
(2003) 09 AHC CK 0110
In the Allahabad High Court
Case No : Second Appeal No. 408 of 1982

Dhanesra and Others

APPELLANT

Vs

Smt. Sabira

RESPONDENT

Date of Decision : 05-09-2003

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 100, 96
Evidence Act, 1872 — Section 11

Citation : (2004) 2 AWC 1686

Hon'ble Judges : Kamal Kishore, J

Bench : Single Bench

Advocate : Anand Swarup Chaudhary, R.V. Chaudhary, Surya Pal Singh, Ram Pal Singh and Dhane, for the Appellant; Usman Siddiqui, for the Respondent

Final Decision : Allowed

Judgement

Kamal Kishore, J.—This is the second civil appeal against the judgment and decree dated 8.1.1982 passed by the then IVth Additional District Judge, Faizabad setting aside the judgment and decree passed by the then VIth Additional Munsif, Faizabad in Regular Suit No. 132 of 1980.

2. The following questions of law have been formulated in this second appeal :

(1) Whether the burden of proof loses its importance when both the parties enter into evidence knowing their cases full well?

(2) Whether the learned lower appellate court wrongly relied on Section 11 of the Evidence Act which has got no application in the present case while setting aside the judgment and decree passed by the learned trial court?

(3) Whether the learned lower appellate court wrongfully rejected the evidence of P.W. Nand Kishore on the pretext that he belongs to another hamlet and did not read the evidence of Kedar Nath, Amin and his map and report?

3. I have heard arguments and have gone through the record.

4. It has been contended on behalf of the respondent that the burden of proof was on plaintiffs alone to prove their case and the learned lower appellate court was justified in placing the burden of proof on the plaintiffs-appellants alone. On the other hand, it has been urged by the learned counsel for the appellants that the burden of proof loses its importance when both the parties enter into evidence knowing their cases fully well. This argument advanced by the learned counsel for the appellants finds support from the ruling of Hon''ble Supreme Court in Arumugham (Dead) By Lrs. and Others Vs. Sundarambal and Another, , wherein it has been held that when both parties adduce oral as well as documentary evidence, the question of burden of proof becomes insignificant. In view of the aforesaid ruling of the Hon''ble Supreme Court, the burden of proof loses its importance in such cases as the learned lower appellate court has thus wrongly relied on Section 111 of the Evidence Act which has got no application in the present case while setting aside the judgment and decree passed by the learned trial court. The arguments advanced by the learned counsel for the respondent, to the contrary, are not tenable.

5. The learned lower appellate court has wrongly rejected the evidence of P.W. Nand Kishore on the ground that he belongs to another hamlet and has wrongly relied on Commissioner''s report of an earlier suit. It has been held by the Hon''ble Supreme Court in the ruling in Pandurang Jivaji Apte Vs. Ramchandra Gangadhar Ashtekar (Dead) by Lrs. and Others, that the drawing an adverse inference on a question would arise only when there is no other evidence on record on the point in issue. The learned lower court has further erred in relying on the Commissioner''s report of an earlier suit without being proved by the person who made them. It has been held by Hon''ble Mr. Justice S. Saghir Ahmad in the ruling in Ram Prasad Singh and Ors. v. Suraj Lal Singh and Ors. 1983 LCD 309 , that the Commissioner''s report of an earlier suit can be admissible in subsequent suit, only if the copy of Commissioner''s report and map prepared in earlier suit is proved by the person who made them and the same is not admissible if not so proved, as has also been held in the ruling in Sarat Chandra Rakhit Vs. Sarala Bala Ghosh and Others, . Since the Commissioner''s report of an earlier suit has not been duly proved as per the aforesaid ruling, the same is not admissible and hence the learned lower court has committed irregularity in relying on the same.

6. The learned lower court has further erred in not reading the evidence of Kedar Nath Srivastava, Survey Commissioner as well as the map and report prepared by him. The map dated 6.11.1980 prepared by the Survey Commissioner in the present civil suit clearly shows that the Gaaz Gobar etc. belonging to the original plaintiff-appellant Gauri Shanker Singh exists towards west of the property in suit, hence the arguments advanced by the learned counsel for the appellants to the effect that the property in suit belonged to the appellant Gauri Shanker Singh, who had given to the defendant-respondent Smt. Sabira to live as licensee only, seems to be correct.

7. The First Appellate Court has erred in not considering the material or relevant evidence in setting aside the findings given by the learned trial court. It has been held by the learned Supreme Court in the ruling in *Dilbagrat Punjabi v. Shared Chandra* 1988 SCC 710 :

"The Court (the first appellate court) is under a duty to examine evidence on record and if it refuses to consider important evidence having direct bearing on the disputed issue and the error which arises is of a magnitude that it gives birth to a substantial question of law, the High Court is fully authorised to set aside the finding. This is the situation in the present case."

8. The finding recorded by the learned Lower Appellate Court is thus perverse and is not sustainable under these circumstances as has been held by this Court in the ruling in *Rasheed Ahmad and Others Vs. Smt. Kariman Khatton and Others*, . The questions of law formulated above are answered accordingly in favour of the appellants.

9. The second appeal is hereby allowed. The judgment and decree passed by the First Appellate Court is set aside and the judgment and decree passed by the learned trial court are hereby maintained. No order as to costs.