
(2013) 03 AHC CK 0261

In the Allahabad High Court

Case No : Second Appeal No's. 484 of 1997 and 260 of 2005

Shiv Nath Prasad Vishwakarma

APPELLANT

Vs

Ganga and Others

RESPONDENT

Date of Decision : 01-03-2013

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 1, 100

Specific Relief Act, 1963 — Section 34

Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1950 — Section 122B

Citation : (2013) 4 ADJ 723 : (2014) 3 ALJ 182 : (2013) 98 ALR 757 : (2013) 5 AWC 5201 : (2013) 119 RD 539

Hon'ble Judges : Sudhir Agarwal, J

Bench : Single Bench

Advocate : J.N. Rai, A.K. Verma, H.K. Verma and R.C. Singh, for the Appellant; L.P. Tiwari and P.C. Tiwari, for the Respondent

Final Decision : Dismissed

Judgement

Sudhir Agarwal, J.—Heard Sri R.C. Singh, learned counsel for appellant and Sri L.P. Tiwari, Advocate for respondents in Second Appeal No. 484 of 1997 and Sri L.P. Tiwari, Advocate for appellants in Second Appeal No. 260 of 2005 under Order 41 Rule 1 C.P.C. These appeals are arising from the judgment dated 31.1.1997 passed by Civil Judge (Senior Division), Gorakhpur in Civil Appeal No. 112 of 1995 instituted by defendants, allowed in part, and modified Trial Court's judgment dated 28.9.1995, in Original Suit No. 129 of 1987. Since the Lower Appellate Court has modified Trial Court's judgment and decree whereby the suit of plaintiff was decreed in its entirety, both the parties have come up in appeals before this Court u/s 100 of the Code of Civil Procedure.

2. The Second Appeal No. 484 of 1997 is preferred by plaintiff-appellant (hereinafter referred to as the "plaintiff") and connected Appeal No. 260 of 2005 is preferred by defendants-appellants (hereinafter referred to as the "defendants").

3. Original Suit No. 129 of 1987 instituted by plaintiff, Shiv Nath Prasad Vishwakarma, seeking an injunction against defendants, restraining them, from interfering with peaceful possession of plaintiff and from using the handpump installed therein. The disputed property was shown in the map appended in schedule and marked with red ink.

4. The defendants contested the suit alleging that disputed property is not that of plaintiff and he had no right thereupon.

5. Four issues were formulated by Trial Court, as under:

1. Whether plaintiff is the landlord of the disputed property having possession over it?

2. Whether plaintiffs suit is barred by the provisions of Section 34 of the Specific Relief Act?

3. Whether the suit is under-valued and the Court fee deposited is insufficient?

4. Whether plaintiff is entitled to any other relief?

(English Translation by the Court)

6. Issue No. 1 which was in relation to question, whether plaintiff is owner and in possession of disputed property, was decided by Trial Court holding that plaintiff is in possession. In recording this finding, the Trial Court observed:

But plaintiff is presently in possession. Even a suit has not been instituted by defendants seeking his eviction. Hence, adverse presumption shall be held against the rights of defendants in relation to the disputed land together with plaintiff's land.

(English Translation by the Court)

7. It is with these findings, suit was decreed by Trial Court. The Lower Appellate Court while considering defendants' appeal has observed that proceeding u/s 122-B of U.P. Zamindari Abolition and Land Reforms Act, 1950 (hereinafter referred to as the "Act, 1950") was initiated against plaintiff and he was fined also. The construction raised by plaintiff on the east of plot No. 288 is during pendency of suit. In respect of construction raised by plaintiff, the Additional Tehsildar penalised him by passing an order u/s 122-B. After rejection of revision by District Magistrate, the matter is pending in Board of Revenue. The Court found that disputed property is owned by Gaon Sabha. The legality and validity of action of plaintiff was already subject-matter of dispute before Revenue Court. These findings do not justify, plaintiff to take advantage of weakness of defence of defendants but since in some part of disputed land, plaintiff and his family actually was residing, he may be allowed to remain in possession thereof, without any interference by defendants, particularly when title dispute is pending in Revenue Court. Hence, it modified Trial Court's decision and dismissed suit in so far as the relief sought in respect to property shown by A, B, C, D in Amin

Map, Paper No. 77-C and in respect of rest of part, the Trial Court's judgment has been confirmed.

8. Sri R.C. Singh, learned counsel for the appellant in Second Appeal No. 484 of 1997, sought to argue that Lower Appellate Court has made out a new case relating to disputed part of land though there was neither any pleading nor evidence.

9. Similarly counsel for appellants in Second Appeal No. 260 of 2005 sought to argue that once it was found by Lower Appellate Court that the title dispute is already pending in Revenue Court, no injunction could have been granted.

10. Having considered the submissions of learned counsels in two connected appeals, I find that both the Courts below have categorically found that plaintiff could not demonstrate his ownership over the property in dispute. No evidence in this regard was placed before the Courts below. There was a lease deed, executed in favour of defendants, by Gaon Sabha, with respect to about two dismal land, in plot No. 288, which was approved by Sub-Divisional Magistrate on 31.3.1993. The plaintiff sought cancellation of aforesaid lease by filing an application which was rejected by Collector on 10.3.1994. There against a revision was filed before Commissioner which was accepted by order dated 15.5.1996 and after setting aside Collector's order, the matter was remanded for fresh hearing. There against the matter came up before Board of Revenue in Reference No. 118 of 1995-96, and vide order dated 14.12.1998, it had set aside Commissioner's order dated 15.5.1996 and affirmed Collector's order dated 10.3.1994. A photo-stat copy of certified copy of order of Board of Revenue, dated 14.12.1998 has been placed before this Court to show that the matter pending before Board of Revenue has now concluded against plaintiff.

11. The fact remains, therefore, that plaintiff could not adduce any evidence about his title or otherwise legal right in respect of property in dispute. The defendants, per contra, could adduce evidence to show legal right for possession, based on lease deed executed by owner of property, i.e., Gaon Sabha. Considering the above and also the fact that plaintiff was already penalised by revenue authorities for encroaching upon Gaon Sabha land, I find no reason to hold that he was/is entitled for any injunction in such facts and circumstances.

12. The Lower Appellate Court, however, noticing the fact that defendants have not come to seek any relief of dispossession of plaintiff from disputed property, therefore, to the extent that plaintiffs have constructed their house and residing therein, should be allowed to stay thereat. I find no illegality or perversity or otherwise error in the aforesaid approach.

13. Sri R.C. Singh, Advocate, however, vehemently argued that finding of fact recorded by Trial Court can be reversed by Lower Appellate Court only after considering the findings of Trial Court and recording own findings, demonstrating clear error in findings of Trial Court, and thereafter by reversing the same and not otherwise. He placed reliance on Apex Court's decisions in Madhusudan Das

Vs. Smt. Narayanibai (Deceased) by Lrs. and Others, ; S.V.R. Mudaliar (Dead) by Lrs. and Others Vs. Rajabu F. Buhari (Mrs) (Dead) by Lrs. and Others, ; Smt. Sawarni Vs. Smt. Inder Kaur and Others, ; and, Major Singh Vs. Rattan Singh (Dead) by LRs. and others, . The proposition of law as stated therein is well accepted and established. It cannot be doubted that Lower Appellate Court, being the last Court of facts, has to examine the entire issues and factual dispute, but, if it intends to reverse the findings of fact of Trial Court, it must consider the reasons given by Trial Court and should point out the errors therein, to record a finding of reversal. Reiterating the above in Santosh Hazari Vs. Purushottam Tiwai (Dead) by Lrs., , the Apex Court observed:

Expression of general agreement with the findings recorded in the judgment under appeal should not be a device or camouflage adopted by the appellate Court for shirking the duty cast on it. While writing a judgment of reversal the appellate Court must remain conscious of two principles. Firstly, the findings of fact based on conflicting evidence arrived at by the trial Court must weigh with the appellate Court, more so when the findings are based on oral evidence recorded by the same presiding Judge who authors the judgment. This certainly does not mean that when an appeal lies on facts, the appellate Court is not competent to reverse a finding of fact arrived at by the trial Judge. As a matter of law if the appraisal of the evidence by the trial Court suffers from a material irregularity or is based on inadmissible evidence or on conjectures and surmises, the appellate Court is entitled to interfere with the finding of fact..... The rule is --and it is nothing more than a rule of practice -- that when there is conflict of oral evidence of the parties on any matter in issue and the decision hinges upon the credibility of witnesses, then unless there is some special feature about the evidence of a particular witness which has escaped the trial Judges notice or there is a sufficient balance of improbability to displace his opinion as to where the credibility lies, the appellate Court should not interfere with the finding of the trial Judge on a question of fact..... Secondly, while reversing a finding of fact the appellate Court must come into close quarters with the reasoning assigned by the trial Court and then assign its own reasons for arriving at a different finding. This would satisfy the Court hearing a further appeal that the first appellate Court had discharged the duty expected of it. We need only remind the first appellate Courts of the additional obligation cast on them by the scheme of the present Section 100 substituted in the Code. The first appellate Court continues, as before, to be a final Court of facts; pure findings of fact remain immune from challenge before the High Court in second appeal. Now the first appellate Court is also a final Court of law in the sense that its decision on a question of law even if erroneous may not be vulnerable before the High Court in second appeal because the jurisdiction of the High Court has now ceased to be available to correct the errors of law or the erroneous findings of the first appellate Court even on questions of law unless such question of law be a substantial one.

14. However, in the present case, I do not find application of the above principle, and, after going through the judgment of Lower Appellate Court, I do not find

any such lapses on the part of Lower Appellate Court, as has been sought to be argued by Sri R.C. Singh. In my view no substantial question of law has arisen in either of these two appeals. Both the appeals are accordingly dismissed.