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Neutral Citation No. - 2024:AHC-LKO:73517

A.F.R

Court No. - 4

Case :- SECOND APPEAL No. - 403 of 2013

Appellant :- Kandhai

Respondent :- Smt. Chameli Devi And Ors.

Counsel for Appellant :- M.P.Yadav

Counsel for Respondent :- R.R.Dev,Prem Shanker Shukla

Hon'ble Rajnish Kumar,J.

1. Heard Shri Utkarsh Yadav, Advocate holding brief of Shri M.P. Yadav, learned counsel for the appellant and Shri R.R Dev, learned counsel for respondent no. 1. None appeared for other respondents.

2. This second appeal under Section 100 of Civil Procedure Code has been preferred against the judgment and decree dated 23.10.2023, passed in Civil Appeal No. 36/2012; Kandhai versus Smt. Chameli and others by Additional District Judge Court No. 4, District Faizabad affirming the judgment and decree dated 10.02.2012 passed in R.S 334 of 2001; Smt. Chameli Devi versus Kandhai and others by Additional Civil Judge, Senior Division, Court No. 14, Faizabad.

3. Learned counsel for the appellant submits that there is no dispute with regard to ownership of the land in dispute in favour of respondent no. 1 as a will was executed by Ram Jas, in her favour. However, the possession is disputed because after the house on the southern part of the land in dispute fell, nothing was constructed on the same by respondent no. 1 and it cannot be said to be the appurtenant land of the house of the respondent no. 1, therefore, the injunction could not

2.

have been granted in favour of respondent no. 1 on the said land. Therefore, the judgment and decrees passed by the trial court and lower appellate court are not sustainable in the eyes of law and liable to be set aside. He relies on ***Subhawati and others versus Rajbali and others; 1998 (16) LCD 777.***

4. Per contra, learned counsel for respondent no. 1 submits that the land in dispute alongwith the house constructed on A,B,C,D,E,F is in ownership and possession of respondent no. 1 on the basis of a will executed by her father Ram Jas and the appurtenant land thereto on the southern side was in possession of his father prior to abolition of Zamindari, therefore, it settled with him and continued to settle with respondent no. 1. Thus, she is the owner and in possession of the same. He further submits that merely because respondent no. 1 could not reconstruct the house on certain portion of land after the house had collapsed and became khandahar due to financial constraints, it cannot be said that respondent no. 1 is not in possession of the land in dispute and appurtenant land thereafter. The appeal has been filed on misconceived and baseless grounds. The substantial questions of law formulated by this court are not involved in this case. The appeal is liable to be dismissed with cost. He relied on a judgment rendered by a co-ordinate Bench of this Court in the case of ***Ramji and another versus Jagdish mallah and others; 2004 (96) RD 568.***

5. I have considered the submissions of learned counsel for the parties, I have perused the records.

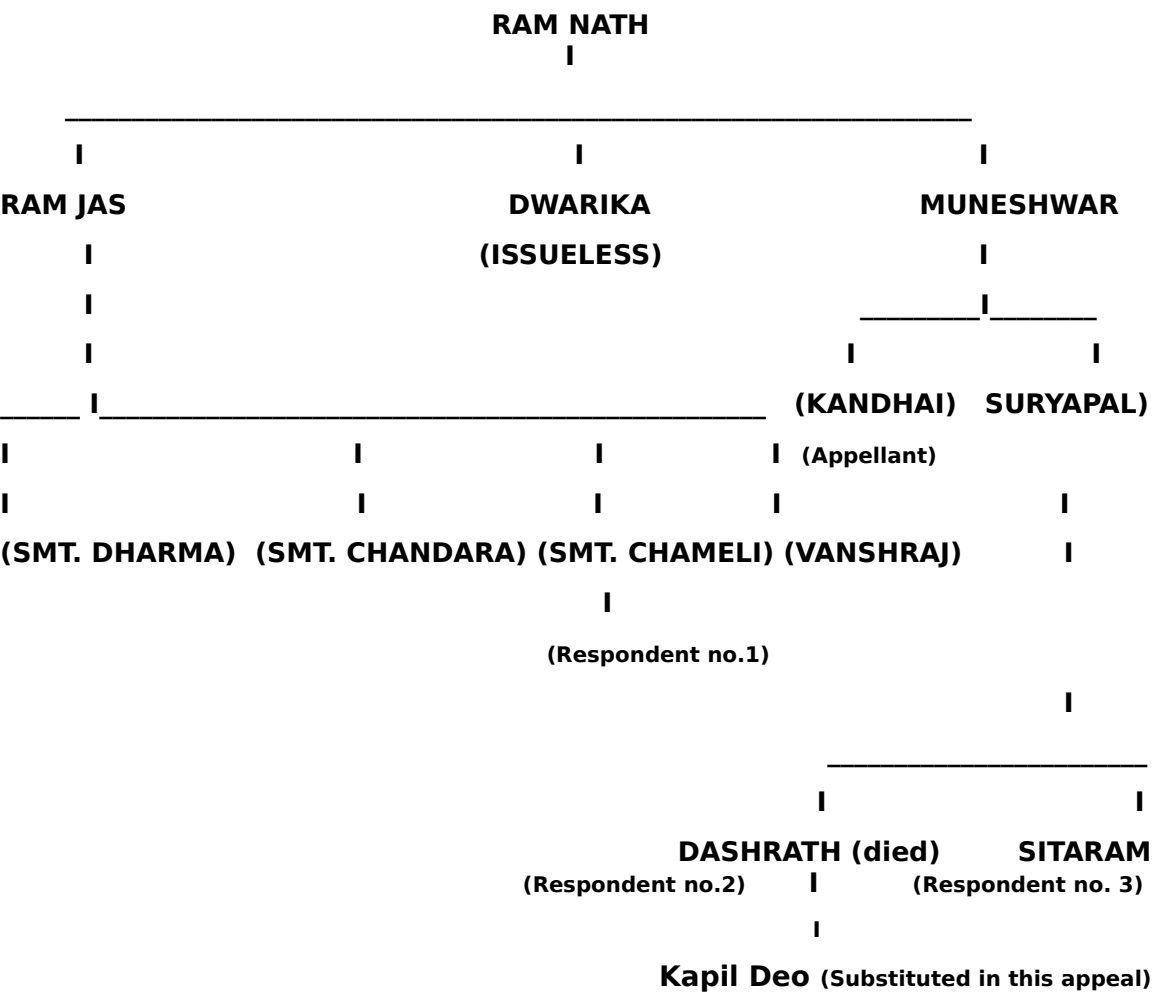
6. The following substantial questions of law have been formulated in this appeal:-

(1) Whether in view of Section 9 of U.P.Z.A and L.R Act, the appurtenant land shall be deemed settled with the plaintiff's father house which is in the form plain land?

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(2) Whether the relief of Permanent Injunction can be granted in a joint co-tenancy of the plaintiff and respondent?

7. The suit for permanent injunction was filed by the respondent no. 1 against the appellant and the respondent nos. 2 and 3 claiming title and possession on the land in dispute on the basis of will executed by her father. The Pedigree of the parties, as disclosed in judgment and decree passed by the trial court, is as under:-



8. According to the aforesaid pedigree, the original tenure holder of the property of the parties including the property in dispute was Ramnath. He had three sons namely Ram Jas, Dwarika and Muneshwar. Dwarika died issueless, therefore, the property was divided between Ram Jas and Muneshwar (half each) after the death of Ramnath. Ram Jas executed a will of his half portion in favour of his daughter Smt. Chameli. His property included house and an appurtenant land. Some

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portion of the house fell being old and is in the shape of khandahar. It appears that the son of Muneshwar namely Kandhai and two sons of his brother Suryapal namely Dashrath and Sitaram started interfering in the possession of the said portion of respondent no. 1, therefore, respondent no. 1 filed a suit for permanent injunction. Dasrath died during pendency of this appeal and substituted by his son Kapil Deo.

9. The pedigree is not in dispute. It is also not in dispute that after the death of Ramnath, his property was divided between his two sons namely Ram Jas and Muneshwar as his third son namely Dwarika had died issueless. It is also not in dispute that Ram Jas had executed the will of his half portion in favour of respondent no. 1 i.e one of his daughters, accordingly she is the owner of the land in dispute and had come in possession of the land in dispute.

10. The suit was filed by the respondent no. 1 stating that in the ancestral house of Ram Jas, there was a door on the eastern side of the house and the second door was on the southern side, where his two trees of Neem and one tree of Kathal were situated. Besides that there was a tree of Kaitha. Ram Jas had put a thatch on the southern side of the land shown as EFGH in the site plan appended to the plaint. The land shown as EFGH was an appurtenant land of the house of Ram Jas, which had settled with him under Section 9 of the U.P.Z.A and L.R. Act. The site plan indicates that there is a house on A,B,C,D and a Khandahar on C,D,E,F. Ram Jas had died on 26.10.1992 and prior to his death, he had executed a will dated 02.06.1986 in favour of respondent no. 1. Accordingly, she had become the owner of the whole house on A,B,C,D,E,F and of the appurtenant land marked as E,F,G,H and in possession thereof. She is still residing on the house on A,B,C,D and the house on C,D,E,F is in the shape of Khandahar. The suit was

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filed alleging that the appellant and the respondent no. 1, who were defendants in the suit started interfering in the possession of the plaintiff i.e. the respondent no. 1.

11. A written statement was filed denying the averments made in the plaint. However, it is not disputed that Ram Nath was the owner and in possession of the land of the whole property of the parties prior to abolition of Zamindari. After his death, the property was divided between his two sons as one had died issueless. Therefore, there is no dispute that the property shown as E,F,G,H was part of the house of Ram Jas and now respondent no. 1 situated on A,B,E,F, part of which i.e. C,D,E,F is now in the shape of Khandahar. The only objection, which has been raised is that since no new construction has been made on the portion C,D,E,F, therefore, now that cannot be treated as an appurtenant land of the house of respondent no. 1.

12. The trial court, after considering the pleadings, evidence of the parties and the material on record found that the respondent no. 1 has proved her ownership and possession on the land in dispute. The evidence of D.W.-1 i.e. appellant Kandhai has not been found reliable on the ground that he has no knowledge about the facts and has given contradictory evidence. The appellant had opened a door on the eastern wall on the land in dispute during pendency of the suit, which was found to be true. The evidence of D.W.-2 Prem Kumar has also not been found to be reliable being contradictory. Considering the evidence of P.W.-1 i.e. respondent no. 1 and the Commissioner report in which he had recorded that the door on the eastern wall of the defendant Kandhai does not seem to be of the time of construction of house and it appears to have been constructed subsequently, a finding has also

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been recorded that the appellant had an appurtenant land on the northern side.

13. After considering the findings recorded by the trial court in detail and the pleadings, evidence and material on record including the Commissioner Report, the lower appellate court found that the respondent no. 1 has proved his ownership and possession on the land in dispute and the trial court has recorded the findings in accordance with the facts and evidences, which are on record and according to which the respondent no. 1 is the owner and in possession of the land in dispute and dismissed the appeal. Hence, this second appeal has been filed. The aforesaid substantial questions of law have been formulated in this second appeal.

14. Section 9 of the U.P Zamindari Abolition and Land Reforms, Act, 1950 (hereinafter referred to as Act of 1950) provides that all buildings situated within the limits of the estate belonging to or held by intermediaries, of tenant or other persons whether residing in the village or not, shall continue to belong to be held by such intermediaries or tenants, as such, as the case may be. Section 9 of the Act of 1950 is reproduced hereinbelow:-

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

All wells, 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."

15. In view of the above, the site of the wells, trees in abadi and all buildings and the area appurtenant thereto shall be deemed to be settled with the person, who was holding the same prior to abolition of

Zamidari. Thus, the area appurtenant to the building also stands settled with the person who was holding the building. Section 9 of the Act of 1950 provides for conceptualizing the area appurtenant to buildings to have settled with them. 'Appurtenance', in relation to a building etc. is dependence of the building on what appertains to it for its use as a building. It has been considered by the Hon'ble Supreme Court, in the case of ***Maharaj Singh versus State of Uttar Pradesh and others; (1977) 1 SCC 155*** and held that in short, the touch stone of "appurtenance" is dependence of the building on what appertains to it for use as a building. The Hon'ble Supreme Court has also observed that the High Court has granted viz. 5 yards of surrounding space, is sound in law although based on the guess work in fact. As such in fact the Hon'ble Supreme Court has observed that 5 yards of surrounding space is based only on guess work. The relevant paragraph nos. 27 to 29 are extracted hereinbelow:-

"27. "Appurtenance", in relation to a dwelling, or to a school, college includes all land occupied therewith and used for the purposes thereof. 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 these 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 incorporal 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.

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 Section 9 viz. buildings.

29. This conclusion is inevitable, although the contrary argument may be ingenious. That the High Court has granted viz. 5 yards of surrounding space, is sound in law although based on guesswork in fact. The appeal fails, and is dismissed but, in the circumstances, without costs."

16. 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

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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.

17. A Co-ordinate Bench of this Court in the case of ***Ramji and another versus Jagdish Mallah and others (supra)***, after considering provisions of Section 4, 6 and 9, has held that Section 9 mitigates the rigors of vesting for a continuity of possession of wells, trees, buildings and the area appurtenant thereto to those persons who held them to the date of vesting and that the site or well or the building with the area appurtenant thereto shall be deemed to be settled with the said person who had been in the possession of it before the date of vesting. The relevant paragraph nos. 10 to 12 are extracted hereinbelow:-

"10. Section 4 of the Act provides that w.e.f. the date to be notified, all the estates in U.P. to which the Act applies shall stand transferred to and shall vest in the State of U.P. free from all encumbrances. The vesting of the estate was dependent on the issuance of the notification by the State of U.P. Pursuant to the issuance and publication of the notification under Section 4 of the Act, the rights, title and interest of all the intermediaries in every estate ceased and came to an end by virtue of Section 6 of the Act and that the same vested in the State of U.P. free from all encumbrances. However, the provisions of Section 6 are subject to the provisions of Section 9 of the Act. Section 9 is an exception to Section 6 of the Act, which reads as under:

.....

11. From a perusal of Section 9 of the Act, it is clear that this section mitigates the rigours of vesting and provides for a continuity of the possession of the wells, trees, buildings and the area appurtenant thereto to those persons who held them before the date of vesting and that the site of the well or the building with the area appurtenant thereto shall be deemed to be settled with the said person who had been in the possession before the date of vesting.

12. Section 9 not only deals with the buildings and wells, but also with their sites. The object of the section is two fold. Firstly, the properties, namely, trees, wells and buildings situate within an estate and belonging to or held by an intermediary, tenant or any other person shall continue to belong to them irrespective of whether they are residents of the village or not. Secondly, the sites of the wells and buildings with land appurtenant thereto shall be deemed to be settled with such persons."

The case of ***Maharaj Singh versus State of U.P (supra)*** has also been considered in this case. The similar view has been taken by

another co-ordinate Bench of this court, in the case of ***Subhawati and others versus Rajbali and others (supra)***.

18. Admittedly, the building i.e. the house and the area appurtenant thereto had settled with the father of the respondent no. 1 after the abolition of the zamindari, which stands settled with respondent no. 1 as a will deed was executed in her favour by her father.

19. There is no provision and learned counsel for the appellant also could not point out any provision to show that once a building or the area appurtenant thereto settled with a person under Section 9 of the Act of 1950, can be said to be unsettled, if some portion of the building has fallen in any condition and no construction could be raised thereon for any reason or on any other ground. Therefore, the building and the portion between the land appurtenant to the building settled with respondent no. 1 cannot be said to be not belonging to respondent no. 1 only because she could not raise construction after the construction fell.

20. In view of the above, the contention of learned counsel for the appellant is not tenable for the reason that the land in dispute was the part of the house of respondent no. 1, which is now in the shape of Khandahar and if she could not reconstruct after it fell down, it cannot be said that the same is an appurtenant land to the house of respondent no. 1 and it is not settled with her, whereas she is owner and in possession of the same.

21. Since there is no dispute between the parties that after the death of Ram Nath, his property was divided between his two sons (1/2 each), therefore, it cannot be said that the appellant was also in possession of the land in dispute. The division after death of Ram Nath has been admitted by the appellant, therefore, the question of co-

tenancy after partition in the ancestral property does not arise. Once there was a partition between the sons of Ramnath and one of his son executed a will in favour of his daughter i.e. respondent no. 1, she became the exclusive owner and in possession of the land in dispute and cannot be said to be a co-tenant.

22. Having gone through the pleadings, evidence and material on record and the findings recorded by the Courts' below, this court does not find any illegality or error in the impugned judgment and decrees as they have been passed on the basis of record with sound reasoning.

23. It is also settled in law that concurrent findings of facts recorded by the two courts below are not liable to be set aside until and unless the findings are perverse. This Court, in the case of ***Surya Kunwari versus Nanhu and others; 2019 (37) LCD 2346***, has held that the concurrent findings of fact recorded by the two courts below are not liable to be set aside until and unless the findings are perverse. The relevant paragraph nos. 11 to 16 are extracted here-in-below:-

"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.*

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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."

24. In view of above and considering the overall facts and circumstances of the case, this court does not find any illegality or error in the impugned judgment and decrees passed by the two courts below and this appeal has been filed on misconceived and baseless grounds. The substantial questions of law formulated in this appeal are answered accordingly.

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

Order Date :- 7.11.2024
DiVYa