

(2011) 11 AHC CK 0311
In the Allahabad High Court
Case No : Second Appeal No. 931 of 2011

Rama Shanker Pandey (deceased) and Others	APPELLANT
Vs	
Chandan Pandey and Another	RESPONDENT

Date of Decision : 21-11-2011

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 11
Evidence Act, 1872 — Section 13

Citation : (2011) 11 AHC CK 0311

Hon'ble Judges : Sibghat Ullah Khan, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

Hon'ble Sibghat Ullah Khan, J.—Heard Sri B.D. Mandhyan, learned Senior counsel for the appellant at the admission stage.

2. This is defendants' Second Appeal arising out of O.S. no. 795 of 1978 which was decreed in part on 8.8.2002 by Ist Additional Civil Judge (J.D.), Court no. 19 Gorakhpur. Against the said judgment and decree two appeals were filed. Appeal filed by defendants was numbered as Civil appeal no. 52 of 2002 and appeal of the plaintiff was numbered as Civil appeal no. 51 of 2002. Both the appeals were dismissed by A.D.J./Special Judge S.C.S.T. Act Gorakhpur on 8.4.2011. This Second Appeal is directed against the said judgment and decree in respect of defendants appeal i.e. civil appeal no. 52 of 2002.

3. The trial court had decreed the suit for demolition and eviction from the portion shown by letters ABEFGH in the plaint map. The relief claimed in respect of cost of some trees etc. was denied by the trial court (and affirmed by the lower appellate court). The land in dispute is included in a part of plot no. 434 and 435. Relief in respect of 0.08 acre of plot no. 440 was also claimed and granted by the trial court. However, trial court had held the plaintiffs to be owner of entire plot no. 440. The said finding was modified by the lower appellate court and lower appellate court held that as only 0.08 acre land of plot no. 440 was in

dispute hence in respect of said plot the decree will operate only in respect of 0.08 acres.

4. The main case of the defendant was that the disputed property was situate in plot no. 432.

5. The dispute had earlier also arisen in and decided through two suits i.e. O.S. no. 663 of 1930 and O.S. no. 15 of 1942. Even though in the suit of 1930 defendants or their ancestors were not parties, however, the courts below held the said decree to be admissible. Ancestors of defendants were parties in O.S. no. 15 of 1942 hence that was binding on the principle of res judicata upon them. The trial court also got the property surveyed through survey Commissioner. Maps filed in the earlier suit were also filed. After taking the entire evidence into consideration including earlier judgments survey map prepared in the suits in question and the maps of the earlier suits and oral evidence both the courts below held that plaintiffs were owner of the property in dispute.

6. Defendants also asserted that their constructions were quite old and also pleaded that in case it was held that they were not entitled to the land then instead of demolition and possession, decree for damages might be passed. The courts below, in this regard held that firstly no substantial construction had been made, only a wall had been constructed and cattle trough had been made and secondly the construction were very recent. For recording this finding reliance was placed upon the Commissioner's report who was also examined as P.W. 4. Report was paper no. 36 Ga in which it was stated that the wall AB had been constructed 3 to 4 days before the visit of the Commissioner.

7. I do not find least error in the concurrent findings which are based on correct appraisal of evidence. Plaint judgment etc. of the suit of 1930 were admissible in evidence u/s 13 of Evidence Act even though defendants or their ancestors were not party thereto. Survey Commissioner very categorically reported that disputed portion was not in plot no. 432 but in plot no. 434 and 435, no substantial construction had been made by the defendant and the constructions were very recent and not old.

8. As far as sale deed dated 13.6.75 through which defendant purchased some property is concerned, the courts below particularly lower appellate court categorically held that it could not be shown that the deed related to the portion in dispute. The deed was of 0.24 acres of plot no. 182. Lower appellate court held that plot no. 182 contained only 0.07 acres of plot no. 434 while total area of plot no. 434 was 0.45 acre. The disputed land contained only 0.02 acre land of plot no. 434.

9. Accordingly the Second Appeal does not involve any question of law. There is no error in the findings recorded by the courts below. Second Appeal is, therefore, dismissed under Order 41 Rule 11 C.P.C.