

Court No. - 5

Case :- SECOND APPEAL No. - 352 of 2003

Appellant :- Hriday Ram And 2 Ors

Respondent :- Paras Nath And Anr

Counsel for Appellant :- Bajrang Bahadur Singh

Counsel for Respondent :- Ved Prakash Yadav

Hon'ble Rajnish Kumar,J.

1. Heard Shri Bajrang Bahadur Singh, learned counsel for the appellants and Shri Ved Prakash Yadav, learned counsel for the respondents.

2. This Second Appeal under Section 100 of the Civil Procedure Code 1908 has been filed for setting aside the judgment and decree dated 30.09.2003, passed by the Additional District Judge/Special Judge, E.C.Act, Court Room No.8, Sultanpur in Civil Appeal No.5 of 1998; Hriday Ram and others Versus Ram Kuber and others and the judgment and decree dated 11.11.1997 passed by the Civil Judge,(Jr.Div.), North, Sultanpur in Regular Suit No.949 of 1993; Hriday Ram and others Versus Ram Kuber and others.

3. This appeal was admitted to decide the following substantial questions of law:-

“1. Whether, the report of the Commissioner indicating that disputed abadi falls facing the house of the defendant, will it deprive the plaintiff appellant to use the abadi land as it was used by the common members of the family?

2. Whether, the claim based on the joint property and there is admission of the defendant that three Bhitoor and Ghhor are in existence, the courts below could reject such admission of the defendant without arising (which should be assigning) any cogent reason whatsoever?

3. Whether, the judgment of the learned appellate court is justifiable as he has said that there is no need to re-examine the evidence although the trial court has misread the evidence of D.W.2 who has given evidence with regard to jointness of the property?

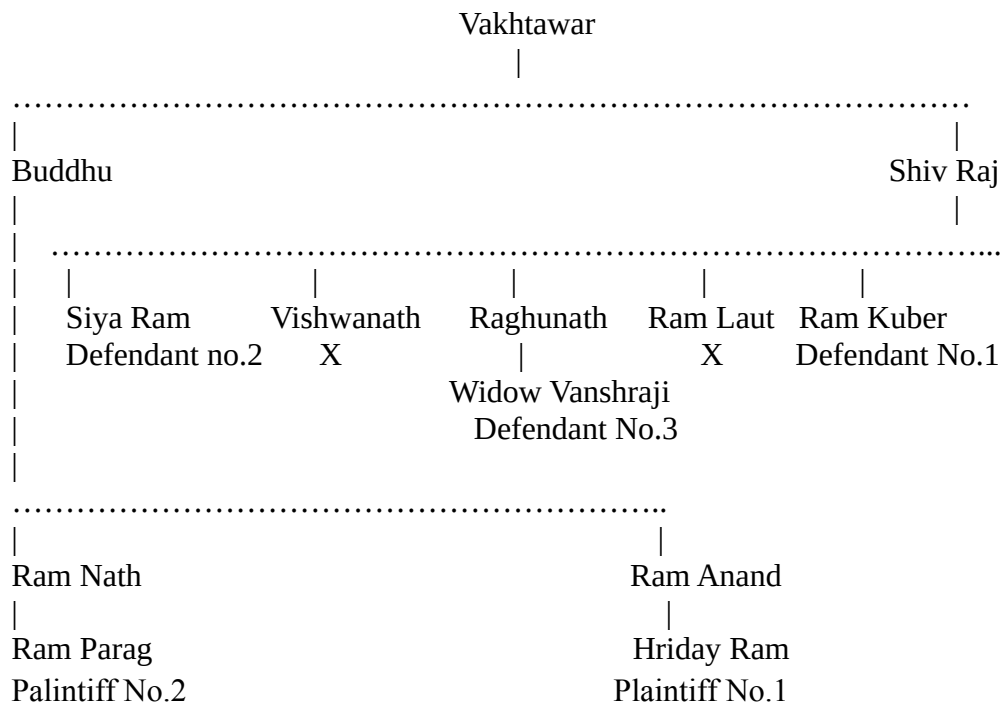
4. Learned counsel for the appellants submitted that the land in dispute was being used commonly by the plaintiffs-appellants (here-in-after referred as appellants) and the defendants/respondents (here-in-after referred as the respondents) since the time of their ancestors. It is coming from the common ancestors of the parties Bakhtawar. The partition had taken place between the two sons of Bakhtawar i.e. the predecessor-in-interest of the parties Buddhu and Shiv Raj except the land in dispute. The respondents tried to make construction on the land in dispute, therefore the appellants had to file the suit for permanent injunction for restraining the respondents from making any construction on the land in dispute or removing the Ghhor, Condore and Kharhi etc. of the appellants or cut the trees and Banskot etc. without partition. He further submitted that the jointness of the property was not disputed by D.W.2, but the learned Trial court has misread the same and learned Appellate court without considering the same dismissed the appeal. The courts below have also failed to consider that there is admission of the respondents that three Bhithoor and Ghhor exists on the land in dispute. He further submitted that merely because the land in dispute is facing the house of the defendants does not deprive the appellants from using as his abadi because it was being used by their common members of family. On the basis of above learned counsel for the appellants submitted that the trial court as well as the appellate court have committed grave miscarriage of justice by recording erroneous and perverse findings without considering the evidence on record correctly and dismissed the suit as well as the appeal, therefore the same are liable to be set aside.

5. Per contra, learned counsel for the respondents does not dispute regarding their ancestors Buddhu and Shiv Raj. However he submitted that they are in possession on their properties since the time of their ancestors and the question of partition does not arise. The land in dispute was a pond situated on the north-eastern side of the house of the respondents which was filled in by the respondents and they are in possession of the said land since prior to abolition of Zamindari. Thus they have got the right and entitlement over that land in dispute under Section 7-AA of the U.P. Zamindari Abolition and Land Reforms Act 1950 (here-in-after referred as the Act of 1950) and it is settled with them on abolition of Zamindari under Section 9 of the said Act. On the basis of above learned counsel for the respondents submitted that the trial court as well as the appellate court have rightly and in accordance with law considered the evidence and material on record and dismissed the suit as well as the appeal filed by the appellants. There is no illegality or error in the impugned judgments and decrees passed by the courts below, which may call for any interference by this court. The appeal is misconceived and lacks merit, which is liable to be dismissed with cost.

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

7. The Suit for permanent injunction was filed by the appellants claiming joint-ness of the land in dispute between the appellants and the respondents. The appellants claim that the land in dispute was a common Abadi of both the parties. They use to utilize it as their Sahan for Ghoor, Kandore, Kharahi etc. Their grainery (Khalihan) also used to be on the said land. However for the last 12 years their grainery (Khalihans) used to be on separate lands. Both the parties have Banskot, trees of Mango, Jamun, Goolar, Seesam, Babul etc. on the land in dispute. The Plaintiff No.1 and 2 have 1/4th share each and defendants No.1, 2

and 3 have 1/6th share each in the land in dispute. There is no partition in regard to the land in dispute between the parties. However it has been admitted that the properties of the parties were coming from the common ancestor Bakhtawar and the partition had taken place between the sons of Bakhtawar i.e. Buddhu and Shiv Raj and thereafter the parties are in possession on their portions. The following pedigree has been given:-



8. The respondents have filed written statement denying all the averments made in the plaint. They have also stated that the site plan given in the plaint is without any scale and against the position on spot. It was also stated that the position of house has also wrongly been shown. It has also been stated that the defendants had a door on the northern side of their house since the beginning and their Sahan is on the northern side and in the said appurtenant land there is Khalihan and Sariya. Their houses are separate since the time of their ancestors Buddhu and Shiv Raj. There is passage between both the houses. It has also been denied that there was any common residence of their family or fooding of their fathers Buddhu and Shiv Raj, therefore the question of partition does not arise. Their Abadi is separate since the beginning. It has also been stated that the respondents have filled

the pond on the north-eastern side of their house and they are using it for keeping their animals and various purposes of agriculture and keeping Kolhu Gulaur, Ghoor and Khalihan since prior to abolition of Zamindari, thus the same is settled with them under Section 9 of the Act of 1950. The land in dispute is their Sahan and appurtenant land to their house, which is settled with them.

9. After exchange of pleadings seven issues were framed by the trial court. Considering the pleadings of the parties and the evidence on record the trial court dismissed the suit holding that the plaintiffs have failed to prove from their evidence that the land in dispute is in the joint ownership and possession of the plaintiffs and defendants, rather it has been found that the defendants are the exclusive owner and in possession of the land in dispute. The land in dispute as per site plan given by the appellants in their plaint and the Commissioner Report is on the north-eastern side of the house of respondents. The house of the appellants is on the western side of the house of the respondents and there is a passage between their houses.

10. The P.W.1, in his statement on oath, has admitted that the partition had taken place between Buddhu and Shiv Raj during their life time and their houses, agricultural fields and fooding had separated. The trial court has recorded a finding that it is apparent from the Khasra Abadi Ext.1 that since 1935 or prior to that their houses were partitioned. The respondents have also given the evidence that they are in possession and are owner of the land in dispute and the appellants are on their part since the time of Buddhu and Shiv Raj as they had separate properties. They have denied the joint-ness of property. In any case it is not in dispute that the parties are in possession and owner of their properties since the time of Buddhu and Shiv Raj.

11. In view of above, even if the contention of appellants is taken to be correct that the parties had joint properties and the

partition had taken place between Buddhu and Shiv Raj in their life time then the question arises as to when all the properties were divided, as to why the land in dispute was not divided between them. Learned counsel for the appellants also failed to give any explanation to this despite repeated queries made by the court. Therefore the contention of the appellants that the land in dispute was also a joint property of the parties is misconceived and not tenable.

12. Now the question arises as to whether the land in dispute, which falls on the north-eastern side of the house of the respondents can be said to be appurtenant land of the appellants, which may have settled with them under Section 9 of the Act of 1950. It is settled law that the land appurtenant to the house which is beneficial for house is called the appurtenant land i.e. Sahan and if the same is being used by them since prior to abolition of Zamindari, it would be deemed to be settled with them under Section 9 of the said Act.

13. The appurtenant land is a land which may be used for the purpose of use of the building. The Hon'ble Supreme Court considered the 'appurtenance' 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. ”

14. As per own case of the appellants and the site plan appended to the plaint, the Sahan of the appellants is in the northern side of their house. The land in dispute is on the north-eastern side of the house of the respondents. The trial court has recorded a finding on the basis of evidence of P.W.1 at page 5 that the location of the land in dispute is the same as has been given by the Commissioner in the site plan prepared by him, according to which the land in dispute is situated on the north-eastern side of the house of the appellants and respondents and in view of the evidence adduced by the appellants that they filled the pond in front of their house and using the same as Sahan land, Buddhu i.e. predecessor-in-interest of the appellants would have filled the land in front of his house in place of the north-eastern side of the respondents. The trial court has also recorded a finding that P.W.1 has stated in his evidence that their Khalihan is still in the land in dispute, whereas in the plaint they have stated that it is not for the last 12 years. As per evidence of the P.W.1, the land in dispute is adjacent to the house of Baijnath and P.W.2 has admitted in his evidence that it is at a distance of 1-2 Latha of the house of Baijnath. Therefore evidence of P.W.1 cannot be believed in absence of any evidence in regard to joint ownership of property-in-dispute and the evidence of P.W.1 is not supported by the documentary evidence. The evidence of P.W.2 has not been found to be believable in regard to filling of the land in dispute by Buddhu and Shiv Raj jointly because as per his age he would have been 5-7 years of age in 1952 and as per their claim the land in dispute must have been filled prior to that.

15. So far as the admission of defendants in regard of Bithoor and Ghoor on the land in dispute is concerned, merely because the D.W1 and D.W.2 have admitted the existence of three Bithore and Ghoor etc. on the land in dispute it cannot be said to be admission on their part in regard to joint-ness of property because it has been admitted by the parties that the partition has taken place among the defendants themselves, who were five brothers and it may be on account of partition among themselves. A plea was also taken by the appellants that they have no other land except the land in dispute for their Sahan land, whereas P.W.1 has admitted that their father had taken the house etc. of Kanhaiya after giving premium to the Zamindar and Kanhaiya had left the village. It has also been admitted by him in his evidence on oath by P.W.1 that the house and land of Kanhaiya was on the east of his house, therefore the contention in this regard is also misconceived and not tenable.

16. The trial court has recorded the findings on the basis of pleadings, evidence and material on record and the land in dispute, which is situated on the north-eastern side of the house of the parties is not appurtenant to the house of the appellants. Admittedly the land in dispute is facing the house of the respondents and is in its north-eastern side and not the house of the appellants, which has also been indicated by the Commissioner in his report. The appellants have their Sahan in front of their houses on the northern side. Therefore the land in dispute cannot be said to be appurtenant land of the houses of the appellants, and settled with them under Section 9 of Act of 1950.

17. The appellate court has recorded the findings on the basis of arguments, pleadings and evidence on record and after recording that the P.W. 1 has admitted that the partition had taken place during life time of Buddhu and Shiv Raj, therefore it is very astonishing as to why the partition of the land-in-dispute had not taken place and the same continued for such a long period as a

joint property. The appellate court has further recorded a finding that the Khasra of the Abadi was prepared in 1935 in which all the properties of Buddhu and Shiv Raj have been shown separately in their names and if the land in dispute would have been a joint property then the same would have been recorded as such, whereas no properties are recorded as their joint property. The claim of the appellants that prior to consolidation they had no land in front of their house except the land in dispute, is also not sustainable in view of admission of P.W.1 that they had taken property of one Kanhaiya after paying the premium. The Appellate court has also recorded a finding that the land-in-dispute is not in front of the house of the appellants, rather it is in front of the house of the respondents, therefore it is not believable and also not obvious that the plaintiffs would have filled the pond in front of the house of the respondents in place of in front of their house. The appellate court has also recorded a finding on the basis of Khasra that the predecessor-in-interest of the appellants Buddhu had other properties also in addition to the house and the appellants have admitted that they are residing in the house of Buddhu and their Khalihan is not on the land in dispute for the last 12 years, therefore after recording a finding that in this way the contention of the appellants does not seem to be true, held that the trial court has minutely analyzed all the evidences in accordance with law and the appellate court is in agreement with the same, therefore the same is not required to be rebutted.

18. This court is of the view that after recording the relevant findings, if the appellate court has recorded its agreement with the findings recorded by the trial court and reasons given for recording such findings, there is no illegality or error in it. Learned counsel for the appellant has also failed to show any illegality or perversity in the findings recorded by the trial court.

19. The Hon'ble Supreme Court, in the case of **Girja Nandini Devi Versus Bijendra Narain Choudhury; AIR 1967 SC 1124**,

has held that Expression of general agreement with reasons given by the Court decision of which is under appeal would ordinarily suffice.

20. The aforesaid view was reiterated by the Hon'ble Supreme Court in **Santosh Hazari Versus Purushottam Tiwari; (2001) 3 SCC 179** holding that the appellate court agreeing with the view of the trial court need not restate the effect of the evidence or reiterate the reasons given by the trial court; expression of general agreement with reasons given by the court, decision of which is under appeal, would ordinarily suffice.

21. The aforesaid judgments have been followed by the Hon'ble Supreme Court, in the case of **G.Amalorpavam and others Versus R.C.Diocese of Madurai and others; (2006) 3 SCC 224**. The relevant paragraphs 10 to 12 are extracted here-in-below:-

“10. At this juncture it would be relevant to note what this Court said in *Girja Nandini Devi v. Bijendra Narain Choudhury* [(1967) 1 SCR 93 : AIR 1967 SC 1124] . In AIR para 12 it was noted as follows : (SCR p. 101 F-G)

“It is not the duty of the appellate court when it agrees with the view of the trial court on the evidence either to restate the effect of the evidence or to reiterate the reasons given by the trial court. Expression of general agreement with reasons given by the Court decision of which is under appeal would ordinarily suffice.”

11. The view was reiterated in *Santosh Hazari v. Purushottam Tiwari*; [(2001) 3 SCC 179] . In para 15 it was held with reference to *Girja Nandini Devi case* [(1967) 1 SCR 93 : AIR 1967 SC 1124] as follows : (SCC pp. 188-89)

“The appellate court has jurisdiction to reverse or affirm the findings of the trial court. First appeal is a valuable right of the parties and unless restricted by law, the whole case is therein open for rehearing both on questions of fact and law. The judgment of the appellate court must, therefore, reflect its conscious application of mind and record findings supported by reasons, on all the issues arising along with the contentions put forth, and pressed by the parties for decision of the appellate court. The task of an appellate court affirming the findings of the trial court is an easier one. The appellate court agreeing with the view of the trial court need not restate the effect of the evidence or reiterate the reasons given by the trial court; expression of general agreement with reasons given by the court, decision of which is under appeal, would ordinarily suffice (see *Girja Nandini Devi v. Bijendra Narain Choudhury* [(1967) 1 SCR 93 : AIR 1967 SC 1124]). We would,

however, like to sound a note of caution. Expression of general agreement with the findings recorded in the judgment under appeal should not be a device or camouflage adopted by the appellate court for shirking the duty cast on it. While writing a judgment of reversal the appellate court must remain conscious of two principles. Firstly, the findings of fact based on conflicting evidence arrived at by the trial court must weigh with the appellate court, more so when the findings are based on oral evidence recorded by the same Presiding Judge who authors the judgment. 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. As a matter of law if the appraisal of the evidence by the trial court suffers from a material irregularity or is based on inadmissible evidence or on conjectures and surmises, the appellate court is entitled to interfere with the finding of fact. (See *Madhusudan Das v. Narayanibai* [(1983) 1 SCC 35 : AIR 1983 SC 114] .) 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 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. (See *Sarju Pershad v. Jwaleshwari Pratap Narain Singh* [1950 SCC 714 : 1950 SCR 781 : AIR 1951 SC 120] .) Secondly, while reversing a finding of fact the appellate court must come into close quarters with the reasoning assigned by the trial court and then assign its own reasons for arriving at a different finding. This would satisfy the court hearing a further appeal that the first appellate court had discharged the duty expected of it. We need only remind the first appellate courts of the additional obligation cast on them by the scheme of the present Section 100 substituted in the Code. The first appellate court continues, as before, to be a final court of facts; pure findings of fact remain immune from challenge before the High Court in second appeal. Now the first appellate court is also a final court of law in the sense that its decision on a question of law even if erroneous may not be vulnerable before the High Court in second appeal because the jurisdiction of the High Court has now ceased to be available to correct the errors of law or the erroneous findings of the first appellate court even on questions of law unless such question of law be a substantial one.”

12. It has been categorically recorded by the High Court that the first appellate court had considered the evidence led on behalf of the parties and has given findings to come to the conclusions arrived at. It noted that the lower appellate court had independently considered the evidence and had given different findings on the issues framed by the trial court and on the basis of the arguments which were advanced before it. It was further noted that there was detailed discussion giving reasons for affirming the order of the trial court. Learned counsel for the appellants had urged that the suit filed by the plaintiff was not maintainable as the plaintiff was the diocese represented by its procurator. It was submitted that the plaintiff is not entitled to any relief as was prayed for in the suit. This point was not urged before the High Court and, therefore, it would not consider necessary to go into that aspect. Judged in the background of legal principles set out above, the judgment of the High Court does not suffer from any infirmity.”

22. In view of above and considering the overall facts and circumstances of the case this court is of the view that the trial court has rightly and in accordance with law considered and recorded findings on the basis of pleadings and evidence adduced before it including the evidence of D.W.2. The impugned judgment and decrees passed by the trial court as well as the appellate court have rightly been passed in accordance with law, which does not suffer from any illegality or error. Thus the substantial questions of law framed in this appeal are answered accordingly. The appeal has been filed on misconceived and baseless grounds and it is liable to be dismissed.

23. The Second Appeal is, accordingly, **dismissed**. No order as to cost.

(Rajnish Kumar,J.)

Order Date :-17.05.2024
Banswar