

(2012) 01 AHC CK 0370
In the Allahabad High Court
Case No : Second Appeal No. 42 of 1979

Rehan Ahmad and others

APPELLANT

Vs

Maqsood Khan and others

RESPONDENT

Date of Decision : 24-01-2012

Acts Referred:

Citation : (2012) 01 AHC CK 0370

Hon'ble Judges : S.S. Chuahan, J

Bench : Single Bench

Final Decision : Allowed

Judgement

Hon"ble S.S. Chuahan, J.—This appeal has been filed challenging the judgment and decree dated 19.10.1978 passed by the first appellate court decreeing the suit.

2. The plaintiff filed a suit for declaration that he be declared the owner of the land described at the foot of the plaint. The facts as stated in the plaint, were that the plaintiff is the owner of the land indicated in the map of the plaint and the disputed land is a part of the land marked by number 77 in the map of the first settlement. A written statement was filed and the evidence was led by the parties and after appreciating the evidence, the trial court dismissed the suit vide judgment and order dated 21.11.1977. Thereafter, plaintiff preferred an appeal and the appellate court vide judgment and decree dated 19.10.1978 allowed the appeal and directed that the plaintiff shall be put in possession of the property in suit within one month from today failing which the same shall be got done through the process of the court. Hence this appeal.

3. Learned counsel for the appellants has raised substantial question of law in respect of the identity of the land and has submitted that neither any issue in regard to identity of the land has been framed nor the identity of the land was determined. Plot No. 230 is the property of the appellants, which is adjoining to plot no. 229 which is the property of the ancestors of the plaintiff-respondent,

but the trial court assuming that plot no. 77 situated besides plot no. 230 proceeded to dismiss the suit, whereas plot no. 77 situate at some distance and at least not adjoining to plot no. 230.

4. Counsel for the respondents, on the other hand, has submitted that the land in suit in accordance with the first settlement was abadi and a portion of plot no. 77 Minzumla. He has also submitted that map of the first settlement of village Bangermau was torn and a copy of the same is not available in the record nor a copy of the same could be issued to the respondents, therefore, it was not possible for them to file the copy of the first settlement of khasra and map. He has further submitted that copy of the khasra and map of the first settlement of village Bangermau is available in the record of Original Suit No. 123 of 1971 Sheo Nath Ram vs. Sheo Shanker Ram and Original Suit No. 1750 of 1971 Hafizul Rahman vs. Town Area Bangermau pending in the court of Munsif, North, Unnao and it was the duty of the plaintiff-respondent to have got summoned the said map from the said court or could have obtained the certified copy of the same and placed it on record and proved the same. Since that has not been done, the claim of the plaintiff-respondent has wrongly been decreed by the appellate court.

5. I have heard learned counsel for the parties and perused the judgment and decrees passed by the trial court as well as by the appellate court and find that it was specifically stated in the written statement as well as it has come in the evidence that khasra and map of the first settlement of village Bangermau was very much available in the records of Original Suit No. 123 of 1971 Sheo Nath Ram vs. Sheo Shanker Ram and Original Suit No. 1750 of 1971 Hafizul Rahman vs. Town Area Bangermau pending in the court of Munsif, North, Unnao, but in spite of the aforesaid specific plea the plaintiff-respondent did not take any pain nor made any effort to get the copy of the said khasra and map from the said suit or get them summoned by moving an application. The obvious reason which appears is that name of the ancestor of plaintiff is Yakub, whereas the sale deed filed in respect of plot no. 77 mentions the house of Yakub and others on the northern side. Now whether northern side of plot no. 77 is situate at plot no. 230 shall be apparent from the khasra and map of the first settlement. The trial court and the appellate court have failed to take into consideration the aforesaid existing position and have also failed to identify the land in respect of which the claim was being made by the plaintiff i.e. plot no. 77. What is the situation of plot no. 77 in the khasra and map of the first settlement was required to be determined by the trial court by framing a specific issue. I have perused the issues framed by the trial court, which are as under:

(i) Whether the plaintiff is owner of the disputed land ?

(ii) Whether the plaintiff has been continuing in peaceful possession for the last several years, if so, its effect ?

(iii) Whether the defendant no. 1 is owner of the disputed property ?

- (iv) Whether the defendant no. 1 has perfected title through adverse possession ?
- (v) Whether the Suit is within time ?
- (vi) Whether defendant no. 1 is bona fide purchaser of the disputed land ? If so, its effect?
- (vii) To what relief, if any, is the plaintiff entitled ?

6. From the aforesaid issues, it is evident that none of the issues in regard to identity of the land has been framed. Therefore, the judgment passed by the trial court is contrary to the evidence available on record is not sustainable. In the commissioner's report, the disputed land has been shown to be part of plot no. 77, but no survey commission has been issued and neither any issue in regard to identity of the disputed land has been framed as to whether it is situated in plot no. 77 or plot no. 229. Since that has not been done, therefore, the claim set up by the plaintiff could not have been allowed by the appellate court. The judgment and decree passed by the appellate court, therefore, cannot be sustained in law and it deserves to be set aside.

7. The appeal is accordingly allowed and the judgment and decree dated 19.10.1978 passed by the first appellate court is hereby set aside and the matter is remitted to the trial court to frame a issue in regard to the identity of the land and decide the same in accordance with law on priority basis.