

(2005) 07 AHC CK 0123
In the Allahabad High Court
Case No : Second Appeal No. 384 of 1999

Raghuvar Sahay Mehrotra and Ors.

APPELLANT

Vs

Pramod Kumar Kapoor & Anr.

RESPONDENT

Date of Decision : 11-07-2005

Acts Referred:

Specific Relief Act, 1963 — Section 36, 41

Citation : (2005) 07 AHC CK 0123

Hon'ble Judges : P.K.Chatterji, J

Final Decision : Partly Allowed

Judgement

P.K. Chatterji, J.—This Second Appeal arises against the judgment and order dated 2271999 passed by the Vth Addl. District Judge, Sitapur in Civil Appeal No. 175 of 1982 arising out of R.S. No. 176 of 1979 decided by Vth Addl. Munsif, Sitapur vide judgment and order dated 691982.

2. Facts of the case, in brief, are that the plaintiffappellant filed a suit for permanent as well as mandatory injunction against the defendantrespondents. The disputed land which is part of the Hata of the plaintiffappellant, is situated in between the houses of the parties. There is a Rasta adjacent to this land towards north and thereafter, situated the house of defendantrespondents. Since the respondents threatened to take forcibly possession by constructing building over the disputed land, the suit was filed by the plaintiff appellant and ad interim injunction was granted. Some constructions were also raised by the defendantrespondents during pendency of the suit and, therefore, relief for demolition was also sought for by making amendment in the plaint. The defendantrespondents protested the suit and claimed his right and title over the disputed land as he used the same to keep their cows and for this purpose their pegs (Khuntas) and troughs (Nandas) were there. A commission was issued by the trial Court and the Commissioner submitted his report alongwith map which was brought on record. The Commissioner found that one side of the disputed land was dug. However, he did not found any peg or trough on the land in

question. The said suit was decreed with cost by the trial Court with direction to the respondents to remove their walls and tinsed from the disputed land. The Court also granted permanent injunction restraining the defendantrespondents from interfering in the possession of the plaintiffappellants. An appeal was fled against the order of trial Court by the defendantrespondents which was allowed and the judgment and the trial Court was set aside and the case was remanded back to the lower Court for decision afresh after framing necessary issues and giving proper opportunity to the parties for adducing evidence. The plaintiffappellant filed a F.A.F.O. No. 149 of 1986 against the appellate order before this Hon''ble Court which was allowed thereby setting aside the order of the appellate Court and it was directed by the Hon''ble Court that the Appeal No. 175 of 1982 will be heard on merits by the first appellate Court. On remand the Vth Addl. District Judge, Sitapur heard the appeal of the defendantrespondents and allowed it and judgment and decree dated 691982 was set aside and the suit of the plaintiff appellant was dismissed with cost. Hence, this Second Appeal.

3. This Second Appeal has been admitted and notice was issued on the grounds No. 1A and AB. However, following substantial questions of law have been formulated :

(1) Whether can it be decided without survey of the area that the disputed land is part of Gata No. 378 or 379 when it is not clear on the basis of pleading in written statement, evidences and documents on record?

(1A) Whether in view of provisions of law contained in Rule 31 of 41 read with Section 107(2) of Code of Civil Procedure. The learned lower Court is empowered and has had jurisdiction to review the findings of learned trial Court without assigning cogent reason for the decision arrived at by it and without framing the points of determination?

(1B) Whether in view of the Section 41 of Specific Relief Act, 1963, the learned lower appellate Court has jurisdiction to refuse preventive relief (injunction) to the plaintiff/appellant without properly scrutinizing the ground of refusal therefore embodied in clauses (a) to (j) of the aforesaid Section 41 of the Specific Relief Act, 1963?

(1C) Whether the learned lower appellate Court can interfere with the discretionary relief of injunction having been granted to the plaintiff appellant under Section 36 of the Specific Relief Act, 1963 by the learned trial Court?

(1D) Whether the learned lower Court has failed to consider the weight of evidence and exercise the powers properly of Section 107 of Civil Procedure Code?

(2) Whether the possession of land can be decided against the plaintiff when the report of Commissioner does not support the averments made by the respondent?

(3) Whether the findings of the appellate Court based on a misreading of

evidence and pleadings the findings so recorded stands vitiated?

(4) Whether the appellate Court committed gross illegality in allowing the appeal and dismissing the suit when the seller himself was not in possession of land in suit and even failed to identify the property in dispute?

4. During pendency of the appeal, the sole appellant Ram Nath Mehrotra died and in place thereof the appellants No. 1/1 to 1/7 have been substituted by the order of the Court.

5. Heard learned Counsel for the appellant as well as the learned Counsel for the respondent. I have also perused the record.

6. Learned Counsel for the appellants has argued that number of disputed plot is 378. Learned appellate Court cannot interfere with the discretionary relief given to the plaintiff by the lower Court. The learned lower Court is not empowered and has any jurisdiction to review the findings of learned trial Court without assigning cogent reason for the decision arrived at by it and without framing the points of determination.

7. It is settled principle of law that the appellate Court has all the powers that of trial Court and, therefore, interference of the appellate Court is always warranted. This issue is decided accordingly.

8. Learned Counsel for the appellant further argued that the appellate Court did not give proper weight to the evidence of the plaintiff. However, learned Counsel for the appellant could not show that on what ground he is saying that the lower Court has not given weight to the evidence of the plaintiff.

9. Learned Counsel for the appellant further argued that the appellate Court committed gross illegality in allowing the appeal and dismissing the suit when the seller himself was not in possession of land in suit and even failed to identify the property in dispute.

10. The plaintiff filed the suit for removal of wall and tinshed on the land marked by ABCD. It is submitted that D.W. 2 is owner of the property and he has sold the property in question. The possession has already been admitted as there was tinshed and wall on the land in dispute. The Commissioner had inspected the spot. From the evidence it has come on the record that the land in question was of widow of Luxmi Narain Dubey.

11. Learned Counsel for the respondents, however, could not show as to how he is in possession over the land in dispute which situate in Plot No. 379. The land in dispute was being used as Sahan and for the purposes of egress and ingress under Section 9 of the U.P.Z.A. and L.R. Act.

12. I, therefore, find that the finding of the appellate Court that the defendant is owner of the land, is perverse. None of them has pleaded that the land in dispute was in their use and, therefore, right of ownership cannot vest to any of them. The case of the appellants is that the land is being used as Sahan for egress and

ingress and for the purposes the land in front of the house is used. Therefore, construction, if any, on the land in dispute is illegal as the same vests with the Gaon Sabha. The parties will utilize the land in dispute for social purposes and not for making any constructions.

13. The appeal is, therefore, partly allowed. The suit of demolition is decreed so far as right of the parties to sell it or to make any construction over it. Nobody will interfere in ingress or egress of both the parties. The parties shall also have no right or title over the land in dispute.