



IN THE HIGH COURT OF UTTARAKHAND AT

NAINITAL

Second Appeal No.156 of 2014

Chatur Singh

.... Appellant

Versus

Vikram Singh and others

..... Respondents

Presence:-

Mr. B. M. Pingal, learned counsel for the appellant.

Mr. D.K. Joshi, learned counsel for respondent no.1.

Mr. Tribhuwan Chandra Pandey, learned counsel for respondent nos.2 and 3.

Hon'ble Siddhartha Sah, J.

This second appeal has been preferred against the judgment & decree dated 09-06-2014 passed by District Judge, Champawat in Civil Appeal No. 06 of 2011, Vikram Singh & others V/s Chatur Singh, whereby the appeal filed by the defendants/respondents was partly allowed and the judgment dated 18-08-2011 passed in Original Suit No.17 of 2007, Chatur Singh Vs. Vikram Singh & ors, by the Civil Judge (J.D.) Tanakpur, District Champawat has been partly set-aside.

2. Facts in brief are being narrated hereinafter. Initially, a suit for permanent prohibitory injunction was instituted by the plaintiff/appellant with regard to Khasra Nos. 107, 108, 109, 118, and 121, having a total area of 0.7600 hectares, situated at Village Gaidakhali No. 4, Tehsil Sri Purnagiri (Tanakpur), District



Champawat. The relief was subsequently amended whereby a decree of mandatory injunction against the defendants was also sought with regard to the alleged encroachment and unauthorized construction, which the plaintiff asserted to be within his property.

3. The suit was filed with the averments that over the property in question plaintiff is recorded as *Sakramani Bhumidhar* of Class-I over Khasra Nos. 107, 108, 109, 118, and 121, having a total area of 0.7600 hectares. It is further averred in the plaint that on 01.07.2007, the defendants came to the spot, broke open the plaintiff's gate, and attempted to break the northern boundary, which was opposed by the plaintiff. Since the villagers and family members of the plaintiff reached the spot, the defendants left, while extending threats of taking possession in future.

4. It is further averred in the plaint that on 15.08.2007, the plaintiff, along with his family, went to his native village, Village Fangoor. Upon returning on 22.08.2007, he found that defendant No. 4 had constructed a kitchen on a portion of his property in the disputed field, and defendant Nos. 1 and 2 had cut the crop standing on one bigha of land, planted lemon trees, and erected a fence thereon.

5. It is further averred in the plaint that the defendants have no right to take illegal possession of the plaintiff's property. Therefore, it was prayed that a decree of permanent injunction be passed against the defendants that the construction raised by the defendants be removed at their own expense and that they be evicted therefrom.



6. The suit was registered as Civil Suit No. 17 of 2009 in the Court of Civil Judge (Senior Division), Tanakpur. Defendant Nos. 1 to 3 contested the suit and filed their written statement. In the written statement, it was contended that the boundaries as stated in the plaint are incorrect. The defendants further contended that the plaintiff was never in possession of the disputed property and by wrongly describing the boundaries, the plaintiff has filed a false case with an intention to grab the property of the defendants.

7. The defendants further contended that they have been in long-standing possession of the property and, therefore, the Court does not have jurisdiction to grant the relief of perpetual injunction.

8. In support of his case, the plaintiff placed on record a copy of the sale deed dated 23.06.2004, extract of Khatoni of Khata Khatoni No. 5 of Village Gaidakhali No. 4, Tehsil Sri Purnagiri, Tanakpur, and extract of Khasra pertaining to Khet Nos. 107, 108, 109, 118, and 121 of Village Gaidakhali No. 4. The defendants, however, did not file any documentary evidence in support of their case.

9. After completion of pleadings, the following issues were framed by the trial court:—

- i. Whether the defendants have interfered with the plaintiff's property and raised illegal construction thereon? If so, its effect.



ii. Whether the suit of the plaintiff is undervalued and the court fee tendered is insufficient? If so, its effect.

iii. The relief of the plaintiff.

10. On Issue No. 1, the trial court came to the conclusion that the defendants had taken illegal possession of the plaintiff's property in question and had made illegal construction thereon. The issue relating to court fees and valuation was decided against the defendants and in favour of the plaintiff.

11. Thus, vide judgment and order dated 18.08.2011, the suit for permanent injunction and mandatory injunction was decreed against the defendants. The defendants were restrained from interfering with or taking possession of the property in question, and by way of mandatory injunction, they were directed to remove the illegal construction within one month from the date of judgment.

12. Aggrieved by the aforesaid judgment and order dated 18.08.2011, the defendants preferred an appeal before the Court of District Judge, Champawat, which was registered as Civil Appeal No. 6 of 2011, *Vikram Singh and others vs. Chatur Singh*. During the pendency of Civil Appeal No. 6 of 2011, cross-objections were also filed on behalf of the plaintiff, which were registered as Cross-Objection No. 8 of 2011. The aforesaid Civil Appeal No. 6 of 2011 and Cross Objection No. 8 of 2011 were finally heard by the District Judge, Champawat, and vide judgment and order dated 09.06.2014, the appeal was partly allowed, whereby the relief of permanent prohibitory injunction granted by the trial court was



affirmed. However, the relief of mandatory injunction was set aside, and the cross-objections preferred on behalf of the plaintiff were also dismissed.

13. The present second appeal has been filed by the plaintiff/appellant only to the extent whereby the first appellate court has set-aside the relief of mandatory injunction while partly allowing the Civil Appeal No. 6 of 2011.

14. Heard Mr. B. M. Pingal, learned counsel for the appellant; Mr. D. K. Joshi, learned counsel for respondent No. 1; and Mr. Tribhuwan Chandra Pandey, learned counsel for respondent Nos. 2 and 3, and perused the record.

15. The present second appeal was initially admitted vide order dated 24.08.2016 on the following substantial question of law:—

- i. As to whether the learned first appellate court has committed illegality in allowing the appeal in part and in declining the relief of mandatory injunction to the plaintiff/ appellant and also committed illegality in non-appreciating the relief claimed by the plaintiff/ appellant substantial and has caused injustice with the appellant in allowing the appeal in part?

16. Assailing the judgment of the first appellate court, learned counsel for the appellant, Mr. B. M. Pingal, submits that the property in question was purchased by the plaintiff/appellant by virtue of a sale deed dated



23.06.2004, comprising an area of 1.883 acres (12 bighas) of land situated in Village Gaidakhali No. 4, Tehsil Shri Purnagiri, comprising Khet Nos. 107, 108, 109, 118, and 121, recorded in Khata Khatoni No. 5. Thereafter, the aforesaid land was mutated in favour of Chatur Singh/plaintiff, which is duly reflected in Khatoni No. 5 of Village Sri Purnagiri. He further submits that in the Khasra of Village Gaidakhali No. 4, the name of Chatur Singh is duly recorded against Khasra Nos. 107, 108, 109, 118, and 121.

17. Learned counsel for the appellant further submits that the defendants failed to file any documentary evidence to establish their title or ownership over the property in question, whereas the plaintiff was in settled possession. It is further submitted that the defendants illegally took possession and, during the absence of the plaintiff, raised construction of a kitchen on the said property. According to him, the trial court has rightly recorded a finding regarding illegal possession by the defendants and has rightly decreed the suit by granting both prohibitory and mandatory injunction.

18. He further submits that Issue No. 1 has been decided by the trial court in favour of the plaintiff on the question of ownership and possession. Learned counsel for the appellant also draws the attention of this Court to the report of the Advocate Commissioner dated 10.11.2009, wherein the description of the Khet numbers and the spot inspection findings were found to be consistent with the boundaries as mentioned in the plaint.



19. Learned counsel for the appellant has further referred to the site plan, which forms part of the Advocate Commissioner's report, and contended that the defendants had taken possession thereof. Learned counsel for the appellant, Mr. B. M. Pingal, further submits that the first appellate court, being the last court of fact and law, erred in reversing the findings of the trial court without properly setting aside the same.

20. Per contra, learned counsel for respondents, Mr. D. K. Joshi and Mr. Tribhuwan Chandra Pandey would submit that, in the garb of wrong boundaries, the plaintiff has attempted to grab the property of the defendants, who have been in settled possession for a considerable period of time. It is further contended on behalf of the respondents that the plaintiff was never in possession of the Khet numbers mentioned in the sale deed executed in his favour, and the boundaries have been wrongly described therein.

21. It is further contended that the Advocate Commissioner's report is primarily based on information supplied by the plaintiff and does not reflect the true position at the spot with regard to the boundaries. It is also contended on behalf of the respondents that the present second appeal is barred by the principle of *res judicata*, since no separate second appeal has been preferred against the dismissal of the cross-objections filed by the plaintiff/appellant.

22. In view of the rival submissions advanced by learned counsel for the parties, this Court is called upon to determine the substantial question of law framed vide order dated 24.08.2016. Effectively, what falls for



consideration in the present second appeal is whether the first appellate court was justified in declining the relief of mandatory injunction to the plaintiff/appellant. To address the aforesaid substantial question of law, reference is required to be made to the judgment of the first appellate court to examine whether the first appellate court adverted to record and properly appreciated the evidence while declining the relief of mandatory injunction at the appellate stage.

23. Perusal of the judgment of the first appellate court reveals that the primary question considered was whether the defendants had taken possession of the disputed property during the period from 15.08.2007 to 22.08.2007 and had raised illegal construction thereon. In this regard, the first appellate court relied upon the deposition of PW2, Jagdish Chandra Arya, who stated that on 19.08.2007 at about 8:00 a.m., he had seen defendant Joga Singh constructing a kitchen in the plaintiff's field.

24. The first appellate court also referred to the cross-examination of the said witness, wherein he stated that on the disputed land there was a pakka house with a lintel, in which a kitchen existed, and that defendant Vikram Singh had been residing therein since 19.08.2007. On the basis of the aforesaid material, the first appellate court found contradictions in the statements of PW2 and further observed that, within such a short span of time, i.e., from 19.08.2007 to 22.08.2007, it was not plausible that such construction could have been completed and possession taken thereon along with residence being established.



25. Thus, the first appellate court inferred that the said witness had not seen any new construction being made and was not aware of the actual facts. The first appellate court also referred to the Khasras of the disputed land bearing Khasra Nos. 86Ka, 107, 108, 109, 118, and 121 of Khata No. 5, which stand recorded in the name of Chatur Singh, and the said Khasras reflect the actual status of the land for the relevant fasli year.

26. The first appellate court noted that in Khasra No. 121, paddy-wheat crop was shown; in Khasra No. 108, the land was recorded as “Abadi”; and in Khasra No. 109, no crop was shown, and it reflected Shesham and Kukat trees. In these Khasras, though the plaintiff, by way of amendment in the plaint, had alleged illegal possession and construction by the defendants, the Khasra entries of the relevant fasli year, even after the amendment, do not reflect any such encroachment, nor do they show that any kitchen was constructed in Khasra No. 121 or that any encroachment existed in Khasra Nos. 108 and 109. Therefore, the first appellate court inferred that the Khasra entries themselves contradict the plaintiff’s case as introduced by way of amendment, and do not establish that between 15.08.2007 and 22.08.2007 the defendants had raised any construction or made encroachment.

27. On the aforesaid premise, the first appellate court partly set-aside the judgment of the trial court to the extent of granting mandatory injunction in favour of the plaintiff. From the above, it is clear that the first appellate court has considered the issue of alleged unauthorized possession in detail and has rightly concluded that the plaintiff failed to establish illegal



28. The findings recorded by the first appellate court are based on the evidence on record, both oral and documentary. Hence, it does not call for interference at the second appellate stage.

30. In view of the above since the substantial question of law has been answered against the appellant, the second appeal deserves to be dismissed.

32. The original record be transmitted to the court concerned.

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