
(2012) 03 AHC CK 0105
In the Allahabad High Court
Case No : Second Appeal No. 448 of 2009

Arjun and Others

APPELLANT

Vs

Jhagdu and Others

RESPONDENT

Date of Decision : 01-03-2012

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 11

Citation : (2012) 4 ADJ 609 : (2012) 3 AWC 2802 : (2012) 116 RD 265

Hon'ble Judges : Sibghat Ullah Khan, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

Hon"ble Sibghat Ullah Khan, J.—Heard Learned Counsel for the parties at the admission stage.

2. This is defendants" second appeal arising out of O.S. No.990 of 1997 which was dismissed on 22.11.2007 by Civil Judge, Junior Division, Haveli, Varanasi. Against the said decree plaintiffs respondents filed Civil Appeal No.23 of 2008, which was allowed on 29.01.2009 by A.D.J. Court No.9, Varanasi. Judgment and decree passed by the trial court was set aside and suit of the plaintiff was decreed and in the property in dispute plaintiffs" share was declared to be half. As the suit was for partition hence preliminary decree was passed by the lower appellate court.

3. Plaintiff respondent No.1 is father and plaintiff respondent No.2 is his son. Similarly, defendant appellant No.1 are father and defendants appellants No.2 & 3 are his sons. Fathers i.e. plaintiff respondent No.1 and defendant appellant No.1 are real brothers. The relationship was admitted by the parties. The trial court dismissed the suit holding that partition had already taken place and parties were in possession of the portions which had come in their shares in the prior partition. Property in dispute is constructed portions and adjoining abadi land.

4. The plaintiffs and their witnesses had admitted that for several years the parties were residing in separate portions and they were separate in fooding also. Trial court held that this amounted to prior partition. Regarding the house towards north adjacent to the road Brijmohan plaintiff No.2 stated that the house of Arjun (defendant) which was on the road side was old construction. Lower appellate court placed reliance upon the judgment of this Court reported in Paramjeet Singh Patheja v. ICDS Ltd. AIR 2007 SC 198 holding that residing in different portions of joint property does not amount to formal partition.

5. I do not find any legal error in the findings recorded by the lower appellate court. However if different co-sharers are residing in separate portions for the sake of convenience for a long time then this aspect must be given special consideration while preparing the lots/ kuras in final decree. If some one is found to have made construction on a particular portion then this must be added ground for the consideration. Accordingly, even though there is no error of law in the impugned preliminary decree however it is observed that while making final decree actual occupation and residence and construction by any party must be given due regard. If the area in actual use and occupation of each party is not equal then the party having / getting the lesser area may be compensated in terms of money to be paid by the party which has got or gets in actual partition larger area.

6. With the above observations second appeal is dismissed under Order XLI Rule 11 C.P.C.