
(2005) 01 AHC CK 0098
In the Allahabad High Court
Case No : Second Appeal No. 1585 of 1998

Ram Swaroop Singh (since deceased) (through his L/H) and Ors. APPELLANT

Vs

State of U.P.through Collector,Bijnor RESPONDENT

Date of Decision : 08-01-2005

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 100

Citation : (2005) 01 AHC CK 0098

Hon'ble Judges : Sanjay Misra, J

Final Decision : Allowed

Judgement

Sanjay Misra, J.

1. The instant second appeal has been filed by plaintiff appellants against the judgments and decree dated 199 1998 passed in Civil Appeal No. 71 of 1991 by the Court of Special Judge/Additional District Judge Bijnor whereby the appeal filed by the defendant/respondent has been allowed and the judgment and decree of the trial Court has been set aside. Relief sought in this second appeal is that the judgment and decree of the lower appellate Court may be set aside and the judgment and decree of the trial Court be restored. This appeal was admitted on 2731999 on the substantial question of law as to whether the lower appellate Court has reserved the finding of the trial Court on no basis.?

2. The facts giving rise to this appeal are that the plaintiffs/appellants filed a suit No. 235 of 1984 seeking injunction and ejectment of the defendant (State of U.P.) from the land in dispute. The plaintiffs case was that plot No. 63 area three Bigha seven Biswa situate at village Meerapur Raza Pargana, Tehsil & District Bijnor belonged to one Sri Nurul Hasan and it was situated within the area of Nagar Palika Bijnor. By a registered sale deed dated 2681961 the said Nurul Hasan sold an area of 907 Sq. yard from the said plot to Sri Prakash Chandra Munish. The purchaser made certain constructions on the said plot purchased by him. By notification dated 17121962 under the Land Acquisition Act, State of U.P.

acquired an area of three Bigha, two Biswa of plot No. 63 for the purpose of construction of police station. The area purchased by Prakash Chandra Munish was not included in the acquisition and no compensation whatsoever was paid to Prakash Chandra Munish. It is alleged that Prakash Chandra Munish continued to be in possession of the area purchased by him and in the meantime defendants took possession on 921963 and constructed buildings of police station on an area of 3 Bigha 2 Biswa in plot No. 63 which was acquired by them. The said acquisition is said to have taken place on 1712 1962 which was after the sale deed dated 2681961 executed by Nurul Hasan in favour of Prakash Chandra Munish. By another sale deed dated 23101974 Prakash Chandra Munish transferred the land in favour of the plaintiffs. The plaintiffs alleged that they came into possession of the land and its construction from the said date. It is the case of the plaintiffs that due to some error/mistake the land in dispute was recorded in the name of the Kotwali in 1379F. It is alleged that from 1333F, the entire area of 3 Bigha 7 Biswa of plot No. 63 was recorded in the name of Nurul Hasan son of Bahadur Ali but after 3 Bigha 2 Biswa of land was acquired under the Land Acquisition Act by the State the name of Nurul Hasan was deleted the police station Kotwali was entered in the revenue record over the area of 3 bigha, 2 Biswa. However, in 1379F, the revenue record erroneously showed the name of police station Kotwali over the area of 3 Bigha 7 Biswa.

3. The plaintiffs alleged that upon discovering the said mistake in the khatauni of 1379F, the plaintiff filed a case No. 16 of 1983 under Section 33/39 of the Land Revenue Act before the competent authority and after obtaining report paper No. Ga91 of Tehsildar the authority by order dated 431983 corrected the said mistake and the police station Kotwali was entered in the Khatauni over an area of 3 Bigha 2 Biswa in plot No. 63. The rest of the area of plot was recorded as abadi. Subsequently in 1391F, same entries are continuing wherein plot No. 63/1 area 5 Biswa was shown as abadi and plot No. 63/2 area 3 Bigha 2 Biswa was shown in the name of police station Kotwali. It is alleged by the plaintiffs that they started certain construction over the plot from the year 1982. In June 1984, the police personnel forcibly occupied the Kothari belonging to the plaintiff situate over a portion of land purchased by the plaintiffs from Prakash Chandra Munish. The possession was resisted. However, when the police personnel did not vacate the premises, plaintiffs were compelled to file the present suit.

4. In support of their case, plaintiffs filed relevant revenue records and sale deeds apart from giving oral evidence. On behalf of the defendants, the case of the plaintiff was denied and it was stated that defendant State has been in possession over plot No. 63 since its acquisition and the land in dispute is in the nature of a road. A plea of adverse possession was also set up by the State.

5. The trial Court framed the following issues ?as to whether the plaintiffs are the owner of the land in dispute? as to whether the land in dispute was a part of plot No. 63; as to whether defendant's possession is unauthorized, as to whether the defendants have been in possession of the disputed land since 1963. The issue of

valuation and limitation was also framed. The plaintiffs got a commission issued for the purpose of locating the land. In the commissioner's report it was stated that the Commissioner tried to find out the fixed point for survey but no such fixed point could be found on account of construction of houses and dense locality hence the Commissioner prepared a sketch map and submitted his report before the Court. The trial Court considered the evidence led by the plaintiffs which consisted of two sale deeds of 1961, two sale deeds of 1974 and payment receipts which were proved by the plaintiffs. The order in Case No. 25 under the Land Acquisition Act was filed as paper No. Ga32 was considered. The trial Court also took into consideration the Commissioner's report and oral evidence led by the plaintiffs. The defendant State of U.P. did not file any evidence before the trial Court nor led any oral evidence.

6. Upon considering the aforesaid evidence, the trial Court was of the view that the land in dispute had not been located exactly by the Survey Commissioner, however, it proceeded to hold that on the basis of documentary and oral evidence it was proved that the plaintiffs had purchased the portion of plot No. 63 which had been sold by Nurul Hasan to Prakash Chandra Munish in the year 1961 having an area of 907 Sq. yard. On the basis of the order in land acquisition Case No. 25 being paper No. Ga32, the trial Court found that State of U.P. had taken possession on 9/2/1963 of an area of 3 Bigha 2 Biswa in plot No. 63. The area of 5 Biswa was left out of acquisition. On the basis of record of rights, the trial Court came to the conclusion that in 1379F, the police station had been wrongly recorded and shown as being owner of three Biswa seven Biswa over plot No. 63 and relied upon the order dated 4/3/1983 of competent authority passed in Case No. 16 of 1983 under Section 33/39 of Land Revenue Act wherein the said erroneous entry had been corrected and defendants was recorded over 3 Bigha, 2 Biswa of plot No. 63 as they had been recorded in the earlier Khataunis. The trial Court also found that the subsequent entries in the Khatauni clearly indicated that the defendants were recorded over 3 Bigha 2 Biswa and balance area of 5 Biswa in plot No. 63 was recorded as abadi. On the aforesaid evidence and findings, the trial Court held that the plaintiffs are owner of the land in dispute that the land in dispute is a part of plot No. 63 and that the defendant State has not been in possession of the land in dispute since 1963. Consequently, it was held that the defendants had unauthorizedly occupied the premises of the plaintiffs in 1984 and they were liable to be ejected therefrom. On the issue of limitation, the trial Court held that since the defendants had entered into unauthorized possession in the year 1984, therefore, the suit filed by the plaintiffs in 1984 itself was not barred by limitation. The trial Court, therefore, decreed the suit of the plaintiffs and ordered the ejectment of the defendants from the land shown as A.B.C.I. in the map of Amin being paper No. Ga 28/5.

7. Feeling aggrieved the defendants filed Civil Appeal No. 71 of 1991 before the lower appellate Court. The lower appellate Court has proceeded to allow the appeal and has set aside the judgment and decree of the trial Court. While considering the evidence the lower appellate Court has recorded that State of

U.P. had acquired 3 Bighas of land from Khasra No. 63 much before the plaintiffs had purchased the land from Prakash Chandra Munish. While considering the oral evidence, the lower appellate Court found that a total area of 1223.64 Sq. yards of land from Khasra No. 63 and 65 had been purchased. It is also found that such fact was not pleaded by the plaintiffs who had confined their case to 907 Sq. yard of land in plot No. 63. The lower appellate Court also recorded that Prakash Chandra Munish had stated that he has purchased the entire Khasra No. 63 from Nurul Hasan in addition to some portion of plot No. 65. On the aforesaid reading lower appellate Court recorded that the State of U.P. had acquired 3 Bigha area from plot No. 63 and plaintiffs purchased the land from Prakash Chandra Munish after acquisition of plot No. 63. It concluded that 3 Bigha was acquired by the State then it becomes out of question that 907 sq. yards land was left in Khasra No. 63. The lower appellate Court then considered the issue of limitation and held that since State of U.P. had been in possession of the disputed land since 1963 when the land was acquired and the plaintiffs having filed the suit for ejectment in the year 1984 it was barred by limitation. The lower appellate also recorded that since State of U.P. had taken possession of the land and the building was constructed thereon, therefore, State of U.P. has been in possession of the land for more than 12 years hence the plaintiffs were not entitled to any relief. The lower appellate Court held that the trial Court had erred in holding that the State of U.P. encroached upon the land belonging to the plaintiffs and that the trial Court had further erred when it held that the suit has been filed within the period of limitation. The lower appellate Court allowed the appeal and set aside the judgment and decree of the trial Court.

8. Heard Sri Devraj learned Counsel appearing for the appellant and learned standing Counsel appearing on behalf of the State of U.P. It has been contended by the learned Counsel appearing for the appellant that the lower appellate Court has reserved the findings of the trial Court without following the procedure provided in Order XLI Rule 31 CPC. He has argued that the lower appellate Court has not made out the points for determination and has not given any reasons for setting aside the findings recorded by the trial Court. He submits that there was no evidence in rebuttal on behalf of the defendant State and the lower appellate Court has misconstrued and misinterpreted the evidence.

9. Learned Standing Counsel submits that the land in dispute forms part of Plot No. 63 and the plot having been acquired under the Land Acquisition Act, the title and possession of the State was conclusively proved. He submits that the plaintiffs have not been able to identify the land in dispute and were not entitled to any relief whatsoever.

10. After the 1976 amendment in Section 100 CPC substantial question of law has to be formulated by the High Court. Findings of facts recorded by the lower Courts cannot be interfered under Section 100 CPC. In the case of *Dilbagari Punjabi v. Sharad Chandra*, AIR 1988 SC 1858, the Hon'ble Supreme Court held:

?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.?

11. In the case of Jagdish Singh v. Nathu Singh, AIR 1992 SC 1604, the Hon''ble Supreme Court held as quoted hereunder:

?Where the findings by the Courts of facts is vitiated by nonconsideration of relevant evidence or by an essentially erroneous approach to the matter, the High Court is not precluded from recording proper findings.?

12. The Hon''ble Supreme Court in the case of Kochukakkada Aboobacker (dead) by LRs v. Attah Kasin, 1996(1) JCLR 593 (SC) : 1996 AIR SCW 1606, has observed on the scope of Section 100 CPC as follows:

?The appellate Court had not considered these documents in a proper perspective and the effect of those documents on the rights of the parties. Accordingly the learned Judge reluctantly had reconsidered the evidence and, in our view, quite rightly since it is not a mere appreciation of evidence but drawing inference from the admitted documents. Since proper construction of the documents and interferences have not legally been drawn by the appellate Court, the High Court has gone in detail and recorded the findings.?

13. The Hon''ble Supreme Court has held that when findings of subordinate Courts are perverse and contrary to evidence the same can be set aside by the High Court in Second Appeal. In the case of Bondar Singh v. Nihal Singh, reported in AIR 2003 SC 1905, it was held as follows:

?If the findings of the subordinate Courts on facts are contrary to evidence on record and are perverse, such findings can be set aside by the High Court in appeal under Section 100 CPC. A High Court cannot shut its eyes to perverse findings of the Courts below?.

14. In the aforementioned case the Hon''ble Supreme Court was considering a plea of adverse possession raised by the plaintiffs. The sale deed dated 951931 in favour of the predecessor in interest of the plaintiffs executed by father of the defendants was an admitted document in the sense that its execution was not disputed. The said sale deed was an unregistered document and therefore, it could not have conveyed title to the vendee. It was held by the apex Court that even though a document is not admissible in evidence it can be looked into for collateral purposes. The issue in the case was with respect to possession and the sale deed showed that the initial possession of the plaintiffs was not illegal or unauthorized.

15. From the law as laid down it is clear that when vital documents for deciding the question of possession are ignored the same would be unjustified. The High Court would therefore, be within its jurisdiction under Section 100 CPC to interfere with findings of fact when material or relevant evidence is not

considered, which if considered would have led to an opposite conclusion and where a finding has been arrived at by the appellate Court by placing reliance on inadmissible evidence, which if it were omitted, an opposite conclusion would be reached. (Reference is made to decision of the Hon"ble Supreme Court reported in AIR 1992 SC 123; Sri Chand Gupta v. Gulzar Singh, AIR 1994 SC 532; Sundara Naichavediyar v. Ramaswami Ayyar; AIR 1998 SC 427, Mehrunissa v. Visham Kumari).

16. A perusal of the judgment of lower appellate Court indicates that the lower appellate Court has taken into consideration the oral evidence of PW 1 Shiv Pal Singh and PW 2 Prakash Chandra Munish. A perusal of the aforesaid statement of PW 1 indicates that this witness has stated that 1423.64 Sq. yards land was purchased from plot No. 63 and 65 from Prakash Chandra Munish by two registered sale deeds being Ex4 & 5 (Paper No. Ka77 and Ka 78). The witness proved the execution of sale deeds and receipt of payment of consideration. This witness has stated that the area of land purchased from plot No. 63 and 65 was by two Sale Deeds. He has stated that possession was taken by virtue of the said two sale deeds which related to portion of land of Nurul Hasan (Plot No. 63) and the portion of land of Plot No. 65. This witness has also clearly stated that Nurul Hasan was original owner of plot No. 63 and that an area of 907 Sq. yard of the said plot was purchased by Prakash Chandra Munish. He has also said that the rest of the land of plot No. 63 was acquired by the State. He has stated that the area of 907 Sq. yard of plot No. 63 sold by Nurul Hasan to Prakash Chandra Munish is separate from land in plot No. 65. He has stated that plot No. 63 has been entered in the revenue records as plot No. 63/1 and 63/2.

17. The statement of PW 2 Prakash Chandra Munish indicates that he had purchased an area of land of plot No. 65 from Ratan Lal Jain in 1961 and has proved the sale deed paper No. Ga41 which is Ex6. He stated that adjacent land of plot No. 63 was owned by Sri Nurul Hasan and he has purchased a portion of the same from Nurul Hasan. He has proved the sale deed being Paper No. Ga42 which has been shown as Ex7. He states that he has purchased these two portions and made certain constructions. He has further stated that in 1974 he sold the said land of plot No. 63 and plot No. 65 to the plaintiffs. The said two registered sale deeds have also been proved by him which have been shown as exhibit No.4 & 5 being paper No. Ka77 and Ka78.

18. From the reading of the aforesaid two statements of PW 1 and PW 2 it transpires that they have referred to the four registered sale deeds of 1961 and 1974 which related to a portion of plot No. 63 and a portion of plot No. 65. The witnesses have deposed with respect to purchase of area as shown in the sale deeds.

19. The sale deeds of 1961 filed before the trial Court are certified copies. The PW 2 who was the vendee of said sale deeds has stated in his deposition that the original sale deeds have been filed before the Income Tax Authorities and therefore, the same could not be filed in original. While considering the

production of a certified copy of a sale transaction under Section 51A of the Land Acquisition Act. The Hon'ble Supreme Court in the case of Cement Corporation of India Ltd. v. Purya & Ors., 2005(1) JCLR 307 (SC) : (2005) 1, UPLBEC 230, held that a presumption as to the genuineness of the contents of the document (certified copy) is permitted to be raised, the same can be relied upon only if the said presumption is not rebutted by other evidence. Considering the provisions of the Evidence Act the Hon'ble Supreme Court observed as under:

22. In the ordinary course a deed of said is the evidence of a transaction by reason whereof for a consideration mentioned therein the title and interest in an immovable property specified therein is transferred by the vendor to the vendee. Genuineness of such transaction may be in question. In a given situation the quantum of consideration or the adequacy thereof may also fall for adjudication. The Courts, more often than not, are called upon to consider the nature of the transaction. Whenever, a transaction evidenced by a sale deed is required to be brought on record, the execution thereof has to be proved in accordance with law. For proving such transaction, the original sale deed is required to be brought on record by way of primary evidence. Only when primary evidence is not available, a certified copy of the sale deed can be taken on record. Such certified copies evidencing any transaction are admissible in evidence, if the conditions precedent therefore, in terms of Section 75 of the Indian Evidence Act are fulfilled. The transaction evidenced by the sale deed must be proved in accordance with law.

23. Evidences are of different types. It may be direct, indirect or real evidence. The existence of a given thing or fact is proved either by its actual production or by the testimony or admissible declaration of someone who has himself perceived it. Such evidence would be direct evidence. Presumptive evidence which is an indirect evidence would mean that when other facts are thus, proved the existence of the given fact may be logically inferred. Although the factum probandum and factum probantia connote direct evidence, the former is superior in nature.

24. The terms "primary and secondary evidence" apply to the kinds of proof that may be given to the contents of a document, irrespective of the purpose for which such contents, when proved, may be received. Primary evidence is an evidence which the law requires to be given first, secondary evidence is evidence which may be given in the absence of that better evidence when a proper explanation of its absence has been given. However, there are exceptions to the aforementioned rule.

20. In the present case, the sale deeds whose certified copies have been filed by the plaintiffs have not been rebutted and the defendant appellant has not led any evidence oral or documentary to prove the contrary.

21. A perusal of the two sale deeds of 1961 would indicate that an area of land was purchased by Prakash Chandra Munish from Nurul Hasan in plot No. 63 and

from Ratan Lal Jain in plot No. 65. In the statement of these two witnesses they have proved the sale deeds with respect to the transfer of the land . The certified copy of sale deed dated 2681961 executed by Nurul Hasan in favour of Prakash Chandra Munish is on record as Ex.7 wherein it indicates that an area of 907 Sq. yards has been transferred in favour of Prakash Chandra Munish. The certified copy of sale deed dated 2661961 executed by Ratan Lal Jain is also on record as Ex.6. A perusal whereof indicates that it relates to sale of land of plot No. 65 in favour of Sri Prakash Chandra Munish. From a perusal of the aforesaid sale deeds it transpires that in the year 1961 Prakash Chandra Munish had purchased portion of plot No. 63 from Nurul Hasan and adjoining portion of plot No. 65 from Ratan Lal Jain.

22. The sale deed dated 23101974 being Exhibit No. 4 and 5 indicates that Prakash Chandra Munish had sold the entire area purchased by him in 1961 to the plaintiffs and had given the measurement of the area being sold by him. It is clearly stated in the said sale deed that towards east and north the building of new Kotwali Bijnor is situated and that towards the west quarter of Hydel and P.W.D. road are situated. The second sale deed dated 23101974 is also on record which indicates that Prakash Chandra Munish had sold an area by giving area and its boundaries therein. These two sale deeds relate to the land purchased by Prakash Chandra Munish in the plot No. 63 and 65. From perusal of the aforesaid sale deed it shows that Prakash Chandra Munish has not stated in his oral statement before the Court below that he has purchased the entire plot No. 63. A perusal of statement of P.W.1, indicates that total area purchased by the plaintiffs from Prakash Chandra Munish was 1423.64 . 64 Sq. yards which consisted of a portion of plot No. 63 and a portion of plot No. 65. The sale deeds of 1961 clearly indicates that out of 3 Bigha 7 Biswa in plot No. 63 Prakash Chandra Munish had purchased only 907 Sq. yards of land before the land was acquired by State of U.P. It is also on record that an area of 3 Bigha 2 Biswa was acquired by the State of U.P. from Plot No. 63. A perusal of the aforesaid evidence indicates that the area of plot No. 63 purchased by Prakash Chandra Munish from Nurul Hasan was not the land acquired by State of U.P. The subsequent sale deeds of 1974 also indicate that Prakash Chandra Munish had sold his land by two sale deeds in favour of the plaintiffs. The said sale deeds of 1974 indicates that Prakash Chandra Munish had sold that portion of land which he had purchased from Nurul Hasan and Ratan Lal Jain in the year 1961 which fell in plot No. 63 and 65. It is also clear that plot No. 63 had an area of 3 Bigha 7 Biswa. The land acquisition record also indicates that State had acquired three Bighas 2 Biswas. It is therefore, undisputed that area of 5 Biswa of plot No. 63 was never acquired by the State of U.P. The State of U.P. had not led any evidence with respect to its ownership of any area of land of plot No. 63 over and above 3 Bigha 2 Biswa. Consequently it cannot be said that State of U.P. became owner of the entire plot No. 63 having original area of 3 Bigha 7 Biswa by virtue of land acquisition proceedings.

23. Lower appellate Court while recording its finding on a perusal of oral

evidence of P.W. 1 and P.W. 2 was clearly erred in recording such a finding which is not borne out from the said evidence. The lower appellate Court has not considered the sale deeds of 1961 and 1974 which were proved by the plaintiff witnesses and have been marked as exhibits nor it has considered the revenue entries. The finding of the lower appellate Court is not based on any evidence much less on the evidence which is on record as such the lower appellate Court has reversed the findings of the trial Court on no basis. The lower appellate Court has not examined important evidence available on record which had a direct bearing on the dispute. The findings of the lower appellate Court are vitiated by nonconsideration of relevant evidence and it has taken an erroneous approach while deciding the appeal.

24. In so far as the finding of the lower appellate Court with respect to bar of limitation is concerned, the lower appellate Court has recorded that the possession of the disputed land is with State of U.P. since 1963 and therefore, the suit filed by the plaintiffs in 1984 is barred by limitation. This finding of the lower appellate Court is not based upon any evidence in as much as evidence on record as contained in oral statement of P.W.1 and P.W.2 as also the entry in the record of rights clearly indicates that since 1963 the defendants State of U.P. was recorded over 3 Bigha 2 Biswa in plot No. 63. The entry of 3 Bigha 7 Biswa which was erroneously entered in 1379 F was corrected by the order dated 4.3.1983 passed by the competent authority in Case No. 16 of 1983 under Section 33/39 of the Land Revenue Act. It was clearly held that entries from 1963 continuously showed that State is entered over 3 Bigha 2 Biswa and due to same mistake only in the year 1379F, entry was shown as 3 Bigha 7 Biswa. Such mistake in 1379F was immediately got corrected by the plaintiffs. From the aforesaid facts it appears that dispute between the parties started due to the aforesaid wrong entry in 1379F. The case of the plaintiffs that the defendants had forcibly and unauthorizedly occupied the plaintiffs constructions in the plot in dispute was proved by the plaintiff witnesses and also revenue records and the trial Court recorded its finding with respect to defendants unauthorized possession in June 1984. The suit was filed in 1984 on the cause of action which took place in June 1984. These two facts along with entries in past revenue records are clear indication that the trial Court's finding with respect to unauthorized possession having been taken by the defendant in the year 1984 was based on evidence and therefore, the suit was not barred by limitation. The lower appellate Court has clearly not taken into consideration any such evidence which existed on record and has given a cursory finding with respect to bar of limitation.

25. For the aforesaid reasons, the judgment of the lower appellate Court cannot be sustained in as much as it has reversed the finding of the trial Court on no cogent basis and against the evidence on record therefore, this appeal deserves to be allowed.

26. The appeal is accordingly allowed. The judgment and decree dated 1991/1998 passed by the appellate Court in Civil Appeal No.71 of 1991 (State of U.P. v. Ram

Swarup Singh & Ors.) is hereby set aside. The judgment and decree dated 14.5.1991 passed by the trial Court is affirmed.

27. However, no order is passed as to costs.