

(2007) 05 UK CK 0028

In the Uttarakhand High Court

Case No : Second Appeal No. 253 of 2001

Smt. Kalawati (Since deceased), through L. Rs. APPELLANT

Vs

Girish Shram (Since deceased), through L.Rs. and Surendra RESPONDENT
Nath (Since deceased), through L.Rs. and Another

Date of Decision : 10-05-2007

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 100
Uttar Pradesh Reorganisation Act, 2000 — Section 35

Citation : (2007) 3 UC 1643

Hon'ble Judges : Prafulla C. Pant, J

Bench : Single Bench

Advocate : Ramji Srivastava, for the Appellant; Sharad Sharma, for the Respondent

Final Decision : Dismissed

Judgement

Prafulla C. Pant, J.—This second appeal, preferred u/s 100 of the Code of Civil Procedure, 1908, is directed against the judgment and decree dated 07-07-1978, passed by i Additional District Judge, Nainital in Civil Appeal No. 19 of 1978, whereby the judgment and decree dated 23-12-1977, passed by Munsif, Kahsipur, in Original Suit No. 160 of 1971, dismissing the suit, is set aside and the appeal is decreed for possession and mesne profits.

2. Heard learned Counsel for the parties and perused the papers on record.

3. Brief facts, as per the plaint case, are that the Plaintiffs Girish Chandra Sharma and Smt. Laxmi Devi (since deceased) were owners and landlords of the property in question situated at Mohalla Khalsa, Kashipur. Defendant Surendra Nath is the son-in-law of Defendant Kalawati, and Defendant Krishna who is daughter of aforesaid Defendant Surencra Nath. Defendant No. 1 was the tenant in the property described in Schedule "Kha" and "Ga" Plaintiffs have pleaded that this property was purchased by them., in auction, as the same was mortgaged by original owner Ram Charan (in favour of one Bal Mukund), who

filed suit for foreclosure. "Hie said suit was decreed and the property was auctioned in the year 1933. The rate of rent was Rs. 1/- per month on which the Defendants were enjoying the property as lessees. However, they stopped to pay rent after 31s" of August, 1961. (in respect of property of Schedule "Kha.", the Defendants were evicted after the suit of the Plaintiffs was decreed. However, it is pleaded that their possession continued in property, shown in Schedule "Ga" over which they encroached upon in February 1963). The Defendant/Respondent Kalawati who was the original tenant started denying title of the Plaintiffs. Hence, after serving the notice suit was instituted.

4. It is pleaded by the contesting Defendant Kalawati that the Plaintiffs are not the owners of the property in suit, nor are they landlords. It is alleged by her that she has inherited the property from her uncle Bihari Lal (Fufa) and aunt Smt. Sukhia (Fufi). In paragraph 16 of the written statement, it was further pleaded that since she (contesting Defendant Kalawati) is in possession of the property in question for more than 50 years, as such, she has matured the titled by virtue of adverse possession. Other Defendants did not contest the suit.

5. The trial court on the basis of the pleadings of the parties, framed following issues:

1. Whether the Plaintiffs acquired title over the disputed property through the sale certificate dated 23-10-1933 ?

2. Whether the Defendant No. 1 has been in unlawful possession over the property detailed in Schedule "Ga" of the plaint?

3. Whether disputed property detailed in Schedule Kha" was let out to the Defendant No. 1 by the mother of the Plaintiff No. 1?

4. Whether Defendant No. 1 is owner of the property in suit?

5. Is the plea of Defendant No. 1 in respect of her alleged ownership is barred by principle of resjudicata?

6. Is the suit within time?

7. To what relief, if any, are the Plaintiffs entitled?

(A part from this issue No. 8 was framed on the point of insufficiency of valuation and court fee, which was decided as a preliminary issue).

6. The trial court, after recording the evidence and hearing of the parties, found that the Plaintiffs had purchased the property through sale certificate dated 23-10-1933 and it also found that the plea of ownership raised by Defendant No. 1 is barred by principle of resjudicate. However, simultaneously, it decided that the Defendant No. 1 has matured the title by virtue of adverse possession. It further found that the Defendants have not encroached upon the property in Schedule "Ga" in 1963, after they were evicted from the property of Schedule "Kha". With the finding that the Defendant No. 1 has matured her title over the

property in Schedule "Ga" by virtue of adverse possession, the suit No. 160 of 1971, was dismissed by the trial court vide judgment and decree dated 23-12-1977. Aggrieved by said judgment and decree, Plaintiffs preferred Civil Appeal No. 19 of 1978, before the District Judge, Nainital, from where it appears to have been transferred to I Additional District Judge, Nainital, for its disposal. The said lower appellate court, after hearing the parties, allowed the appeal and decreed the suit as prayed by the Plaintiffs. The lower appellate court found that the finding recorded by the trial court relating to the adverse possession was wrong. As to the limitation to file suit for eviction it held that the same had not expired on the date of institution of suit. Hence, this Second Appeal was filed by Defendant No. 1 before the Allahabad High Court, from where it is received by transfer to this Court, u/s 35 of the UP. Re-organization Act, 2000, for its disposal.

7. This appeal was admitted by the Allahabad High Court on 16-08-1978, on following substantial question of law:

Whether the Plaintiffs' suit was barred by time?

Answer to substantial question of law:

8. Before further discussion, it is pertinent to mention here that this Court in its exercise of powers u/s 100 of the Code of Civil Procedure, 1908, cannot interfere with the finding of fact recorded by the lower appellate court, unless the same is found to be perverse or against the law. Both the courts below have found that the property was purchased by the Plaintiffs through sale certificate dated 23-10-1933, by participating in an auction, in respect of said property. It is also not disputed that the Defendants were in possession on the Property in question on the date of institution of the suit. The trial court has dismissed the suit only on the ground that the Defendants have matured their title by way of adverse possession, to which the lower appellate court disagreed, after re-appreciating the evidence. It is settled principle of law that for acquiring title over a property by way of adverse possession, the possession must be open, peaceful and to the knowledge of the real owner, for a continuous period of 12 years. From the pleadings of the parties, it is clear that the Defendants have not come with the clear case of acquiring title by way of adverse possession. Rather, Defendant No. 1 has come with the plea that she inherited the property from her uncle Bihari Lal and aunt Shukia. That plea was not accepted by either of the two courts below. In an alternative, the Defendant No. 1 pleaded that she has matured the title by way of adverse possession. On that factual aspect the trial court agreed to it, but the lower appellate court found that the finding of the trial court was wrong. The lower appellate court has given reasons for not agreeing with the trial court on said point. This Court agrees with the lower appellate court that there is difference between long possession" and "adverse possession". In the case of long possession, it may not be necessary to disclose the date since when the party is in possession, but for the purposes of establishing the case of adverse possession, it is necessary to plead and prove, since when the

possession became adverse to the true owner. The burden, certainly lies on the party, who pleads it. From the evidence on record, this Court found that the Defendant No. 1 had failed to plead and prove since when the adverse possession to the true owner started.

9. In the plaint it is pleaded that in February 1963, the Defendants trespassed over the property in Schedule "Ga". They were served with the notices in August 1969, but to no avail. The relevant provision of law as contained in the Limitation Act, 1963, i.e. Article 65, reads as under:

Description of suit Period of limitation Time from which period begins to run

65. For possession of Twelve years When the possession

immovable property or of the Defendant becomes

any interest therein adverse to the

based on title. Plaintiff.

Explanation - For the purposes of this article -

(a) where the suit is by a remainderman, a reversioner (other than a landlord) or a devisee, the possession of the Defendant shall be deemed to become adverse only when the estate of the remainderman, reversioner or devisee, as the case may be, falls into possession;

(b) where the suit is by a Hindu or Muslim entitled to the possession of immovable property on the death of a Hindu or Muslim female, the possession of the Defendant shall be deemed to become adverse only when the female dies;

(c) where the suit is by a purchaser at a sale in execution of a decree when the judgment-debtor was out of possession at the date of the sale, the purchaser shall be deemed to be a representative of the judgment-debtor who was out of possession.

The suit, out of which this appeal has arisen, was instituted in the year 1971 i.e. after commencement of the Limitation Act, 1963. Aforementioned Article 65 of the Limitation Act, 1963, covers suits which were covered earlier under Article 47, Article 136, Article 137, Article 138 and Article 144 of the Limitation Act, 1908. The limitation of three years which was provided under Article 47 of the Limitation Act, 1908, got enlarged to twelve years, after the commencement of the Limitation Act, 1963. Article 144 of the Limitation Act of 1908, did not expressly refer to the suit for recovery of possession based on the title. Rather it comprehended all residuary classes of suits for recovery of possession. But, Article 65 of the Limitation Act, 1963, is limited to the cases for recovery of possession of immovable property or any interest therein based on title. It is settled principle of law that when new Limitation Act came into force on January 1, 1964, and the limitation to file the suit under old Limitation Act (1908) had not expired, the limitation provided under the new Act became applicable to the

suits filed after the aforesaid date. Had the title of the Plaintiffs been extinguished by prescription prior to the institution of the suit it could not have been said that the Plaintiffs were entitled to institute the suit under the new Act. But, it is not the case here. As such, this Court finds no error of law committed by the lower appellate court in holding that the suit is not barred by limitation. Accordingly, the substantial question of law stands answered.

10. In the written statement of the contesting Defendants, it is nowhere stated that since which date the Defendant No. 1 is in possession and when the possession became adverse to the true owner. As such, the trial court committed a clear error of law in holding that the Defendant No. 1 had matured the titled by virtue of adverse possession, and the lower appellate court rightly set aside said finding, and decreed the suit in respect of the property mentioned in Schedule "Ga", also.

11. For the reasons as discussed above, this Appeal has no force, and the same is liable to be dismissed. The Second Appeal is dismissed. Interim order, if any, automatically stands vacated. No order as to costs.