
(1981) 01 AHC CK 0059
In the Allahabad High Court
Case No : Second Appeal No. 366 of 1968

Usman	Vs	APPELLANT
Munneer Hazzam and others		RESPONDENT

Date of Decision : 21-01-1981

Acts Referred:

Evidence Act, 1872 — Section 35, 77

Citation : (1981) 01 AHC CK 0059

Hon'ble Judges : Deoki Nandan, J

Final Decision : Dismissed

Judgement

Deoki Nandan, J.

This is plaintiff's second appeal in a suit for injunction and in the alternative for possession in respect of a plot of land denoted by letters A.B.C.D. on the plaint map. The plaintiff's case was that he was a cosharer in the zamindari rights in respect of the land used to have a Kolhar thereon, that the building of the said Kohar fell down in the year 195556 and the defendant interfered with the plaintiff's possession over the land and prevented him from reconstructing buildings thereon. An earlier suit being suit no. 77 of 1957 filed by Mehdi Hasan plaintiff's uncle and cosharers was decreed by the trial Court but was dismissed on appeal, according to the plaintiff, on a preliminary ground. The suit giving rise to the present second appeal was filed soon thereafter

The defendants traversed the plaintiff's case. The following were the issues on which the parties went to trial;

1. Whether there was a Kolhare building on the land in suit shown by letters A.B.C.D. on the Commissioner's map paper no. 25A2 and the vacant land was appurtenant to it on the date of abolition of zamindari in the State of U. P.? If so was the land in suit settled with plaintiff under Section 9 of Zamindari Abolition and Land Reforms Act.?

2. Whether the suit is barred by time ?

3. Whether the suit is barred by Section 11 Civil Procedure Code as alleged ?
4. Whether the suit is barred by principle of estoppel ?
5. To what relief, if any, is the plaintiff entitled ?"

On the third issue, which was taken up first by the trial Court, it held that the suit was not hit by Section 11 of the Code of Civil Procedure. Issues Nos. 1 and 2 were taken up together. The trial Court disbelieved the plaintiff's case and held that the plaintiff was not in possession of any building on the land on the abolition of zamindari and that, therefore, it could not be said that the land was settled with him under Section 9 of the U. P. Zamindari Abolition and Land Reforms Act. On issue no. 2 it found that the plaintiff had not been in possession over the land within 12 years prior to the date of the institution of the suit and it was accordingly barred by limitation. Issue no. 4 was answered in the negative, and in view of its finding on issues nos. 1,2 and 3, the suit was dismissed by the trial Court.

On plaintiff's appeal, the lower appellate Court observed that the present suit was a vain attempt to claim the land which could not succeed in the earlier suit, and although "technically the plea of resjudicata do not apply "the claim is substantially the same which the plaintiff's uncle could not maintain in the earlier suit. This was followed up by the lower appellate Court by the following observations." The plaintiff as in the suit did not detail the Sikmi plots of which he was cosharer, proprietor before the abolition of zamindari. The partition papers, namely, partition Khasra and the map on the record can be of no help because Sikmi numbers of the land in question have not been plotted. The plaintiff and his cosharers are shown to be the owners of certain Sikmi plots but the same have not been located and the identification of the land in suit with its Sikmi numbers have not been established. The case cannot, therefore, be decided upon conjectures and supposition that the land in suit was indentical with the Sikmi numbers denoted in the Patti Akher Ali belonged to the plaintiff and his cosharers. "I have not been able to make any sense out of the said observations of the lower appellate Court. A case has to be decided by the Court on the pleadings of the parties and on the evidence led by them. Here the decision appears to be based more on absence of evidence which the Court thought was the only evidence on which a case of the present kind could be established.

This is followed by the further observations of the lower appellate Court to the effect that: "There is also no satisfactory evidence to prove that structure existed of the land in suit at the time of abolition of zamindari. The only evidence in this regard was the oral statement of the plaintiff and satra. The Learned counsel placed much reiance upon the inspection report made by the City Munsif in suit no. 77 of 1957 and also upon the report of the Commissioner in that suit. I consider that the inspection notes and Commissioner's report in the earlier suit are irrelevant and inadmissible and, therefore, they cannot be relied and they

need not be referred".

Mr. U. K. Misra. Learned counsel for the plaintiffappellant contended and I think rightly, that the lower appellate Court is in error in having rejected the Commissioner's report in the earlier suit as irrelevant, and in regarding the oral evidence of the parties as almost nothing. There could be no doubt that being public documents certified copies of the Commissioner's report and the inspection note in the earlier suit were admissible in evidence without further proof, under Section 77 of the Indian Evidence Act, as proof of their contents. As to the relevancy of their contents, the inspection note, it could be presumed, must have been recorded by the Presiding Officer in the earlier suit in the due discharge of his duties and the Commissioner must have also submitted his report in the due discharge of his duties entrusted to him by the Court. Both of them are accordingly relevant under Section 35 of the Indian Evidence Act. It is a different matter that in case the Commissioner's report was not confirmed in the earlier suit it would be of no evidentiary value ; and even if it was confirmed in the earlier suit, it might have been open to the parties who contested that report to call for the Commissioner for crossexamination in order to test its correctness, or to show that it was incorrect by some other evidence or to it could not be brushed aside out of hand simply because it was a report made in an earlier suit and the party who relied upon it did not produce the Commissioner to prove that report in the present suit. As to the inspection note of the Presiding Officer, the report could be used to judge the reliability of evidence of witnesses in the present case. Even the Commissioner's report could be primarily used for the same purpose but none of them could be said to be substantive evidence to base the plaintiff's case on. The evidence was in the nature of circumstantial evidence, which could have supported the plaintiff's case if it was found to be consistent with it. Neither of the two Courts below appear to have appraised the oral evidence of the parties in this light and inspite of my great reluctance to remand an old case like the present one. I am constrained to set aside the judgment and decree of the lower appellate Court in the present case and to send the case back to the Court of the District Judge, Azamgarh, with the direction that Civil Appeal No. 621 of 1965 of his Court shall be restored to its original number and heard and decided afresh in accordance with law in the light of the observations made hereinabove, either by him or by such other Additional Judge to whom it may be assigned. There will be no order as to costs in this Court. The appellant shall be entitled to a certificate for refund of the Courtfees paid in this Court. The record shall be sent down at once to the Court below without waiting for the preparation of the decree by this Court.

Under rule 26A of order 41, I fix 6th April 1981 for appearance of the parties in the Court of the District Judge, Azamgarh, for taking further orders about the hearing of the appeal. The office shall ensure that the record reaches the Court of the District Judge, Azamgarh, before that date along with a copy of this judgment.