

(2007) 01 AHC CK 0105
In the Allahabad High Court

Sachidanand Rai and Others

APPELLANT

Vs

Shambhu Singh and Others

RESPONDENT

Date of Decision : 11-01-2007

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 11
Specific Relief Act, 1963 — Section 42
Transfer of Property Act, 1882 — Section 107, 53A

Citation : (2007) 2 ADJ 490 : (2007) 2 AWC 1087 : (2007) 102 RD 276

Hon'ble Judges : Sunil Ambwani, J

Bench : Single Bench

Final Decision : Allowed

Judgement

Sunil Ambwani, J.—Heard Shri Radhay Shyam, learned Counsel for appellants and Shri B.N. Asthana learned Counsel for respondents.

2. The substitution application of appellant No. 2 is delayed by 46 days. The reasons given for explaining the delay are good and sufficient. The delay condonation application and substitution application are allowed. The office shall make a note of the order in the array of parties.

3. The second appeal was dismissed for want of prosecution on 19.8.2006. An application for recalling the order was filed on 11.9.2006. The counsel could not appear as he is stated to be ill on that date. The cause shown is sufficient. The restoration application is allowed. The appeal is restored to its original number and with the consent of parties it was heard.

4. This defendant's second appeal arises out of OS No. 132 of 1963 for declaration that the land "Ka, Ya, Ha", Na is the "Sahan" (Courtyard) of the house of the plaintiff and defendants-second set. The plaintiffs also prayed for relief of permanent injunction, and in the alternative, in case they are not found in possession, for relief of possession. The suit was decreed by the trial court on 27.9.1966 with costs. The Civil Appeal No. 253 of 1966 filed by the defendants

was dismissed on 11.10.1976. The concurrent judgments are under challenge.

5. Briefly stating the facts given in the plaint are that plot No. 329 was partitioned in the year 1935 amongst the Zamindars, in which plot No. 329/1 measuring 4 bishwa 18 biswansi was allotted to Shri Saryoo Prasad Rai; plot No. 329/2 measuring 3 biswas 5 biswansi in the share of Shri Arvind Rakesh Rai, and plot No. 329/3 measuring 4 biswas 18 biswansi to Shri Mahadeo Rai, Mohd, Nazir the father of defendant Nos. 6 to 9 and husband of defendant No. 10 took land of plot No. 329/1 4 biswas 10 biswansi and 329/3 4 biswas 18 biswansi from Saryoo Prasad Rai and Shyam Sunder through registered "Ejajtnama", on 4.1.1939 for constructing a house. He also took plot No. 329/2 measuring 3 biswas; 5 biswansi from Shri Arvind Rakesh Rai on 5.1.1939. Mohd. Nazir constructed a "pacca kothi" in these plots measuring 74" north-south and 38" east-west, in 1939-40. He left the land towards north as-"sahan" (court yard) and used it for the said purpose. This land piece fell in plot No. 329/2 and 329/3 and is appurtenant to the kothi. On the abolition of zamindari the land was settled with him u/s 9 of the U.P. Zamindari Abolition and Land Reforms Act, 1950. The plaintiff No. 2 is the tenant of Mohd. Nazir.

6. It is further stated in the plaint that Mohd. Nazir transferred his half share to plaintiff No. 1. The defendant No. 6 to 10 are heirs of Moh. Nazir. The plaintiff No. 1, and the defendants 2nd set are the owners of the house in suit, The plaintiff No. 2 is the tenant. The plaintiff No. 2 is the mortgagee of the house in suit. The defendant 1st set interfered in the sahan of the plaintiff towards east and south on which the plaintiff No. 1 and Mohd. Nazir filed a Suit No. 474 of 1953 in the Court of Munsif Khalilabad for permanent injunction. The suit was dismissed on technical grounds. Shri Nagendra Rai son of Saryoo Rai executed a sale deed of plot No. 329/1 measuring 4 biswas 18 biswansi in favour of Puran Panjabi, There is no dispute with regard to plot No. 329/1. The appeal preferred against the judgment of Munsif Khalilabad was dismissed by Civil Judge, Basti for non prosecution. The defendants 1st set again started interfering with the possession of the plaintiff over the sahan of the kothi. They started digging foundation on 16.3.1968. The Cane Development Society Khalilabad, brought this fact to the notice of the plaintiff, giving rise to the suit.

7. The suit was contested by defendant-1st set. They denied plaint allegations. The tact of dismissal of Suit No. 474 of 1953 and the appeal arising thereof was however admitted.

8. The trial court decided the issue No. 4, as to whether the suit is barred by Section 11, CPC, in favour of plaintiff and against the defendant. The issue, as to whether the plaintiff is entitled to get benefit of Section 30A of Transfer of Property Act and whether Mohd. Nazir had a right and transferred the property in suit in favour of plaintiff No. 1, and further that plaintiff No. 1 and defendants second set are owners for possession of the land in suit which is sahan land and appurtenant to the house, was also decided in favour of plaintiff. The issues of valuation, court fees, and non-joinder of necessary party were not pressed. The

suit was thus decreed. In appeal the findings of the trial court, on the main issue that the suit was not barred by principle of res-judicata as the same issues between the same parties were decided in previous suit, was upheld and the appeal was dismissed,

9. The appellate court also upheld the findings that deed dated 4.1.1939 was not executed by both the lessor and lessee. It did not confer any right on the lessee. The deed is a registered document. It is also contrary to the mandatory provisions of the Section 107 of Transfer of Properties Act, which requires both the parties to execute the deed. This finding by learned Munsif in previous suit No. 474 of 1953 operates as res judicata between the parties, However, Mohd. Nazir was allowed to remain in possession and to raise constructions of his choice. He consequently raised constructions in 1939-40 and continued in possession till the date of vesting. He therefore becomes owner in view of Section 9 of the U.P. ZA&LR Act, and since more than 12 years have passed between the deeds of transfer to Mohd. Nazir and the transfer made by Mohd. Nazir in favour of plaintiff No. 1, even if any valid rights were conferred by the pattas, Mohd. Nazir became owner of the land by adverse possession. As regard the land towards north of the building in question, which is the disputed land, the plaintiff's witnesses deposed that it was not appurtenant to the houses in question. In this regard the Court found that the trial court's judgment in OS No. 474 of 1953 that the land towards north was admitted to be in possession of respondent, and that the only dispute was regarding the land towards east and south. The admissions made by respondents in previous suit were found to be binding. They could not be permitted to lead evidence against their own admissions The defendants' witnesses in trial court were interested witnesses and could not face the cross examination. Shri Parmatma Prasad Shukla, Court Commissioner in his report (Paper No. 77-C) found that the main door of the house is towards north and shows "sahan" towards north just in front of the main road. The allegation that sahan of building is in another direction towards east was not admitted in view of the fact that in OS No. 474 of 1953 it was alleged to be the land in possession of the plaintiffs.

10. The court did not frame any substantial question of law at the time of the admission of the appeal on 3.1.1977. Shri Radhey Shyam, however, argued the appeal on the question:

Whether the judgment and decree passed in Suit No. 474, of 1953 operates as res judicata between the parties and the court below committed an error in law in holding otherwise?

11. Shri Radhey Shyam submits that parties to both the suits were the same and the person claiming to be owner and that the questions involved were substantially the same. The suit was tried by the court of competent jurisdiction. The fact, that in the previous suit, a statement was given and was noticed in judgment dated 20.10.2005 given by Munsif Khalilabad at Basti to the effect that the defendant contended that they are in possession of the land towards east

and south i.e. land in suit, and that chari crop was grown on it could not have confined only the suit to the land towards east and south of the kothi. The issues regarding ownership and the documents dated 4.1.1939 and 5.1.1939 relied upon in the present suit were also subject matter of the previous suit. The suit No. 473 of 1953 (previous suit) was dismissed on technical grounds. It was held that documents dated 4.1.1939 and 5.1.1939 were not "Ejzajatnamas" but "pattas istmarari" and were invalid as they did not conform to the mandatory provisions of the Section 107 of Transfer of Properties Act and that the plaintiff was found in possession of the land in dispute. The right u/s 53A of the Transfer of Properties Act were found to be the available to the defendant to protect his possession, It did not confer any active title on the transferee of the property, The plaintiff was not entitled to the benefit of the doctrine embodied in Section 53A of the Transfer of Property Act. It was held on previous issue that by virtue of deed dated 9.4.1953, the position of Sambhu Singh plaintiff No. 2 would be that of a person claiming imperfect title, Mohd. Nazir plaintiff was not found in possession and the suit was dismissed.

12. Shri Radhey Shyam learned Counsel for appellant has relied upon judgment in Hope Plantations Ltd. Vs. Taluk Land Board, Peermade and Another, in which the Supreme Court explaining the principle of res judicata and estoppel held in para 26:

26. It is settled law that the principles of estoppel and res judicata are based on public policy and justice. Doctrine of res judicata is often treated as a branch of the law of estoppel though these two doctrines differ in some essential particulars, Rule of res judicata prevents (he parties to. a judicial determination from litigating the same question over again even through the determination may even be demonstrably wrong. When the proceedings have attained finality, parties are bound by the judgment and are estopped from questioning it. They cannot litigate again on the same cause of action nor can they litigate any issue which was necessary for decision in the earlier litigation. These two aspects are "cause of action estoppel" and "issue estoppel". These two terms are of common law origin. Again, once an issue has been finally determined, parties cannot subsequently in the same suit advance arguments or adduce further evidence directed to showing that the issue was wrongly determined. Their only remedy is to approach the higher forum if available. The determination of the issue between the parties given rise to, as noted above, as issue estoppel. It operates in any subsequent proceedings in the same suit in which the issue had been determined. It also operates in subsequent suits between the same parties in which the same issue arises.

13. He has further relied upon K. Ethirajan (P) through LRs v. Lakshmi and Ors. 2003 (4) AWC 3435 . Paras 18 to 20 are quoted:

18. The above contention advanced in reply of the learned Counsel appearing for the respondents, cannot be accepted, In the earlier suit, deceased M. Gurunathan sought eviction of deceased K. Ethimjan from a portion of the suit

property by claiming exclusive title to the whole property involved in the present suit. The case of deceased K. Ethirajan in that suit was of adverse possession and alternatively co-ownership on the basis of joint patta (Exhibit A-7). Looking to the pleadings of the parties in that suit (copies of which are placed before us in additional paper-book), the ground urged by the respondent that in the earlier litigation, claim of exclusive ownership set up by deceased M. Gurunathan was restricted only to a portion of the whole property involved in this suit, does not appear acceptable. On the basis of pleadings of the earlier suit, we find that the issue directly involved was claim of exclusive ownership of deceased M. Gurunathan to the whole property left behind by deceased Gangammal although eviction was sought of the defendant from a particular portion of the land on which he had built a hut for residence. The suit was resisted by deceased K. Ethirajan claiming adverse possession and alternatively as co-owner on the basis of joint patta (exhibit A-7).

19. It is true that joint patta (exhibit A-7) granted by Settlement Authorities in proceedings under the Act of 1948 cannot itself be a source of title to claim ownership and right of partition but as has been found by the trial court and the first appellate court, the plaintiff's claim for partition is not based on joint patta (Exhibit A-7) alone but judgments rendered between same parties (exhibits A-22 and A-23) in the previous suit and appeal, have also been relied wherein the claim of the present plaintiff to remain in possession of the suit property without any interference by deceased M. Gurunathan and now his L.Rs. had been crystalised by decree of dismissal of suit for eviction against him. Based on the judgment in the previous litigation, an indefeasible right to continue to occupy the suit property as owner had been created in favour of the present plaintiff and the said judgment has attained finality between the same parties and their L.Rs.

20. The argument that principle of res judicata cannot apply because in the previous suit, only a part of the property was involved when in the subsequent suit the whole property is the subject matter cannot be accepted, The principle of res judicata u/s 11 of the CPC is attracted where issues directly and substantially involved between the same parties in the previous and subsequent suit are the same may be in the previous suit only a part of the property was involved when in the subsequent suit, the whole property is the subject matter.

14. Shri Radhey Shyam further submitted that plea of Section 9 of the UPZA & LR Act, 1950, ought to have been taken in previous suit as well, and so the issue was also barred by the principle of constructive res judicata. He submits that the benefit of settlement of the Sahan (appurtenant) land to the house u/s 9 of the UP ZA & LR Act, 1950 is given to person who lawfully holds such property. A person with imperfect title of the house is not entitled to such benefit. He has relied upon Bhudan Singh and Another Vs. Nabi Bux and Another, In this case the Supreme Court held in para 7 and 12 as follows;

7. The meaning of the word "held" in Section 9 came up for consideration before a division Bench of the Allahabad High Court consisting of Agarwala and

Chaturvedi JJ. In *Pheku Chamar and Others Vs. Harish Chandra and Others*, In that case the learned Judges held that the Legislature has deliberately used the word "held" and that word connotes the existence of a right or title in the holder. They further opined that Section 9 does not confer a right on the persons having no title to the land. The settlement contemplated by the section is confined in its application to the case where the building is lawfully held by the person in possession. The learned Judges also observed that in enacting Section 9, the Legislature never meant to deprive the citizens of their lawful rights over the lands merely because a trespasser has succeeded in making some construction on it. Section 9 does not mean that if a person has made some construction whatsoever over any land lying within the limits of an estate, however, wrongful or recent the possession might be, that construction must be deemed to have been settled with him by the State Government. The meaning of the word "held" in Section 9 again came up before another Division Bench of the Allahabad High Court consisting of Bharat and Another Vs. Ch. Khazan Singh and Another, The learned judges declined to follow the decision in *Pheku Chamar and Others Vs. Harish Chandra and Others*, They came to the conclusion that the Legislature used a wide language in Section 9 and it covers the case of buildings belonging to persons who constructed them lawfully or unlawfully, It is unfortunate that the latter Division Bench should have thought it proper to sit in judgment over the correctness of a decision rendered by a Bench of coordinate jurisdiction. Judicial propriety requires that if a Bench of a High Court is unable to agree with the decision already rendered by another coordinate Bench of the same High Court, the question should be referred to a Larger Bench. Otherwise, the decisions of High Courts will not only lose respect in the eyes of the public it will also make the task of the subordinate courts difficult.

12. It is true that the Legislature could have used the word "lawfully held" in place of the word "held" in Section 9 but as mentioned earlier, one of the dictionary meanings given to the word "held" is "lawfully held". In Webster's New Twentieth Century Dictionary (2nd Edn) it is stated that in legal parlance the word "held" means to possess by "legal title". In other words, the word "held" is technically understood to mean to possess by legal title. Therefore, by interpreting the word "held" as "lawfully held", we are not adding any word to the section. We are merely spelling out the meaning of that word. It may further be seen that the section speaks of all buildings ... within the limits of an estate, belonging to or held by an intermediary or tenant or other person...The word "belonging" undoubtedly refers to legal title. The words "held by an intermediary" also refer to a possession by legal title. The words "held by tenant" also refer to holding by legal title. In the sequence mentioned above, it is proper to construe the word "held" in Section 9 when used in relation to the words "other person" as meaning "lawfully held" by that person. That interpretation flows from the context in which the word "held" has been used. We have earlier mentioned that the said interpretation accords with justice.

15. Shri Radhey Shyam has further relied upon the judgment in *T. Anjanappa*

and Ors. v. Somalingappa 2006 (65) ALR 151 for the same purpose.

16. Shri B.N. Asthana, on the other hand, submits that the previous suit was confined to the land towards east and south of the kothi which was treated to be disputed land between the parties. The issue with regard to the land in north of the kothi which is the sahan land, it would be treated to be settled with the plaintiff u/s 9 of the U.P.Z.A. & L.R. Act, 1950 was neither raised nor considered in the previous suit. In any case he submits that the plaintiffs were in possession for more than 12 years and will be treated to be in adverse possession of the land in dispute.

17. Shri Asthana has relied upon judgments in Hope Plantations Ltd. Vs. Taluk Land Board, Peermade and Another, District Collector and Another Vs. B. Suresh and Others, and Yashwantrao Laxmanrao Ghatge v. Saburao Bala Yadav 1978 UJ 153.

18. I find considerable force in the submission of Shri Radhey Shyam that parties were at issue in respect of the entire land covered by the pattas executed by the zamindar and thereafter the sale deed. The trial court in the previous suit between the parties framed issue "as to whether the plaintiffs are in possession of the suit plots under Ezazatnama dated 4.1.1939 and 5.1.1939?; whether the deeds in suits are Ezazatnama and leases and are within the mischief of Section 107 of Transfer of Properties Act and its effect; whether the suit is barred by Section 42 of the Specific Relief Act; whether the plaintiff is entitled to benefit of Section 53A of the Transfer of Properties Act and the effect of the deed dated 9.4. 1953 on the plaintiffs right to sue". The defendant had raised an argument for establishing the possession of the defendants in the previous suit on the land towards east and south of kothi. This assertion, however, would not allow the parties to re-agitate the other issue with regard to title of the land and other action in the subsequent suit. The same deeds levelled as Ezazatnamas dated 4.1.1939 and 5.1.1939 and the sale deed dated 9.4.1953 were under consideration in the previous suit. It was held that the deeds dated 4.1.1939 and 5.1.1939 was not "Ezazatnama but pattas istmarari," and are invalid as they offend mandatory provision of Section 107 of the Transfer of Properties Act. The trial court in previous suit also recorded the findings: all these facts reveal frantic attempt on the part of Nazir to dislodge the defendant from the land in dispute or to dispose of the building as he failed to get possession over the land in suit. The plaintiff of the suit is not to defend any rights as against defendant but to actively assert the right as well as possessions of plaintiff and submitted suit in garbi on relief of injunction.

19. Once it was held by the court of competent jurisdiction that Mohd. Nazir did not get any right and he was not in lawful possession, Section 9 of the UP ZA & LR Act, 1950 will not come to his rescue. The Ezazatnamas were not found to be executed in accordance with Section 107 of the Transfer of Properties Act. The plaintiffs, as such, were not having any valid title to occupy the land. In the circumstances the fact that the defendant's counsel in the previous suit claimed

possession (in his arguments) only over cast and south of the kothi, which he termed as disputed land will not take away the effect of issue estoppel. The issue of res judicata u/s 11 of the CPC be attracted in this case as the issues between the parties were directly and substantially involved in the previous suit. The fact that only apart of the properties were involved in his previous suit and other part is involved in the later suit will not make any difference.

20. The second appeal is allowed. The judgment and decree passed by the trial court dated 27.9.1966 in OS No. 132 of 1963 and the judgment dated 11.10.1973 in Civil Appeal No. 253 of 1966 passed by Civil Judge, Basti are set aside and the plaintiffs suit is dismissed with costs throughout.