

(2007) 05 AHC CK 0333**Allahabad High Court****Case No:** None

Pratap Bhan

APPELLANT

Vs

Smt. Krishna Devi Pandey and
Others

RESPONDENT

Date of Decision: May 24, 2007**Acts Referred:**

- Civil Procedure Code, 1908 (CPC) - Section 100

Citation: (2007) 4 AWC 3809**Hon'ble Judges:** Poonam Srivastav, J**Bench:** Single Bench**Final Decision:** Dismissed**Judgement**

Poonam Srivastav, J.

Heard Sri Atul Dayal, learned Counsel for the appellant and Sri Shashi Kant Gupta advocate for the caveator-respondents.

2. This is defendant's second appeal. The plaintiff-respondents instituted Original Suit No. 1278 of 1980 claiming the relief for possession and removal of construction raised by the defendants from the part of the plot No. 5/166, Purana Kanpur alongwith relief of mandatory injunction against the defendant. The plaintiffs claimed to be the owner of the entire property which was purchased by her father-in-law late Sri Baji Lal through a registered sale deed in the year 1902. The husband of the plaintiff instituted S.C.C. Suit No. 460 of 1963 against the defendant for arrears of rent and eviction which was dismissed but later, on intervention of certain respectable persons, the defendant vacated the disputed property in the year 1965. The plaintiff's husband Krishna Dutt Pandey died on 2.11.1968. The defendant resides in premises No. 5/166, Purana Kanpur which is close to the disputed property, taking undue advantage of widowhood of the plaintiff and forcibly took possession of the disputed premises in the year 1980. Since the

plaintiff was threatened by the defendant, a first information report was registered at police station Nawabganj on 20.8.1980. On 30.8.1980, the defendant started making construction, consequently a notice to remove the bricks etc. was given. On receipt of the said notice, the defendant started to make construction quickly, this led to institution of the suit. The defendant filed written statement denying the title of the plaintiff and stated that there was no need of permission before raising the construction. He claimed his title on the basis of adverse possession stating therein that he was in possession much before 1960 and after dismissal of the S.C.C. suit, the defendant enjoyed an uninterrupted possession and he has perfected his right over the suit property.

3. The trial court framed as many as 13 issues. Issue No. 2 was on the question, whether late Sri Krishna Dutt Pandey was owner of the property in suit and after his death plaintiff is the owner of the property. Issue No. 6 was on the question of adverse possession. The trial court held that late Sri Krishna Dutt Pandey was the owner of the disputed premises No. 5/16, Purana Kanpur. Issue Nos. 2, 6 and 11 were also decided against the defendant who had set up his claim on the basis of adverse possession. A conclusive finding was arrived at that the defendant could not establish his possession from the year 1965 to 1980 when the suit was instituted and the constructions were also made in the year 1980-81. The trial court held that the defendant was not in possession and therefore, the assertion that he has perfected his right on the basis of adverse possession, is without any substance. The defendant filed an appeal which was also dismissed by the Additional District Judge, Court No. 14, Kanpur Nagar.

4. Sri Atul Dayal has placed reliance on a number of decisions. The first decision is, Karnataka Board of Wakf Vs. Government of India and Others, The argument advanced on the basis of the aforesaid decision is that since the defendant continued in possession after the dismissal of the S.C.C. suit and since the possession continued without any interruption, it should be construed as hostile possession therefore, the defendant's right on the basis of adverse possession was liable to be decreed. The next decision relied upon by the counsel is, AIR 1981 707 (SC) This decision is again on the question of adverse possession. The submission is, it is not necessary that the possession must be so effective so as to bring it to the specific knowledge of the owner.

5. Counsel for the plaintiff-respondents has emphatically disputed the argument of the learned Counsel for the appellant claiming title on the basis of adverse possession. The fact that the defendant initially disputed the title of the husband of the plaintiff and subsequently changed his stand that after dismissal of the S.C.C. suit, the plaintiff had not tried to interfere in his possession therefore, the defendant's possession was liable to be held continues and his title on the basis of adverse possession cannot be accepted.

6. I am in agreement with the submission of Sri S.K. Gupta. It transpires from bare reading of the plaint that the case set up by the plaintiff is that after dismissal of the S.C.C. suit, the plaintiff was put in possession in the year 1965. Her husband died in the year 1968 and it was only in the year 1980 when the defendant-appellant tried to take forcible possession and started raising construction on the disputed premises, the cause of action arose and the suit was instituted. The pleadings also show that a legal notice was sent to the defendant and also a first information report was lodged at the instance of the plaintiff. This has been accepted by the trial court after assessing the evidence on record and confirmed in appeal, therefore, it is a farfetched claim that the defendant has perfected his right. The decision of the Apex Court relied upon by the learned Counsel for the appellant does not help him as it is settled law that to conclude ouster of the actual owner three circumstances namely, hostile intention; long and uninterrupted possession; and exercise of the right of exclusive ownership openly and to the knowledge of the owner should be proved. The position stands suitably altered when the possession of the property is objected as it has been done in the instant case. The case of the plaintiffs right from the beginning is that it was only in the year 1980 when the defendant tried to take forcible possession and the suit for possession was instituted after availing other remedies, i.e., visible hostility was exhibited by the plaintiff by sending notice, lodging a report and finally instituting the suit, the defendant set up a claim of adverse possession. The burden to prove adverse possession was on the appellant which he miserably failed to discharge. The defendant failed to show on what date he came in possession, what was the nature of the possession, whether the use by him was in the knowledge of the other party, how long possession continued and his possession was open and undisturbed.

7. In the instant case, the requirement of law is not fulfilled and, therefore, I hold that the courts below have correctly decided the issue on the question of adverse possession against the appellant and it does not call for any interference whatsoever. The question of law raised on adverse possession as Question Nos. 1 and 2 is of no consequence. The two Courts have recorded a concurrent finding which does not require reappraisal in this appeal.

8. The next argument raised by the learned Counsel is that the judgment of the courts below are based on misreading of documents and drawing wrong inference and thereby the findings are perverse. Reliance has been placed on two decisions of the Apex Court, Kulwant Kaur and Others Vs. Gurdial Singh Mann (dead) by Lrs. and Others etc., and Ramlal and Anr. v. Phagua and Ors. (2006) 1 SCC 168. Both the decisions are on the scope of Section 100, C.P.C. Learned Counsel has tried to argue that the courts below did not appreciate the evidence on record and conclusions arrived at are perverse and hence it amounts that the judgments suffer from an error which is substantial and liable for reappraisal of evidence in this second appeal.

9. I have gone through the entire judgment and pleadings of both the parties. The courts below have taken into consideration each and every aspects. In fact it is clearly noted and the contention of the appellant was negated by the courts below that initially the defendant denied the title of the plaintiff and later claimed that after the dismissal of the S.C.C. suit, no effort was made to take back possession. On the contrary, it has categorically held that the defendant-appellant can derive no benefit for the reason the judgment in S.C.C. suit was not challenged. All these questions have been gone in detail by the courts below such as notice given to the defendant in the year 1980 as well as first information report lodged on 20.8.1980, therefore. I do not think that the courts below have committed any error in appraisal of evidence or have ignore any evidence which renders the judgment perverse. No substantial question of law arises in the second appeal. The second appeal lacks merit and is accordingly dismissed with cost.