
(2010) 02 AHC CK 0268
In the Allahabad High Court

Raymond Banjerjee (through L.Rs) and Others	APPELLANT
Vs	
Sri C.J. Victor and Others	RESPONDENT

Date of Decision : 18-02-2010

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 100

Citation : (2010) 02 AHC CK 0268

Hon'ble Judges : Rakesh Sharma, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

Rakesh Sharma, J.—Heard Shri Manoj Misra, learned Counsel for the appellants and Shri Anuruddh Chaturvedi for the respondents.

2. Through this Second Appeal, the judgment and decree dated 17.09.2009 passed by Additional District Judge (Court No. 4), Gorakhpur, affirming the findings of the Trial Court vide judgment and order dated 25.8.1977 has been assailed.

3. The litigation between the parties is going on for the last about 47 years as the original suit was filed in the year 1963 in the court of Munsif, Gorakhpur. Ultimately, the courts below after several rounds of litigation have resolved controversy regarding area identification and possession of the plot in dispute situate in District Gorakhpur.

4. It emerges from record that original suit No. 434 of 1963 was filed by Shri C.J. Victor and Ors. against Shri Raymond Banerjee and Ors. for possession over the land in dispute. The dispute arose regarding the land adjacent to an old house situate in plot No. 1181. The plaintiffs claimed that they were the owners of piece of land bearing No. 1129 having an area of 0.80 Decimal and the defendants had no concerned with the said plot. The defendants house was situated in plot No. 1172, which was towards eastern side of plot No. 1129. The plaintiffs had given some land about 0.20 Decimal to Shree Ram Yadav and

Others. The plaintiffs were in possession over the remaining land upon which some Bamboo grove and other trees were planted by them. They had an old Pacca well structure on the disputed plot. The defendants without any authority starting felling the Date Palm (Khajoor) trees on 21.7.1963 and started raising wall, thus giving rise to a cause of action to the plaintiffs-respondents to file a suit.

5. The defendants-appellants filed written statement alleging that the disputed trees were situated in plot No. 1172 having an area of 0.33 Decimal owned by them. It was alleged that after the plaintiffs-respondents sold their land to Shree Ram Yadav they were not left with any land between plot Nos. 1129 to 1172. The land in dispute was settled in favour of the defendants u/s 9 of U.P. Z.A. & L.R. Act, 1950 and that the suit was barred by Section 49 of the C.H. Act, 1963 and the Civil Court had no jurisdiction to adjudicate upon the suit. The Trial Court had framed 12 issues for covering the dispute. For the purpose of this appeal, issue Nos. 1 to 7 are quoted below:

1. Whether the land in suit lies in plot No. 1129?
2. Whether the land in suit is the Sahan land of the defendants?
3. Whether trees in suit were planted by the defendants?
4. Whether the plaintiffs are the owners of the land in suit?
5. Whether the trees in suit lies in plot No. 1129?
6. Whether the plaintiffs are owner of the trees in suit?
7. Whether the land and trees in suit shall be deemed to have been settled with the defendants u/s 9 of the U.P. Z.A & L.R. Act.

6. Both the parties joined issues on the identity of the land. The plaintiffs claimed suit land to be situated in plot No. 1172. The defendants had claimed that it was part of plot No. 1129. The Trial Court appointed a Court's Amin to identify the land, who had submitted his report and map (Papers Nos. 243 Ga and 244 Ga), placed on the record of lower court's record. The Court's Amin found that the land in dispute is situate in plot No. 1129 and that all the Date Palm (Khajoor) trees were situated in the same plot. The Trial Court thus held that the disputed land is situate in plot No. 1129 and other issues were decided accordingly. The Trial Court had categorically held that since the disputed land is situate in plot No. 1129 with which the defendants have no concern. The plaintiffs-respondents had filed the original lease (Ex.A-2) to prove the acquisition of land. The revenue entries of 1363F and Khatauni of 1345F etc. were produced to prove that the land in dispute situate in plot No. 1129 and had remained in possession for a long period of time.

7. The Trial Court had given other findings also in support of the plaint. The defendants had filed a Civil Appeal No. 250 of 1977 against the decree rendered by the Trial Court. It was held that the Court's Amin did not commit any error in

adopting the special procedure. The appellants contentions were repealed. The appeal was dismissed by the First Appellate Court. Against the First Appellate Court order Second Appeal No. 2544 of 1978 Sri Raymond Banerjee (since deceased) represented by Smt. Queeni Banerjee and Ors. v. Sri C.J. Victor (since deceased) represented by Sri O.S. Victor (since deceased) represented by Babloo Selvestor Victor and Ors. have been filed. This appeal had remained pending for several years in this Court and was ultimately disposed of after about 29 years i.e. 10.1.2008. This Hon"ble Court had appreciated the submissions of Shri Manoj Misra, learned Counsel for the appellants that the field-book was not scaled and whenever there is discrepancy between field-book and scale, the survey on the basis of field-book will be incorrect. The court had found fault with the Amin"s report. Finally the court had concluded and recorded its own findings as follows:

In this case it will not be useful to remand the matter for fresh survey as five survey reports were rejected and the 6th survey report found defective, was relied upon to decree the suit. In such circumstances the courts below could not have proceeded to decide the suit on the basis of survey report and should have assessed other material and the oral evidence to decide the matter.

It is unfortunate that this appeal is pending in the court since 1978, and that the matter has to be remanded to the appellate court after 29 years to consider the oral evidence or any other evidence or material on record to find out whether the disputed land falls in plot No. 1121. Both the counsels did not chose to rely upon the oral evidence or any other evidence on record for the purpose of deciding the matter and thus it would be appropriate that the matter is remanded to the appellate court to consider the oral evidence or any other evidence or material on record to record findings whether the land falls in plot No. 1129.

The substantial questions of law with regard to violation of the established principles of surveying in preparing a report, which was made the basis of claim of the plaintiff, is decided in favour of the defendants-appellants. The second appeal is allowed. The judgment of the first appellate court dated 12.5.1978 in Civil Appeal No. 250 of 1977 is set aside. The office shall forwarded the entire record to the appellate court to decide the matter afresh on the basis of other evidence including oral evidence on record. The appellate court shall not consider and rely upon the Amin"s report confirmed by the Trial Court. The deposit of measne profit in terms of the interim orders of this Court shall abide by the result of the judgment of the first appellate court.

Dt/10.11.2008

8. In furtherance of the order passed by this Court the First Appellate Court has dealt with the matter afresh. It was directed to take into account other circumstances including oral evidence, which was placed on record. The Appellate Court this time had excluded from consideration and did not place reliance on the Amin"s report, which was affirmed by the Trial Court. The learned Additional

District Judge, Court No. 4, Gorakhpur has given a fresh look at the matter and decided the case by dismissing the appeal vide judgment and decree dated 17.09.2009. He has affirmed the judgment and decree dated 25.8.1977.

9. Shri Manoj Misra, learned Counsel for the appellants has reiterated almost the same argument, which was raised before this Court when the above said Second Appeal No. 2544 of 1977 was heard and considered. He has placed reliance on a judgment rendered by Apex Court in *Shreepat v. Rajendra Prasad and Ors.* reported in JT 2000 (7) SC 379 in support of his submissions that the First Appellate Court ought to have taken assistance of the Survey Commission to ascertain correctness of the respective claims. The land in dispute had to be identified.

10. Shri Anuruddh Chaturvedi learned Counsel for the respondents has resisted the appeal and supported the findings recorded by the Trial Court and the lower First Appellate Court.

11. I have heard learned Counsel for the parties and perused the materials on record.

12. The learned Additional District Judge has taken note of the seven issues, which were framed for adjudication of the dispute. Both the courts below have taken note of the oral and documentary evidence while deciding the controversy raised. The plaintiffs had produced original lease (Ext.A-2) to prove the acquisition of land. With these documents i.e. paper No. 11-A, 383G, he demonstrated that he was granted lease deed for plot No. 1139 by J.H. Ferar under the provisions contained u/s 18 of U.P. Z.A. & L.R. Act. The plaintiffs had acquired bhumidhari rights. It was indicated in the lease deed that the plot No. 1129 having an area of 0.80 Decimal was given to original plaintiffs and he could build his house and garden on the same. In the revenue entries i.e. Khasra No. 1363 F Khatauni No. 1345 F, the name of J. Victor was recorded. In the other revenue entries out of 0.80 Decimal land, 0.8 Decimal land was recorded in the name of Shri Ram Yadav and still 0.72 Decimal had remained with the plaintiffs. There was mention of the trees situate on plot No. 1129 in the revenue entries. The documents relating to consolidation proceedings were produced by the respondents. The plaintiffs' case was supported by the oral as well as documentary evidence.

13. PW-1 J. Victor had deposed that J.H. Pharar was Secretary of Christian Colony, Basaratpur, Gorakhpur, who had executed lease deed in his favour. He had built a well and house on the plot No. 1129. Shri Anand Ballabh Tiwari boundary wall and plot existed on the eastern side. The Mango, Jackfruit, Samail, Bamboo, grapes trees were planted by the plaintiffs. The respondents had illegally encroached on the land and fell the trees during pendency of the litigation. The courts below had taken note of the fact that the appellants had made contradictory statements at various stages. At the time of framing of issues the defendants had indicated that the plot in dispute was part of plot No.

1172 thereafter, it was claimed that it was part of 1129 also.

14. Both the courts below had taken note that the plot No. 1129 was recorded in the name of respondents in the revenue records. In all the revenue entries the name of plaintiffs were recorded and they became bhumidhars of the said plot. Even in the revenue entries of 4.6.1961, the name of the plaintiffs were shown as owners and having possession over the same. Similarly revenue entries, Khataunis issued on 17.7.1963 and Khasra entries, the name of plaintiffs were recorded on plot No. 1129. The details and boundaries of the plots were indicated in the plaint-map. The settlement map was also produced. It was also considered and dealt with by the courts below. The existence of public passage, boundary wall and house of Anand Vallabh Tiwari was correctly shown in the map. The First Appellate Court has appreciated the statements of respondents vide para 3 of the written statement that on the northern side of plot No. 1172 some trees were existing. Infact the trees were not existing on the said plot. The courts below has also appreciated the deed executed in favour of DW-1 Raymond Banerjee (appellant herein). Considering the boundaries of the plot of Raymond Banerjee having an area of 33 Decimal, the court has found substance in the submissions of the plaintiffs. It was admitted by Shri Raymond Banerjee that the boundary wall was raised on the disputed plot during pendency of the litigation. The Date-Palm and Mango trees were came out naturally. The rosewood and Shamail trees were already existing when the litigation was initiated. After appreciation of the oral and documentary evidence both the courts below had found that the plot No. 1129 was under ownership and possession of the plaintiffs (appellants herein). They had acquired the land through a lease deed executed in the year 1935. They became bhumidhars after implementation of U.P. Z.A. & L.R. Act, 1951. A categorical statement was made by the respondents (appellants herein) that they were not owners, title holders or in possession of the plot No. 1129. In this factual matrix, both the courts below have held that the respondents were owners, title holders and in possession of the plot No. 1129. The appellants were admittedly not owners of the said plot i.e. plot No. 1129. The trees were planting on plot No. 1129. The detailed findings recorded by the Trial Court were affirmed by the lower First Appellate Court also.

15. The facts regarding identity, boundaries of plot No. 1129 has also been settled by the two courts below. The judgment rendered by Shri Manoj Misra, learned Counsel for the appellants is not applicable in the present facts and circumstances of the case. Both the courts below had taken note of the oral as well as documentary evidence, revenue entries and unchallenged lease deed executed in the year 1935. The courts below have also placed reliance on the appellants' own statements that they were never owners of plot No. 1129.

16. In view of above, it is clear that both the courts below have recorded concurrent findings of fact based on oral and documentary evidence and other materials available on record. No substantial question of law arises to be considered in this Second Appeal to persuade this Court to deal with the matter.

No ingredients or elements as required to be attracted u/s 100 of the CPC are available in this case. This Court has also scrutinized this case in the light of the law laid down by the Hon"ble Apex Court in the judgments reported in Kashmir Singh Vs. Harnam Singh and Another, Kondiba Dagadu Kadam Vs. Savitribai Sopan Gujar and Others, Kashibai and Another Vs. Parwatibai and Others, Kashibai W/O Lachiram and Anr. v. Parwatibai W/o Lachiram and others and does not find any ingredients as required u/s 100 of the CPC are attracted in the present case.

17. In view of the above, no substantial question of law arises to be considered. Accordingly, the Second Appeal is dismissed.