

(2012) 04 UK CK 0058

In the Uttarakhand High Court

Case No : Second Appeal No. 21 of 2012

Smt. Sulochna Devi, Bhagwati Dabral and Suman Dabral

APPELLANT

Vs

Nagendra Datt Thapliyal, Ramanand Dabral

RESPONDENT

Date of Decision : 12-04-2012

Acts Referred:

Citation : (2012) 2 UC 1435

Hon'ble Judges : Brahma Singh Verma, J

Bench : Single Bench

Advocate : C.D. Bahuguna, with Mr. Anup Kumar Verma, for the Appellant;
Lokendra Dobhal, Advocate, learned counsel for the plaintiff - respondent no. 1,
for the Respondent

Final Decision : Dismissed

Judgement

Hon"ble B.S.Verma, J.—Learned counsel for the appellant files supplementary affidavit. The same is taken on record. This second appeal is directed against the judgment and decree dated 9-12-2011 passed by the District Judge Uttarkashi in Civil Appeal No. 14 of 2009, Nagendra Datt Thapliyal Vs. Smt. Sulochana and others, whereby the appeal was allowed, the judgment under appeal was set aside and the suit of the plaintiff-appellant for mandatory injunction and permanent injunction was decreed in favour of the plaintiff-respondent no. 1 herein.

2 Briefly stated, the facts giving rise to this appeal are that the plaintiff-respondent no. 1 herein instituted a suit bearing O.S. No. 25 of 2006, for a decree for mandatory injunction as well as permanent injunction in the court of Civil Judge (Senior Division) Uttarkashi in the year 2006 with the averment that he is the owner of a shop and two rooms, situated at Ward Nos. 6, Birla Gali, Uttarkashi as described in Schedule Ka of the plaint. The plaintiff claimed himself to be owner of the said property on the basis of a registered sale deed dated 3-3-1978, which was executed in his favour by Mr. Chandramani and Indramani, sons of Mr. Dharni Datt. In the suit, the plaintiff sought a relief for a decree of

mandatory injunction against the defendants including the appellants herein for removing the constructions raised over the roof of the premises, situated at Birla Gali, Uttarakashi and a decree for permanent injunction restraining the defendants from interfering over the roof and raising construction thereon.

3. So far as the execution of the sale-deed in favour of the plaintiff-respondent no. 1 is concerned, the same has not been disputed by the defendant-appellants in their written statement. The specific case of the defendants before the trial Court was that pursuant to the order passed by the District and Sessions Judge, Tehri Garhwal, the sale deed was executed in favour of Chandramani and Indramani through advocate commissioner, but no possession had ever been handed over to Chandramani and Indramani. It was also stated in paragraph no. 21 of the written statement that by collusion of Tehsildar and official of Tehsil, mutation was also got sanctioned in their favour. Prior to that, an agreement was executed only for a shop and the sale deed was got executed including two disputed rooms also. It was claimed by the defendants that they being the legal heirs of Mahanand are owner of the property in dispute.

4. In this Court, by way of Supplementary Affidavit, the appellant has filed copy of the sale deed, which was executed pursuant to the direction of the District Judge Tehri Garhwal dated 15-9-1976 through Advocate Commissioner, wherein it was mentioned by the executant that "I, Vidy Sagar Raturi, Advocate Commissioner do execute the sale deed in favour of S/Sri Chandermani and Indermani S/o Sri Dharni Datt, R/o village Bandwalgaon Patti Juwa Udaipur, district Tehsri Garhwal and transfer all the rights of the said Sri Maha Nand son of Sri Keshva Nand and Rama Nand son of Sri Maha Nand R/o village Kandasari Patti Nagun, district Tehri Garhwal in demised property. In terms of the order of the court appointing me Commissioner for the said purpose and terms of the decree I shall put the said Chandermani and Indermani in possession over the property demised.

5. The said sale deed was executed pursuant to the order of the District Judge Tehri Garhwal dated 31.3.1977 passed in Civil Execution Case No. 14 of 1976 (Uttarkashi) arising out of Civil Suit No. 41 of 1974, decided on 15-9-1976.

6. By a perusal of the schedule of the demised property it goes to show that the sale deed was executed by the advocate commissioner in respect of one set of shops (consisting of three rooms) bounded on east and west by public roads, on north by the remaining two sets of shops belonging to S/Sri Maha Nand and Rama Nand and on South by the buildings of Sri Jabar Singh situated in the town of Uttarkashi district Uttarkashi, near Birla Dharmshala, Uttarkashi.

7. Before the trial Court, both the parties led their evidence. The trial Court ultimately by judgment and decree dated 1-9-2009 dismissed the suit of the plaintiff-respondent no. 1 herein on the ground that the plaintiff failed to establish that possession was handed over pursuant to the sale deed. Aggrieved by the said judgment and decree of the trial Court, the plaintiff-respondent no. 1

preferred an appeal bearing Civil Appeal No. 14 of 2009 before the District Judge Uttarkashi. The appeal was heard and the learned The learned appellate Court after perusal of the evidence led by the parties before the trial Court reversed the finding of the trial Court on the ground that the sale deed was executed pursuant to the decree passed by the District Judge Tehri Garhwal and thereafter Chandramani and Inramani sold the property in question to the plaintiff and in the sale deed it was mentioned that possession was handed over to the vendees/purchasers. The appellate Court allowed the appeal by judgment dated 9-12-2011 and decreed the suit of the plaintiff-respondent no. 1 by the impugned judgment and decree.

8. The defendant-appellants had denied that there was no tenant in the shop in question. The learned trial Court dismissed the suit on the ground that no such receipt of rent was shown whether Sunder Singh Panwar was the tenant of the plaintiff. The learned appellate Court at paragraph no. 16 has elaborately dealt this issue and has observed that an S.C.C. Suit (SCC Suit No. 2 of 2007) was filed by the plaintiff against Sunder Singh Panwar. He admitted that he was a tenant of the plaintiff at monthly rental of Rs. 600/-. Thereafter, the rent was enhanced to Rs. 750/- per month and written statement was filed by Sunder Singh Panwar, which was placed on record as paper no. 109-C/2-3. The finding of the trial court was set aside on this count and it was held that Sri Sunder Singh Panwar was a tenant. The suit was dismissed by the trial Court on the ground that the plaintiff has failed to establish that actual possession was not proved, as mentioned earlier. The learned appellate Court on the basis of the entries made in the revenue record and the municipal record and after detailed discussion of the oral as well as documentary evidence led by the parties came to the conclusion that possession was handed over to the plaintiff pursuant to the sale deed.

9. So far as the case of the defendant-appellants is concerned, they only denied that possession was not handed over to the plaintiff, therefore, the plaintiff is not entitled to get a decree for mandatory and permanent injunction in the absence of possession. But there is no denial that the sale deeds were executed by the Advocate Commissioner in favour of Chandra Mani and Indra Mani and thereafter in favour of the plaintiff by Chandramani and Indramani and he obtained possession from Chandramani and Indramani, as mentioned in the sale deed dated 3-7-1978.

10. So far as the question of possession whether the plaintiff was in possession of the property in suit or whether the defendants were in possession of the property in suit, it is a question of fact and the same has been concluded by the appellate Court by appraisal of cogent evidence led by the plaintiff and it cannot be a substantial question of law. The defendant-appellants after they got the knowledge of the sale deed having been executed in favour of the plaintiff, which they alleged to have been obtained by playing fraud, did not make any effort to take steps for cancellation of those sale deeds and no counter claim was lodged

even in the written statement to assail those sale deeds, therefore, I find no error in the judgment and decree of the appellate Court, whereby the suit has been decreed and the judgment and decree of the trial court was set aside.

11. Learned Senior Advocate Mr. C.D.Bahuguna, appearing on behalf of the appellants has further raised technical grounds and stress was given on question no. 4 of the additional substantial questions of law, framed by the appellants which reads Whether a regular first appeal against the judgment of the trial court was maintainable before the 1st appellate Court? and Whether the 1st appellate court committed a patent illegality by decreeing the suit of the plaintiff/respondent, without setting aside the decree of the trial court?

12. In this regard, the learned counsel for the appellants has placed reliance upon the judgment of the Allahabad High Court in the case of Budh Sen Vs. Sheel Chandra Agarwal and Others, , wherein it has been held in paragraph no. 9 that the CPC does not contemplate an appeal against a mere finding in the absence of any challenge to the decree itself. To verify the fact whether appeal was preferred against the judgment alone or the decree, learned Senior Advocate drew attention of this Court to the memo of appeal, which has been annexed as Annexure S.A.-7 to the I supplementary affidavit.

13. I have perused the memo of first appeal. The appellant has made a prayer that the appeal be allowed and the judgment and order dated 1-9-2009 passed in Civil Suit No. 25 of 2006, Nagendra Datt Thapliyal Vs. Smt. Sulochani Devi be set aside. The learned senior advocate has contended that there is no specific prayer for setting aside the decree.

14. It is pertinent to mention here that in the memo of appeal at the very first page after the particulars of parties, there is a caption-appeal against the judgment and decree dated 1-9-2009 passed by the Civil Judge (Senior Division) Uttarkashi in O.S. No. 25 of 2006, Nagendra Datt Thapliyal Vs. Smt. Sulochani Devi and others. In this view of the matter, it cannot be said that in the first appeal only the judgment of the trial Court was assailed by the plaintiff-appellant and if in the prayer the word "decree" is escaped, it makes no difference, because the appellant-respondent no. 1 herein had challenged the judgment and decree both passed by the trial Court and prayed for to allow the appeal. The contention of the learned counsel for the appellants has no force and cannot be accepted.

15. Moreover, the ratio of the judgment cannot be disputed but the facts of the case at hand are quite distinct. Before the Division Bench of the Allahabad High Court, the second appeal was preferred not against the decree of the court below but only against the finding recorded by it. In the case at hand, the challenge was made to the judgment and decree both passed by the trial Court.

16. No substantial question of law arises for consideration in the second appeal, since the only dispute raised by the defendants-appellants is that possession had never been handed over pursuant to the sale deed to the plaintiff, therefore,

decree for mandatory injunction and permanent injunction could not have been passed in favour of the plaintiff-respondent no. 1. It is well settled that possession goes with the title. In the case at hand, the first appellate Court has also given the finding, after perusal of cogent evidence, that factum of possession was proved. The finding cannot be said to be perverse. Besides, this issue of possession is only a question of finding of fact.

17. For what has been stated above, I am of the considered view that there arises no substantial question of law for consideration in this appeal, therefore, the second appeal is liable to be dismissed outright at the threshold.

18. The appeal is dismissed in limine. All pending applications stand disposed of.