

Neutral Citation No. - 2024:AHC-LKO:46738

Court No. - 6

Case :- SECOND APPEAL No. - 313 of 2018

Appellant :- Nathu Ram And Another

Respondent :- Mohd. Taufiq And Anr.

Counsel for Appellant :- Vijay Kumar Pandey, Anu Pratap
Singh, Manuvendra Singh, Mohiuddin Khan

Hon'ble Rajnish Kumar, J.

1. Heard, Sri Anu Pratap Singh, learned counsel for the appellants. None appeared on behalf of the respondents despite sufficient service and the case had proceeded exparte by means of the order dated 21.03.2024.

2. The instant second appeal has been filed for setting aside the judgment and order dated 25.09.2018 and decree dated 09.10.2018 passed by the VIIth Additional District & Sessions Judge, Pratapgarh in First Appeal No.60 of 2012; Mohd. Taufiq versus Nathu Ram and Others.

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

“(i) Whether the contention of the appellants/defendants based upon the protection and relief under Section 9 of U.P. Z.A. & L.R. Act has been considered by the lower appellate court?”

“(ii) Whether the lower appellate court ignoring the provisions of Section 9 of the U.P. Z.A. & L.R. act could deny the claim of the appellants/defendants?”

4. The brief facts of the case, giving rise to this second appeal are that the respondent-plaintiffs had filed a suit for permanent injunction, which was amended during pendency of the suit and the prayer for

possession of land in dispute was also added. The suit was filed alleging that the respondent-plaintiffs are in possession of the land in dispute since the time of father-in-law of the father of the respondent-plaintiffs Meer Bux. Kalushah was the maternal grand father of the respondent-plaintiffs and he was in possession of the land in dispute situated on the eastern side of the abadi land. The sons and daughter of Kalushah had died. The parents of the respondent-plaintiffs came into possession during the time of Kalushah and had made madaha, chhapar, charahi, khuta and planted trees and are in possession of the same since abolition of Zamindari. The land in dispute alongwith the land attached on the eastern side settled with the father of the respondent-plaintiffs Meer Bux who became the owner of the constructions and trees therein. Thus, he became the owner of the land in dispute under Section 9 of the U.P. Z.A. & L.R. Act 1950 (here-in-after referred to as the Act of 1950). After death of Meer Bux about three years back, the respondent-plaintiffs and their brother Mohd. Rafiq came into possession of the land in dispute, but Mohd. Rafiq went to his in-laws house and settled there. He left his portion of land and abadi in favour of the respondent-plaintiffs. Thus the respondent-plaintiffs have equal share in the land in dispute.

5.It was also stated that there was one tree of Mahua and two Baas Kothi planted by the father of respondent-plaintiffs on the land in dispute which were cut by the appellant-defendants during pendency of the suit on 20.04.2006 and made forcible possession on the part of the land in dispute marked as A, B, F, E and made new construction thereon, which is shown as M 12 in the map and also constructed a toilet and some other construction on which there is no roof. A hand pump and thatch on the southern side of M-12 was also kept and accordingly the possession of the respondent-plaintiffs was taken away. The alternative plea of adverse possession was also taken on the ground that the respondent-plaintiffs are in possession of the land

in dispute and it is in the knowledge of the appellant-defendants since long time. It was also alleged that the house of the appellant-defendants is at a long distance from the land in dispute on the eastern side which is in the middle of the village where all his works of abadi are being done. The appellant-defendants have no concern with the land in dispute. Since the appellant-defendants used to threaten to make possession and cut trees and stop the flow of water and made construction on the land in dispute, therefore the suit was filed for permanent injunction in regard to the land in dispute marked as A, B,F,E. During pendency of the suit, the respondent-plaintiffs had made possession on the land in dispute, therefore prayer for possession was also added.

6. The suit was contested by the appellant-defendants by filing a written statement with a counter claim. It was alleged by the respondent-plaintiffs that they have no concern with the land in dispute. One tree of Mahua and one tree of Neem on the land in dispute were about 100 years old which had fallen in the last rains, the wood of which has been used by the defendant-appellants. It was also alleged that the Baans Kothi in the land in dispute was planted by the predecessor-in-interest of the defendant-appellants which were also cut as per convenience. It was also alleged that the claim of the respondent-plaintiffs that they have got the land in dispute from the grand maternal uncle through their father Kalushah is wrong and misconceived, whereas the father of the respondent-plaintiffs Meer Bux was a fakir by caste who used to live in Village Rasooli Majre Ramnagar Bhojpur, Paragana and Tehsil-Sadar, District-Pratapgarh during his life time. He came to Aurangabad about 25 years back and settled there and got the construction made with the permission of the defendant-appellants and other villagers. The exit of the construction made by the respondent-plaintiffs is on the eastern and northern side and all the works of abadi are done on the eastern side. He had no

concern with the land in dispute on the western side of his house. It has further been alleged that as per the pedigree of the respondent-plaintiffs in paragraph 21A of the written statement, there was a son of Kalushah, namely Niyamat and his daughter Jaitulnisha who were besides the mother of the respondent-plaintiffs Mariyam Begum. The descendants of the son of Kalushah i.e. Niyamat Ali are still residing on the land which they got from Kalushah. Therefore the claim of the respondent-plaintiffs that Kalushah had only one daughter Mariyam Begum, from whom the property has come to the respondent-plaintiffs, is not correct.

7. The defendant-appellants have also given pedigree in the written statement and it has been stated that the property in dispute and the land appurtenant thereto on the eastern and northern side of the same was being possessed by their predecessor-in-interest Ram Kumar who used to live in the same after constructing the house since prior to abolition of zamindari. The said Ram Kumar had died issueless prior to abolition of zamindari. Therefore all his property devolved on his brother Ghisai who remained in possession on the same during his life time, thereafter Kashideen and then the defendant-appellants came into possession. The house constructed by Ram Kumar on the said land had fallen, therefore the defendant-appellants had kept thatch and made houda etc. on the land in dispute and the land appurtenant thereto. It was further alleged that the respondent-plaintiffs, after the first commission made basic changes in the land in dispute and constructed hand pipe, bathroom and new thatch etc, whereas the constructions on the northern side of the defendant-appellants are existing. The defendant-appellants also alleged that during pendency of the suit, the respondent-plaintiffs have made forceful possession on Chappar, Sariya and Baithkaa etc., on account of which the possession of the defendant-appellants have been taken away since August 2008, therefore the requirement of filing of the counter claim arose.

Thus the prayer was made that the suit of the respondent-plaintiffs be dismissed and the counter claim be allowed and the respondent-plaintiffs be directed to remove their possession from the land in dispute.

8. The respondent-plaintiffs filed replication/written statement to the counter claim denying the averments made in it and reiterating the averments made in the plaint. The position in regard to the pedigree given by the defendant-appellants was clarified. It has been stated that Kaluram's son Niyamat had died during his life time and the descendants of Niyamat Ali shown in the pedigree are sons of his wife Jaituna Begum and her second husband Mohar Ali. The sons of Mohar Ali keep vengeance with the respondent-plaintiffs and they are in possession of the land of Mohar Ali. It was also alleged that the defendant-appellants have made forceful possession on the northern side of the land in dispute by making construction on the eastern side and erecting a hand pump on the southern side in the year 2007. Therefore the prayer was made that the defendant-appellants be directed to remove their possession and hand it over to the respondent-plaintiffs. An additional written statement was filed by the defendant-appellants against the replication which was filed by the respondent-plaintiffs alleging therein that there is no person namely Ram Kumar predecessor-in-interest of the respondent-appellants and there was no brother of Ghisai namely Ram Kumar. Therefore the claim on the basis of the property of Ram Kumar is only concocted and baseless, therefore the counter claim is liable to be rejected.

9. On the basis of pleadings of the parties, 8 issues were framed. The issue no.1 is as to whether the land in dispute is part of the abadi of the respondent-plaintiffs and are in possession of it. The issue no.5 is as to whether the property described in the counter claim is part of the abadi of defendant-appellants and they are in possession of it. Other issues were in regard to the valuation of court fees, limitation etc.

After the issues were framed, evidence was adduced by the parties in which Mohd. Taufiq appeared as P.W.1 and Munnawar as P.W.2 on behalf of the respondent-plaintiffs and Raghuvver as D.W.1 and Ram Kumar as D.W.2 on behalf of the defendant-appellants. Certain documentary evidences were also filed by the parties. After considering the pleadings of the parties, evidence and material on record, the suit filed by the respondent-plaintiffs was dismissed and counter claim filed by the defendant-appellants was allowed by means of the judgment and decree dated 13.03.2012. A direction was also issued to the respondent-plaintiffs to remove their possession and hand over the possession to the defendant-appellants.

10. Being aggrieved by the aforesaid judgment and decree passed in Regular Suit, Civil Appeal No.60 of 2012 was filed by one of the plaintiffs Mohd. Taufiq i.e the plaintiff no.2 arraying the appellant-defendants and the respondent no.2/plaintiff no.1 as respondent in the appeal. In the appeal, two points of determination were made. First of which is as to whether the plaintiffs are the owner of land in dispute on the basis of grounds given in the plaint. The second point of determination is as to whether the counter claimant/respondent-appellants are the owner of the land in dispute on the basis of grounds given in the counter claim.

11. The first point of determination in regard to the ownership of the land in dispute of the respondent-plaintiffs has been decided against them holding that the respondent-plaintiffs have failed to prove their possession and ownership on the land in dispute. The First Appellate Court, after considering the pleadings of the parties and material on record, found that the property of Kalushah was Gata No.375,378 and 381, the new number of which is 419,423 and 431. After scrutinizing the evidence adduced by P.W.1, the First Appellate Court came to the conclusion that the respondent-plaintiffs have failed to prove that they are the only legal heirs of Kalushah as according to their evidence

Kalushah had two sons and two daughters namely Niyamat Ali, Nawab, Mariyam Begum and Jaituna. Mother of P.W.1 was Mariyam Begum. Jaituna was married in Sorai, District Sultanur. Liyakat had one daughter. Her name was Isratul, who is still alive. Nawab Ali have no children. Jaituna was wife of Liyakat. After death of Liyakat, Jaituna married to Mohar Ali. After marriage, Mohar Ali came to live with Jaituna. Sarid, Habib and Raseed were born to Mohar Ali and Jaituna. Therefore as per own admission of the plaintiff-respondents, their mother was not the only legal heir of Kalushah and one of his legal heir Isratul is still alive. As such the plaintiff-respondents have failed to prove that they are owner of the land in dispute on the basis of grounds given in the plaint.

12. The second point of determination has been decided by the First Appellate Court against the defendant-appellants on their counter claim, which is under challenge in this second appeal. The appellate court found that the defendant-appellants are claiming that the land in dispute has come to them from Ram Kumar, whereas the respondent-plaintiffs have stated that there was no person namely Ram Kumar in the pedigree of the defendant-appellants. Neither there was any brother namely Ram Kumar of Ghisai the predecessor-in-interest of the defendant-appellants. The First Appellate Court also found that the defendant-appellants have not placed on record any documentary evidence to show that their predecessor-in-interest Ghisai had any brother namely Ram Kumar. It has also been found by the First Appellate Court that the maps made by the Advocate Commissioner indicates that the house of the respondent-plaintiffs is situated on the western side of the house of the defendant-appellants and the land in dispute is existing on the western side of the house of the respondent-plaintiffs which has extended up to the north, therefore the land in dispute cannot be said to be appurtenant land of the house of the defendant-appellants. The First Appellate Court has also recorded a

finding that the predecessor-in-interest of the respondent-plaintiffs were got settled on the western side of the house of the defendant-appellants with his permission and permission of other villagers, whereas if they had settled on the land of the defendant-appellants then there was no question for seeking permission from other villagers.

13. Learned counsel for the appellants submitted that the respondent-plaintiffs had no exit on the western side of their house and they had opened the exit some time before on account of which there was some dispute between the parties which was settled through Panchayat and it was decided that the respondent-plaintiffs can use that exit only as a window. It has also been submitted by learned counsel for the appellant that the name of the predecessor-in-interest of the defendant-appellant is recorded at serial no.139 in copy of Khasra Bandobasht Awwal, Mouja-Aurangabad, Patti, District Pratapgarh, therefore, it cannot be said that the predecessor-in-interest of the defendant-appellants were not in possession of the land in dispute.

14. Serial No.139 of the aforesaid copy of khatuani indicates that the name of Dudhu is mentioned, which does not indicate firstly that it is in regard to the land in dispute and secondly it is in the name of Dudhu and the claim of the defendant-appellants is that the land in dispute has come to them through Ram Kumar but they have not shown as to how Ram Kumar got the said land and despite specific objection taken by the respondent-plaintiffs that there was no person namely Ram Kumar brother of Ghisai, no cogent evidence has been adduced to show that there was any brother of Ghisai namely Ram Kumar and as to how he acquired the land in dispute. Therefore the contention of learned counsel for the appellants is mis- conceived and not tenable and liable to be repelled only.

15. Perusal of the site plan prepared by the Advocate Commissioner, which is not disputed, indicates that the land in dispute is A, B, F, E.

There is a way on the north side of land in dispute, which goes to the house of the defendant-appellants which is after house of the respondent-plaintiffs. It has also been stated by D.W.1 in his evidence that number of the land in dispute is 25, the length of which is 10 latha and width 8-10 latha. The house of Ram Kumar is on the northern side of it and on the southern side there is Kabristan and house of Khalil. In the eastern side of the land in dispute, the house of Taufiq and Majeed is there and chak road and Baag (Orchard) of Durga Prasad is on the western side. Sahan darwaja of Abdul Majeed and Taufeeq is on the western side. On the eastern side of house of Abdul Majeed and Taufeeq there is hata of Sabir Ali. Adjacent to the constructed house on the eastern side, there is kachha house of D.W.1 and his brother and there is two madha on the eastern side. Sahan darwaja is on the northern side and chappar is also on the northern side of the constructed house, which is from east to west in which his animals are kept. There is a mud wall in northern side of the said thatch which is east to west which turns from the western corner towards the south. Earlier there was a chhappar dalan in place of thatch which was made by the father. D.W. 2 Ram Kumar has stated in his evidence that on the eastern side of the ancestral residence of the defendant-appellants there is house and abadi of Shiv Shanker Pandey. Thus the First Appellate Court found that the evidence of defendant-appellants is in consonance with the site plan prepared by the Advocate Commissioner, according to which the house and sahan etc. of the defendant-appellants is at a distance from the land in dispute. Thus it is evident that the land in dispute is not adjacent or near but at a great distance from the house of the defendant-appellants, whereas they are claiming the rights on the land in dispute under Section 9 of the Act of 1950.

16. The defendant-appellants have also placed on record the documentary evidence i.e paper no.62 Ga 1/28, Jot Chakbandi Aakar

Patra 45, in which the name of Isratul daughter of Niyamat Ali is recorded. Similarly in Paper No.62 Ga/30, the name of Niyamat Ali son of Kalushah is recorded. In Paper No.62 Ga 1/32, the name of Niyamat Ali , son of Kalushah resident of Aurangabad is recorded. The copy of NCR has been placed on record as 62 Ga/36, which is in regard to the dispute regarding Nali between the parties. Thus the First Appellate Court considering the aforesaid evidence came to the conclusion that the property came to Niyamat Ali after death of his father Kalushah but it has been stated by the respondent-plaintiffs that no sons and daughter of Kalsushah was surviving, which is contrary to the documentary evidence. Besides it after death of Niyamat Ali, name of his daughter Ishratul was recorded.

17. Section 9 of the Act of 1950 provides that all wells, trees in abadi and all buildings situated within the limits of an estate, belonging to or held by an intermediary or tenant or other persons, whether residing in the village or not, shall continue to belong to or be held by such intermediary or 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. Thus the building and area appurtenant thereto can be said to have been settled with a person who was in possession on the land in dispute on the date of vesting under the Act of 1950. Though the defendant-appellants are claiming their rights under Section 9 of the Act of 1950 but the claim is not sustainable firstly for the reason that land in dispute is not appurtenant land to the house of the appellant-defendants and it is at a considerable distance after ahata of Sabit Ali and the house etc. of the respondent-plaintiffs. Secondly, the defendant-appellants are claiming their rights over the land in dispute from their predecessor-in-interest Ram Kumar in regard to whom a plea has been set up by the respondent-plaintiffs that there was no person namely Ram kumar in

the pedigree of the appellants and the defendant-appellants have failed to adduce any cogent evidence to show that Ram Kumar was in the pedigree and if he was, as to how he got the land in dispute, whereas the record indicates the name of Dudhu, however it does not indicate that it is in regard to the land in dispute.

18. The Hon'ble Supreme Court, considered the appurtenance, in the case of **Maharaj Singh versus State of U.P. and others;(1976) 1 SCC 155** and 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. ."

19. In view of above, this Court is of the view that the First Appellate Court after considering the pleadings, evidence and material on record has come to the conclusion that the defendant-appellants have failed to prove that they are the owner of the land in dispute on the basis of the claim set up in the counter claim and land in dispute is situated at a distance from the house of the defendant-appellants, therefore they cannot be the owner of the land in dispute. The findings have been recorded in regard to the appurtenance of the land in dispute holding that the land in dispute is not appurtenant to the house of the defendant-appellants, therefore merely because Section 9 of the Act of 1950 has not been mentioned in the findings will not vitiate the findings recorded by the First Appellate Court because the findings are in terms of Section 9 of the Act of 1950, therefore the contention of the defendant-appellants based upon the protection and relief under Section 9 of the Act of 1950 have not been considered and the relief has been declined ignoring the said provision is misconceived and not tenable. It is also settled preposition of law that mere non mentioning of any provision or wrong mentioning of provision does not vitiate an order. Thus, the substantial questions of law are answered accordingly.

20. In view of above and considering the overall facts and circumstances of the case this court is of the view that there is no illegality or error in the impugned judgment and order. Even otherwise in view of provisions made in Section 99 of the Code of Civil Procedure 1908, since the defendant-appellants have failed to prove their ownership on the land in dispute, it would not affect the merits of the case in any manner and the impugned judgment and decree cannot be set aside. Thus, this Court is of the view that trial court as well as the First Appellate Court have recorded finding of facts on the basis of pleadings, evidence and material on record as well as the commission report, which does not suffer from any illegality, error or perversity which may require any interference by

this Court. This second appeal has been filed on mis-conceived and baseless grounds, which is liable to be dismissed.

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

(Rajnish Kumar,J.)

Order Date :- 10.07.2023
Akanksha