(2013) 07 AHC CK 0171

Allahabad High Court (Lucknow Bench)

Case No: Second Appeal No. 258 of 2012

Kripa Ram		APPELLANT
	Vs	
Rajdayee and Others		RESPONDENT

Date of Decision: July 3, 2013

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 8 Rule 10
- Evidence Act, 1872 - Section 101, 102, 110, 114, 3

Hon'ble Judges: Saeed-UZ-Zaman Siddiqi, J

Final Decision: Disposed Of

Judgement

SaeedUzZaman Siddiqi, J.
The instant second appeal has been preferred against the judgment and decree dated 29.04.2010, passed by learned Civil Judge (S.D.) Third, Faizabad in Regular Suit No.13 of 1995, by which the plaintiffs" suit for permanent injunction was dismissed exparte against which the appellant preferred civil appeal no.87 of 2010 which was also dismissed exparte by learned Additional District Judge, Court No.2, Faizabad. Hence, this second appeal has been preferred which has been admitted on the following substantial questions of law:

"1. Whether the learned Trial Court as well as learned First Appellate Court were justified in discussing the pleas taken by defendant in his written statement, in violation of Order 8 Rule 2, 3, 4, 5 and 10 of the Code of Civil Procedure?

2. Whether the learned Trial Court and learned First Appellate Court were justified in rejecting the evidence lead by the plaintiff which was not rebutted by the defendant, in violation of Section 101 of Indian Evidence Act?"

The respondents did not appear even in this Court in spite of service and the appeal was heard exparte. Now, it is the case in which the defendants did neither appear before the learned Trial Court nor before the learned First Appellate Court nor before this Court.

Heard learned counsel for the appellant and gone through the records.

Brief facts of the case are that the plaintiff/appellant filed suit for injunction on the ground that the dispute property no.57 is an abadi land which is shown with letters A,B,C & D in the site plan; the plaintiff is in possession of the said property and there exist mango, neem, shahtoot, gooler, jamun, amrood, badher, amla, papeeta, jangal jalebi etc. trees planted by his father; the plaintiff is deriving benefits from the trees after the death of his father and his father was also deriving such benefits during his lifetime and the plaintiff is in possession since then. It has also been pleaded in para 2 of the plaint that the plaintiff''s father was using the disputed property before abolition of zamindari as sahen and, as such, his father has perfected his title/ownership under Section 9 of U.P.Z.A. & L.R. Act and after the death of his father the plaintiff has become its owner; the defendants have no concern with the disputed property, who are father and sons and, are attempting to raise constructions over the disputed property, against which the plaintiff has moved an application at Police Station Bikapur; the police concerned has stopped the defendants from raising any construction, but now the defendants are intending to keep sugarcane leaves over the disputed property and have damaged amla tree. Hence, the suit was filed for injunction with prayer that the defendants be directed not to cut the trees standing over the disputed property nor raise construction nor interfere with peaceful possession of the plaintiff over the disputed property.

The defendant no.1 contested the suit by filing written statement but later on absented himself and suit proceeded exparte against all the defendants. The plaintiff got a commission issued. The site plan prepared by the commission is also on the records. Plaintiff proved his case by filing his affidavit as PW1 and the affidavit of Ramlal as PW2, but the learned Trial Court rejected the evidence led by the plaintiff on the ground that the plaintiff has pleaded that he is the owner of abadi plot no.57 but has failed to prove the said possession by proving the plot number. Learned Trial Court has also held that since the disputed land is away from his sahen and, as such, it does not appear to be sahen land of the plaintiff, as it is not adjoining land and, has dismissed the plaintiff''s suit by holding that the said land did not vest with the plaintiff''s father under Section 9 of U.P.Z.A. & L.R. Act.

Entire discussions made by learned Trial Court and findings arrived at are full of absurdities. It has adopted a critical approach and was determined to dismiss the suit when it was not contested or controverted by the defendants.

Unfortunately, learned First Appellate Court has established a new law of its own by holding that in a suit for permanent injunction the plaintiff has to prove his possession over the disputed property beyond doubt. Both the learned Courts below have failed to understand the definition of word ''proved'' as defined under Section 3 of the Indian Evidence Act, 1872, which runs as follows:

"Proved." A fact is said to be proved when, after considering the matters before it, the Court either believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists.

Moreover, Section 4 itself provides, which is as under:

4. " May presume." Whenever it is provided by this Act that the Court may presume a fact, it may either regard such fact as proved, unless and until it is disproved, or may call for proof of it:

" Shall presume." Whenever it is directed by this Act that the Court shall presume a fact, it shall regard such fact as proved, unless and until it is disproved:

" Conclusive proof." When one fact is declared by this Act to be conclusive proof of another, the Court shall, on proof of the one fact, regard the other as proved, and shall not allow evidence to be given for the purpose of disproving it.

When a plaintiff alleges in his plaint that his father was in possession of the disputed property prior to the abolition of Zamindari, what is expected from a man of ordinary prudence is that he may presume that the fact exist unless and until it is disproved. Similarly, the court shall presume the fact unless it is disproved. This is in addition to the definition of "burden of proof" as given under Section 101 of the Indian Evidence Act, 1872. Had it been a case in which the Court has proceeded under Order VIII Rule 10 of C.P.C., the court had to presume on the basis of averments in the plaint itself. But, in this case, the learned Trial Court has presumably preferred to proceed under Order IX Rule 6 (i) (a) of the Code of Civil Procedure and has passed the judgment exparte. While passing an exparte judgment, a liberal approach is expected from a court of law or a public authority or by a person of ordinary prudence. The established law is that while passing an order a court of law is not obliged to call upon an aggrieved person to show law on the point. The only requirement of law is that the court should pass all such orders as required by rules of justice, equity and good conscious, unless it is expressly or impliedly barred by any law for the time being in force.

Section 102 of the Indian Evidence Act, 1872 provides as follows:

"102. On whom burden of proof lies. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side."

Section 110 of the Indian Evidence Act, 1872 provides as under;

"110. Burden of proof as to ownership. When the question is whether any person is owner of anything of which he is shown to be in possession, the burden of proving that he is not the owner is on the person who affirms that he is not the owner."

Section 114 of the Indian Evidence Act, 1872, is as under:

"114. Court may presume existence of certain facts. The Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case."

A careful reading of all the sections make it quite clear that a person in possession of a property has to be believed as its owner and he can defend his title against the whole world except the true owner.

The learned First Appellate Court has also discussed that the disputed land did not vest with the plaintiff under Section 9 of U.P.Z.A. & L.R. Act and has determined that the plaintiff has mentioned his age in the suit filed in the year 1996 as 28 years and has mentioned his age in his affidavit dated 6.3.2010 as 42 years which shows that the plaintiff was born in the year about 196869 and the plaintiff did not born on 1.7.1952 when U.P.Z.A. & L.R. Act was not enforced and, as such, the plaintiff cannot depose anything existing at the time of abolition of zamindari. I am unable to understand the approach of the learned Court below. If this approach is accepted as true, no person in India can prove that he or she is the grand son/daughter of a particular person who had died before his birth. Not only pedigrees but even parentage of a sizable number of litigants would come under clouds.

The learned First Appellate Court has also discussed the plaintiff"s pleadings and evidence that several trees, as mentioned earlier, exist on the disputed land which were planted by his father but the learned First Appellate Court has further mentioned that the plaintiff has not deposed in his affidavit that there was any house of the plaintiff or his ancestors adjoining with the disputed land or that the ancestors were living in it. Thereupon, the learned First Appellate Court has mentioned that in this light he proceeded on to examine report commission and site plan paper no.16C and 17C which shows that the house of the plaintiff is situated at a distance from the disputed property. He has further been mentioned that in the report commission the house of the plaintiff has been shown between west and between east there is house of Jamuna and between east of it there is Chhappar, Charhi of Jamuna and the disputed property A,B,C & D lies towards south of it. It shows that no house of the plaintiff or his ancestors exist adjoining to the disputed land and, as such, the evidence of the plaintiff is neither sufficient nor believable. In a similar fashion learned First Appellate Court has rejected the evidence of PW2 Ramlal who is of the age of 73 years, on the date of filing of the affidavit. Again, learned First Appellate Court has reiterated that the disputed land could not belong to the plaintiff on the ground that there is no house of the plaintiff which adjoins the disputed land in which his ancestors were living or his father using it as Khalihan and for other agricultural purposes. Again, the learned First Appellate Court has shown absurdity of mind that since the house of the plaintiff does not adjoin the disputed property he could not prove his physical possession over the disputed property nor any question of his

possession arise. Learned First Appellate Court has relied upon the law laid down by this Court in Ramji Rai v. Jagdish Mallah, 2004 (2) CRC 274, which has no application to the facts of the present case. There is nothing like "proved beyond doubt" in a civil case. The law is quite clear right from its inception that in a civil case the plaintiff is the dominuslitus. In this case before this Court, the plaintiff has specifically pleaded the possession of his father over the disputed land prior to abolition of Zamindari and, as such, the disputed land had settled with the plaintiff"s father under Section 9 of U.P.Z.A. & L.R. Act. The plaintiff has also specifically pleaded that several trees were planted over the disputed land by his father who continued to enjoy the fruits of the same and after his death the plaintiff is enjoying the fruits of the trees. The plaintiff has proved the averments in the plaint through his own evidence which has been supported by evidence of other witness Ram Lal. The evidence of these two witnesses gets corroborated from the report of Amin Paper No. 16C and site plan in Paper No. 17C.

Both the courts below have confused itself regarding the definition of "appurtenant land" which is different with the "adjoining land". "Appurtenant land" does not necessarily mean any land adjoining the house. Appertain means a right or attribute to pertain or relate and the word "appurtenant" is derived from the word appertain. Appurtenance means a right belonging to property as an appendage or accessory and something that appertains.

The definition of `appurtenant" in Black"s Law Dictionary (Special Deluxe, Fifth Edition) page 94 which, in so far as is relevant, reads as follows:

"Appurtenant: belonging to; accessory or incident to; adjunct, appended, or annexed to; answering to accessorium in civil law. Employed in leases for the purpose of including any easements or servitudes used or enjoyed with the demised premises. A thing is "appurtenant" to something else when it stands in relation of an incident to a principal and is necessarily connected with the use and enjoyment of the latter. A thing is deemed to be incidental or appurtenant to land when it is by right used with the land for its benefit, as in the case of a way, or water course, or of a passage for light, air or heat from or across the land of another."

The word "appurtenant" has, in the context, a much wide meaning. It is not just restricted to land which, on a consideration of the circumstances, a court may consider necessary or imperative for its enjoyment. It should be construed as comprehending the land which the parties considered appropriate to let along with the building. The Hon"ble Apex Court, while deciding the case of Larsen and Toubro Ltd, Club House Road, Madras vs. Trustees of Dharmamurthy Rao Bahadur Calavala Cunnan, Chetty"s Charities by its Trustees [(1988) 4 SCC 260] has considered its earlier decision in Maharaja Singh vs. State of U.P. [1977 (7) SCC 155] and held that, "What is integral is not necessarily appurtenant. A position of subordination, something incidental or ancillary or dependent is implied in appurtenance."

In the case of Larsen and Toubro Ltd (supra), the Hon"ble Apex Court has held as under:

"Appurtenant", in relation to a dwelling, or to a school, college includes all land occupied therewith and used for the purposes thereof [Words and Phrases Legally DefinedButterworths, 2nd Edn.] The word "appurtenances" has a distinct and definite meaning . . . . . Prima facie it imports nothing more than what is strictly appertaining to the subject matter of the devise or grant, and which would, in truth, pass without being specially mentioned. Ordinarily, what is necessarily for the enjoyment and has been used for the purpose of the building, such as easements, alone will be appurtenant."

A perusal of judgments of two courts below show that the Presiding Officer belongs to that category of persons, whose only motive is to create obstacles during the course of trial and not to let the trial conclude. The perversity is evident from the judgments of two courts below, who have discussed wrong and incorrect particulars so as to deny justice to aggrieved litigant, who has not approached the court as a matter of course. But, has pleaded and proved his genuine grievances. Both the courts below have lost sight of the provisions contained in Rule 10 of order VIII of Code of Civil Procedure, which runs as follows:

10. Procedure when party fails to present written statement called for by Court. Where any party from whom a written statement is required under rule 1 or rule 9 fails to present the same within the time permitted or fixed by the Court, as the case may be, the Court shall pronounce judgment against him, or make such order in relation to the suit as it thinks fit and on the pronouncement of such judgment a decree shall be drawn up.

As is evident from the portion emphasized by me in the abovesaid provision, the Court is not required to compel the plaintiff to prove the averments made in the pleading of the plaint through affidavit or any other evidence. But the suit has to be decreed on the basis of pleadings.

The word "shall" used in this portion is directory in nature. It does not empower a court of law to call upon plaintiff to lead evidence in support of his case. Though, the learned Trial Court, in this case in hand has not proceeded under Order VIII Rule X C.P.C. but the mandate of the legislature cannot be lost sight of. The obstructionist approach is suicidal for the judicial mechanism. Justice is to be delivered by administering the law according to the provisions of law and not upon whims.

In result, judgments of both the courts below shows that they are based upon whims and misconception of fact as well as law and deserve to be set aside. While setting aside the judgments, I am constrained to observe that the poor appellant has been dragged by the two courts below and not by his adversary defendants to approach to this Court for getting justice. The courts of law should be careful enough to avoid such litigative aerobatics and the aggrieved party should not be compelled to continue to fight up to the Court of highest strata, in a judicial system, which is already overburdened. While holding this I may mention here the Hon''ble Apex Court in the case of Gurdev Kaur & Ors. v. Kaki & Ors, 2006 (4) SBR 371 has observed as under:

"Judges must administer law according to the provisions of law. It is the bounden duty of judges to discern legislative intention in the process of adjudication. Justice administered according to individual"s whim, desire, inclination and notion of justice would lead to confusion, disorder and chaos. Indiscriminate and frequent interference under Section 100 C.P.C. in cases which are totally devoid of any substantial question of law is not only against the legislative intention but is also the main cause of huge pendency of second appeals in the High Courts leading to colossal delay in the administration of justice in civil cases in our country."

It is true that frivolous and deceptive litigation has increased because of loss of moral values in the public, at large, caused by rapid development in the society which has converted the mentality of individuals towards money rather than morals but it does not empower a Court or authority to presume that each and every litigant is dishonest. The only presumption which can be drawn under the constitutional mechanism is that only aggrieved person approaches a Court or authority and if the grievances of the aggrieved persons are not resolved, without delay, he will lose faith in the constitutional or statutory authority and ultimately resort to unconstitutional modes which is suicidal for the survival of the nation. Judicial sense is of divine nature and judicial sense of a Judge should be so high that if both the parties are apparently correct, the Judge could say who is more correct.

In a civilized society, the State is bound to ensure humane considerations of shelter to every individual and in order to ensure it, the State has involved a number of persons to administer the society in accordance with the Constitutional mechanism. The Judiciary has been set up to keep a vigilant eye upon the administrative mechanism of the State, which is the backbone of judicial mechanism. In our judicial system uncalled for litigation must not get encouragement because of State Officials or Judges. The realistic approach is expected in the exercise of skills for achieving justice. Litigation perception of the probability of the other party getting dire and succumbing to the delays and setting with him and the Court, ultimately, awarding what kind of restitution ? Paltry or realistic. This perception ought to be the real risk evaluation. The Courts have to be extremely careful and balancing in granting and refusing relief to a litigant. This must be done in such a fashion, which may discourage the dishonest and unscrupulous litigant from abusing the judicial system, so as to remove the incentive for the wrong doer. But, unhesitatingly this must be done to encourage the aggrieved person in such a way that the wrong doer or mischievous citizen must not abuse his legal rights. The only course available before a Civil Court is to examine the pleadings and act accordingly. While doing so, the expectation is that the Court must be cautious and extremely careful in protecting rights so that no other extra constitutional authority may create havoc. The endeavour should be to dispose of such matters as expeditiously as may be possible. The settled law in this country is that "pleadings are foundation of the claims of the parties. It is the bounden duty and an obligation of the Learned Trial Judge to carefully scrutinize, check and verify pleadings of the parties. This must be done immediately after the civil suits are filed, so

that the Court may adopt realistic and pragmatic approach, keeping in view the ground realities. Not only Judicial Officer, but every public authority must be concerned with what is practicable, expedient and convenient, or with practical consequences, rather than with theories and ideals.

Accordingly, second appeal is allowed exparte. The plaintiff''s suit for permanent injunction is decreed exparte and the defendant/respondents are restrained from interfering in peaceful possession of the plaintiff over the disputed property shown with letters A, B, C, D in the site plan prepared by the Commissioner Paper No. 17C, which shall form part of the decree. There is no order as to the costs.