

(2012) 01 AHC CK 0317**Allahabad High Court****Case No:** Second Appeal No. - 2161 of 1978

Rajdeo and Another

APPELLANT

Vs

Surya Narain and Others

RESPONDENT

Date of Decision: Jan. 5, 2012**Hon'ble Judges:** Sibghat Ullah Khan, J**Bench:** Single Bench**Final Decision:** Dismissed**Judgement**

Hon"ble Sibghat Ullah Khan, J.

Heard learned counsel for the parties.

2. This is defendants" second appeal arising out of O.S. No.8 of 1971. The suit was decreed in part on 14.08.1976 by Munsif, Basgaon Gorakhpur. Against the said decree plaintiff filed Civil Appeal No.274 of 1976. Defendants filed cross-objections in the said appeal. II Additional District Judge, Gorakhpur allowed the appeal, dismissed the cross-objections and decreed the entire suit through judgment and decree dated 01.04.1978. This second appeal has been filed by the defendants against the decree passed by the lower appellate court. This second appeal was admitted on 07.08.1978 on the following substantial question of law:

The substantial question of law involved in this case is whether the judgment of the lower appellate court is vitiated by mis-reading of the pleadings particularly the plaint.

3. Matter relates to an area of 0.06 acres (6 decimal) of Plot No.634 total area of which is slightly more than 1 acre (1.02 acre). The trial court decreed the suit in respect of half of the land in dispute i.e. 3 decimal situate towards north and dismissed the suit in respect of 3 decimal of land in dispute situate towards south. Relief claimed in the plaint was for removal of cattle troughs and pegs made/ placed in the land in dispute by the defendants and for restoration of possession and for prohibitory injunction seeking to restrain the defendants from causing any

interference in plaintiffs" possession. The specific case of plaintiffs was that entire Plot No.634 was jointly owned by their father and other co-sharers and a portion of said plot containing land in dispute had fallen in the share of their father and that even though entire plot was grove, however there were no more any trees in the 6 decimal portion of the said plot, which was in dispute and plaintiffs" father and after his death plaintiffs were using the land in dispute as abadi for storing cow dung cakes, paddy stacks and firewood and for tying and feeding cattles etc. for a very long time. Defendants admitted that disputed area of 6 decimal of Plot No.634 had been converted into abadi (para-4 of the plaint and para-4 of the written statement).

4. Lower appellate court has mentioned that in paragraphs 8 and 13 of the written statement defendants did not assert any claim over any part of Plot No.634.

5. The trial court had held that northern half portion (3 decimal) of the land in dispute had been in use and occupation of the plaintiffs and southern half portion in use and occupation of defendants. Trial court had mentioned that plaintiffs could not prove the allegation that the entire disputed land of 6 decimal had been surrounded by boundary wall by them. Lower appellate court held that in the plaint it was nowhere stated that the entire 6 decimal area which was in dispute had been surrounded by the plaintiffs by the boundary wall. In the entire plaint there is no allegation that land in dispute had been surrounded by the boundary wall by the plaintiffs. Lower appellant court rightly observed that

There is no such contention to be found anywhere in the plaint.

6. In Para-8 of the written statement defendants pleaded that defendants" house was situate in part of Plot No.616 and Plot No.617 which belonged to the defendants in which defendants were having old huts, trees and wells. In Para-13 of the written statement it was stated that if from inspections, survey and demarcation it was found that some negligible portion in possession of the defendants i.e. part of land in dispute lay in Plot No.634 and not in Plots No.616 & 617 then defendants were in use and occupation of the same for a very long time, hence suit could not be decreed. In the end of the said para, it was specifically pleaded that plaintiffs were not at all bhoodhars of the land in dispute and were not having their abadi thereupon. It was further stated that if there was any inadvertent encroachment of Plot No.634 by the defendants then it was for the reason that it was just adjacent to Plots No.616 & 617 and the encroachment would not be more than 3 or 4 karis (1/6th or 1/5th of a decimal).

7. Moreover in the oral statement defendant No.2 clearly admitted that he had no concern with Plot No.634 (defendant No.1 did not examine himself). It was further stated by defendant No.2 in his oral statement that his house, garhi, cattle trough and pegs and trees etc. were mainly in Plots No.616 and 617 and some portion of garhi lay in Plot No.635.

8. The trial court had directed the Court Amin to prepare survey map which he had done.

9. The lower appellate court after taking into consideration the pleadings of the parties, oral statement of the defendant No.2 and report of the Court Amin held that the suit deserved to be decreed completely. Amin's map No.115/6 was directed to form part of the decree by lower appellate court and the suit was decreed in respect of portion shown by letters ka, kha, ga, gha in the said map. The said portion in the map is clearly shown to be part of Plot No.634.

10. The findings recorded by the lower appellate court are pure findings of fact. Pleadings have correctly been interpreted by it. The substantial question of law framed in this second appeal is therefore decided against the appellant and in favour of respondents and the second appeal is dismissed.