

(2007) 03 AHC CK 0290
In the Allahabad High Court
Case No : Second Civil Appeal No. 62 of 1979

Shiv Prasad (Dead) by L.R. Smt. Malti Devi and Others	APPELLANT
Vs	
Azhar Husain and Others	RESPONDENT

Date of Decision : 08-03-2007

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 25, 100
Transfer of Property Act, 1882 — Section 106

Citation : (2007) 7 AWC 7111

Hon'ble Judges : Rakesh Sharma, J

Bench : Single Bench

Advocate : Z. Zilani, P.L. Misra and D.P. Gupta, for the Appellant; A.A. Rizvi and Mohd.Arif Khan, for the Respondent

Final Decision : Allowed

Judgement

Rakesh Sharma, J.—Heard Sri P. L. Misra and Sri Z. Jilani, learned Counsel for the Appellants and Sri Mohd. Arif Khan, learned senior advocate appearing for the Respondents.

2. The second civil appeal has been filed against the judgment and decree dated 29.9.1978, passed by Ist Additional District Judge, Bahraich in Civil Appeal No. 110 of 1972, Azhar Hussain and Ors. v. Shiv Prasad, setting aside the judgment and decree passed by the Munsif, Bahraich in Regular Suit No. 371 of 1971, Shiv Prasad v. Azhar Husain and Ors. The finding dated 28.3.1978 recorded by the Ist Additional Munsif, Bahraich on issue No. 4 was confirmed by the first appellate court.

3. The following substantial questions of law were framed by this Court on 22.8.1979 while admitting the appeal :

(1) Whether the lower appellate court was justified in rejecting the Plaintiff's evidence merely on the ground that the details of the origin of relationship of landlord and tenant were not given in the plaint?

(2) Whether the suit for eviction should not have been decreed on the ground of title in the alternative?

4. Brief facts of the case are as follows :

A Regular Suit No. 371 of 1971, was brought before the Court of Munsif, Bahraich by one Sri Shiv Prasad (now dead and being represented by his legal heirs, who are Appellants in this case) for ejectment of the Respondent-tenants. Sri Shiv Prasad had alleged in the suit that he was the owner of the house in dispute. This house was let out about twenty years ago (to be counted from the date of suit) to one Athar Husain, father of Respondent-tenants at a monthly rent of Rs. 6. The tenancy was from month to month. Athar Husain was in possession of the house as tenant till his death and he was paying rent regularly to Shiv Prasad. After the death of Athar Husain, the Defendants-Respondents became the tenants of Plaintiff Shiv Prasad. The Respondents stopped paying rent to the landlord. They defaulted in making payment of rent with effect from 1.4.1969 to 4.9.1970. After serving a notice u/s 106, Transfer of Property Act, on the Defendants demanding the arrears of rent and terminating their tenancy, the suit was filed. The Defendant-Respondent contested the suit and filed their written statement, inter alia submitting that they had been in possession of the house for the last twenty-five years ; there was no relationship of landlord and tenant between the parties and the rights of the Plaintiff, if any, stood extinguished by virtue of adverse possession.

5. On the pleadings of the parties, three issues were framed by the learned trial court as below :

1. Whether relationship of landlord and tenant exists between parties?
2. Whether any valid notice was served?
3. To what relief, if any, is the Plaintiff entitled?

6. On issue No. 1, the learned Munsif held that the Defendants were tenants of the Plaintiff at monthly rent of Rs. 6 and they did not pay rent since 1.4.1969. On issue No. 2, it was held that the notice served on the Defendants was valid. In view of findings recorded on issues No. 1 and 2, the suit for ejectment and arrears of rent was decreed. Against the said judgment and decree, the Defendants filed an appeal which was allowed vide judgment and order dated 30.3.1974 and the matter was remanded to the trial court for further trial according to law. Against the said judgment and decree of the appellate court, the Plaintiff preferred an appeal before this Court which was allowed on 22.7.1977 and the judgment and decree of the lower appellate court dated 30.3.1974 was set aside. The lower appellate court was directed to frame necessary issue as regards the origin of tenancy of Defendants and remit it to the trial court for giving its finding thereon after giving opportunity to either party to adduce evidence under Order XLI, Rule 25, Code of CPC and then decide the appeal. As directed by this Court, the lower appellate court framed the

following issue and referred it to the trial court for giving its finding :

When the tenancy between the parties originated? Whether any relationship of landlord and tenant existed between the Plaintiff's father and the Defendants' father? If so, its effect?

7. In compliance of the order passed by the lower appellate court, the learned Munsif dealt with the matter and vide his order dated 28.3.1978 held that the relationship of landlord and tenant was not established between the Plaintiff and the Defendants. Against this finding of learned Munsif, the Plaintiff filed objections in Civil Appeal No. 110 of 1972, Azhar Husain and Ors. v. Shiv Prasad, preferred by the tenants and maintained that the finding of the learned Munsif holding that the relationship of landlord and tenant was not established in between the Plaintiff and the Defendants was erroneous. The lower appellate court/Ist Additional District Judge, Bahraich, vide his judgment and order dated 29.9.1978 allowed the appeal with costs and set aside the judgment and decree dated 6.7.1972 passed by the then Munsif Bahraich. The suit of the Plaintiff Shiv Prasad (Appellant here) was dismissed with costs. This judgment and order dated 29.9.1978 of the lower appellate court has been assailed in this appeal, which was admitted by this Court for adjudication on two substantial questions of law as referred to above.

8. The first question which arises for consideration before this Court is as to whether relationship of landlord and tenant existed between the Plaintiff and the Defendants. It emerges from record that the Plaintiff-Appellant Shiv Prasad, in addition to the submissions made in the plaint, had examined himself as P.W. 2 and one Shri Ram as P.W. 2 to establish that the house in suit was let out to the Defendants' father Athar Husain about twenty years ago at a monthly rent of Rs. 6. Athar Husain remained tenant of the house in suit till his death. He had been paying rent to the landlord. After his death, the Defendants (Respondents) became tenants in the house in suit. The appellate court had found that a contract of tenancy was not created between the father of the Plaintiff and the father of the Defendants and no rent note in writing was got executed by the father of the Plaintiff from the father of the Defendants, nor any receipts were issued in respect of the rent paid by the tenants.

9. The Plaintiff had based his claim on oral evidence, i.e., the statements of P.W. 1 Shiv Prasad and P.W. 2 Shri Ram. The Defendants had examined three witnesses, namely, Shahanshah Hussain as D. W. 1, Akhtar as D. W. 2 and Mahboob as D. W. 3 in support of their case that no contract of tenancy was ever made in between the Plaintiff and the Defendants. They had set up a case in the written statement that relationship of landlord and tenant did not exist between the parties.

10. The landlord Shiv Prasad placed on record various receipts and copies of ikarnama, kabooliyat, etc. to demonstrate that his father had obtained the land, over which the house in question situates, from its erstwhile zamindar in the

year 1933. The documents filed exhibit the same land over which the rented house is in existence. The learned appellate court has laid much stress on the fact that the Defendants and their father Athar Husain were occupying the house in suit and living in the same peacefully, openly for a period of twelve years or more. They might be lawfully or unlawfully occupying the house even without paying the rent. Due to this reason, the appellate court had formed the opinion that rights, title and interest of the Plaintiff even if there were any in the house in suit, were extinguished. According to the lower appellate court, the Plaintiff could have requested for converting the suit into a title suit and that in the absence of documentary evidence to show that relationship of landlord and tenant existed between the parties, the Respondents could not have been evicted from the house in suit. The lower appellate court has held, reversing the judgment of the trial court, that the house in suit was not leased out by the father of the Plaintiff landlord to the father of Respondents and that there was absence of landlord-tenant relationship between the parties.

11. Sri Mohd. Arif Khan, learned senior advocate appearing for the Respondents has placed reliance on two judgments of this Court in *Laxmi Kant Upadhyay v. Sri Dev Narayan Mishra*, 2002 (20) LCD 312: 2001 (2) AWC 993 and *Smt. Savitri and Ors. v. Surendra Mohan Mohana* 1987 (5) LCD 137, to submit that a suit of the small causes nature, registered and tried as regular suit will remain a suit of the nature of small causes and no appeal or revision could be filed against the judgment and order passed by the Small Causes Court. The burden of proving the title in the property rests with the person who pleads before the Court that he had a title in the property. In response to this submission, Sri P. L. Misra, learned Counsel appearing for the Plaintiff Appellants has submitted that the appeal is maintainable as on earlier occasion also, this Court had entertained the Appeal No. 36 of 1974, dealt with the matter and remanded the case vide its judgment and order dated 22.7.1977. The specific issue was framed in furtherance of the order passed by this Court on 22.7.1977. This has resulted in passing of the impugned judgment and order. He has also placed reliance on the relevant provisions of the U. P. Civil Laws (Amendment) Act, 1972 (U. P. Act No. 37 of 1972), in support of his submission that such a suit was maintainable and the order is appealable. This Act had come into effect on 20.9.1972.

12. It is borne out from the record and has remained unchallenged that the Plaintiff Shiv Prasad's grandfather Sri Krishnanand had obtained the land from Riyasat/Zamindar in the year 1933 and thereafter constructed the house in question over the said land. The deed relating to obtaining of the land is Exhibit No. 1 of the case. Another document kabooliyat has been placed on record as Exhibit No. 2. Receipts for payment of rent to the Riyasat./Zamindar have also been filed by the landlord to demonstrate that the land where the house in question situates belonged to the Plaintiff and after the independence, he became owner of the land. The receipts issued by the local bodies have also been placed on record. The Plaintiff Shiv Prasad P. W. 1 and Shri Ram P. W. 2 have deposed that the house in question was let out at Rs. 6 per month to Athar

Husain. Shri Ram had deposed that he was present when the house was rented out. The trial court had appreciated the documents Exhibits 1 to 11 to arrive at its conclusion that Sri Krishnanand, the grandfather of Plaintiff Shiv Prasad had obtained land from Riyasat in 1933. The rent receipts do support these documents, which were issued in subsequent years. The land where the house in question situates remained with the Plaintiff's grandfather Krishnanand and the Plaintiff. No one has disputed the existence of the house in suit over the said land.

13. It is noteworthy that neither before the trial court nor before the appellate court the Respondents had demonstrated as to how they had occupied the house situate over the land owned by the Plaintiffs' grandfather and the Plaintiffs, etc. whether as a licensee, lessor or as tenant. The trial court in its first judgment had also indicated that the Respondents' father Athar Husain was a resident of District Gonda. He came to reside at Rupaidiha when he was posted there about twenty-five years ago. There was no document showing interest of the Defendant-Respondents in the house in dispute. Their version in the written-statement before the trial court and before the appellate court has remained unsubstantiated. In my opinion, the then Munsif, Bahraich while writing his judgment on 6.7.1972 in Regular Suit No. 371 of 1971 was right in holding that the Plaintiff had established his case in the plaint by oral and documentary evidence. All the documents relating to grant of land, kabooliyat, rent receipts (more than 11 documents in total) are connected with the house in suit. P. W. 2 Shri Ram had deposed that the terms of tenancy were settled before him. There was no reason to doubt or disbelieve the aforesaid evidence. The sole testimony of Defendant Shahanshah could not have been accepted against the convincing oral and documentary evidence adduced by the Plaintiff before the trial court. There is substance in the submission of the learned Counsel for the Plaintiff-Appellants that Athar Husain was the tenant of the Plaintiff at Rs. 6 per month as rent. After his death, his sons, Respondents had acquired the status of tenant, no other status based on adverse possession. It is evident from the record that the Defendants did not pay the rent as they were claiming themselves to be the owners of the land on the basis of alleged adverse possession. The learned Munsif had indicated in the judgment dated 6.7.1972 that by pleadings adverse possession over the house in suit, the Defendants had strengthened the case of Plaintiff landlord. The Respondents had accepted the fact that the house, against which adverse possession was alleged, once belonged to the Plaintiff. The plea of adverse possession was not substantiated by placing relevant evidence that the Respondents had a hostile title and they had perfected their title by continuing in the house for more than twelve years. The document executed in 1933 kabooliyat, rent receipts etc., make it amply clear that the Plaintiff Shiv Prasad's grandfather owned the land and after his death, Shiv Prasad became its owner. After the death of Shiv Prasad, his legal heirs, who are parties to the case including Ram Chandra brother, are the owners. The Plaintiffs' case finds strength from the judgments of Hon'ble Supreme Court of India in Roop Singh (dead), by L.Rs. v. Ram Singh (dead), by L.Rs. , 2001 (19) LCD 232 (SC) : 2000

(2) AWC 2.22 (SC) ; S.C. Balkrishnan v. Satya Prakash and Ors. 2001 (19) LCD 1082 and S.M. Karim Vs. Mst. Bibi Sakina,

14. While dealing with the afore-mentioned substantial questions of law, this Court is of the view that the Plaintiff-landlords' evidence, oral and documentary, cannot be discarded merely on the ground that the Plaintiff had not specifically indicated in the plaint as to when, on what date and at what time the tenancy was created. He had demonstrated by making averments in the plaint and producing the independent witness Shri Ram as also by placing eleven documents on record that he and his grandfather owned the land over which the house in suit situates and that they were also paying rent to the Riyasat/ Zamindar and thereafter to the local body, etc. The house was rented out to the Defendants' father about twenty years back and he had been paying rent all through his life and after his death, his legal heirs, the Defendants became the tenants but they stopped paying rent to the landlord.

15. This Court while sitting in appellate jurisdiction u/s 100, Code of CPC can deal with these points, issues and adjudicate the matter in the light of two substantial questions of law referred to above, vide (Three-Judge Bench) Nagar Palika, Jind Vs. Jagat Singh, Advocate, and Om Prakash Gupta v. Ranbir B. Goyal, 2002 (20) LCD 612 (SC).

16. As far as the question of locus standi of the co-owner Ramesh Chandra, brother of Shiv Prasad, original Plaintiff is concerned, it is the settled law that in a landlord-tenant matter one of the co-owners is competent to seek eviction of the tenant, vide Girraj Kishore Vs. Dr. Trilokinath Vimal, wherein this Court relying on some judgments of Hon'ble Supreme Court of India and this Court has held that one of the co-owners is competent to serve noticed terminating the tenancy and he is also competent to maintain a suit in pursuance of such notice.

17. This Court has appreciated the fact that one issue regarding the origin of tenancy of Defendants was framed by the lower appellate court and remitted to the trial court for giving its finding thereon after giving opportunity to either party to adduce evidence under Order XLI, Rule 25, Code of CPC This Court while dealing with the earlier appeal had allowed opportunity to the either party to adduce evidence in respect of the fourth issue. This Court cannot exclude from consideration the material point of ownership/title of the Plaintiff over the land where the house in question situates. The various rent receipts, ikrarnama, kabooliyat, etc. filed by the Plaintiff could not have been ignored and brushed aside merely because the suit in question was not a title suit. After a careful consideration of the facts and circumstances of the case as well as oral and documentary evidence placed on record, this Court is of the opinion that the lower appellate court was not justified in rejecting the Plaintiff's evidence merely on the ground that the details of the origin of relationship of landlord and tenant were not given in the plaint. The Plaintiff's evidence regarding his ownership over the land on which the house in suit is situate, cannot be ignored or excluded from consideration. This Court may also see as to how and in what manner the

Respondents were inducted in the house in suit as a tenant, lessor or licensee. After the Court has found that the Plaintiff was the owner of the house against the theory of adverse possession set out by the Defendant-Respondents, it has to see whether any rent was paid by the persons using and occupying the premises of the landlord, Plaintiff-Appellants here. Evidently no rent was paid by the Respondent-tenants and they became defaulter. How can the Respondents be allowed to continue in possession without paying rent to the landlord-Appellants. Obviously, they were liable to be evicted from the premises in question. The authorities cited by the learned Counsel for the Respondents as referred to above are of no help to them in view of the facts and circumstances of the present case and for reasons recorded hereinabove.

18. The questions of law are accordingly answered.

19. In the result, the appeal is allowed. The impugned judgment and decree dated 29.9.1978, passed in Civil Appeal No. 110 of 1971, is set aside. The judgment and decree passed by the Munsif, Bahraich in Regular Suit No. 371 of 1971, is restored and upheld. The Plaintiff's suit is decreed with costs throughout. The consequences shall follow.

20. The execution proceedings shall be carried out expeditiously without wasting time as the suit for eviction was filed in the year 1972 and more than 34 and a half years have passed since then in litigation.