(2013) 07 AHC CK 0272

Allahabad High Court (Lucknow Bench)

Case No: Second Appeal No. 52 of 2002

Zakir Ali and Others	APPELLANT
Vs	
Mehar Tilat	RESPONDENT

Date of Decision: July 10, 2013

Citation: (2013) 100 ALR 441 : (2013) 121 RD 134

Hon'ble Judges: Sibghat Ullah Khan, J

Bench: Single Bench

Advocate: K.S. Rastogi, for the Appellant; Farooq Ahmad, for the Respondent

Judgement

Sibghat Ullah Khan, J.

Heard learned Counsel for both the parties at the admission stage under Order XLI, Rule 11, C.P.C. This is defendants'' second appeal arising out of Regular Suit No. 86 of 1994, Mehar Tilat v. Zakir Ali and others. The suit was dismissed on 4.12.1998 by Additional Civil Judge (J.D.), Mohammadi, District Lakhimpur Khiri. Against the said decree, plaintiff-respondent filed Civil Appeal No. 8 of 1999. Vth A.D.J., Lakhimpur Khiri allowed the appeal through judgment and decree dated 16.10.2001 set aside the decree passed by the Trial Court and decreed the suit of the plaintiff-respondent restraining the defendants from interfering in the ownership and possession of the plaintiff over the land in dispute, however it was clarified that the decree would have no adverse effect on Muslim residents of the village. The property in dispute is agricultural land bearing Plot No. 230, area 0.222 hectare situate in village Magraina Pargana and Tehsil Mohammadi, District Lakhimpur Khiri. Undisputedly, plaintiff is bhumidhar of the land in dispute and was recorded as such in the revenue records. It was alleged in the plaint that about a year before defendants made efforts to bury the taziya in the land in dispute. Relief claimed was that defendants appellants, who are nine in number must be restrained from doing so.

2. The defendants pleaded that since time immemorial, they were burring the taziya in the land in dispute during Moharram and they had acquired easementary/customary right. They also pleaded that they were holding fair and a

longer every year in Moharram in which all the Muslim residents of the village, who were about 500 in number were participating and these activities were being done for hundreds of year in Moharram and Chehallam. It was also pleaded that for the said purpose, Abdul Wajid Khan, father of the plaintiff and his ancestors had granted the permission. It was also stated in the cross-examination by D.W. 2 that father of the plaintiff had granted permission to bury the taziyas but it was oral and not in writing. D.W. 2, Hasan Ali, who gave the said statement, subsequently stated in his cross-examination that even before the permission, taziyas were being buried in the land in dispute. D.W. 3, Habib Ali also stated the same thing that father of the plaintiff had granted the permission but even before grant of permission taziyas were being buried in the land in dispute and fair etc. was being held.

3. Lower Appellate Court mentioned that it was not explained that in case since times immemorial, the land in dispute was being used as Karbala (for burying the taziyas and holding longer etc.) then what was the need of obtaining permission of plaintiff''s father. Accordingly, the Lower Appellate Court held that it was not proved that any permission was granted by the plaintiff''s father. Lower Appellate Court further held that in the revenue records of 1391 and 1392 Fasli (1983-85 A.D.) in khasra word ''Karbala'' was mentioned and in revenue record of 1402 Fasli (1994-95 A.D.) in the last column it was mentioned that in Plot No. 230-a, taziya was buried. However, in all these khasras name of plaintiff or her father was mentioned, and crop and grove was also mentioned. Lower Appellate Court further mentioned that consolidation had also taken place and during consolidation the word ''Karbala'' was not mentioned in the revenue records.

4. The fantastic case taken up by the defendants that due to the influence of the plaintiff and her husband, the revenue officers did not record the word ''Karbala'' in the revenue records was disbelieved by the Lower Appellate Court. D.W. 3 admitted that the villagers did not make any efforts to get the land entered as ''Karbala'' in the revenue records.

5. The Lower Appellate Court further held that apart from khasras of 1391, 1392 and 1402 Fasli, in no other khasra ''word'' Karbala was mentioned or it was mentioned that taziyas were buried in the plot in dispute. Oral evidence particularly of the defendants was also discussed by the Lower Appellate Court.

6. The Lower Appellate Court also held that even if it was assumed that for some years, taziyas were being buried in the land in dispute, still the period was not hundreds of years or even 20 years hence defendants did not acquire any easementary right.

7. Lower Appellate Court further held that the Trial Court had wrongly granted relief to the defendants to the effect that defendants would be having right to bury taziya and holding mela and longer during Moharram and Chehallam even though there was no counter claim on their behalf.

8. The Lower Appellate Court further held that defendants had not sought any permission to defend the suit on behalf of the Muslim residents of the village under Order VIII, Rule 1, C.P.C. hence judgment would not be binding upon other Muslim residents.

9. I do not find any error in the impugned judgment and decree passed by the Lower Appellate Court. The entire evidence has been taken into consideration. The Trial Court was unnecessarily swayed by entries in three years'' khasras. The Trial Court did not take into consideration the statement of the defendants that father of the plaintiff had granted permission. Even if this statement is correct, it would go against the defendants as for easement express permission is antithesis.

10. Learned Counsel for appellant has cited several authorities particularly Lakhmi Chand Vs. Moti Lal and Others, , Kanhai Singh and Others Vs. Basdeo Sahai and Others, and AIR 1938 177 (Nagpur) . The authority of Nagpur dealt with immersing of taziyas at Moharram in two ghats in tank, however in the said case, it was found that it was being done from times immemorial.

11. In Kanhai Singh and Others Vs. Basdeo Sahai and Others, , it was found as a fact that residents of the village had been accustomed for a long period of time to make offering at particular place situate in a house when their cattle were afflicted by a disease hence they became entitled to easementary right within the meaning of section 18 of Easement Act.

12. In Lakhmi Chand Vs. Moti Lal and Others, it was found as a fact that in the plot in dispute residents of the village were collecting-fuel and burning Holi there and performing religious ceremonies hence it was a right of easement.

13. The authorities of the Supreme Court in Rattan Dev Vs. Pasam Devi, and Nicholas V. Menezes Vs. Joseph M. Menezes and Others, have been cited by learned Counsel for appellant to contend that while deciding first appeal the Court must consider evidence on record and the reasons given by the Trial Court. In the instant case, Lower Appellate Court after discussing the entire evidence on record has given finding in favour of the plaintiff. No such piece of evidence, which was taken into consideration by the Trial Court has been ignored by the Lower Appellate Court. On the basis of oral and documentary evidence, the Lower Appellate Court can very well take a view different from the view of the Trial Court. First appeal lies on question of fact as well as law.

14. I do not find any legal error in the impugned findings by the Lower Appellate Court. Lower Appellate Court has found as a fact that it could not be proved by the defendants that since times immemorial they were burying the taziyas and holding fair and longer on Moharram and Chehallam in the land in dispute.

15. In respect of custom, reference may also be made to a recent authority by the Supreme Court in Laxmibai (Dead) thr. L.Rs. and Another Vs. Bhagwantbuva (Dead)

thr. L.Rs. and Others, . After discussing several other Supreme Court authorities on the question, the Supreme Court has held that custom being in derogation of a general rule is required to be construed strictly and a policy relying upon a custom is applied to establish by way of clear and unambiguous evidence (paras 7 to 11). Accordingly, there is no error in the findings recorded by the Lower Appellate Court, which are basically findings of fact. No substantial questions of law is involved in this appeal. It is therefore dismissed in limine under Order XLI, Rule 11, C.P.C.