

Neutral Citation No. - 2024:AHC-LKO:58701
AFR
Reserved

Court No. - 6

Case :- SECOND APPEAL No. - 392 of 2013

Appellant :- Shyampati

Respondent :- Ram Karan Pandey And Ors.

Counsel for Appellant :- V.P.Nagaur

Counsel for Respondent :- Ram Raj Ojha,Durga Prasad

Hon'ble Rajnish Kumar,J.

1. Heard, Shri V.P.Nagaur, learned counsel for the appellant and Shri Ram Raj Ojha, learned counsel for the respondent No.1. The respondent no.2 has died and no other legal heir has been substituted and respondent no.3 is the court concerned.

2. Learned counsel for the plaintiff-appellant submitted that the First Appellate court has decided the appeal without following the provisions of Order XLI Rule 31 CPC as it has been decided without formulating the points of determination, which arises for adjudication and recording reasons for its decision on the said point. He further submitted that merely because the plaintiff-appellant, who is an illiterate lady could not give correct description of the things, it cannot be said that she failed to prove her case. He further submitted that the space between the house of the plaintiff-appellant and the land in dispute is part of her property and left for rain water and on account of same it cannot be said that the land in dispute is not appurtenant to the house of the plaintiff-appellant. He further submitted that merely because the Husk is existing on the land in dispute, it cannot be said that it is not Sahan of the plaintiff-appellant because in view of the provisions made in the United Provinces Village Abadi Act, 1948 the house owner is entitled to make construction in the Sahan Darwaja or land appurtenant to the house as may be necessary for agricultural and domestic purposes. He also submitted that a person ordinarily

residing in an area of the Gram Sabha is entitled to be registered in the village Register as per U.P.Panchayat Raj (Maintenance of Village Register) Rules 1970 and since the name of the plaintiff-appellant is recorded in the Family Register, her rights on the land in dispute cannot be disputed. He also submitted that all efforts have been made by the defendants-respondents for forceful possession on the land in dispute and making construction. The plaintiff-appellant tried to get it settled before filing the suit but merely on this ground it cannot be said that the land in dispute is not of the plaintiff-appellant. Thus since the plaintiff-appellant is in possession of the land in dispute since prior to abolition of Zamindari and her house is existing adjacent to the land in dispute and the land in dispute is being used for various agricultural and house hold purposes since the time of ancestors of her husband, it is settled with them under Section 7 (aa) and 9 of the U.P.Z.A.&L.R.Act. He also submitted that if there was any dispute in regard to settlement of land in dispute with the parties under Section 9 of the U.P.Z.A.&L.R.Act the issue should have been framed and decided after affording opportunity of evidence to the parties.

3. On the basis of above, learned counsel for the plaintiff-appellant submitted that the findings recorded by the first appellate court are perverse, illegal and based on conjectures and surmises, therefore the same are not sustainable in the eyes of law and are liable to be set aside by this court and the appeal is liable to be allowed. He relied on **Maharaj Singh Versus State of U.P. and others; (1976) 1 SCC 155, judgment and order dated 27.03.2019 passed in Second Appeal No.232 of 1990; Jhoori and others Versus Shambhoo Nath and others.**

4. Learned counsel for the defendants-respondents submitted that the defendants-respondents are in possession and owner of the land in dispute as it is a part of their Sahan land and being used by them for various agricultural and house hold purposes since prior to abolition

of Zamindari, therefore it is settled with them under Section 9 of the U.P.Z.A.&L.R.Act. The plaintiff-appellant or her husband or his ancestors were never in possession of the land in dispute because the possession was taken by her forcefully through police force after the judgment and decree dated 12.01.2010 passed by the trial court, which is apparent from the information given under Right to Information on 13.04.2010 by the concerned Police Station and filed as Paper No.24-Ga/1 before the first appellate court. He further submitted that it is not in dispute that the fire had broken in the village on 02.04.2005, in which some portion of the house of the defendants-respondents was also burnt. He further submitted that the plaintiff-appellant has not produced any witness of the village, in which the land in dispute is situated. The plaintiff-appellant had appeared herself as P.W.1, who could not tell the correct things and P.W.2 was the interested witness as he was brother-in-law of Chandra Pal, the husband of the plaintiff-appellant, who lives in another village. He further submitted that the defendant-respondent No.1 had appeared as D.W.1 and deposed that his thatch was burnt in the fire in 2005, for which government aid was given to him and houses of nine others were also burnt, therefore it cannot be said that the land in dispute is not appurtenant land of the defendants-respondents. The plaintiff-appellant had admitted in her evidence that his Pakka house was constructed 30-40 years back and since then she is making Kanda-Uppala on its roof, therefore the contention of the plaintiff-appellant that she is using the land in dispute for the said purposes is misconceived and not tenable, but the trial court recorded the contrary findings on presumption that since there is dispute between the parties in regard to the land in dispute, therefore if the plaintiff-appellant is making Kanda-Uppala on her roof to avoid quarrel and beating, it cannot be said that she is not in possession of the land in dispute. He further submitted that in the commission report, the door of the land in dispute is in front of the

house of the defendants-respondents and the land in dispute is not connected with the house of the plaintiff-appellant in any manner, which was admitted by the plaintiff-appellant also. He also submitted that plaintiff-appellant has to prove her case and she can not get any benefit of weakness of the defendants-respondents but she has failed to prove her case.

5. On the basis of above, learned counsel for the defendants-respondents submitted that the trial court has passed the judgment and decree without considering the whole evidence and recording contrary and perverse findings, therefore it has rightly and in accordance with law been set aside by the first appellate court after considering the whole pleadings, evidence and recording the findings on the basis thereof on all issues framed by the trial court as no new issue was raised, therefore there is no violation of Order 41 Rule 31 CPC also. This Second Appeal has been filed on misconceived and baseless grounds, which is liable to be dismissed. He relied on **Bala Devi (Smt.) Versus Mukhtyar Singh; 2017 (2) ARC 363, Bhudan Singh and another Versus Nabi Bux and another; (1969) 2 SCC 481, judgment and order dated 22.11.2019 passed in Second Appeal No.251 of 2019; Chandrajit Versus Baliram (dead) and 6 others, Smriti Debbarma (dead) through Legal Representative Versus Prabha Ranjan Debbarma; AIR 2023 SC (Civil) 472, Baij Nath Ram (Dead) and others Versus Smt. Sonmati and others; 2008 (4) ADJ 708(DB), B.V.Nagesh and another Versus H.V.Sreenivasa Murthy;(2010) 13 SCC 530 and Habibullah and others versus Mohd.Yasin and another; 1995 (13) LCD 1073.**

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

7. The appellant-plaintiff filed a suit for permanent injunction for restraining the defendants-respondents for ever not to disturb the

peaceful possession of the land in dispute marked with read in the map of the plaint and do not forcefully dispossess and make no new construction and demolish the wall of the husk structure (Thatch) thereon. The suit was filed alleging therein that House No.1149 of the plaintiff-appellant was got constructed by her husband and situated since prior to abolition of Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1950 (here-in-after referred to as U.P.Z.A.&L.R.Act). It has further been alleged that since the time of construction of her house Sahan, Baithaka, Bhusaila (husk), etc. is situated on the western side. The land in dispute is part of Sahan of plaintiff-appellant, in which there is a Bhusaila (Husk). It has also been alleged that the plaintiff-appellant used to tie her animals, make Kanda-Uppala and all other agricultural and homely works and keeps Bhusa, Puwal, Lakdi, Kanda etc. in the Husk. All these works are being done since the time of her husband like his ancestors and after his death the plaintiff-appellant is doing all such works. Thus the plaintiff-appellant is in possession and the same is settled with the husband of the plaintiff-appellant under Section 9 and Section 7 (aa) of the U.P.Z.A.& L.R.Act and after his death the plaintiff-appellant is owner and in possession of the land in dispute. It has further been alleged that all the four walls of Husk are five fit high on which there is a thatch. It has further been alleged that the defendants-respondents have neither any concern with the land in dispute nor they are in possession of the same. The house of the defendants-respondents is on the northern side of the land in dispute after the path, the Sahan Darwaja of which is on the eastern side. The defendants-respondents on the basis of their muscle power use to harass the plaintiff-appellant. The fire had broken on 02.04.2005 in the village, in which the thatch kept on the husk had fallen and taking the benefit of the same the defendants-respondents tried to make possession on the land in dispute and on being objected they threatened the plaintiff-appellant

and the defendants-respondents were not ready to settle the dispute (make tafsiya) in any manner, therefore the plaintiff-appellant approached the trial court with the aforesaid prayer.

8. The suit was contested by the defendants-respondents by filing two separate written statements; one by defendants no.1 and 2 and the other by the defendant no.3, who was wife of the defendant-respondent no.2 denying the pleadings of the plaint of the suit and admitting that the house No.1149 of the plaintiff-appellant is recorded in the Parivar Register. It has also been admitted that the wall of the land in dispute is five fit high. The defendants-respondents alleged that the plaintiff-appellant has no concern with the land in dispute and she was never in possession of the same. It has further been alleged that the defendants-respondents are the permanent residents of the village in question and their house is situated at its place since the time of their ancestors, the Sahan of which is on the eastern side till date and it is wrong to say that there is a path in between the house of the defendants-respondents and the land in dispute. It has further been alleged that the construction in the land in dispute was got made by the ancestors of the defendants-respondents for their sitting, which is called 'Chaupal' also. The defendants-respondents also claimed that on a part of the land in dispute they are tying their animals, making Uppla Kanda and doing other works relating to agriculture and house hold since prior to abolition of Zamindari and after abolition of Zamindari the same is settled with them under Section 9 of U.P.Z.A.&L.R.Act. It has further been alleged that after death of the husband of the plaintiff-appellant, she filed the suit with malafide intention. During pendency of the suit an application for amendment was moved on 23.05.2006 and the amendment was made in paragraph 14 of the additional pleas changing their stand to the effect that some portion of the land in dispute was given to the plaintiff-appellant as demanded by her for making her new house.

9. On the basis of pleadings of the parties the following five issues were framed:-

- (I) Whether the plaintiff is owner and in possession of the land in question?
- (ii) Whether suit is under valued and court fee paid thereon is insufficient?
- (iii) Whether the suit is barred by section 34/41 of Specific Relief Act?
- (iv) Whether the suit is barred by Limitation Act?
- (v) The plaintiff is entitled to get which relief?

10. The plaintiff-appellant, in support of her claim got examined herself as P.W.1 (Shyampati) and Shree Nath as P.W.2 and filed documentary evidence. She filed Paper No.8-Ga-1 (Certified copy of Pariwar Register), Paper No.8-Ga ½ and 14-Ga-1 (Certified copy of order of the High Court), Paper No.15-Ga ½ and 62 Ga-1 to 63-Ga-3 (Original Mukhtarnama Khaas). The defendants-respondents got examined Ram Karan as D.W.1, Rajendra Prasad as D.W.2 and Ram Kripal as D.W.3. In documentary evidence, they filed Paper No.32-Ga-1 (Copy of commissioner report with map of original suit no.471/96), Paper No. 33-Ga-1/2 and Paper No.53-Ga-1/4 and Paper No.54-Ga-1 (Photographs). The commission was also got conducted during pendency of the suit and the report submitted by the Commissioner is on record as Paper No.50-Ga-2, which was confirmed by the trial court subject to evidence by the parties to the suit.

11. The trial court, after considering the pleadings of the parties, evidence and the material on record decreed the suit in favour of the plaintiff-appellant restraining the defendants-respondents from making forceful possession on the land in dispute and any new construction on the land in dispute and not to demolish the walls of Husk by means of the judgment and decree dated 12.01.2010 passed in Regular Suit No.162 of 2005; Shyampati Versus Ram Karan Pandey and others by Civil Judge (Sr.Div.), Court No.15, District-Sultanpur.

12. Being aggrieved by the judgment and decree passed by the Trial Court, the defendants-respondents preferred Civil Appeal No.4 of 2010; Ram Karan Pandey and others Versus Shyam Pati, which has been allowed by means of the judgment and decree dated 21.11.2013 by the Additional District Judge, Court No.4, Sultanpur and the judgment and decree dated 12.01.2010 has been set aside and the Regular Suit filed by the plaintiff-appellant has been dismissed with costs. Hence this Second Appeal has been filed.

13. The following substantial questions of law have been formulated in this second appeal:-

“(1) Whether the lower appellate court has committed manifest illegality in not complying with the provision of Order XLI Rule 31 CPC and thereby not formulating the points of determination?”

(2) Whether the non compliance of provision of Order XLI Rule 31 CPC would make the impugned judgment and order unsustainable in the eyes of law?

(3) Whether the findings recorded by the lower appellate court are totally perverse and based on conjecture and surmises?”

14. The appeal filed under Section 96 is a valuable right of the appellant. Section 107 of the Code of Civil Procedure, 1908 (here-in-after referred as C.P.C.) provides the powers of appellate court, which is extracted here-in-below:-

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

(a) to determine a case finally;

(b) to remand a case;

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

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

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

15. According to the aforesaid Sub-Section 2 of Section 107 subject to the provision made in sub-section(1), the appellate court shall have

the same powers and duties as are conferred and imposed on the courts of original jurisdiction of suits instituted therein. Thus, the first appellate court has all the powers of the trial court while deciding the appeal, therefore the appellate court is required to consider all the pleadings of the parties, evidence and material available on records while deciding the appeal. The appellate court is required to pass judgment in appeal in accordance with the provisions of Order 41 Rule 31 CPC, which is extracted here-in-below:-

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

(a) the points for determination;

(b) the decision thereon;

(c) the reasons for the decision; and

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

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

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

16. In view of above, the appellate court is required to state the points for determination and record its reasons for the decision thereon and it can reverse or vary the decree against which the appeal has been preferred and in such case the relief to which the appellant is entitled, therefore the appellate court can not only reverse the findings of the trial court but also take a different view and it can be done after considering the pleadings, evidence and material on record as a trial court and also considering the findings recorded by the trial court and as to whether the same have rightly and in accordance with law been recorded or not after evaluating the pleadings, evidence and material

on record as a trial court. It is for the reason that if any plea or evidence has been left to be considered by the trial court, it can appropriately be considered by the first appellate court to avoid injustice to either of the parties. Thus the first appeal is in continuation of trial and if all the issues framed by the trial court are considered by the first appellate court in accordance with law after considering the pleadings, evidence and material on record and dealing them appropriately and no new issue is raised at the appellate stage, this court is of the view that the judgment passed by the first appellate court may not be said to be vitiated and liable to be set aside only on this ground as there would be substantial compliance of Order 41 Rule 31 CPC.

17. 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**, has held that it is no doubt desirable that the appellate court should comply with all the requirements of Order 41 Rule 31 CPC. But if it is possible to make out from the judgment that there is substantial compliance with the said requirements and that justice has not thereby suffered, that would be sufficient and where the appellate court has considered the entire evidence on record and discussed the same in detail, come to any conclusion and its findings are supported by reasons even though the point has not been framed by the appellate court there is substantial compliance with the provisions of Order 41 Rule 31 CPC and the judgment is not in any manner vitiated by the absence of a point for determination.

18. The Hon'ble Supreme Court, in a recent judgment and order dated 10th May, 2024 in the case of **Mrugendra Indravadan Mehta and others Versus Ahmadabad Municipal Corporation; (Civil Appeal Nos.16956-16957 of 2017) 2024 Live Law (SC) 369**, considered the aforesaid judgment and other judgments of Hon'ble Supreme Court and held that the High Court did set out all the issues

framed by the trial court in the body of the judgment and was, therefore, fully conscious of all the points that it had to consider in the appeal and no issue was left to be considered while adjudicating the appeal, therefore there is no merit in the contention that impugned judgment is liable to be set aside on this issue. The Relevant paragraphs 27 to 31 are extracted here-in-below:-

“27. This being the legal position *vis-à-vis* the Act of 1976, it was contended before us by the plaintiffs that the impugned judgment of the High Court is liable to be set aside on the short ground that no points for determination were framed therein, as required by Order [41 Rule 31 CPC](#). Reliance was placed on *Malluru Mallappa (Dead) through Lrs. v. Kuruvathappa*⁵, wherein this Court observed that the first appellate Court is required to set out the points for determination, record the decision thereon and give its own reasoning. It was further observed that, even when the said Court affirms the judgment of the Trial Court, it has to comply with the requirements of Order [41 Rule 31 CPC](#) as non-observance thereof would lead to an infirmity in its judgment. However, it may be noted that no absolute proposition was laid down therein to the effect that failure to frame points for determination, in itself, would render the first appellate Court's judgment invalid on that ground.

28. Reference was also made to *Santosh Hazari v. Purushottam Tiwari (Deceased) by LRs*⁶, wherein this Court held that a first appeal is a valuable right and unless restricted by law, the whole case would be open for rehearing before it, both on questions of fact and law, and, therefore, the judgment of the first appellate Court must reflect conscious application of mind and it must 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 said Court. It was further observed that, while reversing a finding of fact, the first appellate Court must come into close quarters with the reasoning of the Trial Court and then assign its own reasons for arriving at a different finding. This, *per* this Court, would satisfy the requirement of Order [41 Rule 31 CPC](#).

29. However, in *Laliteshwar Prasad Singh v. S.P. Srivastava (Dead) thru. Lrs.*⁷, this Court, while affirming the aforestated principles, observed that it is well settled that the mere omission to frame the points for determination would not vitiate the judgment of the first appellate Court, provided that the first appellate Court recorded its reasons based on the evidence adduced by both parties.

30. Thus, even if the first appellate Court does not separately frame the points for determination arising in the first appeal, it would not prove fatal as long as that Court deals with all the issues that actually arise for deliberation in the said appeal. Substantial compliance with the mandate of Order [41 Rule 31 CPC](#) in that regard is sufficient. In this regard, useful reference may be made to *G. Amalorpavam v. R.C. Diocese of Madurai*⁸, wherein this Court held as under:—

‘9. The question whether in a particular case there has been substantial compliance with the provisions of Order [41 Rule 31 CPC](#) has to be determined on the nature of the judgment delivered in each case. Non-compliance with the provisions may not vitiate the judgment and make it wholly void, and may be ignored if there has been substantial compliance with

it and the second appellate court is in a position to ascertain the findings of the lower appellate court. It is no doubt desirable that the appellate court should comply with all the requirements of Order [41 Rule 31 CPC](#). But if it is possible to make out from the judgment that there is substantial compliance with the said requirements and that justice has not thereby suffered, that would be sufficient. Where the appellate court has considered the entire evidence on record and discussed the same in detail, come to any conclusion and its findings are supported by reasons even though the point has not been framed by the appellate court there is substantial compliance with the provisions of Order [41 Rule 31 CPC](#) and the judgment is not in any manner vitiated by the absence of a point of determination. Where there is an honest endeavour on the part of the lower appellate court to consider the controversy between the parties and there is proper appraisal of the respective cases and weighing and balancing of the evidence, facts and the other considerations appearing on both sides is clearly manifest by the perusal of the judgment of the lower appellate court, it would be a valid judgment even though it does not contain the points for determination. The object of the rule in making it incumbent upon the appellate court to frame points for determination and to cite reasons for the decision is to focus attention of the court on the rival contentions which arise for determination and also to provide litigant parties opportunity in understanding the ground upon which the decision is founded with a view to enable them to know the basis of the decision and if so considered appropriate and so advised to avail the remedy of second appeal conferred by Section [100 CPC](#).’

31. As already noted hereinabove, the High Court did set out all the issues framed by the Trial Court in the body of the judgment and was, therefore, fully conscious of all the points that it had to consider in the appeal. Further, we do not find that any particular issue that was considered by the Trial Court was left out by the High Court while adjudicating the appeal. In effect, we do not find merit in the contention that the impugned judgment is liable to be set aside on this preliminary ground, warranting reconsideration of the first appeal by the High Court afresh.”

5. (2020) 4 SCC 313,

6. (2001) 3 SCC 179,

7. (2017) 2 SCC 415,

8. (2006) 3 SCC 224

19. The Hon’ble Supreme Court, in the case of **U.Manjunath Rao Versus U.Chandrashekar and another; (2017) 15 SCC 309**, has held that it is well settled in law that the reason is the life of law. It is that filament that injects soul to the judgment. Absence of analysis not only evinces non-application of mind but mummifies the core spirit of the judgment. The Hon’ble Supreme Court with reference to Rule 31 of Order 41 CPC has held that it is quite clear that the judgment of the appellate court has to state the reasons for the decision. It has also been held that the appellant could raise issues pertaining to facts and appreciation of evidence and this is indicative of the fact that the first

appellate court has a defined role and its judgment should show application of mind and reflect the reasons on the basis of which it agrees with the trial court. There has to be an “expression of opinion” in the proper sense of the said phrase. Needless to say, it is one thing to state that the appeal is without any substance and it is another thing to elucidate, analyze and arrive at the conclusion that the appeal is devoid of merit and the appellate court has to keep in view the language employed in Order 41 Rule 31 CPC. Similar view has been taken by the Hon’ble Supreme Court in the case of **B.V.Nagesh and another Versus H.V.Sreenivasa Murthy (Supra)**.

20. On perusal of the impugned judgment, this court finds that the first appellate court has though not framed the points for determination, but on the basis of the arguments raised before the First Appellate court observed that nothing has been stated on behalf of both the parties for framing any new issue, therefore the issues framed by the trial court would be examined by the court. The relevant paragraph is extracted here-in-below:-

“इस न्यायालय के समक्ष उभय पक्ष की ओर से किसी नवीन वाद विन्दु के निर्धारण के सम्बन्ध में कोई कथन नहीं किया गया, इसलिए अधीनस्थ न्यायालय द्वारा विरचित किये गये वाद विन्दु की ही समीक्षा इस निर्णय में की जायेगी।”

21. After recording the aforesaid, the first appellate court proceeded to decide the issues framed by the trial court one by one and recorded its findings on all the aforesaid five issues, therefore it cannot be said that there is any violation of Order 41 Rule 31 CPC and impugned judgment vitiates and liable to be set aside on this ground alone. Thus the case of **Bala Devi (Smt.) Versus Mukhtyar Singh (Supra)** relied by learned counsel for the respondent no.1 is not applicable on the facts and circumstances of the present case.

22. Adverting to the facts of the present case the Suit filed by the plaintiff-appellant was decreed by the trial court, which was challenged before the First Appellate court. The First Appellate Court

recorded a finding that the trial court though mentioned all the facts mentioned in the plaint, but has not based his judgment on the evaluation of the evidence of the plaintiff-appellant and P.W.2 and only the evidence of the defendants-respondents have been referred and the suit has been decreed, whereas the plaintiff-appellant had to prove her case on the basis of her evidence and the Suit could not have been decreed on the basis of evidence of the defendants-respondents, but failed to disclose as to how the plaintiff-appellant has failed to prove her case and as to why the reference of evidence of the plaintiff-appellant and P.W.2 was not sufficient for deciding the issue no.1 in her favour.

23. The learned First Appellate Court has recorded that the trial court has referred the evidence of defendants-respondents i.e. D.W.1, D.W.2 and D.W.3 in detail, which is not required to be mentioned again in the judgment, which clearly shows that the evidence of defendants-respondents have not been considered by the First Appellate Court merely on the ground that they have been referred extensively by the trial court, whereas it is settled law that once the parties have adduced the evidence, the burden of proof loses its efficacy, and therefore evidence of both the parties is required to be considered and evaluated.

24. The First Appellate Court considering the averments of the plaintiff-appellant in paragraph 6 of the plaint that the defendants-respondents are very powerful persons and they are not ready to settle (Tafsia) the matter observed that the plaintiff-appellant claims herself to be the owner and in possession of the land in dispute then what settlement she wanted to do and held that it indicates that the plaintiff-appellant was not confirmed about her ownership on the land in dispute, but failed to consider the further averment made in paragraph 6 of the plaint that despite repeated requests of the plaintiff-appellant, the defendants-respondents are not ready to stop their illegal activities,

therefore the necessity of filing of suit arose. Thus on the basis of a sentence in a paragraph without considering the other averments made in the plaint and further averment in the said paragraph and the evidence adduced before the trial court, the presumption has been drawn by the appellate court that the plaintiff-appellant was not confirmed about her ownership on land in dispute, which could not have been done.

25. The learned First Appellate Court, in regard to the husk on the land in dispute, recorded a finding that if the same would have been of the plaintiff-appellant, the door should have been on the southern side and without considering the plea of the plaintiff-appellant in regard to the passage between the house of the plaintiff-appellant and husk recorded a finding that there is no explanation as to why the said distance has been left, whereas the plaintiff-appellant has given the explanation for the same i.e. for rain water, but it has not been considered in the light of the pleadings and evidence adduced. A presumption has also been drawn without any pleadings and evidence that if the said husk would have been of the plaintiff-appellant, it would have been got constructed in the northern side of her Baithka (sitting place) because no person would get his husk made adjacent to his house, but failed to consider that there is a passage between house and husk and if a person would not construct his husk adjacent to his house then why he would construct adjacent to the place where he/she may be sitting and entertaining his/her guests. However it is also required to be considered as to when the door of husk is not towards the house or sahan of the plaintiff-appellant, how she can claim it to be her.

26. The learned First Appellate Court recorded a finding that the plaintiff-appellant is claiming in her suit that the house No.1149 is situated since prior to Zamindari Abolition Act, whereas as per her statement in evidence the Pakka house was constructed 30-40 years

ago. Her statement has been recorded on 13.07.2007. Zamindari was abolished in 1952, therefor, certainly the said house would not have been constructed prior to abolition of Zamindari, even then the trial court has recorded a finding that the house of the plaintiff-appellant was on the land in dispute since prior to Zamindari abolition, but failed to consider as to whether there was any house or not at the time of abolition of Zamindari and even if the Kachcha house was there, it cannot be said that there was no house.

27. The First Appellate Court recorded a finding that the land appurtenant to the construction would settle with the owner of the construction under Section 9 and Section 7(aa) of the U.P.Z.A.&L.R.Act and the husk in the land in dispute comes under the category of construction, therefore the plaintiff-appellant could not have the owner of husk, but failed to consider that all the buildings situated within the limits of a State belonging to any person shall also continue to belong to that person and any land appurtenant thereto shall be deemed to be settled with him and a person of the categories mentioned in Section 7(aa) of the Act would continue with the similar right as was enjoying on the date immediately preceding the date of vesting and defendants-respondents are also claiming the said structure their on the ground that it settled with them under Section 9 of the Act, whereas the defendant-respondent No.1 i.e. D.W.1 and D.W.2 have specifically stated that they do not know about the abolition of Zamindari in their cross examination, which is in contradiction to their pleadings. Even otherwise the United Provinces Village Abadi Act, 1948, provides under Section 3 that all houses built in a village abadi and existing on the 15th day of August, 1947, shall, unless the contrary is proved, be presumed to have been built with the consent of the landlord. Section 4(b) of the said Act provides notwithstanding any custom or usage to the contrary in any agricultural village, a house-owner may make such construction in the

sahan darwaza or land appurtenant to such house as may be necessary for agricultural or domestic purposes.

28. The First Appellate Court, without considering the evidence of the plaintiff-appellant and P.W.2, recorded a finding that in the present matter the case of the plaintiff-appellant is not proved by the evidence of plaintiff-appellant and P.W.2 and she has failed to prove that she was in possession on the disputed husk since prior to abolition of Zamindari on account of which she has become the owner, whereas the plaintiff-appellant pleaded the same in her suit as well as deposed the same in examination-in-chief but no cross examination was made from her on this point in her cross-examination, but it has not been considered and no finding has been recorded as to why it is not proved.

29. The Hon'ble Supreme Court, in the case of **Maharaj Singh Versus State of U.P. and others (Supra)**, 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.*

30. The Hon'ble Supreme Court, in the case of **Budhan Singh Vs. Nabi Bux and Another (supra)**, has held that it is true that the legislature could have used the word "lawfully held" in place of the word "held" in section 9 but as mentioned earlier one of the dictionary meanings given to the word "held" is, "lawfully held". The expression "held" has been used in various other sections to connote possession by legal title, therefore 'held' means 'lawfully held'. It has been relied by a Coordinate Bench of this Court in the case of **Chandrajit Versus Baliram (Dead) and 6 others (Supra)**

31. The First Appellate Court on the one hand recorded a finding that even after adducing the evidence by both the parties the case was to be proved by the plaintiff-appellant first and on the other hand recorded that where both the parties have adduced the evidence the 'burden of proof' loses its importance, but without considering the evidence of the respective parties i.e. the plaintiff-appellant and defendants-respondents recorded a finding that keeping into mind the evidence adduced by the parties the commission report of Regular Suit No.471/96 i.e. Paper No.33-Ga/3 should have been considered, which is also in contradiction to its own findings and also failed to consider that the said report was in regard to a suit in which the parties

of the instant suit were not parties and the same was also not proved in this case in accordance with law. The Hon'ble Supreme Court, in the case of **Smriti Debbarma (Dead) through Legal Representative Versus Prabha Ranjan Debbarma (Supra)**, has held that the burden to prove facts rests with party who substantially asserts in the affirmative and not on the party which is denying it and if the parties fail to adduce evidence the suit must fail. The burden of proof and establish the title lies upon the plaintiff and onus of proof shifts and shifting is a continuous process in the evaluation of process. A Coordinate Bench of this Court in the case of **Habibullah and others Versus Yasin and another (Supra)** has held that a suit can be allowed on the strength of the evidence of the plaintiff and not on the weakness of the respondents. A Co-ordinate Bench of this court after considering the judgments of the Hon'ble Supreme Court in the case of **Baij Nath Ram (Dead) and others Versus Smt.Sonmati and others (Supra)** has held that where two contesting parties have led evidence, the burden of proof loses its importance and it would assume secondary importance. Thus when both the parties have led evidence, the same are to be considered in accordance with law and if on the evaluating the evidence of the parties, it is found that the strength of the evidence of the plaintiff is sufficient to prove his case in comparison to the defendant the suit can be allowed.

32. The First Appellate Court without considering the evidence adduced by the defendants-respondents and merely on the basis of their averments recorded a finding that P.W.2 was the interested witness as he was the relative of the plaintiff-appellant, whereas it was specifically denied by the P.W.2, which has been recorded but not considered and reason for not accepting it has also not been recorded. The First Appellate Court also discarded the evidence of plaintiff-appellant in view of some contradiction in her statement in regard to

the brothers of her husband, but failed to consider her evidence as discussed above.

33. A plea has been raised by the plaintiff-appellant that since both the parties were claiming the possession on the land in dispute and the construction thereon since prior to the abolition of Zamindari, therefore specific issue should have been framed in this regard in view of judgment and order dated 27.03.2019 passed in **Jhoori and others Versus Shambhoo Nath and others (Supra)** and the District Magistrate and Gaon Sabha should also have been impleaded to clarify the position. However in the said case the Coordinate Bench of this Court had observed that in the facts and circumstances of the said case the court found it appropriate. However in the present case though the plea of settlement of land is disputed under Section 9 of the U.P.Z.A.&L.R.Act has been raised by the defendants-respondents also, but in evidence the defendant-respondent no.1 and D.W.2 have specifically stated that they do not know about the abolition of Zamindari, therefore the plea taken by them seems to be nothing but a camouflage because a plea was taken by the plaintiff-appellant. However since the matter is being remitted, it is open for the appellate court to consider it in accordance with law.

34. This court also notices that the information given under the Right to Information on 13.04.2010 by the Police Station Jamo, District-Sultanpur was placed on record before the Lower Appellate Court as paper no.24-Ga/1, which indicates that the compliance of judgment and decree dated 12.01.2010 passed by the Civil Judge (Sr.Div.), Court No.15, Sultanpur was made by the police on an application made by the plaintiff-appellant on 14.02.2010, therefore it appears that the plaintiff-appellant was not in possession on the land in dispute on the date of judgment and decree dated 12.01.2010,

whereas the Suit was filed alleging therein that the plaintiff-appellant is owner and in possession of the land in dispute and defendants-respondents have neither any concern with the land in dispute nor in possession of the same. The interim injunction for maintaining the status quo by the parties was granted on 06.05.2005 in Civil Revision filed by the plaintiff-appellant before the Court of District Judge, Sultanpur and application for interim injunction was allowed by means of order dated 06.12.2006 by the trial court, therefore the First Appellate Court while considering the case and evaluating the evidence and material on record should also have considered it.

35. In view of above this court is of the view that though the First Appellate Court has considered all the issues framed by the trial court and no new issue was raised to be considered but recorded perverse findings on the basis of conjectures and surmises. Hence the same are not tenable in the eyes of law and liable to be set aside with a direction to re-consider and decide the appeal afresh. The substantial questions of law formulated in this appeal are decided accordingly.

36. This Second Appeal is, accordingly, **partly allowed**. The judgment and decree dated 21.11.2013 passed in Civil Appeal No.4 of 2010; Ram Karan Pandey and others Versus Shyampati by the Additional District Judge, Court Room No.4, District-Sultanpur is hereby set aside. The matter is remitted back to the First Appellate Court to consider and decide the Civil Appeal No.4 of 2010; Ram Karan Pandey and others Versus Shyampati in accordance with law and in the light of the observations made here-in-above in this order expeditiously and preferably within a period of six months from the date of production of a certified copy of this order without granting unnecessary adjournment to either of the parties. The parties shall appear before the First Appellate Court on 18th of September 2024. No order as to costs.

37. The Lower Court Record shall be remitted back to the Lower Appellate Court expeditiously and in any case within a period of two weeks from today.

(Rajnish Kumar, J.)

Order Date :-29.08.2024
Banswar