

Neutral Citation No. - 2024:AHC-LKO:36531

Reserved on 08.12.2023

Delivered on 02.05.2024

Case :- SECOND APPEAL No. - 386 of 1988

Appellant :- Shiv Pratap Singh

Respondent :- Kewal Singh And Others

Counsel for Appellant :- B.K.Singh,Indrajeet Shukla

Hon'ble Saral Srivastava,J.

1. Heard Sri Indrajeet Shukla, learned counsel for the appellant.
2. The plaintiff/appellant by means of the present Second Appeal has assailed the judgement and decree dated 24.03.1984 by which the trial court i.e. IV Additional Munsif, Rae Bareilly has dismissed the suit of plaintiff/appellant with respect to plot No.132 and judgement and decree dated 02.09.1987 passed by the II Additional District Judge, Bareilly dismissing the appeal of the plaintiff/appellant.
3. The plaintiff/appellant instituted a suit contending *inter-alia* that the house of the plaintiff/appellant existed on plot No.133 of Village Doondi, Pargana Sareni, District Rae Bareilly since long. The father of the plaintiff/appellant planted five trees of Katahal(Jack Fruit), Mango and Lemon on the said plot.
4. The further case of the plaintiff/appellant was that the plot no.132 which is adjacent to plot no.133 was used as Sahan of the house of plaintiff/appellant which was used to tether their cattle and used to keep dung and also used as Khalihan.
5. Further case of the plaintiff/appellant was that there was abadi in plot nos.132 and 133 of the village but on account of

wrong entry in the revenue records, the defendants/respondents wanted to take advantage of it, and the names of the defendants/respondents are recorded as Bhumidhars and they filed a collusive suit for partition of the plots and the suit of the defendants/respondents was decreed but they were neither in possession nor they ever challenged the possession of the plaintiff/ appellant.

6. The suit was contested by the defendants/respondents contending *inter-alia* that the plot nos.132 and 133 were their property and they were Bhumidhars of the aforesaid plots. Further, their case was that the suit for partition was decreed as no building of the plaintiff/appellant and trees belonging to the plaintiff/appellant were standing on the plots. They further stated that the suit was not maintainable being barred by principle of *res judicata* and Section 49 of the Consolidation of Holdings Act.

7. On the basis of the pleadings, the trial court framed 8 issues. However, so far as the plot No.133 is concerned, the trial court found that the title and ownership of the plaintiff/appellant has become absolute over the plot no.133. In recording the aforesaid finding, the trial court considered in detail the testimony of PW2 and the compromise deed dated 02.07.1979 in Civil Revision No.91 of 1976-77.

8. So far as the plot No.132 is concerned, the trial Court found that the Commissioner in his report has stated that it is not clear as to how the plaintiff/appellant got the possession in the North side of plot no.132. The Commissioner further stated that the article shown by the plaintiff/appellant over the plot no.132 does not establish the ownership of the

plaintiff/appellant. It further held that the plaintiff/appellant should have appeared on 24.02.1984 and should have cross-examined the defendant/respondent, but since he did not appear till 2:45 p.m., therefore, the case proceeded against the plaintiff/appellant under Order 17 Rule 2 C.P.C. and the case was fixed for 28.02.1984 for the evidence of defendants/respondents. Consequently, the trial court found that because of the absence of the plaintiff/appellant, the testimony of DW2 remained without cross-examination, and accordingly, it found that the plaintiff/appellant failed to prove their ownership and their possession over the plot no.132. Consequently, it dismissed the suit of the plaintiff/appellant in respect to plot no.132.

9. The plaintiff/appellant preferred an appeal against the judgment and decree of the trial court dismissing the suit in respect to plot no.132.

10. The Appellate Court after considering in detail the evidence on record found that the plaintiff/appellant failed to prove his case. It further held that unless the plaintiff/appellant establish that they became owner of the land under Section 9 of U.P.Z.A. & L.R. Act, they are not entitled to any relief.

11. The Appellate Court further repelled the argument of plaintiff/appellant that he could not get any opportunity to cross-examine the DW2. The said contention was also repelled by the Appellate Court by holding that the record reveals that proper opportunity was given to the appellant to cross examine the DW2 but neither he nor his counsel appeared on the date fixed.

12. It further held that the plaintiff/appellant did not try to know progress of their case, therefore, there was no option before the learned Munsif except to proceed under order 17 Rule 2 C.P.C. It further recorded that an application to set aside the order and seeking permission to grant opportunity to cross-examine to DW2 was given and date was fixed for judgement, accordingly, it found that the Trial court has rightly rejected the application seeking permission to cross examine the DW2.

13. Challenging the aforesaid order, learned counsel for the appellant has contended that the Appellate Court has erred in law in rejecting the application of the plaintiff/appellant to set aside the order of the trial court to proceed under Order 17 Rule 2 C.P.C. despite the fact that the application submitted by the plaintiff/appellant disclosed substantial ground for non-appearance of the plaintiff/appellant to cross-examine the DW2. Accordingly, it is submitted that since proper opportunity has not been afforded to the plaintiff/appellant to cross examine the DW2, therefore, the order impugned cannot be sustained in law.

14. Be that as it may, the order of the Trial court reveals that the plaintiff/appellant was to appear before the Court on 24.02.1984 to cross examine the defendants/respondents. The judgement further reveals that the Trial court waited till 2:45 p.m. for the plaintiff/appellant and his counsel to cross examine the defendant, but despite that neither the plaintiff/appellant nor his counsel appeared before the Trial court on the date fixed. Consequently, the Trial Court had no option except to proceed under Order 17 Rule 2 C.P.C.

15. The Appellate Court had also considered the fact that

sufficient opportunity was given to the plaintiff/appellant to cross-examine the defendants/respondents, but neither the plaintiff/appellant nor his counsel appeared to cross examine the DW2. Even the application to set aside the order of the Trial Court to proceed under Order 17 Rule 2 C.P.C. was filed on the date of the judgement. Accordingly, the Appellate Court found that the Trial Court had rightly refused to allow the application of the plaintiff/appellant.

16. Learned counsel for the appellant could not demonstrate from the record that the grounds on which the application to set aside the order to proceed under Order 17 Rule 2 C.P.C. was filed disclosed the justifiable reason, due to which the plaintiff/appellant could not be put to cross examine the defendants/respondents and non-consideration of the said ground has prejudiced the appellant.

17. The finding returned by the Trial Court as well as Appellate Court on the aforesaid fact is a finding of fact, based on proper appreciation of facts and do not warrant any interference by this Court.

18. Since, in the present appeal, no substantial question of law arises which needs to be answered by this Court. Therefore, the appeal lacks merit and is accordingly, **dismissed**.

Order Date :-02.05.2024

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