

(2020) 09 UK CK 0022
In the Uttarakhand High Court
Case No : Second Appeal No. 98 Of 2013

S. Harnaam Singh (Since Deceased)	Vs	APPELLANT
Uttar Pradesh Avas Evam Vikas Parishad		RESPONDENT

Date of Decision : 09-09-2020

Acts Referred:

Uttar Pradesh Avas Evam Vikas Parishad Act, 1965 — Section 28, 29, 82
Code Of Civil Procedure, 1908 — Section 100, Order 41 Rule 31
Constitution Of India, 1950 — Article 32, 226

Citation : (2020) 09 UK CK 0022

Hon'ble Judges : Lok Pal Singh, J

Bench : Single Bench

Advocate : U.K. Uniyal, Piyush Garg, Pankaj Purohit

Final Decision : Allowed

Judgement

Lok Pal Singh, J

1. Present second appeal is directed against the judgment and its decree dated 30.07.2012, passed by Special Judge (UMC) / Addl. District Judge, Dehradun, in Civil Appeal no. 217 of 2001, Sardar Harnam Singh (dead) through LRs. Vs Avas Vikas Parishad U.P., only to the extent of partial rejection of the defendant / appellants counter claim and for setting aside the judgment and decree dated 23.10.2001, passed by Civil Judge (Sr. Div.) / FTC VI, Dehradun, in Original Suit no. 390 of 1991, Avas Vikas Parishad Vs Sardar Harnam Singh, only to the extent of partial rejection of the defendants / appellants counter claim and further to allow the defendants / ap counter claim in toto and amend the decree accordingly, with costs throughout.

2) Initially the second appeal was admitted 04.09.2015 on the following substantial question of law:

i) Whether the learned Appellate Court failed to appreciate that the order dated 21.08.2009 passed by this Court in Writ Petition no. 1861 of 2007 between the

same parties wherein this Court has held that no award was made in respect of khasra no. 58 and 68 and that the award was not made for constructed area, has attained finality since the SLP against the same has also been dismissed and the same would operate as res-judicata?

ii) Whether the Courts below have erred in law by not appreciating that in the absence of any compensation being paid by the plaintiff to the appellant / defendant in lieu of the alleged acquisition in respect of property in question, the same cannot be said to be a part of acquired property and the plaintiff cannot be said to have acquired any interest in the same?

3) When the second appeal came for hearing before this Court on 04.03.2020, following additional substantial question of law was formulated:

iii) Whether the single appeal filed by the respondent before the courts below against the dismissal of suit was barred by the principles of res judicata as no separate appeal was filed against the decree of allowing the counter claim?

4) Facts leading to filing of the present case are that the plaintiff / respondent instituted the said suit, inter alia, on the grounds that the plaintiff had acquired the land bearing khasra nos. 58, admeasuring 1.16 acres and Khasra no. 68, admeasuring 0.90 acres along with other plots, situated in Village Ajabpur Kalan, Pargana Central Doon, Dehradun and the possession was delivered to the plaintiff on 25.06.1975. Since then the suit property is in the possession of the plaintiff. Plaintiff prepared Nehru Nagar, Yojna no. 1 for construction of the residential houses. A Notification under Section 28 of the U.P. Avas Evam Vikas Parishad Act, 1965 (hereinafter referred to as 'the Act') was issued in the official Gazette and thereafter another Notification under Section 29 of the Act was published. Notices were also issued personally to the land owners. The said land was acquired by the plaintiff. The original defendant Harnam Singh had illegally encroached upon a portion of khasra nos. 58 and 68, total measuring 1629.70 sq. mt. of the land (hereinafter referred to as 'the suit property'). It is averred that the defendant had illegally constructed a boundary wall and also constructed personal house and Gurudwara over the suit property. Since the defendant has illegally encroached upon the suit property, the plaintiff served a notice under Section 82 of the Act on 04.01.1991 and demanded the possession from the defendant. Since the defendant did not comply with the notice, then the plaintiff was constrained to institute a suit for ejectment of the defendant from the suit property.

5) Defendant Sardar Harnam Singh put in his appearance in the suit. He denied the plaint averments specifically. It is averred that the defendant is in possession of the suit property prior to 25.06.1975 and raised the permanent construction over it. The land Khasra no. 58, admeasuring 0.14 acres, was purchased by him through registered sale deed dated 13.12.1962, which was duly registered in the office of Sub Registrar, Dehradun on 06.12.1962. Through another sale deed dated 09.08.1961, the defendant purchased 0.96 acre land of said khasra no. 58,

from one Ram Avatar, which was also duly registered in the office of Sub Registrar, Dehradun on 17.08.1961.

6) Notice dated 04.01.1991 issued under Section 82 of the Act as well as notice dated 15.01.1991 by which the defendant was asked to remove his illegal encroachment were sent to the defendant by the plaintiff.

7) Plaintiff as well as the defendant led their oral and documentary evidences. Thereafter, on the basis of the pleadings of the parties, trial court framed necessary issues. After discussing the statements of witnesses and the documents produced by the parties, the trial court dismissed the original suit of the plaintiff (respondent herein), being O.S. no. 390 of 1991, Avas Vikas Parishad U.P. Vs Sardar Harnam Singh, vide judgment and decree dated 23.10.2001 holding that it could not prove its case by leading evidence. However, the counter claim of the defendant Harnam Singh was partly allowed in respect of his residence, shown in the map 39C/6 (Ext. 1) at Sl. Nos. 5 and 6 annexed with the plaint and the defendant was declared owner of said portion. The counter claim of the defendant was rejected in respect of the balance property.

8) Aggrieved against the judgment and decree dated 23.10.2001, both plaintiff as well as defendants (legal representatives of deceased Harnam Singh) preferred Civil Appeals in the Court of Special Judge (UMC) / Addl. District Judge, Dehradun, being Civil Appeal no. 217 / 2001, Sardar Harnam Singh (deceased) through LR Vs Avas Evam Vikas Parishad and Civil Appeal no. 228 of 2001, Avas Vikas Parishad U.P. Vs Sardar Harnam Singh (deceased) through LR. Both the appeals were heard together. Having heard learned counsel for the parties and after perusing the documents brought on record, first appellate court dismissed both the appeals vide judgment and order dated 30.07.2012. Hence, present second appeal.

9) Heard learned counsel for the parties and perused the entire material available on record.

Answer to the substantial question of law no. (i):

10) This Court has elaborately discussed the facts in connected Second Appeal no. 65 of 2013, in regard to the judgment and order dated 21.08.2009 passed in Writ Petition no. 1861 (M/S) of 2007 (previously WPMB no. 1075 of 2006) and the order passed by Hon'ble Apex Court dismissing the Special Leave to Appeal filed by the plaintiff / respondent. This Court has held that the judgment and order dated 21.08.2009 passed by this Court which has been affirmed by Hon'ble Apex Court vide judgment and order dated 15.01.2010, has an effect of res judicata against the respondent U.P. Avas Evam Vikas Parishad. Also, in view of the decision of Hon'ble Apex Court in P. Bandopadhyaya & others Vs Union of India & others (2019) 13 SCC 42, wherein having relied on a Constitutional Bench judgment in Direct Recruit Class II Engineering Officers' Association Vs State of Maharashtra and others (1990) 2 SCC 715 it has been held that the principle of res judicata are applicable to the writ petitions.

11) Relevant paragraphs of the judgment rendered by Hon'ble Apex Court in P. Bandopadhyaya & others Vs Union of India & others (2019) 13 SCC 42 are extracted hereunder:

"8.7. The decision in S.V. Vasaikar & Ors. v. Union of India & Ors. [2003 (2) Mh. L.J. 691 : 2003 (4) Bom CR 79] was not challenged before the Supreme Court, and has since attained finality. Therefore, the relief sought by the Appellants before the High Court was barred by the principle of res judicata.

Reference can be made to the decision of the Constitution Bench in Direct Recruit Class II Engineering Officers' Association v. State of Maharashtra & Ors., (1990) 2 SCC 715, wherein Sharma, J., on behalf of the five judge bench, held:

"35...It is well established that the principles of res judicata are applicable to writ petitions. The relief prayed for on behalf of the petitioner in the present case is the same as he would have, in the event of his success, obtained in the earlier writ petition before the High Court. The petitioner in reply contended that since the special leave petition before this Court was dismissed in limine without giving any reason, the order cannot be relied upon for a plea of res judicata. The answer is that it is not the order of this Court dismissing the special leave petition which is being relied upon; the plea of res judicata has been pressed on the basis of the High Court's judgment which became final after the dismissal of the special leave petition. In similar situation a Constitution Bench of this Court in Daryao v. State of UP AIR 1961 SC 1457 held that where the High Court dismisses a writ petition under Article 226 of the Constitution after hearing the matter on the merits, a subsequent petition in the Supreme Court under Article 32 on the same facts and for the same reliefs filed by the same parties will be barred by the general principle of res judicata. The binding character of judgments of courts of competent jurisdiction is in essence a part of the rule of law on which the administration of justice, so much emphasised by the Constitution, is founded and a judgment of the High Court under Article 226 passed after a hearing on the merits must bind the parties till set aside in appeal as provided by the Constitution and cannot be permitted to be circumvented by a petition under Article 32..."

(emphasis supplied)

Albeit the decision of the Constitution Bench was in the context of a Writ Petition filed under Article 32, it would apply with greater force to bar a Writ Petition filed under Article 226, like the one filed by the present Appellants, by the operation of the principle of res judicata."

12) Thus, the substantial question of law no.(i) is answered in favour of defendants / appellants holding that the judgment and order dated 21.08.2009, passed by this Court in Writ Petition no. 1861 (M/S) of 2007, Sardar Harnam Singh Vs State of U.P. & others which has been affirmed by Hon'ble Apex Court, has an effect of res judicata between the parties. The substantial question of law is answered accordingly.

13) Substantial questions of law though were framed on 04.03.2020, however, this Court feels that the findings on additional substantial question of law no. (iii) is to be recorded before recording the findings on substantial question of law no. (ii). Thus, the findings on additional substantial question of law no. (iii) is being recorded before substantial question of law no. (ii).

Answer to the additional substantial question of law no. (iii):

14) Suit no. 390 of 1991, Avas Evam Vikas Parishad U.P. Vs Sardar Harnam Singh was dismissed by Civil Judge (Sr. Div.) / F.T.C. VI, Dehradun vide judgment and its decree dated 23.10.2001, whereby the counter claim of the defendants was rejected partially. Feeling aggrieved Avas Evam Vikas Parishad U.P. preferred civil appeal no. 228 of 2001, Avas Evam Vikas Parishad U.P. Vs Sardar Harnam Singh (Dead through LRs.), but did not file any appeal whereby the counter claim filed by the defendants was allowed. Thus, the judgment and decree passed by the trial court in partially allowing the counter claim remains unassailed. Therefore, the judgment and decree passed on the counter claim has attained finality against the plaintiff U.P. Avas Evam Vikas Parishad and has a binding effect of res judicata against the plaintiff.

15) My view is fortified by the decision of Hon'ble Apex Court in the case of Premier Tyres Limited vs. Kerala State Road Transport Corporation 1993 Supp (2) Supreme Court Cases 146, wherein it has been held that where two connected suits are tried together and a finding has been recorded in one suit became final in absence of appeal, appeal preferred against the finding recorded in the other suit would be barred by res judicata. Relevant paragraphs of the judgment are as follows:

"4. Although none of these decisions were concerned with a situation where no appeal was filed against the decision in connected suit but it appears that where an appeal arising out of connected suit is dismissed on merits the other cannot be heard, and has to be dismissed. The question is what happens where no appeal is filed, as in this case from the decree in connected suit. Effect of nonfiling of appeal against a judgment or decree is that it becomes final. This finality can be taken away only in accordance with law. Same consequences follow when a judgment or decree in a connected suit is not appealed from.

6. Thus the finality of finding recorded in the connected suit, due to non-filing of appeal, precluded the court from proceeding with appeal in other suit. In any view of the matter the order of the High Court is not liable to interference."

Since no appeal was preferred against the judgment and decree dated 23.10.2001, the effect of non-filing of appeal against a judgment and decree is that it becomes final. This finality can be taken away only in accordance with law. Same consequences follow when a judgment or decree in a connected suit is not appealed from. The substantial question of law no. (iii) is answered accordingly.

Answer to the substantial question of law no. (ii):

16) The plaintiff / respondent did not prove the fact that in lieu of alleged acquisition of plot nos. 58 and 68, which is the subject matter in present second appeal, any compensation had been paid to the defendants. The writ court in Writ Petition no. 1075 (M/B) of 2006, Sardar Harnam Singh Vs State of U.P. and others [renumbered as 1861 (M/S) of 2007] has categorically recorded its findings that no compensation had been paid by U.P. Awas Evam Vikas Parishad to the land owners / defendants in regard to the land bearing khasra nos. 58 and 68. The judgment of writ court has attained finality upto Hon'ble Supreme Court and has binding effect upon the parties. This Court has also addressed this substantial question of law while adverting to the finding on substantial question of law no. (i).

17) No one can become owner of the property on acquisition or otherwise unless due compensation has been paid to the land owners. Since the U.P. Awas Evam Vikas Parishad has failed to prove the fact that ever any compensation was paid to the defendant / appellants, it cannot be said that the property of alleged acquisition ever vested in the plaintiff U.P. Awas Evam Vikas Parishad. Furthermore, the writ court has also held that no compensation has been paid in regard to the suit property, therefore, there is no question of alleged acquisition by the plaintiff. The substantial question of law no. (ii) is answered in affirmative i.e. in favour of the defendants / appellants and it is held that the plaintiff / defendant did not pay any compensation to the land owner / defendant, who has purchased the suit property through registered sale deeds dated 09.08.1961 and 13.12.1962.

18) It is an admitted case that the defendant rebutted the evidences adduced by the plaintiff and in support of his counter claim led oral and documentary evidence. It is also an admitted case of the plaintiff that the defendant has raised construction over all the suit property. At some part of the property, the defendant raised construction of his residential house and on remaining part a Gurudwara has been constructed. In so far as construction of residential house is concerned, both the courts below have granted a relief to the defendant by allowing the counter claim in part. The trial court had declined the counter claim of the defendant in regard to the construction of Gurudwara on account of the fact that the Gurudwara was constructed later on.

19) Both the courts below have erred in law in non-appreciating the material evidence available on record, more particularly, in not considering the judgment dated 21.08.2009 passed by this writ court, as affirmed by the Hon'ble Apex Court. The trial court decreed the counter claim of the defendants / appellants in part and dismissed the counter claim in regard to some part of suit property. It is admitted case of the plaintiff that the defendant has raised construction over the suit property and the suit filed by the plaintiff in regard to the same property has been dismissed by the trial court and affirmed by the first appellate court as well as by this Court in Second Appeal no. 65 of 2013, U.P. Awas Evam Vikas Parishad Vs Harprit Singh and another. It is held that the first appellate court has erred in

law in non-decreeing the counter claim of the defendants / appellants in toto, more particularly, when the trial court had dismissed the suit of the plaintiff U.P. Avas Evam Vikas Parishad. First appellate court failed to consider the fact that the issue between the parties stood decided by a competent court which had attained finality. Thus the first appellate court erred in law in dismissing the appeal of the defendants. The trial court as well as the first appellate court did not consider the judgment dated 21.08.2009, which had binding effect of res judicata upon the plaintiff. Thus, it was a case of misreading the evidence and both the courts below have failed to appreciate the material evidence and committed illegality in ignoring the judgment of the writ court dated 21.08.2009 as also the judgment rendered by the Hon'ble Apex Court dated 15.01.2010. Thus, the finding recorded by the courts below that the original defendant could not prove his title over the suit property is perverse and liable to be quashed. The same is hereby quashed. The substantial question of law no. (ii) is decided in affirmative i.e. in favour of the defendants / appellants. It is held that the defendant Sardar Harnam Singh (since deceased) has successfully proved the fact that he is the owner of the property whereupon the counter claim has been led by him.

20) Though Hon'ble Apex Court in C.Doddanarayana Reddy (Dead) by LRs and others Vs C. Jayarama Reddy (Dead) by LRs and others AIR 2020 SUPREME COURT 1912 in para 25 of the judgment has categorically held that the power of the High Court to interfere in second appeal under Section 100 CPC is limited solely to decide a substantial question of law, if at all the same arises in the case, and the Court cannot interfere with the findings of fact in second appeal, but it has further been observed that the findings of fact can be interfered with only when such findings are perverse or not based on material on record. Para 25 of the judgment reads as under:

"25. The question as to whether a substantial question of law arises, has been a subject matter of interpretation by this Court. In the judgment reported as Karnataka Board of Wakf v. Anjuman-E- Ismail Madris-Un-Niswan, (1999) 6 SCC 343, it was held that findings of the fact could not have been interfered within the second appeal. This Court held as under:

"12. This Court had repeatedly held that the power of the High Court to interfere in second appeal under Section 100 CPC is limited solely to decide a substantial question of law, if at all the same arises in the case. It has deprecated the practice of the High Court routinely interfering in pure findings of fact reached by the courts below without coming to the conclusion that the said finding of fact is either perverse or not based on material on record.

13. In Ramanuja Naidu v. V. Kanniah Naidu (1996 3 SCC 392), this Court held:

"It is now well settled that concurrent findings of fact of trial court and first appellate court cannot be interfered with by the High Court in exercise of its jurisdiction under Section 100 of Civil Procedure Code. The Single Judge of the

High Court totally misconceived his jurisdiction in deciding the second appeal under Section 100 of the Code in the way he did."

14. In *Navaneethammal v. Arjuna Chetty* (1996 6 SCC 166), this Court held :

"Interference with the concurrent findings of the courts below by the High Court under Section 100 CPC must be avoided unless warranted by compelling reasons. In any case, the High Court is not expected to re-appreciate the evidence just to replace the findings of the lower courts.

... Even assuming that another view is possible on a re-appreciation of the same evidence, that should not have been done by the High Court as it cannot be said that the view taken by the first appellate court was based on no material."

21) Indisputably, the defendant is in possession of the suit property. The trial court did not consider the oral and documentary evidence and has also failed to notice the fact that it has been specifically held by this Court in its judgment and order dated 28.08.2006 that a perusal of the award dated 01.12.1976 would reveal that no award has been made in respect of khasra nos. 58 and 68. Said judgment and order dated 28.08.2006 passed by this Court has been affirmed by the Hon'ble Supreme Court. Thus, it is apparently clear that the land of khasra nos. 58 and 68 was not acquired by the plaintiff. The trial court erred in law in not-considering the material evidence available on record in this regard. The first appellate court, which is the last court of facts and law, also failed to discharge its legal obligation to decide the appeal in view of the provisions contained in Order 41 Rule 31 of CPC and has affirmed the judgment and decree passed by the trial court in a routine manner without applying its judicial mind that sufficient oral and documentary evidence is available on record to support the case of the defendant that the property of khasra nos. 58 and 68 was not acquired by the plaintiff and the construction has been raised by the defendant. Subsequent construction of Gurudwara makes no difference in granting the relief in favour of the defendant.

22) Non-consideration of relevant material by a court while recording the findings of fact has been considered as a perversity. Hon'ble Apex Court in *S.R. Tiwari Vs Union of India* (2013) 6 SCC 602, has observed that the findings of fact recorded by a court can be held to be perverse if the findings have been arrived at by ignoring or excluding relevant material or by taking into consideration irrelevant / inadmissible material. The finding may also be said to be perverse if it is "against the weight of evidence", or if the finding so outrageously defies logic as to suffer from the vice of irrationality.

23) In view of the foregoing discussion, the judgments passed by the trial court as well as the first appellate court and decree prepared on it are modified to the extent that the counter claim filed by the defendant / appellant is allowed in toto. The second appeal of the appellants is allowed. Let a decree be prepared accordingly. However, in the facts and circumstances of the case, there will be no order as to costs.