

Neutral Citation No. - 2024:AHC-LKO:63107

AFR

Court No. - 6

Case :- SECOND APPEAL No. - 509 of 1987

Appellant :- Pitamber

Respondent :- Ram Milan

Counsel for Appellant :- B. Nath, Anand Giri, Manoj Kr.

Gupta, Pradeep Kumar Singh, Raghav Ram Upadhyay, S.K. Pandey

Counsel for Respondent :- A.N. Verma, Anil Kumar

Pandey, Gyanendra Kumar Pandey

Hon'ble Rajnish Kumar, J.

1. Heard, Sri Raghav Ram Upadhyay, learned counsel for the appellant and Sri Anil Kumar Pandey, learned counsel for the respondent.
2. The instant second appeal has been filed for setting aside the judgment and decree dated 29.03.1985 passed in Regular Suit No.304 of 1982 by Munsif Hawali, Faizabad now Ayodhya and judgment and decree dated 14.05.1987 passed in Civil Appeal No.89 of 1985 by VIth Additional District Judge, Faizabad, now Ayodhya.
3. The following substantial questions of law have been formulated in this second appeal:-

“(1) Whether on the facts and circumstances of the case, the Courts below would have decreed the suit in absence of specific findings with regard to the essential conditions required under Section 9 of the U.P. Zamindari Abolition Act in favour of the plaintiff?”

“(2) Whether mere use of the land is sufficient to hold that the land had been settled under Section 9 of the U.P. Zamindari Abolition Act?”

(3) Whether esementary right and the adverse possession can be pleaded together and if not the suit is liable to be rejected?

(4) Whether the land lying after the public path and not adjoining the house of the plaintiff could be treated as land appurtenant to the house of the plaintiff under Section 9 of the U.P. Z.A. & L.R. Act?"

4. Learned counsel for the defendant-appellant submitted that the plaintiff-respondent has failed to prove his possession on the land in dispute, therefore the suit could not have been decreed. The suit can be decreed only if the plaintiff is able to prove his case and not on the weakness of the defence of the defendant, whereas learned trial court and the appellate court have decreed the suit and dismissed the appeal on the ground that defendant-appellant has failed to prove his right on the land in dispute. He further submitted that the defendant-appellant was in possession of the land in dispute and it was admitted by the witnesses of the plaintiff-respondents also that thatch of the defendant-appellant is on the land in dispute. The drainage of the defendant-appellant, as per evidence adduced by the parties, was also going from the house of the defendant-appellant towards east, then north and then to the south in the pond. He further submitted that there is overwriting in the evidence of D.W.3 at page no.2 as 20 has been made 30.

5. On the basis of above, submission of learned counsel for the defendant-appellant is that the learned trial court as well as the first appellate court have wrongly and illegally decreed the suit and dismissed the appeal, therefore the appeal is liable to be allowed and the judgment and decree passed by the first appellate court and the trial court are liable to be set aside. He relied on ***Ramchandra Sakharam Mahajan versus Damodar Trimbak Tanksale(D) and others;2007(25) LCD 1515, Gurunath Manohar Pavaskar and Others versus Nagesh Siddappa Naval Gund and Others;2008(26) LCD 225 and T.K. Mohammed Abubucker (D) Thr. L. Rs. And Ors.***

Versus P.S.M. Ahamed Abdul Khader and Others;AIR 2009 SC 2966.

6. Per contra, learned counsel for the plaintiff-respondents submitted that the suit for permanent injunction was filed by the plaintiff-respondent. After filing of the suit, the defendant-appellant had raised construction and put thatch on the land in dispute, therefore, the suit was amended and prayer for mandatory injunction for removal of construction made by the defendant-appellant was made. Learned trial court, after considering the pleadings of the parties, framing the issues and affording opportunity of evidence to the parties decreed the suit by a reasoned and speaking order. The first appeal filed by the defendant-appellant has also rightly been dismissed in accordance with law after considering the pleadings of the parties and evidence. He further submitted that case set up at the trial stage was changed at the appellate stage by the defendant-appellant and a defence was taken that the land in dispute is recorded as talab. He further submitted that the land in dispute is not appurtenant land of the defendant-appellant and it is an appurtenant land of the plaintiff-respondent and it is in front of the house of the plaintiff-respondent. He further submitted that the claim of the defendant-appellant that he had purchased the land in dispute from the then zamindar could not be proved by him, therefore learned trial court as well as the first appellate court have rightly and in accordance with law decreed the suit and dismissed the appeal, which does not suffer from any illegality or error and call for any interference by this Court.

7. On the basis of above, submission of learned counsel for the plaintiff-respondent is that he is in possession of the land in dispute since the time of their ancestors and they are using it as their sahan land, therefore merely because it is in front of the house of the plaintiff-respondent after the public path, it cannot be said that the land in dispute is not appurtenant to the house of the plaintiff-

respondent and it is being used for beneficial enjoyment of the house of the plaintiff-respondent. He relied on ***Damodar Lal versus Sohan Devi and Others; 2016(34) LCD 303 and Ambika Savaria and Others versus Sanjay Sharma and Others;2016(34) LCD 2500.***

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

9. The suit for permanent injunction was filed by the plaintiff-respondent claiming that the land in dispute is his sahan land, on which he used to sit and keep his animals and also use it for agricultural purposes. He is in possession of the land in dispute since the time of his ancestors prior to abolition of zamindari, therefore he has become owner of the land in dispute under Section 9 of the U.P. Zamindari Abolition & Land Reforms Act 1950(hereinafter referred to as the Act of 1950). It has further been alleged that the defendant-appellant is a muscle man of the village, who has also been elected as Pradhan. Since the plaintiff-respondent had not helped him in the election, therefore he has become angry and trying to forcibly make possession and raise construction in the sahan land of the plaintiff-respondent. During pendency of the suit, the defendant-appellant raised certain constructions on the land in dispute and put a thatch,therefore the suit was amended and plea of mandatory injunction for removal of the construction raised by the defendant-appellant and for a direction to hand over the possession to the plaintiff-respondent was made.

10. The written statement was filed by the defendant-appellant admitting that he has been elected as Pradhan and denying the averments made in the suit. It has also been stated that the plaintiff-respondent had never been in possession of the land in dispute. It has also been stated that the land in dispute is made of land No.600 having an area of 1 biswa and land No.601 having an area of 5 dhur and land No.602 having an area of 15 dhur and land no.603 having an area of

15 dhur. It was purchased by him from the then Zamindar Ravi Nandan Singh in consideration of Rs.90/- and since then he is in possession of land in dispute. It has further been stated that after purchasing the said land from the then zamindar, Saria, Baithaka and Wall of bricks have been erected and thatch has been kept. The Saria has not been shown by the plaintiff-respondent in the site plan annexed with the plaint. It has also been stated that the land in dispute is being used for various house hold purposes and also he used to sow vegetables and tree of neem is also there. It has also been stated that the drainage of the house of the defendant-appellant goes from the house of the defendant-appellant and plaintiff-respondent towards east and from the side of his saria towards north in the pond. A plea was also taken that the land in dispute is recorded as talab in the government records, which is deemed to be of the Gaon Sabha and since the Gaon Sabha has not been impleaded, therefore the suit is liable to be dismissed for non-joinder of parties. The site plan was annexed alongwith the written statement showing that the drainage of the defendant-appellant goes towards north from his house, then east, then north and then towards east to the pond. After amendment, the additional written statement was filed denying the averments as amended in the plaint. Thereafter amendment was also made in the written statement admitting the site plan as prepared by the Commissioner, which shows that the drainage of the house of the defendant-appellant goes towards north and then through passage between the houses of defendant-appellant and plaintiff-respondent towards east and then after passage in front of the house of both the parties in the east side towards north and then towards east in the pond.

11. After exchange of pleadings, the trial court framed 6 issues. Thereafter opportunity of evidence was afforded, in which some documentary evidence were filed and plaintiff-respondent Ram Milan

appeared as P.W.1 and one Ram Sukh as P.W.2. From the side of the defendant-appellant Shobha Nath Srivastava, Lekhpal appeared as D.W.1 and defendant-appellant Pitambar as D.W.2 and Ram Shabd as D.W.3. After considering the pleadings of the parties, material and evidence on record and after affording opportunity of hearing to the parties, the trial court decreed the suit by means of the judgment and order dated 29.03.1985 holding that the land in dispute is the sahan land of the plaintiff-respondent and he is using it as appurtenant land to his house and the defendant-appellant has failed to prove his case. It has further been held that a plea has been taken that the land in dispute was taken from the then zamindar and in the written statement it has been stated that the land in dispute has been purchased from the then Zamindar Raghu Nandan Singh, whereas in the evidence on oath it has been stated that it has been purchased from Ravi Nandan Singh and receipt of payment of Rs.90/- as claimed or any documentary evidence in regard to purchase of land has not been placed on record, rather it has been admitted in the oral evidence that there is no such documentary evidence. It has also been observed that despite admission that the sons of the then zamindar are alive by D.W.3, none has been produced in evidence. The learned trial court also found that the defendant-appellant has raised construction and kept his thatch on the land in dispute during pendency of the suit and accordingly directed to remove it. Being aggrieved, the defendant-appellant filed first appeal. The first appeal has been dismissed holding that the plaintiff-respondent is the owner and in possession of the land in dispute and the defendant-appellant has failed to prove his possession on the land in dispute and the plaintiff-respondent has proved his better title on the land in dispute in comparison to the defendant-appellant. The appeal has been dismissed by means of the judgment and order dated 14.05.1987. Therefore the present second appeal has

been filed and the aforesaid substantial questions of law have been formulated in it.

12. Section 7(aa) and 9 of the Act of 1950, relevant for consideration of this case are extracted hereinbelow:

7. Saving in respect of certain rights-- *Nothing contained in this chapter shall in any way affect the right of any person-*

(aa) being a bhumidhar, sirdar, adhivasi or asami of any land, to continue to enjoy any easement or any similar right for the more beneficial enjoyment of the land, as he was enjoying on the date immediately preceding the date of vesting;]

9. Private wells, trees in abadi and buildings to be settled with the existing owners or occupiers thereof.

- [All wells] [Substituted by U.P. Act No. 16 of 1953 (w.e.f. 01.07.1952).], 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, shall continue to belong to or be held by such intermediary tenant or person, as the case may be, 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 on such terms and conditions as may be prescribed.

13. Under the aforesaid Section 7(aa), if a person was enjoying the right of easement or any similar right for more beneficial enjoyment of any land prior to date of vesting, he shall continue to enjoy the same after abolition of Zamindari and date of vesting. Under the aforesaid Section 9, the site of wells or the buildings within the area appurtenant thereto shall be deemed to be settled with the person who is holding it since prior to the abolition of the Zamindari. Thus Section 9 provides for conceptualizing the area appurtenant to buildings to have settled with the owners of the buildings etc.

14. 'Appurtenant' is dependence of the building on what appertain to it for its use as a building. The meaning of the word 'appurtenant' as given in the 'Mariam Webster Dictionary' is constituting a legal accompaniment and 'appurtenance' is an incidental right attached to a principle property right and passing in possession with it. According to the 'Law Lexican Dictionary', the word 'appurtenant' means

appertaining or belonging to; accessory; pertaining, incident or relating to, as a legal right, interest or property subsidiary to one more valuable or important. 'Oxford Dictionary' defines the 'appurtenant' as a thing appertaining, a belonging, belonging as a property or legal right(to); specify in law, constituting a property or right subsidiary to one which is more important.

15. This Court, in the case of ***Harnam Singh versus Bhikimbar Singh; AIR 1980, All 50***, has held that literally the word 'appurtenant' means pertaining to or belonging to. It does not mean adjacent to.

16. This Court, in the case of ***Ram Sukh versus Gaya Din & Another; 1994(12) LCD 733***, relied on the judgment of the Chief Court of Oudh in the case of Special Manager Court of Wards, Balrampur Estate versus Shyam Lal; AIR 1936 Oudh 324, in which it has been held that land appurtenant to residential house need not be actually adjoining the house and the user of the land for the enjoyment of the house by the claimant or by person is necessary to be proved with certain length of period. The relevant paragraphs 28 and 29 are extracted herein-below:

"28. It is also well settled that a Riaya may have the Sahan Darwaza on all the sides of a house. It is user of the land on the date of vesting and prior thereto is material. The passing of a galiyara or Rasta or drain in between the building or house and the land over which in relation to a building or house, the rights of appurtenance is claimed, does not adversely affect the sahan darwaza right or rights involving rights of a person to a land as land appurtenant In the case of Special Manager Court of Wards. Balrampur Estate v. Shyam Lal (AIR 1936 Oudh 324) it has been held by the Chief Court of Oudh, that land appurtenant to residential house need not be actually adjoining the house and the user of the land for the enjoyment of the house by the claimant or by person is necessary to be proved with certain length of period may be of 12 years as held by Chief Court of Oudh in the case of S. Murtaza Ali v. Emperor, reported in (AIR 1947 Oudh page 131).

29. The material observation of the Hon'ble Chief Court of Oudh in the case of Balrampur Estate (Supra) reads as under:

"As to the argument that the land in question cannot be treated as appurtenant to house because there is a public road interven- ing I do not think there is any force in the contention. No authority has been cited for the view that appurtenant land must actually be adjoining the residential house, prima facie, I do not see why a tenant should not use land opposite his house but on the other side of public way for the purpose of tethering his cattle and why such land should not be regarded as appurtenant to his house. In absence of any authority to the contrary I think it may be held that the land is appurtenant."

17. 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 enjoy- ment 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 'appurte- nances'. 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 prin- cipal subject granted by s. 9, viz., buildings. This conclusion is inevitable, although the contrary argument may be ingenious. What the High Court has grant- ed, 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.

18. The Hon'ble Supreme Court, in the case of ***Budhan Singh Vs. Nabi Bux and Another***; 1970 ALJ 903, 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.

19. A coordinate Bench of this Court, in the case of ***Gafoor versus Abdul Rashid and Others***; 1980 SCC Online All 442, has held that before a person is entitled to claim settlement of land under Section 9 of the U.P. Act 1 of 1951 it must be found that the land was necessary for the enjoyment of the building of which it was claimed to be appurtenant.

20. This Court, in the case of ***Bashir Ahmad (Dead) Through LRS versus Taiyab Husain(Dead) Through LRS and others***; 2012(6) AWC 6259, has held that under Section 9 of the U.P. Z.A. & L.R. Act, land may be settled only if it is appurtenant to the claimant's house, essential to be used for the beneficial enjoyment of the claimant's house, actually being used for the beneficial enjoyment of the claimant's house and has got a reasonable ratio with the constructed portion which under no circumstance can be double the area of the constructed portion.

21. In view of above a claim for settlement of any land under Section 9 of Act of 1950 is tenable and can succeed only if the land in question is appurtenant to house of claimant, however it need not be just adjacent to the house of the claimant but in close proximity and may be in front of house of claimant after public path so that it is essential for beneficial enjoyment of house of claimant and it is actually being used for beneficial enjoyment of house of claimant i.e. for household and agricultural

purposes since prior to abolition of zamindari and date of vesting under the Act.

22. Adverting to the facts of the present case, this Court finds that plaintiff-respondent claimed that the land in dispute is the appurtenant land to his house, which is being used by him, since the time of his ancestors and prior to abolition of zamindari, for various purposes including agricultural purposes, therefore it is settled under Section 9 of the Act of 1950 with him and it has been proved by the plaintiff-respondent by appearing himself as P.W.1 and adducing evidence of P.W.2 Ram Sukh who admitted that the land in dispute is in possession of the plaintiff-respondent since the time of his memory and the defendant-appellant is not in possession of the land in dispute. His drainage also does not pass in the land in dispute, it goes to east. He also admitted that he is of the caste of the defendant-appellant. He also admitted that he is seeing the saria of the defendant-appellant for the last 6-7 years whereas the khute on the land in dispute are of the plaintiff-respondent. Sri Shobha Ram Srivastava, Lekhpal appeared as D.W.1. He admitted that he does not know the land in dispute. He also admitted that he does not know on which number it is situated. The defendant-appellant-Pitamber appeared as D.W.2 but he could not prove his possession. The evidence of D.W.3-Ram Shabd has not been found reliable by the trial court as according to his evidence he was not residing at the place as stated by him since prior to abolition of zamindari. So far as the plea of manipulation in the years of living of the D.W.3 in his in-laws house is concerned, it cannot be said to be correct as no such plea was ever taken, even before the court's below. If it would have been, this plea must have been taken before the trial court, where the evidence was recorded in presence of counsels or before the first appellate court when the finding of the trial court had come on it.

23. The learned trial court, after considering the pleadings of the parties and evidence on record, held that the plaintiff-respondent is the owner of the land in dispute and he is in possession of the same and the defendant-

appellant has evicted the plaintiff-respondent and kept his thatch on the land in dispute which is liable to be removed. The learned trial court also found that the defendant-appellant, though claimed in the written statement that land in dispute was purchased by him from Ravi Nandan Singh, the then Zamindar in consideration of Rs.90/- but in the evidence adduced before the trial court he stated that it was purchased from the then Zamindar Raghu Nandan Singh therefore there is contradiction in the name of the then zamindar and no documentary evidence of purchasing has also been placed on record including the receipt of Rs.90/- as claimed by the defendant-appellant. This Court does not find any illegality or error in the findings recorded by the trial court.

24. So far as the judgment relied by learned counsel for the appellant are concerned they are on the point that the burden to establish title is on the plaintiff but the weakness of the defence or the failure of the defendants to establish the title set up by them would not enable the plaintiff to a decree, which are not applicable on the facts and circumstances of the case in hand because the plaintiff-respondent has proved his title whereas the defendant-appellant has failed to demolish his case and prove the case set up by him.

25. The learned trial court, after considering the rival claim of the parties in the present case, has held that the plaintiff-respondent has proved his title and possession on the land in dispute but the defendant-appellant has failed to prove the same. On being challenged before the first appellate court, the first appellate court also considered the grounds raised by the defendant-appellant and the pleadings and evidence on record making the point of determination as to whether the plaintiff-respondent has been the owner and in possession of the land in dispute or the defendant-appellant. The learned first appellate court also, after considering the pleadings and evidence on record, found that the plaintiff-respondent has proved his title better than the defendant-appellant as is apparent from the evidence on record. It is proved from the evidence on record that the plaintiff-

respondent was in peaceful possession on the land in dispute and the defendant-appellant has made possession on the land in dispute by raising constructions and putting thatch on the land in dispute during pendency of the suit. The learned first appellate court came to the said conclusion after considering the respective pleadings and evidence of the parties. The Hon'ble Supreme Court, in the case of ***Ramchandra Sakharam Mahajan versus Damodar Trimbak Tansksale (D) and others(supra)***, has held that obviously the burden is on the plaintiff to establish the title but no doubt in appreciating the case of title set up by the plaintiff, the Court is also entitled to consider the rival title set up by the defendants. But the weakness of the defence or the failure of the defendants to establish the title set up by them, would not enable the plaintiff to a decree. Thus the rival claims of the parties are to be considered by the court.

26. In view of above, this Court does not find any illegality or error in the findings recorded by the trial court as well as the first appellate court. The substantial questions of law no.1,2 and 4 are decided accordingly.

27. The 'easementary right' can be claimed under the Easements Act 1882. Section 4 defines the easement, which is extracted herein-below:-

“4. Easement defined-An easement is a right which the owner or occupier of certain land possesses, as such, for the beneficial enjoyment of that land, to do and continue to do something, or to prevent and continue to prevent something being done, in or upon, or in respect of, certain other land not his own.

Dominant and servient heritages and owners- The land for the beneficial enjoyment of which the right exists is called the dominant heritage, and the owner or occupier thereof the dominant owner; the land on which the liability is imposed is called the servient heritage, and the owner or occupier thereof the servient owner”

Explanation-In the first and second clauses of this section, the expression land includes also things permanently attached to the earth; the expression beneficial enjoyment includes also possible convenience, remote advantage and even a mere amenity; and the expression to do something includes removal and appropriation by the dominant owner, for the beneficial enjoyment of the dominant heritage, of any part of the soil of the servient heritage or anything growing or subsisting thereon.”

28. Section 12 provides as to who may acquire easements, which is extracted here-in-below:-

“12. Who may acquire easements.—An easement may be acquired by the owner of the immovable property for the beneficial enjoyment of which the right is created or on his behalf, by any person in possession of the same.

One of two or more co-owners of immovable property may, as such, with or without the consent of the other or others, acquire an easement for the beneficial enjoyment of such property.

No lessee of immovable property can acquire, for the beneficial enjoyment of other immovable property of his own, an easement in or over the property comprised in his lease.”

29. In view of above, the ‘easementary right’ may be acquired by the owner or occupier of an immovable property for the beneficial enjoyment of that property i.e. to do or to continue to do something or to prevent or continue to prevent something being done that something is in or upon or in respect of certain other property, which is not his own. The land for the beneficial enjoyment of which the right exists is called the dominant heritage and the owner or occupier thereof, the dominant owner; the land on which the liability is imposed is called the servient heritage, and the owner or occupier thereof, the servient owner. Thus, the right of easement is claimed by owner or occupier of an immovable property for the beneficial enjoyment of that property on the other property or land which is not owned by him and in his possession. The Hon’ble Supreme Court has held as under in paragraph 19 of ***Bachhaj Nahar versus Nilima Mandal and Another;(2008) 17 SCC 491:-***

“19.Easements may relate to a right of way, a right to light and air, right to draw water, right to support, right to have overhanging eaves, right of drainage, right to a watercourse, etc. Easements can be acquired by different ways and are of different kinds, that is, easement by grant, easement of necessity, easement by prescription, etc. A dominant owner seeking any declaratory or injunctive relief relating to an easementary right shall have to plead and prove the nature of easement, manner of acquisition of the easementary right, and the manner of disturbance or obstruction to the easementary right.”

30. The law of ‘adverse possession’ finds its roots in the law of Limitation Act 1963. Section 3 of the Limitation Act 1963 provides the bar of limitation, according to which no cognizance can be taken by the

court if the suit is barred by limitation whether the defence is taken by the defendant or not. However, the said provision bars only remedy of the person filing the suit and not his right as available to him under law. Section 27 of the Act provides that in case the person has not taken any action for recovery of possession during the period of limitation then his right gets extinguished. Article 65 of Schedule 1 of the Limitation Act, 1963 prescribes a limitation of 12 years for a suit for possession of an immovable property or any interest therein based on title and after passing of the period of limitation, the possession of the defendant becomes adverse to the plaintiff. Article 65 of Schedule 1 of Limitation Act is extracted hereinbelow:-

Description of suit	Period of limitation	Time from which period begins to run
For possession of immovable property or any interest therein based on title explanation – for purpose of this article (a) where the suit is by a remainderman, a reversioner (other than a landlord) or a devisee, the possession of defendant shall be deemed to become adverse only when the estate of the remainderman, reversioner or devise, as the case may be, falls into possession ; (b) where is suit is by a hindu or muslim entitled to the possession of immovable property on death of a Hindu or Muslim female, the possession of the defendant shall be deemed to become adverse only when the female dies;	Twelve years.	When the possession of the defendant becomes adverse to the plaintiff.

Description of suit	Period of limitation	Time from which period begins to run
(c) where the suit is by a purchaser at a sale in execution of a decree when the judgment debtor was out of possession at the date of the sale, the purchaser shall be deemed to be a representative of the judgment- debtor who was out of possession		

31. In view of above, the ‘adverse possession’ can be claimed only if the person claiming it is in actual possession of the property and such possession is open and undisturbed. It is well settled principle that the party claiming adverse possession must prove that his possession is ‘nec vi, nec clam, nec precario’ i.e. peaceful, open and continuous. The possession must be adequate in continuity, in publicity and in extent to show wrongful disposition of the rightful owner and be actual, visible, exclusive, hostile and continued over the statutory period. Therefore whenever the plea of adverse possession is projected, inherent in the plea is that someone else was the owner of the property and it is open and within his knowledge. The Hon’ble Supreme Court, in the case of ***Karnataka Board of Wakf versus Government of India and others; (2004) 10 SCC 779***, has held that it is a well settled principle that a party claiming adverse possession must prove that his possession is ‘nec vi, nec clam, nec precario’, that is, peaceful, open and continuous. The possession must be adequate in continuity, in publicity and in extent to show that their possession is adverse to the true owner. It must start with a wrongful disposition of the rightful owner and be actual, visible, exclusive, hostile and continued over the statutory period. The relevant paragraphs 11 and 12 are extracted hereinbelow:-

11. In the eye of law, an owner would be deemed to be in possession of a property so long as there is no intrusion. Non-use of the property by the owner even for a long time won't affect his title. But the position will be altered when another person takes possession of the property and asserts a right over it. Adverse possession is a hostile possession by clearly asserting hostile title in denial of the title of true owner. It is a well- settled principle that a party claiming adverse

possession must prove that his possession is 'nec vi, nec clam, nec precario', that is, peaceful, open and continuous. The possession must be adequate in continuity, in publicity and in extent to show that their possession is adverse to the true owner. It must start with a wrongful disposition of the rightful owner and be actual, visible, exclusive, hostile and continued over the statutory period. (See : *S M Karim v. Bibi Sakinal* AIR 1964 SC 1254, *Parsinni v. Sukhi* (1993) 4 SCC 375 and *D N Venkatarayappa v. State of Karnataka* (1997) 7 SCC 567). Physical fact of exclusive possession and the animus possidendi to hold as owner in exclusion to the actual owner are the most important factors that are to be accounted in cases of this nature. Plea of adverse possession is not a pure question of law but a blended one of fact and law. Therefore, a person who claims adverse possession should show (a) on what date he came into possession, (b) what was the nature of his possession, (c) whether the factum of possession was known to the other party, (d) how long his possession has continued, and (e) his possession was open and undisturbed. A person pleading adverse possession has no equities in his favour. Since he is trying to defeat the rights of true owner, it is for him to clearly plead and establish all facts necessary to establish his adverse possession. (*Dr. Mahesh Chand Sharma v. Raj Kumari Sharma*).

12. A plaintiff, filing a title suit should be very clear about the origin of title over the property. He must specifically plead it. (See: *S M Karim v. Bibi Sakinal* AIR 1964 SC 1254). In *P Periasami v. P Periathambi* (1995) 6 SCC 523 this Court ruled that -

"Whenever the plea of adverse possession is projected, inherent in the plea is that someone else was the owner of the property."

The pleas on title and adverse possession are mutually inconsistent and the latter does not begin to operate until the former is renounced. Dealing with *Mohan Lal v. Mirza Abdul Gaffar* (1996) 1 SCC 639 that is similar to the case in hand, this Court held:

"As regards the first plea, it is inconsistent with the second plea. Having come into possession under the agreement, he must disclaim his right there under and plead and prove assertion of his independent hostile adverse possession to the knowledge of the transferor or his successor in title or interest and that the latter had acquiesced to his illegal possession during the entire period of 12 years, i.e., up to completing the period his title by prescription nec vi, nec clam, nec precario. Since the appellant's claim is founded on Section 53-A, it goes without saying that he admits by implication that he came into possession of land lawfully under the agreement and continued to remain in possession till date of the suit. Thereby the plea of adverse possession is not available to the appellant."

Similar view has been taken by a three Hon'ble Judges Bench of Hon'ble Supreme Court in the case of *Ravinder Kaur Grewal and others versus Manjit Kaur & Others*; (2019) 8 SCC 729.

32. In view of above, the 'easementary right' and 'adverse possession' are totally different in regard to the property because the easementary right is claimed and can be acquired by owner or occupier of a property for beneficial enjoyment of his property on the other land, which is not his

own and he is not in possession thereof and it may be of different kinds as provided under the Act, whereas the 'adverse possession' can be claimed and proved only if the person claiming it is in possession of the land/property in question continuously for the requisite period peacefully and in the knowledge of public and owner. Therefore both the claims can be set up totally on different footing, therefore they cannot be pleaded together. Even otherwise, both the claims can be set up only after admitting the ownership of other on the land in dispute and impleading him party but in the present case, the plaintiff-respondent has not admitted the ownership of the respondents. Thus the substantial question of law number 3 is decided accordingly.

33. It is settled law that concurrent findings of fact recorded by the two courts below are not liable to be set aside in second appeal unless and until the findings are perverse. The Hon'ble Supreme Court, in the case of ***Kapil Kumar versus Raj Kumar; (2022) 10 SCC 281***, has held that unless the concurrent findings recorded by the courts below were found to be perverse, the same were not required to be interfered with by the High Court in exercise of powers under Section 100 CPC. Similar view has been taken by the Hon'ble Supreme Court in the case of ***Damodar Lal versus Sohan Devi and Others(supra) and Ambika Savaria and Others versus Sanjay Sharma and Others(supra)***.

34. This Court, in the case of ***Suryakunwari versus Nanhu and others;2019(37) LCD 2346***, considering several judgments has held that concurrent findings of fact recorded by the two courts below are not liable to be set aside unless and until the findings are perverse. The relevant paragraphs 11 to 16 are extracted hereinbelow:-

"11. In this case, there are concurrent findings on facts by both the courts below. The Hon'ble Apex Court in catena of judgments has laid down the law that the concurrent findings of fact recorded by two courts below should not be interfered by the High Court in Second Appeal, unless and until the findings are perverse.

12. In a recent case of Shivah Balram Haibatti Vs. Avinash Maruthi Pawar (2018)11 SCC 652 the Apex Court has held as under:- "..... These findings being concurrent findings of fact were binding on the High Court and, therefore, the second appeal should have been dismissed in limine as involving no substantial question of law."

13. In another recent case of Narendra and others Vs. Ajabrao S/o Narayan Katare (dead) through legal representatives, (2018) 11 SCC 564 the Hon'ble Apex Court held as under:-

"...interference in second appeal with finding of fact is permissible where such finding is found to be wholly perverse to the extent that no judicial person could ever record such finding or where that finding is found to be against any settled principle of law or pleadings or evidence. Such errors constitute a question of law permitting interference in Second Appeal."

14. In one more recent case Dalip Singh Vs. Bhupinder Kaur, (2018) 3 SCC 677 the Hon'ble Apex Court has held that if there is no perversity in concurrent findings of fact, interference by the High Court in Second Appeal is not permissible.

15. In Gautam Sarup v. Leela Jetly and Ors. [(2008) 7 SCC 85], the Apex Court held that a party is entitled to take an alternative plea. Such alternative pleas, however, cannot be mutually destructive of each other.

16. In State Bank of India and others Vs. S.N. Goyal; (2008) 8 SCC 92 the Hon'ble Supreme Court has held as under :-

"Second appeals would lie in cases which involve substantial questions of law. The word 'substantial' prefixed to 'question of law' does not refer to the stakes involved in the case, nor intended to refer only to questions of law of general importance, but refers to impact or effect of the question of law on the decision in the lis between the parties. 'Substantial questions of law' means not only substantial questions of law of general importance, but also substantial question of law arising in a case as between the parties. In the context of section 100 CPC, any question of law which affects the final decision in a case is a substantial question of law as between the parties. A question of law which arises incidentally or collaterally, having no bearing in the final outcome, will not be a substantial question of law. Where there is a clear and settled enunciation on a question of law, by this Court or by the High Court concerned, it cannot be said that the case involves a substantial question of law."

35. In view of above and considering the overall facts and circumstances of the case, this Court is of the view that trial court as well as the first appellate court have recorded finding of facts on the basis of the pleadings and evidence, which does not suffer from any illegality, error or perversity, which may require any interference by this Court. This second appeal has been filed on mis-conceived and baseless grounds, which is liable to be dismissed.

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

(Rajnish Kumar,J.)

Order Date :-12.09.2024
Akanksha