
(2012) 02 UK CK 0034

In the Uttarakhand High Court

Case No : Writ Petition (M/S) No. 630 of 2001 and Old No. 20391 of 1990

Radhey Shyam Saxena (deceased)

APPELLANT

Vs

Sub Divisional Magistrate/Collector 1st Class and Others

RESPONDENT

Date of Decision : 28-02-2012

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 145
Evidence Act, 1872 — Section 58, 60, 61, 62, 63
Transfer of Property Act, 1882 — Section 53A, 53A
Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1950 — Section 164, 209, 229B

Citation : (2012) 2 UC 1424

Hon'ble Judges : B.S. Verma, J

Bench : Single Bench

Advocate : Rajendra Dobhal and Mr. Lokendra Dobhal, for the Appellant; Sushil Vashisth, Brief Holder, Learned Counsel for Respondent Nos. 1 to 3, Mr. Sharad Sharma and Mr. Bhuwan Bhatt, Learned Counsel for Respondent Nos. 4/1 to 4/6 and 5/1 to 5/3, for the Respondent

Judgement

B.S. Verma, J.—By means of this writ petition, the petitioners have sought a writ in the nature of certiorari quashing the judgment and order dated 30-7-1990 passed by the second appellate Court, i.e. Board of Revenue U.P. at Allahabad, whereby the appeal preferred by defendant No. 1 - Bishambhar Dayal (deceased respondent No. 4 herein) has been allowed and suit of the plaintiff-Radheshyam Saxena (deceased petitioner herein) was dismissed. During the pendency of the writ petition, the plaintiff-petitioner Radhe Shyam Saxena and the defendant-respondents No. 4 and 5 (Bishambhar Dayal and Dhanpat Rai) have died, therefore, they have been substituted by their legal heirs in the writ petition.

2. Briefly stated, the facts giving rise to the present writ petition are that the petitioner-plaintiff Radheshyam filed a suit for possession u/s 209 of the U.P. Zamindari Abolition and Land Reforms Act (for short the Z.A. & L.R. Act) against the defendant-respondent Nos. 4 and 5 Bishambhar Dayal and Dhanpat Rai as

well as State of Uttar Pradesh. The plaintiff filed the suit alleging therein that the plaintiff is the Bhumidhar of the land in suit comprising of plot No. 245, area 4 bigha, 8 biswa situated in village Kichha, Pargana Rudrapur, district Nainital and he entered into an agreement for sale with defendants Bishambhar Dayal and Dhanpat Rai on 28-8-1972, but the defendants did not honour the terms and conditions of the agreement and failed to get the sale deed executed and in the year 1976, the defendants attempted to take forcible possession of the land in suit, which led an apprehension of breach of peace. It is also alleged in the plaint that the defendants Nos. 1 and 2 by interpolation added the words handed over possession in the document for agreement for sale and also in collusion with the revenue staff managed entries of possession in the Khasara. It is also alleged in the plaint that Subhash Chandra, son of the plaintiff, lodged a complaint and the proceedings u/s 145 Cr.P.C. were drawn by the Sub Divisional Magistrate concerned which were decided on 27-11-1978 in favour of the defendants. The plaintiff filed a revision against the order passed by the Magistrate concerned, which was ultimately allowed by the Additional Session Judge, Nainital, who by order dated 7-8-1979 set aside the order of the Sub Divisional Magistrate with a direction to put the plaintiff in possession but the defendant Nos. 1 and 2 assailed the order of the Additional Sessions Judge before the Allahabad High Court in Criminal Revision No. 1508 of 1979, which was allowed on 20-5-1981 and the order passed by the S.D.M. was upheld. Aggrieved, the plaintiff-petitioner filed SLP (Crl.) No. 2482/81 before the Apex Court. The Apex Court passed the order dated 27-11-1981 to the following effect:-

Mr. R.K. Jain mentioned this matter today requesting for corrections of the order made on 16.11.1981. The court directed that the order of 16.11.1981 should be read as under:

Special leave petition is rejected since it is directed against an order passed in a proceeding under s. 145 Cr.P.C. and it is always open to the father of the petitioner to file a suit in order to establish titles and recover possession of property. If the father of the petitioner files such suit within three months from today the trial court will dispose it of within 6 months from the date of filing the suit.

3. Thereafter the revenue suit u/s 209 of the Z.A. & L.R. Act was filed by the plaintiff-petitioner. The suit was contested by the respondent-defendants by filing written statement. The learned Assistant Collector framed necessary issues in the suit. Both the parties have adduced oral as well as documentary evidence. The learned Assistant Collector after hearing both the parties and considering the evidence led by the parties decreed the suit by judgment and decree dated 20-2-1984. Aggrieved by the said judgment and decree, the defendant Nos. 1 and 2 (respondent Nos. 4 and 5 herein) preferred Z.A. Appeal No. 65/27 of 1983-84. The first appellate Court did not find favour with the appellants-respondent Nos. 4 and 5 and dismissed the appeal by judgment and decree dated 28-6-1985.

4. Aggrieved, the contesting defendants preferred the Second Appeal No. 87 of 1984-85, which was ultimately allowed by the Board of Revenue by order dated 30-7-1990 thereby the judgment and decree passed by the trial court as well as the first appellate court were set aside and the suit of the plaintiff-petitioner was dismissed with costs, which gave rise to the present writ petition.

5. Counter affidavit has been filed on behalf of the respondent No. 5 (since deceased). It has been stated therein that the petitioner instituted a suit in the year 1982 u/s 209 of the Z.A. & L.R. Act on the ground that the petitioner had entered into an agreement on 24-8-1972 to sell the disputed land and that he received a sum of Rs. 7,000/- as per agreement to sell and the remainder of Rs. 6,000/- was to be paid at the time of execution of sale deed. The contesting respondents took possession of the disputed land and they were found in possession of the land in Section 145 Cr.P.C. proceeding and the SLP of the plaintiff-petitioner was dismissed by the Supreme Court. In the counter affidavit, the answering respondent No. 5 has supported the judgment and order of the Board of Revenue.

6. On behalf of the petitioner, rejoinder affidavit has been filed wherein the averments made in the writ petition have been reiterated and it has been specifically stated that possession of the disputed land was not handed over by the plaintiff to the respondent Nos. 4 and 5 at the time of execution of agreement to sell and that the trial Court as well as first appellate Court on the basis of evidence has recorded a finding of fact that possession of the disputed land was not handed over to the respondent Nos. 4 and 5. It has also been stated that the Board of Revenue could not have reversed the finding of fact in second appeal, which had been recorded by the Trial Court as well as the first appellate Court after perusal of the evidence led by the parties.

7. On behalf of the plaintiff-petitioner, supplementary affidavit has been filed and along with the same, the petitioner has annexed copy of memo of possession dated 20-4-1984 as Annexure-1 to the supplementary affidavit, to show that possession of the disputed land had been handed over to the plaintiff-petitioner on 20-4-1984.

8. According to the plaintiff-petitioners, the agreement for sale has not been proved by examining the witnesses and since the plaintiff has pleaded that there is an interpolation in the agreement for sale regarding handing over possession, therefore, the burden to prove this fact that possession was given at the time of execution of the agreement was upon the defendants, which was not discharged. The learned Assistant Collector has, therefore, rightly decreed the suit and the learned first appellate Court has rightly dismissed the appeal. According to the petitioners, the learned second appellate Court has given a perverse finding by re-appreciating the evidence, which is not permissible under the law and thus, dismissed the suit for possession filed u/s 209 of the Z.A. & L.R. Act.

9. Learned Senior Advocate Mr. Sharad Sharma assisted by Mr. Bhuwan Bhatt,

Advocate, appearing for the contesting respondents has contended that the agreement to sell was admitted in the plaint itself, therefore, there was no question to prove the agreement and the learned Board of Revenue has categorically held in its order that the original agreement was filed in the proceedings of 145 Cr.P.C. and photo copy of which has not been challenged by the other party. The contention of the learned counsel for the respondent Nos. 4/1 to 4/6 and 5/1 to 5/3 is that if there is no denial of the execution of the agreement for sale, there is no need to prove that the agreement was executed, u/s 58 of the Evidence Act. This fact is not disputed that the advance of Rs. 7000/- was received by the plaintiff-petitioner and receipt of the same has been executed, which is admitted to the petitioner. Learned counsel further submitted that since the possession of the disputed land was handed over under the agreement for sale, therefore, u/s 164 of the Z.A. & L.R. Act, it would be a deemed sale and since possession being with the consent of the plaintiff, therefore, the principle of estoppel would apply against the plaintiff and the suit u/s 209 of the Z.A. & L.R. Act would not be maintainable. In support of his contention the learned counsel for the contesting respondents has placed reliance upon the case of Bhairab Dutt Joshi Vs. Additional Chief Revenue Commissioner and Others .

10. Learned counsel for the respondents has further contended that as per direction of the Apex Court the plaintiff-petitioner in order to establish titles and recover possession of property ought to have filed a suit u/s 229B of the Z.A. & L.R. Act along with the Section 209 suit, which has not been done. In reply thereto, the learned counsel for the petitioner has submitted that since he was a recorded tenure holder, his title is established and the plaintiff has filed a suit for dispossession of the defendants, therefore, there was no question to file a suit u/s 229B of the Z.A. L.R. Act for declaration of his right.

11 Learned counsel for the plaintiff-petitioners has vehemently contended that the finding of the learned second appellate Court is entirely perverse on the point of possession of the defendant-respondents. Learned counsel has further argued that there is plethora of evidence on record to establish that possession was not delivered to the defendants on the basis of the agreement between the parties and that the defendants tried to take forcible possession of the suit land in the year 1976 which led to the proceedings u/s 145 of the Cr.P.C. and the possession was given after the decision in the said proceedings.

12. Undisputedly, in the case at hand, a suit bearing Civil Suit No. 205 of 1990 Bishambhar Dayal and another Vs. Radhey Shyam Saxena was instituted in the Court of Civil Judge, Nainital for specific performance of contract, which was dismissed in default vide order dated 21-5-1996. It is also not disputed that a restoration application was moved to recall the order of dismissal of the suit, which too was dismissed for want of prosecution and it is also not disputed that so far the suit for specific performance of contract has not been restored.

13. Learned counsel for the petitioners has firstly argued that when a transferee

seeks to avail of to retain possession of the property which he had under the contract as per provisions of Section 53A of the Transfer of Property Act, it is incumbent upon the transferee to plead and prove his readiness and willingness to perform his part of the contract particularly when the suit for specific performance of contract had been dismissed. Learned counsel for the petitioners has placed reliance upon the Apex Court verdict in the case of Mohan Lal (Deceased) through his Lrs. Kachru and Others Vs. Mirza Abdul Gaffar and Another, wherein the Apex Court has observed in paragraph No. 5 as under:-

5. The question then is whether he is entitled to retain possession u/s 53-A. It is an admitted fact that suit for specific performance had been dismissed and became final. Then the question is whether he is entitled to retain possession under the agreement. Once he lost his right under the agreement by dismissal of the suit, it would be inconsistent and incompatible with his right to remain in possession under the agreement. Even otherwise, a transferee can avail of Section 53-A only as a shield but not as a sword. It contemplates that where any person contracts to transfer for consideration any immovable property by writing, signed by him or on his behalf, from which the terms necessary to constitute the transfer can be ascertained with reasonable certainty and the transferee has performed or is willing to perform his part of the contract, he would be entitled to retain possession and to continue in possession which he has already received from the transferor so long as he is willing to perform his part of the contract. Agreement does not create title or interest in the property. Since the agreement had met with dismissal of the suit his willingness to perform his part of the contract does not arise.

14. In this case, learned trial Court as well as the learned first appellate Court have categorically given a finding that the defendant-contesting respondents have only filed photostat copy of the agreement for sale and they have not got the same proved by adducing oral evidence to substantiate that the defendants were put into possession over the suit land from the date of execution of the agreement for sale. The learned trial Court while dealing with Issue Nos. 1, 4 and 5 framed in the suit has elaborately discussed the evidence led by the parties and had also perused the record of proceedings of Section 145 Cr.P.C. and the trial court had come to the conclusion that had the possession been given to the defendants at the time of execution of the agreement with the consent of the plaintiff, the name of the defendants ought to have been recorded in the revenue record in the column meant for possession, but the defendants entered into possession since 1974. The learned trial Court has also recorded a finding of fact that the plaintiff is the Bhumidhar of the land in dispute. I am of the view that the finding that the possession was taken by the defendant Nos. 1 and 2 in the year 1974 and no possession was given to the defendants on 24-8-1972 with the consent of the plaintiff recorded by the learned trial Court is a finding of fact, which was upheld by the first appellate Court. The learned second appellate Court should not have upset the finding of fact arrived at by the trial Court as well as first appellate Court in the second appeal.

15. Learned counsel for the plaintiff-petitioners has submitted that the plaintiff has specifically pleaded in para No. 3 of the plaint that the defendant Nos. 1 and 2 got one sentence added in the agreement for sale to the effect that possession has been delivered to second party on spot by interpolation and fraud. Learned counsel also submitted that the contesting respondents-defendants have only filed Photostat copy of the alleged agreement of sale and that the same cannot be classified as document. In support of his contention, learned counsel for the plaintiff-petitioners has relied upon the judgment of Allahabad High Court in the case of Saudul Azeez Vs. District Judge, Gorakhpur and others, , wherein it has been held in paragraph Nos. 6, 7 and 8 as under:-

6. The document in generic sense means the original document. Section 61 of the Evidence Act prescribes that the contents of a document may be proved either by primary evidence or by secondary evidence. According to Section 62 thereof primary evidence means the document itself produced for the inspection of the Court. Explanation 2 to Section 60 provides that copies of a common original are not primary evidence.

7. Thus the alleged photocopy cannot be a primary evidence. As such it cannot be classified as document. Now let us see whether it can come within the definition of secondary evidence.

8. As prescribed in Section 63 of the Evidence Act, secondary evidence includes (1) certified copies; (2) copies made from original by mechanical process which in themselves insure the accuracy of the copy and copies compared with such copies; (3) copies made from a compared copy and compared with the original. These have been illustrated thereunder as (a) a photograph of an original even if not compared with original may be a secondary evidence if what was photographed was the original; (b) a copy compared with a copy made by a copying machine from the original is a secondary evidence; (c) a copy transcribed from a copy and compared with original is a secondary evidence; but the copy not so compared with the original, though copies from a copy so (sic) with the original is not a secondary evidence; (d) neither an oral account of a copy compared with the original, nor an oral account of a photograph or machine copy of the original is secondary evidence of the original.

16. In the case at hand, as would appear from a perusal of the original record which was summoned in the writ petitioner the defendant-respondents filed a photocopy of the alleged agreement for sale (paper No. 23/2-4). From a bare perusal of this paper, it would be seen that the mention that possession had been given to the purchaser has been written at the end of paragraph No. 3, while there is mention of payment of advance of Rs. 7,000/- in paragraph No. 2, therefore, the appropriate place regarding the possession having been delivered to the purchaser would be paragraph No. 2, but it is not so, therefore, the argument of the learned counsel for the plaintiff-petitioners that originally there was no mention in the agreement for sale that possession was delivered has some force. In my view the trial court after appraisal of evidence has rightly

recorded a finding of fact that possession was obtained by the defendant-respondents forcibly in the year 1975 and no possession was handed over with the consent of the seller in the year 1972. The first appellate Court too has rightly upheld the finding of fact recorded by the trial court on this count.

17. Learned counsel for the petitioners further submitted that even otherwise the defendant-respondents cannot claim title on the basis of their alleged possession on the strength of the agreement of sale as provided u/s 164 of the U.P.Z.A. and L.R. Act.

18. In support of his argument, learned counsel for the plaintiff-petitioners has placed reliance upon the case of Hasan Raza Khan and others Vs. The Board of Revenue U.P. At Allahabad and others [1996 (87), R.D., 165 (Allahabad H.C.)].

19. From a bare perusal of the impugned judgment 30-7-1990, it is obvious that the learned second appellate Court has wrongly placed reliance upon the photocopy of the sale deed and has observed as under:-

From the perusal of the photo copy of the documents it is clearly apparent on the face of document itself that there is no interpolation as alleged by the plaintiff or as observed by the learned court below, because the gap between the lines is itself an indicator of the fact that there is similarity and sequence throughout in the document. The gap between the lines on page 2 of this document is wider in the beginning and have been reduced gradually afterwards due to scarcity of space as it appears to include the material but by no stretch of imagination it can be believed that the words have been added afterwards and there has been any interpolation in the document. Thus it is clear that the findings of the learned court below are absolutely perverse not based on correct appraisal and appreciation of the evidence on record.

20. I am of the considered view that it was not open to the learned second appellate Court to have reversed the findings of fact recorded by the trial Court as well as first appellate Court on appraisal of evidence merely on appraisal of photocopy of the agreement for sale, which is neither a certified copy nor had been compared with the original.

21. For the reasons and discussion made above, it is evident that the findings recorded by the learned second appellate Court are totally perverse and not tenable in the eye of law. In my view the second appellate Court has also committed jurisdictional error in upsetting the findings of fact in second appeal. In the result, the writ petition deserves to be allowed and the impugned judgment passed by the learned second appellate Court is liable to be set aside.

22. The writ petition is allowed. The impugned judgment dated 30-7-1990 is set aside. The judgment and decree passed by the trial Court as well as the first appellate Court are maintained. Costs easy. The interim order dated 18-8-1990 is vacated.