

Neutral Citation No. - 2024:AHC-LKO:30277

Court No. - 5

Case :- SECOND APPEAL No. - 115 of 1988

Appellant :- Mukhtar Ali

Respondent :- Ram Manorath And Others

Counsel for Appellant :- Umesh Kumar Srivastava, Nirmal Srivastava

Counsel for Respondent :- Shyam Mohan

Hon'ble Rajnish Kumar, J.

1. Heard, Sri Nirmal Srivastava, learned counsel for the appellant and Sri Shyam Mohan, learned counsel for the respondents.
2. This second appeal has been filed for setting aside the judgment and decree dated 17.12.1987, passed in Regular Civil Appeal No.157 of 1986; Ram Manorath and others versus Mukhtar Ali by the Civil Judge, Bahraich, by which the appeal preferred by the defendant-respondents was allowed and the judgment and decree dated 21.10.1986, passed in Regular Suit No.85 of 1983; Mukhtar Ali versus Ram Manorath and others by the Second Additional Munsif, Bahraich has been set aside and the suit of the plaintiff-appellant has been dismissed with a prayer that the decree passed by the trial court be restored with cost throughout.
3. The suit for permanent injunction was filed by the plaintiff-appellant with regard to the property-in-dispute with Khandhar thereon, the site plan of which was given with the Commission report dated 23.03.1983 with the boundaries as a-b-c-d, which was purchased through two registered sale deeds by the plaintiff-appellant from Bacha Ram and Kripa Ram son of Bharose, Village Belbharia, District Bahraich. The plaintiff-appellant purchased the said land by means of the registered sale deed dated 16.02.1983 in

consideration of Rs.1000/- from Bacha Ram and the remaining portion through registered sale deed dated 16.07.1984 in consideration of Rs.1500/- from Kripa Ram and the possession was handed over by them and since then he was the owner and in possession of the land in dispute. Thereafter the plaintiff-appellant had constructed the wall around the property-in-dispute. The defendant-respondents have no concern with the said property-in-dispute but they threatened to take possession of the property-in-dispute and on denial, did not recused themselves, therefore the suit was filed by the plaintiff-appellant. It has also been alleged through amendment that the defendant-respondents have forcibly made possession on the land in dispute during pendency of the suit. Therefore the relief of possession was also sought by the plaintiff-appellant by way of amendment. The relief has also been sought through amendment for demolition of the thatch etc. on the land in dispute put by the respondent-defendants.

4. The defendant-respondents no.1 to 4 filed a written statement denying the averments made in the plaint. The defendant-respondents no.1 to 4 stated that Kripa Ram and Bacha Ram were never the owner of the land in dispute nor in possession of the same. It has further been alleged that the property-in-dispute is a residential house and in possession of the defendant-respondent nos. 1 to 4. They are the owner of the said property. It has also been alleged that the house of the defendant-respondents no.1 to 4 is in Village Belbharia,Dihva, which was in the Zamindari of Nanpara Estate. It was taken by the father of the defendant-respondent nos.1 to 4-Maikoo from the Nanpara Estate after making payment of Rs.11 on 10.09.1946 through Izazatnama dated 09.09.1946 for construction. He had constructed the house and was the owner and in possession of the land in dispute. After his death, the defendant-respondents no.1 to 4 are the owner and in possession of the land in dispute and residing thereon. It has further been alleged that the defendant nos.5 and 6 have no concern with the

land in dispute. Accordingly, it has been alleged that the sale deed in question is fictitious and baseless. It has further been alleged that Bacha Ram is not residing in Village Belbharia for the last 25-30 years and he is residing in Village Hariram, Gulharia Pargana Charda, Tehsil Nanpara. It has also been alleged through the additional written statement that the plaintiff-appellant was not the owner of the land in dispute on 22.02.1983. Thus, it has been alleged that the suit has been filed only to harass the respondent-defendants, which is liable to be dismissed.

5. On the basis of the pleadings of the parties, twelve issues were framed. The first one was as to whether the plaintiff is the owner and in possession of the land in dispute on the basis of sale deed dated 16.02.1993. The second issue was as to whether the father of the defendant nos. 1 to 4 Maikoo had obtained the rights on the land of the disputed Khandahar house after making the payment of Zamindari and since then father of the defendants no.1 to 4 and now defendants no.1 to 4 are residing on the same after constructing the Khandahar house and they are in possession, if so, it's effect. The issue no.9 was framed as to whether the plaintiff is the owner and in possession of the land in dispute on the basis of sale deed dated 16.07.1984. The issue no.10 was framed as to whether the disputed construction is liable to be demolished. The remaining issues were in regard to jurisdiction, locus and court fees etc., some of which were not pressed and some of them decided as per pleadings and evidence.

6. The trial court, after considering the pleadings of parties, evidence adduced by the parties and material on record allowed and decreed the suit in favour of the plaintiff-appellant by means of the judgment and decree dated 21.10.1986. Being aggrieved by the same the defendant-respondents filed a civil appeal, which was allowed by means of the judgment and decree dated 17.12.1987 setting aside the judgment and decree dated 21.10.1986 passed by the trial court and the suit of the

plaintiff-appellant has been dismissed, therefore the instant second appeal has been filed with the aforesaid prayers.

7. The appeal was admitted and the following substantial question of law has been framed by this Court:-

"Whether the lower appellate court was justified in reversing the judgement passed by the trial court ignoring the material evidence available on record including the admission made by the defendants' witness, which clearly established the title of the plaintiff."

8. Learned counsel for the plaintiff-appellant submitted that the plaintiff-appellant had purchased the land in dispute through two registered sale deeds dated 16.02.1983 from Bacha Ram and sale deed dated 16.07.1984 from Kripa Ram, both sons of Bharose. The defendant-respondents no.1 to 4 have not denied that the aforesaid sale deeds are not in regard to the property-in-dispute. The only allegation is that the sale deeds are fictitious and the sellers were not authorized to execute the sale deeds as they were not the owners. However, after considering the pleadings of the parties, 12 issues were framed. The issues no.1,2,9 and 10 were decided in favour of the plaintiff-appellant and, accordingly, the suit was allowed. He further submitted that the appeal was filed setting up a different case regarding the boundaries and property-in- dispute, which was not pleaded before the trial court. The appellate court, only considering the issues no.1,2 and 9, decided the appeal without considering the issue no.10, which was decided in favour of the plaintiff-appellant. He further submitted that the appellate court recorded a finding that the plaintiff-appellant has failed to prove his ownership and the ownership of his predecessor-in-interest in the land in dispute, and possession and the possession of the defendant-respondents no.1 to 4 is proved and since the plaintiff-appellant has failed to prove his ownership, therefore they are the owners, whereas the trial court, after analysing the pleadings,evidence and material on record including admission of D.W.4 recorded a finding that the plaintiff-appellant has proved the

ownership and their possession. The trial court has also recorded a categorical finding that the defendant-respondents no.1 to 4 have made possession on the land in dispute and kept two thatches on the same during pendency of the suit. Thus the thatches, put by them during pendency of the suit after making possession, are liable to be demolished. The appellate court without recording the reasons for disagreement with the factual findings recorded by the trial court on the basis of pleadings, evidence and material on record and setting aside the same, allowed the appeal, which could not have been done. The appellate court has not considered and dealt with the evidence of all witnesses and the commission report. In fact, the appeal has been decided on the new plea which was not in dispute. Thus, the appellate court has travelled beyond its power under Order 41 Rule 31 CPC. The appellate court has also failed to consider the evidence of D.W.4, who has admitted the ownership and possession of predecessor-in-interest of Bacha Ram and Kripa Ram i.e. their father.

9. On the basis of above, submission of learned counsel for the palintiff-appellant is that the appellate order has been passed without setting aside the factual findings, recording reasons for disagreement and recording erroneous and perverse findings, which is liable to be set aside and the judgment and decree passed by the trial court is liable to be restored. He relied on **Rasheed Ahmad & Others versus Smt. Kariman Khatoon & Others; 2002 (19) LCD 1097, Kallu Ram Yadav & Others versus Bhagwati & Others; 2003(21)LCD 705 ,Kasturibai & Others versus Anguri Chaudhary; 2003(21) LCD 707, Govindraju versus Mariamman; 2005(23) LCD 868, Vinod Kumar versus Gangadhar; (2015) 1 SCC 391, Union of India versus K.V.Lakshman & Others; 2016 (3) ARC 3 AND Jagdish Singh versus Natthu Singh;(1992) 1 SCC 647.**

10. Learned counsel for the defendant-respondents no.1 to 4 vehemently opposed the submissions of learned counsel for the

appellant. He submitted that the suit was filed after execution of the first sale deed dated 16.02.1983 on 22.02.1983 taking the plea of purchase of two Khandahar, which is not in consonance with the sale deed. He further submitted that there is contradiction in both the sale deeds got executed by the appellant-plaintiff from Bacha Ram and Kripa Ram as the boundaries does not tally to each other. He further submitted that in fact the defendant-respondents no.1 to 4 were the owner and in possession of the land in dispute as the land in dispute was got by their father Maikoo from the Estate of Nanpara after making the payment of Rs.11 on 10.09.1946 with Izazzatnama for construction dated 09.09.1946 and the relevant documents in this regard were placed on record and proved but ignored by the trial court while allowing the suit. He further submitted that the appellate court, after considering the same, found that the defendant-respondents no.1 to 4 are the owner and in possession of the property-in-dispute and rightly and in accordance with law allowed the appeal and set aside the judgment and decree passed by the trial court and dismissed the suit of the plaintiff-appellant. There is no illegality or error in the appellate order, which may call for any interference by this Court. Thus, the second appeal is misconceived and liable to be dismissed with cost as no substantial question of law arises in this appeal. He relied on *(Smt.) Savitri and others versus Surendra Mohan Mohana;1987(5) LCD 137 AND Punjab Urban Planning & Development Authority versus Shiv Saraswati Iron & Steel Re-Rolling Mills;(1998) 4 SCC 539.*

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

12. The suit for permanent injunction was filed by the plaintiff-appellant on the ground that he is owner and in possession of the land in dispute on the basis of sale deed dated 16.02.1983 executed by Bacha Ram and the respondent-defendants no.1 to 4 are adamant to

take possession of the said property. The suit was filed on 22.02.1983 and the commission was issued. The Advocate Commissioner visited the land in dispute on 23.02.1983 and submitted his commission report dated 23.03.1983 alongwith site plan. The site plan prepared by the Advocate Commissioner was adopted by the plaintiff-appellant and the suit was amended, as the remaining portion of the land in dispute was also purchased by the plaintiff-appellant through registered sale deed dated 16.07.1984 from the brother of Bacha Ram, namely, Kripa Ram and prayer for possession and removal of thatches kept by the defendant -respondents no.1 to 4 were added on the ground that they have made possession on the property-in-dispute and kept the said thatches during pendency of the suit. During pendency of suit another Commission was conducted, under the orders of the trial court on an application moved by a party, on 19.08.1984. The report of which was submitted on 12/14.09.1984, in which house of phoos and five rooms have been found.

13. The plaintiff-appellant filed both the sale deeds dated 16.02.1983 and 16.07.1984 and the sale deed dated 11.06.1979, the certificate of Gram Pradhan dated 27.07.1986 and Nakal Khatauni Gram Dihva. The plaintiff-appellant himself appeared as P.W.1. Besides him Lallan, attesting witness of sale deeds dated 16.02.1983 and 16.07.1984 and Abdul Khalid were also produced in evidence as P.W.2 and P.W.3. On behalf of the defendant-respondents no.1 to 4, the Receipt of payment of Zamindari dated 10.09.1946, Izzazatnama dated 09.09.1946, Copy of the voter list of Village Dihva and Question-answer were filed. The defendant no.3-Ferai appeared himself in evidence as D.W.1, Hafizullah appeared as D.W.2 Ram Pyare as D.W.3, Nankau as D.W.4 and Sewakram as D.W.5.

14. The trial court, after considering the pleadings of the parties, evidence and material on record, recorded a finding that the plaintiff-appellant, who appeared as P.W.1 has proved the purchase of property-

in-dispute through two registered sale deeds dated 16.02.1983 and 16.07.1984 executed by Bacha Ram and Kripa Ram. One of the attesting witness of both the sale deeds Lallan appeared as P.W.2 and he proved the execution of sale deeds by Bacha Ram and Kripa Ram. He proved the execution of sale deeds in accordance with law and also proved the thumb impression and signatures of seller and witnesses including his signatures. P.W. 3 who is also resident of same village has also stated about purchase of property-in-dispute by the plaintiff-appellant. The D.W.4- Nankau has also proved in his evidence that Gauri and Bharose lived in the property-in-dispute throughout their life. However, he stated that the same was sold by them to the predecessor-in-interest of the respondent-defendants no.1 to 4 i.e. his father Maikoo, who thereafter constructed house on it, but the same could not be proved by any evidence. Thus it is proved that the Bacha Ram and Kripa Ram, who were sons of Bharose, were owner and in possession of the property-in-dispute and they sold it to the plaintiff-appellant through the aforesaid two registered sale deeds.

15. The trial court further held that defendant no.3-Ferai, who appeared as D.W.1, stated that Bacha Ram and Kripa Ram have executed fictitious sale deeds in favour of the plaintiff-appellant but no cogent evidence has been adduced in this regard and none of the witnesses to the sale deeds have been produced, therefore the defendant-respondents no.1 to 4 have failed to prove that the sale deeds were fictitious.

16. The plea of the defendant-respondents no.1 to 4 that Bacha Ram and Kripa Ram are not living in the village in question has also not been found proved because Kripa Ram son of Bharose had executed sale deed dated 11.06.1979 of agricultural land in favour of the plaintiff-appellant which has been admitted by the witnesses of defendant-respondents no.1 to 4.

17. The trial court also found that the defendant-respondents no.1 to 4 are claiming that the house was build by their father-Maikoo after getting the permission for construction on the land in dispute from the Nanpara Estate, but the receipt of payment and Izazatnama could not be proved by them by any cogent evidence. D.W.1 stated that he got the receipt and permission from his father, who had died 15-16 years back, but he could not tell as to what is written on it as he was illiterate and he was minor at the time of issuance of same. D.W.2, who claimed himself to be the Sarvarakar of Nanpara Estate proved signatures of the persons, who signed them and stated that they had died but he could not prove as to who has written them. Thus, the issue nos.1,2 and 9 have been decided in favour of the plaintiff-appellant. This Court also finds that no proof has been filed to prove that the D.W.2 was Sarvarakar of Nanpara Estate and defendant-respondents no.1 to 4 were residing on property in dispute at the time of filing of suit. No house was found on the land in dispute in the first commission conducted on 23.02.1983 and only two thatches and khandhar were found, whereas in the second commission conducted on 19.08.1984, report of which has been submitted on 12/14.09.1984, in which house of phoos with five rooms and thatches have been found, the walls of which are weak except two.

18. In regard to the issue no.10, which was, as to whether the disputed constructions are liable to be demolished, the trial court found that defendant-respondents no.1 to 4 have made possession on the land in dispute during pendency of the suit and kept the thatches, whereas they could not prove themselves to be the owner of the land in dispute,therefore the same is liable to be demolished.

19. The trial court after considering and dealing with the material on record and evidences adduced before it, allowed the suit with a direction to the respondents not to interfere in the possession and use of the property-in-dispute by the plaintiff-appellant. It was further

directed that the defendant-respondents no.1 to 4 would remove the thatches from the property-in-dispute and give the possession of the property-in-dispute to the plaintiff- appellant within a month.

20. The judgment and decree passed by the trial court was challenged by the defendant-respondents no.1 to 4 in civil appeal, which has been decided by the Civil Judge, Bahraich. The appellate court considered only issue nos.1,2 and 9 recording that being aggrieved by the decision on the said issues in favour of the plaintiff- appellant, the appeal has been filed.

21. The appellate court, after considering the pleadings and the evidence on record recorded its own finding in regard to the issues no.1,2 and 9 without considering and recording any reasons for disagreement in regard to the factual findings recorded by the trial court on the basis of the evidence and material on record. The appellate court recorded a finding that the plaintiff-appellant has failed to prove that the sale deeds in question are in regard to the land in dispute, whereas the defendant-respondents no.1 to 4 have nowhere disputed that the sale deeds executed by Bacha Ram and Kripa Ram in favour of the plaintiff-appellant are not in regard to the land in dispute. Their allegation is only that the sale deeds are fictitious as Bacha Ram and Kripa Ram were not the owners and in possession of the land in dispute and the respondent-defendants no.1 to 4 are the owners and in possession of the land in dispute and residing there after making construction of the house on the land in dispute by their father, after permission granted by the Nanpara Estate. However the defendant-respondents no.1 to 4 have failed to prove the constructed house and no constructed house was found on the land in dispute in the commission executed on the very next day of filing of the suit, whereas fresh construction of walls was found, in regard to which the plaintiff-appellant has stated in his suit that after taking possession of

the land in dispute after execution of the sale deeds in his favour on 16.02.1983, he had started making construction around the Khandahar.

22. The appellate court has discarded the admission of D.W.4 in regard to the ownership and possession of the land in dispute by father of Bacha Ram and Kripa Ram and Gauri on the ground that his complete evidence is to be considered and it is not proved that same Bharose was his father as Bharose is also father of defendant-respondents no.5 and 6 and what happened to land of Gauri, whereas it was not disputed by defendant-respondents no.1 to 4 and no specific ground was also taken that Bharose was not their father and they were not predecessor-in-interest of Bacha Ram and Kripa Ram and it is also not case of the defendant-respondents no.1 to 4 here before this Court nor it has been argued.

23. The appellate court, in regard to the ownership of the defendant-respondents no. 1 to 4, has recorded that they had constructed the house on the land in dispute after taking permission from the Nanpara Estate which has been proved by D.W.1 in his evidence and the permission letter and receipt have been proved by D.W.2 and the boundaries of the property-in-dispute as mentioned in the permission letter are in consonance from three side of the boundaries of property-in-dispute i.e. east, north and south but failed to consider that no constructed house was found on the land in dispute in the commission by the commissioner held in pursuance of the order passed by the trial court, on the next date of filing of the suit. D.W.1 also does not know as to what is written on the receipt and izazatnama, which he says got from his father. The appellate court also failed to consider the evidence of D.W.2 completely because he has stated that due to less light in room he is not able to see clearly, therefore as to how he recognised the signatures etc. No reasons have also been recorded as to when the boundaries of three sides of the property-in-dispute are only in consonance with the permission letter, as to how the property-

in-dispute is identifiable and it is the same property, the boundaries of which have been given in the permission letter and the sale deeds executed on 16.02.1983 and 16.07.1984. This Court does not find that there is any discrepancy in both the sale deeds except that it may not be very specific, but they are of the two parts of the property-in-dispute, which can not be doubted from the boundaries given in both the sale deeds. However the appellate court disputed it dealing with the evidence of P.W.1 on the ground that in para 1 of plaint, two Khandhar has been mentioned but para 2 shows that two parts of one Khandhar have been purchased, whereas as per sale deeds one Khandhar from Bacha Ram and Sahan and Parti land from Kripa Ram have been purchased but he could not give correct description of his property in his statement. However minor contradiction in description of property and aforesaid pleading cannot be a ground to set-aside the factual findings recorded by the trial court without recording reasons for disagreement.

24. The appellate court is required to decide the appeal in accordance with Order 41 Rule 31 of Civil Procedure Code, 1908 (here-in-after referred as CPC). Thus, while exercising the appellate powers, the appellate court is required to consider the findings of the trial court and in case the appellate court is not in agreement with the factual findings recorded by the trial court, then the reasons for disagreement should be recorded while recording its own findings and the findings recorded by the trial court are required to be set aside to the extent the appellate court is not in agreement but without recording the reasons for disagreement with the factual findings recorded by the trial court, the appellate court has recorded its own findings in regard to issue nos. 1, 2 and 9 and set aside the judgment and decree passed by the trial court without considering the findings recorded in regard to issue no. 10 and recording any finding in that regard. This Court is of the

considered opinion that it could not have been done by the first appellate court.

25. The Hon'ble Supreme Court, in the case of **Govindraju versus Mariamman(supra)**, has held that the findings of fact recorded by the courts below were wrong, in our opinion, these findings of fact could not be disturbed without coming to the conclusion that the findings recorded were perverse i.e. based on misreading of evidence or based on no evidence. The relevant paragraph 19 is extracted herein below:-

“19. Even if the High Court was of the view that the findings of fact recorded by the courts below were wrong, in our opinion, these findings of fact could not be disturbed without coming to the conclusion that the findings recorded were perverse i.e. based on misreading of evidence or based on no evidence. The High Court did not come to such a conclusion. The learned Singh Judge also did not come to the conclusion that the appeal involved other substantial questions of law or formulate the same.”

26. The Hon'ble Supreme Court, in the case of **Vinod Kumar versus Gangadhar(supra)**, has held that the duty of the first appellate court is to decide the appeal in view of the scope and powers conferred on it under Section 96 read with Order 41 Rule 31 CPC. The relevant paragraph 19 is extracted herein below:-

19 “Being the first appellate court, it was the duty of the High Court to have decided the first appeal keeping in view the scope and powers conferred on it under [Section 96](#) read with Order 41 Rule 31 CPC mentioned above. It was unfortunately not done, thereby, resulting in causing prejudice to the appellant whose valuable right to prosecute in the first appeal on facts and law was adversely affected which, in turn, deprived him of a hearing in the appeal in accordance with law. It is for this reason, we are unable to uphold the impugned judgment of the High Court.”

27. The Hon'ble Supreme Court, in the case of **Union of India versus K.V.Lakshman & Others(supra)**, has held that the jurisdiction of the first appellate court while hearing the first appeal is very wide like that of the trial court and it is duty of the first appellate court to appreciate the entire evidence and may come to a conclusion different from that of the trial court. The relevant paragraph 22 is extracted herein below:-

“22. It is a settled principle of law that a right to file first appeal against the decree under [Section 96](#) of the Code is a valuable legal right of the litigant. The jurisdiction of the first appellate Court while hearing the first appeal is very wide like that of the Trial Court and it is open to the appellant to attack all findings of fact or/and of law in first appeal. It is the duty of the first appellate Court to appreciate the entire evidence and may come to a conclusion different from that of the Trial Court.”

28. The Hon’ble Supreme Court, in the case of ***Jagdish Singh versus Natthu Singh(supra)***, has held that where the findings by court of facts is vitiated by non consideration of relevant evidence or by an essentially erroneous approach to the matter, the High Court is not precluded from recording proper findings. The relevant paragraph 10 is extracted here-in-below:-

“10. In our opinion, the High Court was right in its view. The notices must be presumed to have been served as contemplated by [Section 27](#) of the General [Clauses Act](#). As to the jurisdiction of the High Court to reappreciate evidence in a second appeal it is to be observed that where the findings by the Court of facts is vitiated by non-consideration of relevant evidence or by an essentially erroneous approach to the matter, the High Court is not precluded from recording proper findings. We find no substance in the first contention.”

29. Similar view has been expressed by a coordinate Bench of this Court in ***Rasheed Ahmad & Others versus Smt. Kariman Khatoon & Others(supra)*** and ***Kallu Ram Yadav & Others versus Bhagwati & Others(supra)***.

30. The Hon’ble Supreme Court, in the case of ***Punjab Urban Planning & Development Authority versus Shiv Saraswati Iron & Steel Re-Rolling Mills(supra)***, has held that the plaintiff/appellant must succeed or fail on his own case and cannot take advantage of weakness in the defendant/respondent’s case to get a decree.

31. A coordinate Bench of this Court, in the case of ***(Smt). Savitri and others versus Surendra Mohan Mohana(supra)***, has held that in a suit for ejectment the plaintiff has to succeed or fail on the title that he establishes and if he cannot succeed on the strength of his title his suit

must fail notwithstanding that the defendant in possession has no title to the property. It has also been held that the vendor has to disclose his title in the sale deed. In the present case, it has been disclosed in the sale deeds that the vendors are the owner and in possession of the land in dispute and it has been admitted by D.W.4 that the predecessor-in-interest of the sellers i.e. their father Bharose and Gauri were the owner and in possession of the land in dispute during their life time and they sold it to the father of defendant-respondents no.1 to 4 but it could not be proved by any cogent evidence. However it has not been disputed by the defendant-respondents no.1 to 4 that Bharose was not father of sellers i.e. Bacha Ram and Kripa Ram and he and Gauri lived in the property-in-dispute during their life time, therefore their ownership cannot be disputed.

32. Adverting to the facts of the present case and applying the aforesaid laws, this Court finds that the trial court has recorded factual findings on the basis of pleadings, evidence adduced before it and material on record and admission of D.W.-4 in regard to ownership and possession of the predecessor-in-interest of the plaintiff-appellant but without recording the reasons for disagreement with the same and recording any cogent finding as to how they are erroneous and perverse, the first appellate court set aside the judgment and decree passed by the trial court. The first appellate court has also failed to consider the issue as to whether the disputed construction is liable to be demolished and the commission report and evidence of all witnesses and material on record including the two commission reports. The appellate court also erred in law in holding that since the plaintiff-appellant has failed to prove his ownership therefore since the defendant-respondents no.1 to 4 are in possession therefore they can be presumed to be the owner without considering and setting aside the specific finding of the trial court that the defendant-respondents no.1 to 4 have made possession and kept the thatches

during pendency of suit, which is also apparent from the two commission reports.

33. In view of above, this Court is of the considered opinion that the appellate court was not justified in reversing and setting aside the judgment and decree passed by the trial court ignoring the material evidence available on record including the defendant's witness, which clearly established the title of the plaintiff-appellant. Thus the substantial question of law framed in this appeal is answered accordingly and this appeal is liable to be allowed with cost.

34. The appeal is, accordingly, **allowed** with cost. The judgment and decree dated 17.12.1987 passed in Regular Civil Appeal No.157 of 1986; Ram Manorath and others versus Mukhtar Ali by Civil Judge, Bahraich is hereby set aside upholding the judgment and decree dated 21.10.1986 passed in Regular Suit No.85 of 1983; Mukhtar Ali versus Ram Manorath and others by Second Additional Munsif, Bahraich.

(Rajnish Kumar,J.)

Order Date :- 16.04.2024
Akanksha