
(2012) 02 AHC CK 0276
In the Allahabad High Court
Case No : Second Appeal No. 145 of 2012

Samay Lal

APPELLANT

Vs

Chhote Lal (Deceased) and Others

RESPONDENT

Date of Decision : 21-02-2012

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 11
Civil Procedure Code, 1908 (CPC) — Order 41 Rule 11
Civil Procedure Code, 1908 (CPC) — Order 41 Rule 11

Citation : (2012) 02 AHC CK 0276

Hon'ble Judges : Sibghat Ullah Khan, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

Hon"ble Sibghat Ullah Khan, J.—Heard learned counsel for the appellant at the admission stage.

2. This is plaintiff's Second appeal arising out of O.S. no.746 of 1990 which was decreed by Additional Civil Judge/A.C.J.M. XII Allahabad on 31.8.1992. Against the said decree legal representatives of original defendant respondent Chotey Lal filed civil appeal no.38 of 1994 (legal representative had been substituted in the suit after the death of original defendant).

3. A.D.J. Court no.XIX, Allahabad through judgment and decree dated 2.11.2011 allowed the appeal set aside the judgment and decree passed by the trial court and dismissed the suit of the plaintiff, hence this Second Appeal.

4. Plaintiff and original defendant Chhote Lal were real brothers. According to the own case of the plaintiff his father had left behind two houses which were partitioned among themselves by plaintiff and original defendant and house shown by letter Aa in the plaint map came in the share of plaintiff and house shown by the letter Ba came in the share of the defendant. This is undisputed position. However, the dispute related to land lying towards west of plaintiff's

house and south of defendant's house. Plaintiff stated that it was sahan and it was kept joint and not partitioned, however, the original defendant pleaded that the sahan was also partitioned except a rasta of 9" width which passed through that, and in the portion of the sahan which had fallen in the share of the plaintiff, plaintiff had already made construction along with few steps as plinth of the house of higher than the ground which was part of the house shown by letter Ba in the plaint map. The suit was filed for permanent prohibitory injunction seeking to restrain the defendant from making construction in the land which according to the plaintiff was common sahan.

5. The trial court held that sahan was common, however, lower appellate court after discussing the entire evidence disagreed with the said findings of the trial court and held that from the evidence of the parties it was quite clear that even sahan had been partitioned and the only thing which was left joint was a rasta. It was further held by the lower appellate court that part of the sahan which had come in the share of the plaintiff, plaintiff had already made construction. Plaintiff himself described his house into two parts eastern part as Kachha and western part as Pakka. The lower appellate court held that the western part was newly constructed by the plaintiff in that part of the sahan which had come in his share. Even from the plaint map it is clear that the plaintiff's house is almost double the size of defendant's house. The findings of the lower appellate court that sahan had been partitioned and in that part of the sahan which came in the share of plaintiff, plaintiff had made further construction are findings of fact which do not suffer from any error.

6. As far as rasta is concerned defendant himself categorically stated that rasta was there in existence and he had absolutely no intention of interfering in the said rasta. Defendant stated that width of rasta was 9" plaintiff stated that it was 10". This does not appear to be major difference.

7. The trial court recorded a strange findings that there was no documentary evidence of partition of sahan. When partition of the house was admittedly oral, there was no sense in insisting that there should be a document partitioning to partition of the sahan.

8. Learned counsel for the appellant argued that there is always a presumption of jointness unless partition is proved. This argument is utterly misconceived as plaintiff himself stated that partition of the houses had taken place.

7. The findings recorded by the lower appellate court are pure findings of fact suffering from no error of law. Second appeal is, therefore, dismissed under Order 41 Rule 11 C.P.C.