

(2013) 07 AHC CK 0150
In the Allahabad High Court
Case No : Second Appeal No. 603 of 1979

Firoz Jahan and Others

APPELLANT

Vs

Nazim Husain and Others

RESPONDENT

Date of Decision : 10-07-2013

Acts Referred:

Administration of Evacuee Property Act, 1950 — Section 28, 46, 47
Civil Procedure Code, 1908 (CPC) — Order 41 Rule 31, 100, 103
Evidence Act, 1872 — Section 13

Citation : (2013) 07 AHC CK 0150

Hon'ble Judges : Sibghat Ullah Khan, J

Final Decision : Dismissed

Judgement

Sibghat Ullah Khan, J.

Heard Sri Hari Om Singh, learned counsel for the appellant and Sri S.K. Mehrotra, learned counsel for the respondent.

This is defendants Second Appeal arising out of Regular Suit No.87 of 1961, Nazim Husain and another Vs. Smt. Firoz Jahan and four others. The suit was instituted for possession of a house except a part thereof consisting of a Kothari and a shop. The Kothari and the shop were stated to be in possession of another person Qazim Husain. The suit was dismissed by Additional Civil Judge Lucknow on 8.1.1965 holding the suit to be barred by Article 142 of old limitation Act. Against the said decree plaintiffs, respondents No.1 & 2 filed civil appeal no.58 of 1965 which was allowed by 4th A.D.J. Lucknow on 16.5.1979, judgment and decree passed by the trial court was set aside and plaintiffs suit for possession was decreed along with Rs.26/ as damages for use and occupation and pendente lite and future damages for use and occupation @ of Rs.7/ month. This second appeal is directed against the decree passed by the lower appellate court.

Initially lower appellate court had dismissed the appeal against which decree Second Appeal no.112 of 1967 was filed which was allowed by this court on 3.4.1974. The lower appellate court at the earlier occasion had refused to take

on record some documents sought to be filed before it as additional evidence. The high Court through judgment and decree dated 3.4.1974 directed that said documents shall be taken on record as additional evidence.

It is undisputed that initially one Shanker Lal was the owner of the house in dispute who sold it to Sri Khurshid Ali on 24.2.1868 (wrongly mentioned as 24.2.1968 at several places in the judgment of the lower appellate court). Thereafter, several mortgages and transfers of mortgagee/mortgagers rights and sale deeds took place and a partition suit (No.10 of 1911) was also filed. Different cosharers transferred their shares inter se. Ultimately both the plaintiffs through sale deed dated 25.9.1961 became owner of the entire property in dispute, however, by way of abundant precaution they also purchased a small share which might belong to Meer Humayun Jah through registered sale deed dated 19.1.1964.

In between 1868 and 1964 aforesaid transactions took place in the following years:

1. 26.2.1980
2. 18.10.1980
3. 2.3.1911 (on this date application was filed in the partition suit adding the property in dispute as part of the property in dispute in the said suit)
4. 16.8.1941
5. 21.12.1944
6. 30.11.1944
7. 15.1.1947
8. 19.1.1954
9. 3.12.1954
10. 17.9.1955
- 11.27.10.1960
- 12.14.09.1961
- 13.19.09.1961
- 14.25.09.1961
15. 19.1.1964

All the details have been given in the opening portion of the judgment of the lower appellate court.

According to the plaint case Akbar Ali father of defendant No.1 had taken the house on rent from Meer Humayun Jah. Rabia Begum alias Rabbo daughter of

Kale Khan was wife of Akbar Ali. Akbar Ali and Smt. Rabia migrated to Pakistan but defendants who are daughter of Smt. Rabia and her other relations continued to illegally occupy the said house. It was also pleaded in the plaint that Rabia migrated to Pakistan after her husband and before migration surrendered her tenancy rights to Humayun Jah.

The defendants admitted that Shanker Lal was the original owner of the house, however, they asserted that Haider Ali son of transferree of Shanker Lal sold the house in dispute to Kale Khan (father of Smt. Rabia) through unregistered sale deed dated 26.7.1906 hence it was wrong to assert that his daughter Rabia was the tenant and according to the defendants after the death of Kale Khan even though his daughter Rabia migrated to Pakistan but they being descendants of Kale Khan inherited the house in dispute and had got an independent right to the house in dispute. Sri Kale Khan died in 1931 leaving behind his widow a son and two daughters including Rabia Begam. Defendants in the written statement pleaded that they had also perfected their title right and title on the basis of adverse possession.

Plaintiffs had asserted that Akbar Ali had executed a Sarkhat in favour of Meer Humayun Jha.

As far as title of plaintiffs' predecessors in interest upto 1906 is concerned it was not denied by the defendants.

In this Second appeal on 18.3.2008 following order was passed:

"Sri Hari Om Singh Advocate and Sri S.K. Mehrotra Advocate have agreed to the hearing of this appeal on the following substantial questions of law::

1. Whether the learned first Appellate Court decided the appeal without recording the findings on issue nos. 4,5 and 6, if so, how it materially affected the decision?
2. Whether the learned first Appellate Court has failed to decide the question of issue of limitation?
3. Whether the interpretation of paper no. A72 is based on misreading of the documents and evidence on record?
4. Whether the Judgment of learned first Appellate Court in regard to the title is based on inadmissible evidence and on documents not proved in accordance with law?
5. Whether for deciding the title of the plaintiff it was necessary to have considered the title of his predecessor in interest?
6. Whether the Judgment of first Appellate Court is bad due to not framing the point for determination as contemplated under Order 41 Rule 31 CPC?

Let appeal be listed for hearing in list "B".

The lower appellate court on the basis of oral statement of defendants witnesses

DW 6 and DW 9 held that boundaries in the sale deed dated 24.2.1868 substantially tallied with the house in dispute. In any case this position was not denied by the defendants. The boundaries were also tallied with subsequent mortgage/transfer deeds and from the plaint and decree of the partition suit (No.10 of 1911) also .

The unregistered sale deed dated 26.7.1906 was filed by the defendants and marked as paper no. A32. From the appearance of the sale deed the lower appellate court held that it was fabricated and contained rubbing.

The Sarkhat (rent note) executed by Akbar Ali was filed by the plaintiffs and marked as exhibit 49. Meer Humayun Jah, PW 2 proved the same. Money order coupons were also filed and marked as Exhibit 56 which proved sending of some money (rent) by Sri Akbar Ali to Meer Humayun Jah.

The house in dispute was declared as evacuee property after migration of Smt. Rabia wife of Akbar Ali to Pakistan. She filed an application before the Assistant custodian of evacuee property Lucknow on 3.10.1949 admitting that Meer Humayun Jah was owner of the house in dispute and she and her husband was residing therein as tenant. That application is paper no.122. The order of Assistant Custodian dated 20.3.1950 accepting the ownership of Meer Humayun Jah and releasing the property in dispute in his favour is Exhibit14. Two letters written by Akbar Ali to Meer Humayun Jah were also filed.

Even though the judgment of the lower appellate court is not very satisfactory and points for determination as required by order 41 Rule 31 C.P.C. were not framed by it however, the main point pertaining to ownership of the parties has thoroughly been considered by the lower appellate court. Non framing of points for determination is not so fatal that the judgment may be quashed in Second Appeal only on this ground if the lower appellate court was conscious of the main point and it is reflected from the judgment. It has been held in the following authorities that merely for non framing of point for determination under Order 41 Rule 31 C.P.C. judgment can not be set aside.

Assistant Commissioner, Tumkur and Ors. v. K.N. Nagaraja, AIR 1983 Karnataka 111

Assistant Commissioner, Tumkur and Ors. v. K.N. Nagaraja AIR 2000 Madras 465
AIR 2002 AP 134

Accordingly, question No.6 is decided against the appellants.

As far as first substantial question of law is concerned it was not necessary for the lower appellate court to record finding on each and every issue framed by the trial court. However, it would have been more appropriate for it to frame points for determination. As far as question no.3 is concerned pertaining to paper no. A32 (wrongly mentioned as A72 in the order dated 18.3.2008) the alleged sale deed of 1906 the lower appellate court held that on the face of it, it appeared to

be fabricated. In any case innumerable dealings of the house in dispute including transfer deeds and partition suit and subsequent inter se transfer of shares were admissible in evidence under Section 13 of Evidence Act to prove that no transfer had taken place in the year 1906 and the house in dispute continued to belong to the plaintiffs and their ancestors.

As far as question no.4 is concerned the first appellate court has not taken into consideration inadmissible evidence. The documents were proved in accordance with law. As far as question no.5 is concerned, lower appellate court has thoroughly discussed the title of plaintiffs and their ancestors.

Accordingly, question no.1, 3 to 6 are decided against the appellant.

As far as question no.2 relating to limitation is concerned, it is correct that lower appellate court has not specifically adverted to the question of limitation, however, by reading the judgment of the lower appellate court it becomes clear that the lower appellate court has considered the question to title of both the parties. Defendants had basically come forward with the plea of their title. To plead and attempt to prove adverse possession along with the plea of title is a sort of tight rope walking. Even the trial court did not record any findings that defendants had matured their title by adverse possession. Ingredients of adverse possession were neither pleaded nor found proved by the trial court. Supreme Court in Custodian Evacuee Property and Ors. v. Jafran Begum AIR 1968 SC 169 has held that by virtue of Section 47,28 and 46 of Administration of Evacuee property Act it is the exclusive jurisdiction of the custodian to decide as to whether a particular property is or is not Evacuee property and jurisdiction of the Civil court in this matter is barred. Accordingly, the decision of the Assistant Custodian that Akbar Ali was Evacuee but the property in dispute did not belong to him, instead it belonged to Meer Humayun Jah can not be questioned by the civil court.

As defendants did not even admit the ownership of the plaintiffs or their predecessors in interest hence they could not pleaded adverse possession. For adverse possession the possession must be hostile and adverse to the true owner. In respect of ingredients of adverse possession para 18 of Hemaji Waghaji Jat v/s Bhikhabhai Khengarbhai Harijan & Others AIR 2009 SC 103 is quoted below:

"18. In Karnataka Board of Wakf v. Govt. on India(2004)10SCC779, this Court observed as under:

"In the eye of the law, an owner would be deemed to be in possession of a property so long as there is no intrusion. Nonuse of the property by the owner even for a long time won't affect his title. But the position will be altered when another person takes possession of the property and asserts a right over it. Adverse possession is a hostile possession by clearly asserting hostile title in denial of the title of the true owner. It is a wellsettled principle that a party claiming adverse possession must prove that his possession is "nec vi, nec clam,

nec precario", that is, peaceful, open and continuous. The possession must be adequate in continuity, in publicity and in extent to show that their possession is adverse to the true owner. It must start with a wrongful disposition of the rightful owner and be actual, visible, exclusive, hostile and continued over the statutory period."

The court further observed that plea of adverse possession is not a pure question of law but a blended one of fact and law. Therefore, a person who claims adverse possession should show: (a) on what date he came into possession, (b) what was the nature of his possession, (c) whether the factum of possession was known to the other party, (d) how long his possession has continued, and (e) his possession was open and undisturbed. A person pleading adverse possession has no equities in his favour. Since he is trying to defeat the rights of the true owner, it is for him to clearly plead and establish all facts necessary to establish his adverse possession."

Supreme court emphasised that adverse possession to confer title must be open and hostile. In the instant case absolutely no allegation was made or evidence was adduced regarding hostility. Defendants all along were asserting that by virtue of unregistered sale deed of 1906 they were owners in possession.

Learned counsel for both the parties have cited several authorities on the point of adverse possession. Almost all those authorities and many more have recently been considered by Hon"ble Sudhir Agarwal, J. in the judgment reported in 2013 (3) A.L.R. 514.

Even though the question of adverse possession and applicability of Article 142 and 144 of old Limitation Act have not been considered by the courts below but by virtue of Section 103 C.P.C. in this Second Appeal High Court is empowered to determine this issue which is a mixed issue of fact and law. I hold that neither there is any pleading nor evidence regarding the ingredients of maturity of title by adverse possession. Accordingly, question of law no.2 is decided by holding that even though courts below wrongly ignored to decide the question of limitation but on the facts of the case, said question is decided against appellant.

Accordingly, Second appeal is dismissed.