earlier suit. It was only by way of a compromise decree i.e also only with one defendant of present suit, who has not appeared to adduce evidence.

35. The Hon'ble Supreme Court, in the case of **Paras Ram Vs. Sukhdeo Prasad and Another (supra)**, has held that the relief of injunction could be sought by the plaintiff if he had succeeded in establishing his ownership of the plot in dispute or his lawful possession over it. In the present case the lower appellate court after examining the respective pleadings, evidence and material on record has recorded finding that the plaintiff-respondent has proved his possession on the land in dispute.

36. The Hon'ble Supreme Court, in the case of **Anathula Sudhakar Vs. P. Buchi Reddy (Dead) by Lrs. and Others (supra)**, has summarized the position in regard to suits for prohibitory injunction relating to immovable property in paragraph 21 and has also held that where a cloud is raised over plaintiff's title and he does not have possession, a suit for declaration and possession, with or without a consequential injunction, is the remedy. In the present case the defendant-appellants have failed to raise any genuine cloud on the title and possession of the plaintiff-respondent and the appellate court

after examining and evaluating the pleadings, evidence and material on record of the parties has come to the conclusion that the land in dispute has been settled with the plaintiff-respondent as he was in possession since prior to the abolition of zamindari and also in possession. The defendants-appellants have also failed to prove their case as discussed by the lower appellate court in detail. Thus the plea of learned counsel for the appellant is misconceived that the suit of the plaintiff-appellant was not maintainable without relief for declaration and not tenable because mere on the basis of objection of title and possession of the plaintiff without any genuine dispute with some material and cogent evidence, it can not be said that the plaintiff has necessarily to seek the relief of declaration. This view is covered by the judgment of Hon'ble Supreme Court, in the case of **Jharkhand State Housing Board Vs. Didar Singh and Another (supra)**, relied by the learned counsel for the appellant. The relevant paragraph 11 of which is extracted here in below:-

"11. It is well settled by catena of Judgments of this Court that in each and every case where the defendant disputes the title of the plaintiff it is not necessary that in all those cases plaintiff has to seek the relief of declaration. A suit for mere injunction does not lie only when the defendant raises a genuine dispute with regard to title and when he raises a cloud over the title of the plaintiff, then necessarily in those circumstances, plaintiff cannot maintain a suit for bare injunction."

37. The Hon'ble Supreme Court, in the case of **Chairman-cum-Managing Director, Coal India Limited and Others Vs. Ananta Saha and Others (supra)**, which is in regard to a departmental enquiry held that it is a settled legal proposition that if initial action is not in consonance with law that is in case a foundation is removed, the superstructure falls but this case is not applicable in the present case as discussed above .

38. This Court, in the case of **Parashuram Vs. D.D.C. and Others (supra)**, has held that any contract after 08.08.1946 by the zamindar is

void in view of Section 8 of the Act of 1950. Accordingly, this Court has also recorded a finding that a decree on the basis of collusive suit will not confer right, title or interest to a person who was a party through collusive proceedings. The Hon'ble Supreme Court, in the case of **Shri Ram Prakash Vs. Mohammad Ali Khan (supra)**, has held that the scheme of the Act is to create new rights in place of old rights. The old rights are dead and gone after the commencement of the Act. These reports relied by the learned counsel for the appellants are of no benefit to the appellants as they are not applicable on the facts and circumstances of the present case as discussed above firstly because the claim on the basis of Izazatnama has not been found tenable on the ground that it was not registered and secondly it was for construction of house, which may not be covered under section 8 of the Act of 1950.

39. The Hon'ble Supreme Court, in the case of **Karam Pal (D) Vs. Joint Director of Consolidation and Others (supra)** relied by learned counsel for appellant, has held that the land in possession or deemed to be held by an intermediary grove held as Sir, Khudkast or any intermediary's grove held on the date immediately preceding the date of vesting would be deemed to be settled with such intermediary, lessee, tenant, grantee or grove holder in terms of section 18 of the act who shall be entitled to take or return possession as Bhumidhar thereof. It is not applicable on the facts and circumstances of the present case.

40. The Hon'ble Supreme Court, in the case of **Sayed Muhammed Mashur Kunhi Koya Thangal Vs. Badagara Jumayath Palli Dharas Committee and Others (supra)**, has held that the plaintiff could only succeed on the strength of its case and not on the weakness found in the case of the defendant. The similar view has been taken by the Hon'ble Supreme Court, in the case of **Jagdish Prasad Patel (Dead) through Legal Representatives and Another Vs. Shivnath**

and Others (supra). In the present case the lower appellate court after considering the pleadings of the parties, evidence and material on record and evaluating them in detail has come to the conclusion that the plaintiff-defendant has proved his case and the defendant-appellants have failed to give any cogent evidence against the same. The defendants-appellants have also admitted that they have got settled the plaintiff-respondent in the village after permission from the Zamindar. Even otherwise the defendant appellants have failed to prove their case and the benefit of section 7(AA) of Act 1950. Thus the submission in this regard of learned counsel for the defendant-appellants is misconceived and not tenable

41. In view of above, this Court is of the view that the learned appellate court has rightly and in accordance with law considered the case and held that the plaintiff-defendant has proved his possession since prior to the abolition of zamindari, therefore it has settled with him and also is in possession on the land in dispute being appurtenant land to his house by reasoned and speaking order. There is no illegality or error in the findings recorded by the lower appellate court. The substantial questions of law framed in this appeal are answered accordingly.

42. This second appeal has been filed on misconceived and baseless grounds which is liable to be dismissed.

43. The appeal is, accordingly, **dismissed**. No order as to costs.

(Rajnish Kumar, J.)

Order Date :- 30.05.2024

Haseen U.