

(2017) 03 AHC CK 0018
In the Allahabad High Court
Case No : First Appeal No. 290 of 1986

Shri Chand

APPELLANT

Vs

Harbans

RESPONDENT

Date of Decision : 31-03-2017

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 96
Specific Relief Act, 1963 — Section 36, Section 37, Section 38

Citation : (2017) 4 ADJ 759

Hon'ble Judges : Ashwani Kumar Mishra, J.

Bench : Single Bench

Advocate : B.B. Paul and A.B.L. Gaur, Advocates, for the Appellant; K.C. Sinha, A.N. Shukla, Murlidhar, S.A. Gilani and V.K. Jaiswal, Advocates, for the Respondent

Final Decision : Dismissed

Judgement

Ashwani Kumar Mishra, J.—This is an appeal under Section 96 of the Civil Procedure Code by the plaintiff appellant, challenging the judgment dated 27.5.1986, whereby plaintiff appellant's suit for permanent injunction in respect of suit property has been dismissed.

2. The sole plaintiff-appellant instituted Original Suit No.45 of 1985 with the allegation that he is owner in possession of the suit property, described by letters A, B, C, D in the plaint map. Right over the suit property was claimed on the basis of two lease/(pattas) executed by Gaon Sabha of the same date i.e. 21st April, 1972. Paper No.10C-1 is the first lease for residential purpose, executed for consideration of Rs.85, whereas the other lease is Paper No.10C-2, executed for setting up a flour mill. Both the leases were upon plot No.150, situated in village Raghunath Pur, and were of 250 sq. yard each. The boundaries of suit property were specified in plaint. The plaintiff-appellant alleged that towards west of suit property situated Khasra No.149, which belonged to defendant Tularam and was acquired for the benefit of Noida Authority, over which a road is

already constructed. In para 5 of the plaint, an averment is made that there were certain old constructions, which had fallen, and plaintiff-appellant was re-constructing it upon his land, but the defendants-respondents without any authority of law started interfering in raising of such construction of shops, resulting in filing of the instant suit.

3. A written statement was filed denying the plaint allegations. In the additional statement, the defendants-respondents pleaded that plaintiff-appellant has no right over the suit land and it did not form part of the land allotted to him. According to the defendants-respondents, the suit property belonged to them. So far as allotment of two plots in favour of plaintiff-appellant of 250 sq. yard each is concerned, it was not disputed, but with reference to the boundary set out in the lease it is stated that plaintiff-appellant is already in possession of it, and constructions have already been raised over it by the plaintiff-appellant. It was stated that land adjoining such allotted land belonging to defendants respondents is now sought to be encroached upon by the plaintiff-appellant, misrepresenting it to be the land allotted. Boundaries of the plot as given in the lease and in plaint are relied upon by the defendants to contend that the plaintiff appellant is claiming right over land in addition to what was allotted to him. Submissions were also raised that Gaon Sabha has not been impleaded, although it was a necessary party, and that suit is liable to fail. Further plea was taken that suit is barred by virtue of Section 34 and 41 of the Specific Relief Act. Plaintiff-appellant and defendants-respondents in support of their respective cases have led oral and documentary evidence.

4. Trial court on the basis of pleadings framed following issues:-

"1. Whether the suit is under valued and the court fee paid is insufficient? 1A. Whether the plaintiff is owner and in possession of the disputed property, if so, its affect?

2. Whether the disputed property has been constructed solely by the defendant No.1 and he is in possession of the same, if so, its affect?

3. Whether the Gram Sabha Chaura Raghunathpur is a necessary party to the present suit, if so, whether the suit is bad for nonjoinder of the necessary parties?

4. Whether the suit is barred u/s 34 of the 41 of the Specific Relief Act?"

5. Trial court on Issue No.1A and 2 has elaborately considered the evidence brought on record to return a finding that the suit property defined by letters A, B, C, D in the plaint map was not leased out by Gaon Sabha, and that the suit property was the Abadi of the defendants-respondents, over which they are in possession. A further finding has been returned that shops in question had been raised by the defendants. On Issue No.3 a finding has been returned that since disputed property belongs to defendants, as such, Gaon Sabha is neither its owner, nor is it proper and necessary party to the suit. In view of the aforesaid findings, Issue No.4 has been answered holding that plaintiff-appellant is not

entitled to any injunction and suit is dismissed.

6. Learned counsel for the plaintiff-appellant submits that the observations and findings of the trial court are contrary to materials available on record and are thus liable to be set aside. It is stated that slight inconsistency in the case of plaintiff-appellant was liable to have been overlooked, and that this Court can mould relief in the interest of justice. Reliance is placed upon a judgment of Apex Court in *Bhaskar Laxman Jadhav and others v. Karamveer kakasaheb Wagh Education Society and others*, (2013) 11 SCC 531, as well as the Constitution Bench judgment of the Apex Court in *Rupa Ashok Hurra v. Ashok Hurra and another*, (2002) 4 SCC 388.

7. Learned counsel for the defendants-respondents, on the other hand, has supported the discussions and conclusions drawn by the trial court on the matter in issue.

8. I have heard Sri B.B. Paul, learned counsel for the plaintiff-appellant and Sri A.N. Shukla, learned counsel for the defendants-respondents and have perused the materials brought on record.

9. Injunction is sought by plaintiff-appellant over suit property described in the plaint by letters A, B, C, D. According to the plaintiff-appellant, his right upon the suit property emanates from the two lease deeds, which are filed as Paper Nos.10C- 1 and 10C-2, whereby 250 sq. yard land each was allotted to plaintiff-appellant from plot no.150. The defendants-respondents, on the other hand, contend that the land allotted by Gaon Sabha is already in possession of the plaintiff-appellant, over which he has raised construction and his two sons are residing.

According to the defendants, the plaintiff-appellant, who is already in possession of the land leased out to him, is trying to encroach upon Abadi land of the defendants. The question that crops up for consideration in this appeal is as to whether the suit property is the same, which has been leased out to plaintiff by two lease deed, marked as Paper Nos.10C-1 and 10C-2. Identity of the property thus falls for determination.

10. It is settled that identity of immovable property could be ascertained with reference to its boundaries. Plaintiff-appellant admits that allotment has been made to him from land of plot no.150. As per plaint assertion to the north of suit property defined by letters A, B, C, D, exists land of Khasra No.148, whereas on its south exists plot of Lachhi and Beg Chandra; on the west is road side land where after exists a road, and on the east exists houses belonging to Ramesh and Suresh, sons of plaintiff, where after situates land of Om Prakash, son of Prahlad Singh. The two patta specifies description of 250 sq. yard land each allotted to the plaintiff. The two plots allotted are contiguous to each other. The plots are 10 sq. yard x 25 sq. yard running north-south each, with land of Gaon Sabha and Abadi of Om Prakash situated on the east, road on the north and Abadi of Jiyaram on the south.

11. Perusal of the plaint map would clearly go to show that towards east of the disputed land situates houses and appurtenant land including platform (Chabutra) of plaintiff's sons Ramesh and Suresh. However, as per boundary of plot given in lease, on the east of the plot allotted to plaintiff is the Abadi of Gaon Sabha and Om Prakash. The material distinction between the plaint map and identity of the suit property shown in the lease is the existence of houses belonging to Ramesh and Suresh i.e. plaintiff's sons. According to the defendants, it is the land beneath houses of Ramesh and Suresh along with platform and appurtenant land, which was allotted to plaintiff by the Gaon Sabha. A sketch plan would be useful to appreciate situation on the spot.

12. Plaintiff-appellant has appeared as P.W.-1. He has admitted in his statement that he lives either with his son Ramesh or Suresh and has no other house to live in. He states that his sons have got the land from Gaon Sabha, over which their houses exists, but he admits in categorical terms that no document is available to show allotment of land to them. He has also admitted that towards east of the house of Ramesh and Suresh exists plot of Om Prakash. In the description of property leased out to plaintiff-appellant, it is shown that land of Om Prakash exits on the eastern side, whereas in the plaint map towards the east of the disputed property are the houses of plaintiff's sons Ramesh and Suresh. There is no explanation as to when allotment was made to Ramesh and Suresh. The trial court on the basis of such materials has come to a conclusion that the allotted land is same upon which houses and appurtenant land situates of Ramesh and Suresh. The inconsistency in eastern boundary as per lease deed viz-a-viz the eastern boundary shown in the plaint map remains unexplained. Plaintiff appellant has not been able to show any independent right upon the land over which situates the houses existing in the name of his two sons although the house was constructed by plaintiff. The trial court has made following observations in this regard:-

"It is stated by him that he was a native of village Milakpur but he had shifted to the disputed village 45 years before the allotment of the said plot. Previous to the allotment of these plots he was living in the rented house of Amar Nath. After he allotted the said plot he had constructed the house and shops in the disputed plot. In this way, it is clear that the plaintiff Shri Chandra is not resident of the said village and he had no land in village Chaura Raghunathpur. He has stated that the plots which were allotted to him for the purposes of installing the grinding machine, there is plot of Om Prakash in the east, there is agricultural land of Pandit Tula Ram in the west and in the north there is a rasta and in the south there is land of Jia Lal. It is also admitted by him that Pandit Tula Ram is father of defendant Harvansh. He has further showed his ignorance regarding mentioning of the boundaries in the receipts. In this way, it is clear that the land to which the plaintiff claims his right is different from that land which is demarcated by the boundaries mentioned in his own statement. It is also revealed that the same boundary has been mentioned in this socalled unregistered lease deed paper No.10A1 to 102A. In this case, report Amin paper

No.85C2 is on record which was obtained in O.S. No.697 of 1984. With the said report of Amin there is description of plot in dispute between the parties in which house of Ramesh and Suresh have been mentioned in the east of the disputed plot and thereafter there is house of Om Prakash. In the west there is disputed land in the north, there is rasta and in the west there is plot of Gopi Chandra and Jia Ram. According to this Amin report the disputed plot which was also disputed in the present case is the same. If the plaintiff was granted lease of the said plot the boundaries of the same stated by him in his statement should have tallied with the disputed land, but the boundaries of the disputed land is different from the boundaries for which he claims right by way of lease deed alleged to have been executed by Gaon Sabha. From the perusal of this report and map it is clear that in the east of the disputed plot there is house of Ramesh and Suresh sons of Shri Chandra, in the west there is Kachi Patri and in north rasta and in the sought Abadi of Godi Chandra. This goes to show that the disputed land is not the same which is claimed by the defendant. The plaintiff has admitted that he has constructed the house in the east of disputed land in which his sons Ramesh and Suresh Chandra are living. It is also admitted by him that he was also living in the said house. It is further admitted by him that the said land in which his house is constructed was granted to him by Gram Sabha on lease. It is stated by the defendant and his witnesses that it is the same land in which the house of plaintiff is constructed which was granted by the Gaon Sabha to him, but the disputed land is different from the land leased out to him by Gram Sabha. In case the disputed land was the same which was granted by him by the Gram Sabha he should have given the correct boundary of the same and the manner how he acquired the land in which the houses is situated but when he was inquired now he got this land PW.1 Shri Chandra stated that he does not know whether the Gaon Sabha has allotted this land to him or where from it has come to him. It is further stated by him that he does not know whether any proceedings are taken by Gaon Sabha for dislodging him from the land in which his house is constructed. He further stated that he had no lease deed of that land granted to him by gram Sabha in which his house is situated. It is clear that Shri Chandra is not original resident of the said village. According to him he had settled down in the said village only 45 years before the execution of lease deed in his favour. He does not allege that the land in which his house is constructed was given to him by gaon sabha in lease whereas the defendant's case is that the land in which the house is constructed is the same allotted to him on lease by Gaon Sabha and not the disputed land. In the absence of giving any detail how he acquired this portion of the land and the fact that the boundaries of land in which his house is constructed tallies with the description given in his plaint clearly goes to show that the disputed land is not the same which is being claimed by the plaintiff now."

13. Sri B.B. Paul has not able to explain inconsistency in the boundary of the plot leased out to plaintiff as against the boundary shown in the plaint map. Plaintiff has admitted that he had constructed the houses, which are recorded in the

name of his two sons. Admittedly, after the two houses of plaintiff's sons situate the plot of Om Prakash. Unless the plaintiff is able to explain his right over the land on which exist the two houses, I am inclined to endorse the view taken that the plaintiff is in possession over the land leased out to him and two houses of his sons exist over it, and he is now trying to encroach upon land in addition to what was leased out to him. As per the lease, on the eastern boundary of plot situate abadi of Om Prakash and Gaon Sabha. As per the sketch plan "EF" denotes this eastern boundary and matches with the eastern boundary of the house of plaintiff's son. Plaintiff-appellant admits that his sons had never applied for grant of lease of any land, over which their houses situate. It is clear that the only land leased out by Gaon Sabha was in favour of the plaintiff. The two houses are also constructed by plaintiff. The eastern boundary of lease as well as houses of plaintiff's son is identical/same. Plaintiff, thus, has not been able to establish that suit property was allotted to him.

14. The further finding given by trial court that disputed land belongs to defendants respondents is also borne out from the oral and documentary evidence brought on record. Copy of Khasra of 1385 fasli which corresponds to the year 1978 clearly shows that 7 biswa land of plot no.150 was the Abadi of Tularam, father of defendants. Khasra is a document of possession and the entry of defendants over it would legitimately justify drawing of inference that defendants were in possession over such land. The finding that the disputed property situate in plot no.150 and is the Abadi of defendants since 1385 fasli has not been shown to be perverse or erroneous. Plaintiff has admitted that he is not the original resident of village Raghunath Pur but got settled therein few years prior to allotment of plots in 1972. The plaintiff-appellant had raised his claim over the suit land on the basis of two patta/lease, and in view of evidence that plaintiff-appellant was in possession of such allotted land over which exist two houses etc., there was no other land over which plaintiff could claim any right. Plaintiff-appellant has failed to establish his case.

15. The plea of defendants that the khasra produced was fabricated has rightly been rejected by the trial court after taking note of the fact that old plot number of plot no.150 was 107/1 miljuma and included plot no.149, which admittedly belonged to the defendants. The village Pradhan has also stated that suit land was never allotted to plaintiff-appellant and that such land belongs to defendants, and was being used by them. The plaintiff-appellant since has failed to establish that the description of suit property matches with the description of property leased out to him, as such, the plaintiff's suit for injunction in respect of such land has rightly been rejected.

16. The judgment relied upon in Bhaskar Laxman Jadhav (supra) was a case arising out of writ proceedings, wherein the High Court moulded relief considering the interest of a public trust, and the Hon'ble Supreme Court refused to exercise its jurisdiction under Article 136 of the Constitution of India. This judgment has no applicability in the facts of the present case.

The Constitution Bench judgment in Rupa Ashok Hurra (*supra*) relates to exercise of review jurisdiction by Apex Court in "curative petition", and is not shown to have any applicability in the facts of the present case.

17. The finding of the trial court that defendants-respondents are in possession, and had raised constructions, which belongs to them, is also based on appreciation of evidence brought on record. Plaintiff-appellant since has not been able to establish his right or possession over the suit property, as described in the plaint, the appeal is found to be lacking in substance, and is accordingly dismissed.