

(2003) 02 AHC CK 0085
In the Allahabad High Court
Case No : Second Appeal No.42 of 1990

Kallu Ram Yadav and Others	Vs	APPELLANT
Bhagwati and Others		RESPONDENT

Date of Decision : 14-02-2003

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 100

Citation : (2003) 02 AHC CK 0085

Hon'ble Judges : Kamal Kishore, J

Final Decision : Allowed

Judgement

Kamal Kishore, J.

1. This is the second civil appeal against the judgment and order dated 30.11.1989 passed by the then learned V Additional District Judge, Pratapgarh, setting aside the judgment and decree passed by the then learned VIII Additional Munsif in Regular Suit No.493 of 1981, which was a suit for permanent injunction.

2. The following questions of law have been formulated:

1. "Whether the judgment and order of the learned 1st Appellate Court is perverse and manifestly illegal due to nonconsideration of material evidence on record?

2. Whether the learned 1st Appellate Court had committed substantial illegality by not considering the statement of defendant, Bhagwati Din recorded under Order 10 Rule 3 of CPC?

3. Whether the learned 1st Appellate Court had committed substantial illegality by making out a 3rd case and not accepting the pleading of any party?

3. I have heard learned counsel for the parties and have gone through the record.

4. It has been argued by the learned counsel for the plaintiffsappellants that the findings recorded by the First Appellate Court is perverse and the learned First

Appellate Court has committed substantial illegality in not considering the statement of Bhagwan Din recorded under Order 10 Rule 3 CPC. I find that there is substance in this argument of the learned counsel for the plaintiffsappellants. The plaintiffsappellants has filed the extract of Khatauni for the year 1359:F and other extract of revenue records which show that the plaintiffs were tillers etc. of the soil and were resident of village since the time of Zamindari Abolition and the contention of the defendants respondents that they had settled in the village about 4 or 5 years ago only after coming from Allahabad to the contrary is not tenable.

5. The report and map prepared by the Commissioner also belie the contention of the defendants respondent that there is no abadi of the plaintiffs appellants toward the North of the well shown in the commissioner's map. This fact find further support from the statement of the defendant Bhagwati Din recorded in Trial Court in which it has not been denied that the house of the plaintiffsappellants is situated towards the South of the land in dispute and that the main door of the plaintiffsappellants opens towards North. Hence, I agree with the findings recorded by the learned Trial Court to the effect that the land is situated toward the North of the house of the plaintiffsappellant. The learned Lower Appellate Court has erred in overlooking this fact. The report and map prepared by the Commissioner finds further support from the testimony of DW 2, in which he has admitted that abadi and house of the plaintiffsappellants situated towards the West of the land in dispute and the house of Ramdev opens towards the North i.e. towards the land in suit. An admission is the best evidence of which the other party may rely and though not conclusive decisive of the matter unless successfully withdrawn as has been held in ruling reported in AIR 1960 SC 101. Since the same has not been successfully withdrawn or rejected. Since the Commissioner's report and map etc. do not show the house of the defendantsrespondents near the land in suit the same cannot be said to be land pertinent to the house of the defendantsrespondent and the same cannot be deemed to have been settled with the defendantrespondents under the provisions of Section 9 of Zamindari Abolition & Land Reforms Act and I fully agree with the findings recorded by the learned trial court.

6. The first appellate Court has erred in not considering the material relevant evidence in setting aside the findings given by the learned trial court. It has been held by the Hon"ble Supreme Court in the ruling reported in 1988 Supp. SCC 710, Dilbagrai Punjabi v. Sharad Chandra:

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 authorized to set aside the finding. This is the situation in the present case."

7. 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 reported in 2001 (19) LCD 1097, Rasheed Ahmad and others v. Smt. Kariman Khatoon and others.

8. The same view has been taken by the Hon"ble Supreme Court in subsequent ruling also reported in 2000(10) Supreme Court Cases 540, Devram Bilvev. Indumati: wherein it has been held that the appellate Court must examine the evidence on record and in absence of such examination a doubt as to the correctness of its conclusions would remain. The questions of law formulated above 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 is hereby maintained. No order as to costs.

(Appeal allowed)