

Court No. - 37

Case :- SECOND APPEAL No. - 205 of 2014

Appellant :- Nazir Ahamad

Respondent :- Mohammad Lookman And 10 Others

Counsel for Appellant :- Amit Kumar Asthana, Govind Narain
Srivastava

Counsel for Respondent :- A.P.Singh, Krishna
Mohan, Raghvendra Prakash

Hon'ble Dinesh Pathak, J.

1. Heard learned counsel for the parties.
2. Appellant is aggrieved with the judgment dated 30.08.2012 passed by the trial court whereby counter claim filed on behalf of contesting defendants for possession and damages has been allowed and affirmed by first appellate court vide its judgment dated 04.12.2013.
3. Plaintiff-appellant has filed a suit, being O.S. No. 274 of 1999, for permanent prohibitory injunction against the defendants, restraining them from interfering in his peaceful possession over the property in question, and declare the registered sale deeds dated 05.07.1999 and 17.07.1999 null and void said to have been executed by Jinnat and others (defendant IIInd set) in favour of the Mohammad Lookman and Others (defendant Ist set). During pendency of the suit, defendants have filed counter claim with the relief for possession over the house in question and for damages. Learned trial court, vide judgment dated 30.08.2012, has dismissed the suit filed on behalf of plaintiff-appellant, however, allowed the counter claim filed on behalf of defendants-respondents with a specific direction that possession of the house in question, which is shown by letters a, b, c, d, e, f, g, h, i, j, k and l at the foot of the plaint, shall be handed over to the defendants within a period of 90 days. Apart from that, defendants were held entitled for the damages to the tune of Rs. 1000/- per mensem from July, 2001 which was directed to be paid within 90 days as well. Having been aggrieved with the judgment passed by the trial court, plaintiff-appellant has preferred two appeals. First, being Civil Appeal No. 214 of 2012 against the dismissal of suit and, second being Civil Appeal No. 215 of 2012 against allowing the claim petition. Learned appellate court, vide common judgment dated 04.12.2013,

has dismissed both the aforesaid civil appeals. Having been aggrieved with the common judgment dated 04.12.2013, plaintiffs-appellants have preferred two separate second appeals, first, being Second Appeal No. 79 of 2014 (Nazir Ahmad Vs. Lookman and Others) assailing the judgment dated 04.12.2013 passed in Civil Appeal No. 214 of 2012; and, another, Second Appeal No. 205 of 2014 assailing the order dated 04.12.2013 passed in Civil Appeal No. 215 of 2014. It is apposite to mention that Second Appeal No. 79 of 2014 arising out of dismissal of suit, has been dismissed by coordinate bench of this court vide judgment dated 28.01.2014 and same has attained finality between the parties. For ready reference judgment dated 28.01.2014 passed in Second Appeal No. 79 of 2014 is quoted herein below:

"1. Heard Sri Ashish Kumar Srivastava for the appellant and Sri Krishna Mohan and Sri S.K. Mishra for the respondents.

2. This second appeal has been filed from the decree of Additional District Judge, Court No.-3, Azamgarh, dated 4.12.2012, passed in Civil Appeal No. 214 of 2012 Nazir Ahamad Vs. Mohammad Lookman and others, dismissing the appeal of the appellant and affirming the decree of the trial court.

3. Nazir Ahamad (appellant) filed a suit (registered as Original Suit No. 274 of 1999) for permanent injunction, restraining the respondents from interfering in his possession over the house in dispute, situated in plot 313 of village Shivli tappa Athausi, (mohalla Chakla), pargana Nizamabad, district Azamgarh and for declaring the sale deeds dated 05.07.1999 and 17.07.1999 executed by Jinnat and others, (defendants second set), in favour of Mohammad Lookman and others (defendants first set) in respect of the property in dispute, as void. It has been stated by the plaintiff that the property in dispute was abadi land and house situated within the municipal limit of district Azamgarh. Subrati son of Bhaggal, Fufa of the plaintiff was owner of the property in dispute. Subrati had three daughters and no male issue. The daughters were married and residing at their husbands' house. The plaintiff was living with Subrati and his wife Smt Aisha, since his childhood and was looking after them in their old age. Due to services rendered by the plaintiff, Subrati voluntarily executed a will dated 05.06.1974 in his favour of the properties in dispute. Subrati died on 11.09.1980 while his wife Smt. Aisha had already died during his life time. After death of Subrati, the appellant inherited the property in dispute, on the basis of Will dated 05.06.1974. The daughters of Subrati neither inherited the property in dispute nor were in possession of it. They never asserted any right over it. After death of Subrati on 11.09.1980, the name of the plaintiff was mutated in the municipal record as an heir of Subrati. However, the daughters have illegally, showing themselves as the owner of the property in dispute, executed the sale deeds dated 05.07.1999 and 17.07.1999 in favour of the defendants first set Mohammad Lookman and others. On the basis of the aforesaid sale deed Mohammad Lookman and others could not get possession over the property in dispute. On these allegations the suit was filed.

4. The suit was contested by the defendants first set. They filed their written

statement as well as counter claim. The defendants denied execution of Will dated 05.06.1974 by Subrati in favour of Nazir Ahmad. It has been stated that after death of Subrati, the property in dispute was inherited by his three daughters. It has been stated that Nazir Ahmad, being relation of Subrati, was living in the house of dispute as a licensee. As he has begun to claim adverse interest over the property in dispute as such they decided to take possession over the property in dispute from him. Accordingly the prayer was made in the counter claim that the plaintiff be ejected from the house in dispute and possession be delivered to the defendants first set who have purchased the property in dispute from defendant second set.

5. The suit was tried by Civil Judge (Senior Division) Azamgarh, who framed nine issues on the pleadings of the parties. The plaintiff, apart from documentary evidence, examined himself as PW-1 and Shekh Idu as PW-2, Mazid Ahmad as PW-3 and Jagarnath as PW-4. The defendants, apart from documentary evidence, examined Rizwana as DW-1, Mohammad Islam as DW-2 and Mohammad Ashraf as DW-3. Issue no. 1 was framed in respect of the title of the plaintiff over the house in dispute. The trial court found that Ram Khelavan and Hari Nath were shown as the attesting witnesses of the Will dated 05.06.1974. It is alleged that both of them are dead. The plaintiff examined Shekh Idu, PW-2, to prove due execution of the Will. Shekh Idu, in his statement, has stated that the Will was executed in his presence and Subrati as well as Ram Khelavan and Hari Nath affixed their thumb marks over it. He stated that due to old age and some disease, Subrati could not make his signature as such he used to affix his thumb impression instead of signatures. The trial court found that original Will was neither put before the witness nor he has proved its execution. The trial court further found that although Shekh Idu in his statement has stated that Hari Nath used to affix his thumb impression but the defendants have filed vakalatnama of Hari Nath in another case showing that Hari Nath used to make signature and not the thumb mark. On these discrepancies, the trial court found that due execution of the Will was not proved. As the due execution of the Will in favour of the plaintiff was not proved and admittedly the defendant second set were the daughters of Subrati, it was held that they inherited the property in dispute after death of Subrati and the sale deed executed by them in favour of defendants first set, was valid. So far as the possession of the plaintiff is concerned the trial court found that the possession of the plaintiff over the property in dispute, at the most can be said for one year only, as such, it does not confer any title upon him. On these findings the suit was dismissed and counter claim was decreed by the judgment and decree dated 30.8.2012.

6. The appellant filed the appeal (registered as Civil Appeal No. 214 of 2012) from the aforesaid decree. The lower appellate court found that due execution of the Will dated 05.06.1974 was not proved, accordingly, the appellant has no case at all. On the other hand due execution of the sale deeds by the daughters of Subrati in favour of defendant first set was proved. In such circumstances, the lower appellate court found that the decree of the trial court did not suffer from any illegality. As such the appeal was dismissed. Hence this second appeal has been filed.

7. The counsel for the appellant submits that due execution of the Will was proved according to the provisions of Section 68 of Indian Evidence Act, 1872. The Will was given effect to and the name of the appellant was mutated

in municipal records which has never been challenged by the daughters of Subrati till the execution of the sale deeds. The plaintiff/appellant remained in possession over the property in dispute after death of Subrati in the year 1980, as such, his adverse possession was also matured over the property in dispute. The lower appellate court has not framed the point for determination as required under Order 41 Rule 31 CPC nor recorded any findings on the points and the judgment of the lower appellate court is illegal. He has framed following substantial questions of law in the memorandum of appeal: -

"(i) Whether both the courts below are not justified in dismissing the suit filed by the plaintiff/appellant and decreeing the counter claim filed by the defendant-respondent without considering legal provision contained in section 68 of Indian Evidence Act?

(ii) Whether both the courts below are not justified in dismissing the suit filed by the plaintiff/appellant and decreeing the counter claim filed by the defendant-respondents without considering case of plaintiff/appellant on basis of adverse possession?

(iii) Whether both the courts below failed to consider the material evidence available on record and without considering legal provisions of law that Will/hibba executed by Subrati on 05-06-1974, the name of plaintiff/appellant already entered into municipal record of the house in dispute and plaintiff/appellant becomes the owner of house in dispute?

(iv) Whether both the courts below failed to consider that plaintiff-appellant duly proved his will by the Subrati on 05-06-1974?

(v) Whether both the courts below are justified in dismissing the suit filed by the plaintiff/appellant and decreeing the counter claim filed by the defendant-respondent on the basis of surmises and conjectures?"

8. So far as substantial questions of law framed and the arguments raised that due execution of the Will was proved according to the provisions of Section 68 of Indian Evidence Act, 1872, are concerned, the trial court found that Shekh Idu PW-2, in his statement, has not verified the Will, in as much as he had not stated that the will dated 05.06.1974, bear the thumb impressions of Subrati as well as Ram Khelavan and Hari Nath. Thus neither due execution nor attestation of the will by Subrati was proved. The trial court further found that although Shekh Idu PW-2 in his statement has said that Hari Nath used to mark his thumb impression but from the vakalatnama of Hari Nath, produced by the defendants, his statement was disbelieved as Hari Nath used to make signature. In such circumstances, secondary evidence adduced by the plaintiff to prove due execution of the Will was not sufficient according to the provisions of Section 68 of the Evidence Act, 1872. The Courts below disbelieved the statement of Shekh Idu for valid reasons. It is not open for this Court to reassess the evidence on record. The substantial questions of law raised in this respect do not arise.

9. So far as the claim of the appellant in respect of his adverse possession is concerned, admittedly, the appellant is a relation of Subrati as well as defendants second set. Admittedly the appellant was residing with Subrati from his life time, therefore, at no point of time, his possession was independent possession. At the most, his possession was by way of licence being a relation and no question of adverse possession arise at all. The substantial questions of law raised in this respect do not arise.

10. The third argument raised by the counsel for the appellant that the lower

appellate court has neither framed any point for determination nor recorded its independent findings in respect of various points raised by the appellant in the appeal as required under Order 41 Rule 31 of CPC, is concerned, the lower appellate court has decided points and found that due execution of the Will in favour of the appellant was not proved since it is a judgment of concurrence as such detail evidence was not referred but the points were dealt with and decided by the lower appellate court. The lower appellate court further found that due execution of the sale deeds in favour of the defendants first set by defendants second set have been proved. Although the judgment is a short judgment but the judgment being a judgment of concurrence cannot be said to be illegal. In such circumstances, no substantial question of law arise in the second appeal.

11. The counsel for the appellant lastly submits that the award of compensation at the rate of Rs. 1,000 per month is highly excessive. However, the counsel for the respondents informs that there were two separate civil appeals before the court below. So far as the decree relating to damages, is concerned, it was subject matter in Civil Appeal No. 215 of 2012 while this second appeal has been filed from the decree passed in Civil Appeal No. 214 of 2012. In such circumstances, the liberty is given to the appellant to file a separate second appeal for the decree in Civil Appeal No. 215 of 2012.

12. In view of the aforesaid discussion, no substantial question of law is involved in this second appeal. Second Appeal is dismissed in limine."

4. Instant second appeal is arising out of counter claim which has concurrently been allowed by both the courts below. Learned counsel for the plaintiff-appellant has raised solitary question with respect to identity of the property i.e. house in question, possession of which has been directed to be delivered in favour of the defendants. Intending to maintain the instant second appeal moved at the behest of plaintiff-appellants, following substantial questions of law have been formulated, by way of amendment, at the bottom of the second appeal, which are quoted herein below:

"8. Whether the learned court below are justified in giving possession to the respondents 1st set against the settled principle in latin maxim famous "Nemo dat quod non havet" meaning "That no body can give what he himself has not got" on the basis of sale deed dated 05.07.1999 and 17.07.1999 which is only for Aabadi land not for the house?

9. Whether the learned court below are justified to granting the relief to the respondents 1st set beyond their pleading or prayer?

10. Whether the learned court below are justified by allowing the counter claim of respondent 1st set without any identification of property mentioned in counter claim?

11. Whether the learned court below are justified by not considered the reply filed by appellant against the counter claim and not framed any issue in this regard?"

5. Having considered the rival submissions advanced by learned counsel for the parties and perusal of record, it evince that plaintiff is claiming his right and title over the property in question on the basis of will deed dated 05.06.1974, said to have been executed by Subrati (son of Bhaggal), who died on 11.09.1980. After the death of Subrati, plaintiff came into the possession and got his name recorded in the record of rights. Conversely, defendants Ist set (respondent herein) are claiming their right and title over the property in question on the basis of registered sale deeds dated 05.07.1999 and 17.07.1999 said to have been executed by daughters of Subrati. Learned Civil Judge (Senior Division), Azamgarh has framed as many as nine issues and discarded the claim of the plaintiff on the basis of the will deed and upheld the sale deeds in question executed by daughters in favour of defendant Ist set. So far as identity of the plot in question, as raised by learned counsel for the appellant is concerned, it is evident from the record that no specific pleading has been made questioning the identity of the suit property. It is apposite to mention that on the basis of the pleading made by the parties, the trial court has formulated issue no. 3, as to whether defendant nos. 1 and 2 are entitled for recovery of possession, as averred in the counter claim. Issue no.3 has been decided in favour of the defendants acknowledging their right over the property in question. While dismissing the suit and allowing the counter claim, learned trial court has given specific observation that plaintiff shall deliver the possession of the property in question shown by letters a, b, c, d, e, f, g, h, i, j, k and l at the foot of the plaint within a period of 90 days. Thus, it is abundantly clear that property which has been directed to be handed over to the contesting defendants is the same property as depicted at the foot of the plaint by letters a, b, c, d, e, f, g, h, i, j, k and l. There is no ambiguity in the direction given by the trial court *qua* identity of the plot in question. Moreover, legality of the counter claim filed by the defendants for the relief of possession and damages has been considered as well in previous Second Appeal No. 79 of 2014 decided by the order dated 18.01.2014. Substantial question of law no. 5, in the Second Appeal No. 79 of 2014, was formulated *qua* counter claim, however, same has been negated.

6. Careful consideration of the record on board evince that right and title of the plaintiff over the property in question has concurrently been culminated in negation up to the stage of second appeal being Second Appeal No. 79 of 2014. Thus, he has no *locus standi* to assail the concurrent finding of facts returned by both the courts below on the pretext of identity of the suit property. None of

the substantial questions of law, as formulated by the appellant at the bottom of second appeal, are involved in the instant second appeal. There is nothing on the record to demonstrate that the culmination of right and title of the plaintiff-appellant over the property in question by finding of fact returned at all the three stages of the suit, to wit, up to the second appeal, has ever been assailed before any competent court. Thus, precisely, once the right and title of the parties has attained finality up to the stage of second appeal i.e. Second Appeal No. 79 of 2014, it would not be befitting for this Court to reopen the concluded finding of fact and reappraise the evidence in the light of the submissions advanced by learned counsel for the plaintiff-appellant. It is no more *res integra* that first appellate court is a court of fact and law, however, second appeal can be entertained only on the basis of substantial question of law as enunciated under Section 100 C.P.C. This Court being a second appellate court cannot embark upon the question of fact which has already been culminated by the courts below in the proceeding arising out of counter claim as well as in the suit up to the stage of second appeal, as mentioned above.

7. In this conspectus, as above, no interference is warranted by this Court in exercise of its jurisdiction being a second appellate court, inasmuch as no substantial question law is made out in the given facts and circumstances of the present case.

8. Resultantly, instant second appeal, being misconceived and devoid on merits, is ***dismissed***.

Order Date :- 17.3.2025

Sumit K.