

HIGH COURT OF UTTARAKHAND AT NAINITAL

(Court’s order whether the case is or not approved for reporting)

Description of the Case

S.A. No. 1193 of 2001

Sher Mohammad and others

Vs.

Habib Ahmad

Approved for reporting

Date of Decision – 31.12.2007

Initial of Judge:

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HIGH COURT OF UTTARAKHAND AT NAINITAL

SECOND APPEAL NO. 1193 OF 2001

OLD NO. 719 OF 2000

1. Sher Mohammad
2. Rais Ahmad
3. Rasheed Ahmad
4. Hanif
(All sons of late Raunak Ali
Resident of Mohalla Chauhanan
Town and Post Office Jaspur
District Udham Singh Nagar
5. Asgar son of Abdulla
6. Intzar Hussain son of Mohammad Yusuf
7. Rais Ahmad son of Zahoor Ahmad
All residents of Mohala Chhipiyanganj
Town and Post Office, Jaspur
District Udham Singh Nagar
8. Mohammad Siddiq son of Mohammad Ibrahim
Resident of Mohalla Nai Basti
Town and Post office, Jaspur
District Udham Singh Nagar

..... Defendants-Appellants

Vs.

1. Habib Ahmad son of Bashir Ahmad
2. Mohammad Sharif son of Shabbir Ahmad (deceased)
- 2/1 Fatah Mohammad s/o Mohammad Sharif
- 2/2 Sher Mohammad son of Mohammad Sharif
- 2/3 Smt. Bano Widow of Late Mohammad Sharif
- 2/4 Noor Mohammad s/o late Mohammad Sharif

.....Plaintiff-Respondents

31.12.2007

Hon'ble Rajesh Tandon, J.

Heard Shri Khalil Ahmad, counsel for the appellants and Shri B.S. Parihar, counsel for the respondents.

2. By the present second appeal filed under Section 100 of the Code of Civil Procedure, the appellants have prayed for setting aside the judgment and decree dated 6.5.2000 passed by the District Judge, Udham Singh Nagar (Rudrapur) in Civil Appeal No. 51 of 1999 by which the judgment and decree dated 20.7.1999 passed by the Civil Judge (Junior Division), Kashipur, District Udham Singh Nagar has been set aside.

3. Second appeal was admitted on the following substantial question of law:-

1. Whether the Civil Court has jurisdiction to decide the boundary dispute in respect of agricultural land?
2. Whether without a declaration by the competent Revenue Court, a person claiming adverse possession of Shikami can himself to be the Bhumidhar of the agricultural land ?

4. Briefly stated, the plaintiffs have filed a suit being suit no. 139 of 1990 for a decree for permanent injunction. According to the plaint averments, the plaintiffs are in the possession of the land khasra no. 343 area 0-20 acre 0-081 Hect. situate at Mauja Amritpur, Tehsil Kashipur, District Nainital for more than the last 25 years. On the land in dispute there is wood depot of the plaintiffs. The

defendants have no concern over the land in dispute and they were never in the possession over the land in dispute. the plaintiffs are in peaceful possession over the land in dispute. a suit being suit no. 86 of 1979 was filed for eviction of the plaintiffs by Anand Priya and other which was dismissed by the judgment and decree dated 19.3.1981 and appeal against the said judgment and decree was also dismissed by the Additional District Judge by his order dated 26.11.1981 in civil appeal no. 71 of 1981. It has been stated that the defendants are cunning and of quarreling nature and have threatened the plaintiffs that they will occupy the land in dispute forcibly on 13.6.1990 and 19.6.1990. It has been stated that if the defendants are not restrained from doing the same, the plaintiffs will suffer irreparable loss and injuries. Hence the present suit has been filed.

5. A written statement has been filed on behalf of the defendants denying the averments made in the plaint. It has been submitted that the plaintiffs have not come before the Court with clean hands. The plaintiffs have not produced any map along with the plaint with regard to the land in dispute. It has been stated that the total area of Khasra no. 343 was 45 acres and Anand Priya was its original Khatedar. Out of the aforesaid 45 acres of land, the defendants have purchased the land measuring 25 acres by registered sale deed dated 10.2.1988 and since then the defendants are owners in possession over the aforesaid land. The plaintiffs are not in possession over the land

shown by letters ka, kha, ga in the map i.e. paper no. 17 ka/5 annexed with the written statement.

6. On the pleadings of the parties, the trial court has framed the following issues:

1. As to whether the plaintiffs are the owner in possession of the land in dispute ?
2. As to whether the order passed by Munsif, Kashipur in suit no. 86/1979 Anand Priya v. Habib Ahmad and other has any effect over the instant defendants ?
3. As to whether the property in dispute is situate towards North of wall Da, Sa, Kha, Ga as shown by the map paper no. 17 ga/5 annexed with the written statement ?
4. Relief?

7. While deciding as to whether the plaintiffs are the owners in possession of the land in dispute, the trial court has relied upon paper no. 9 ga i.e. copy of khatauni wherein the name of the plaintiffs have been recorded with regard to the ownership of 0.081 Hect. area of khasra no. 343. In the aforesaid document, from the red colour, it has been endorsed that 'भूमि के ऐसे अध्यासी जिन्होंने खसरे के स्तंभ ४ में उल्लिखित व्यक्तियों की सहमति के बिना भूमि पर अधिकार कर लिया है ।' On the basis of the aforesaid, the trial court has recorded the finding that the possession of the plaintiffs over the land in dispute is unauthorized. Further, reliance has been placed on paper no. 10 ga which is copy of khasra no. 343 wherein the name of Anand Priya has been mentioned as

original kashtkar and the name of the plaintiffs have been mentioned as sub-kastkar. So far as paper no. 32 ga submitted by the plaintiffs in support of their case is concerned, the trial court has recorded the finding to the following effect:

This document is the certified copy of judgment passed in civil no. 86/79 Anand Priya v. Mohd. Sharif and others. The suit of the plaintiffs is based on the same document and the first witness of the plaintiff Habib Ahmad P.W.1 in page 3 of his oral examination has stated that he has not purchased the 20 decimal land rather won in suit. On the basis of the said suit, the plaintiff admits his kashtkari on the aforesaid land. On the perusal of the aforesaid paper no. 32 ga, it appears that aforesaid judgment has been passed in Small Causes court wherein the defendants were not parties. In the aforesaid judgment paper no. 32 ga the court has held that since the plaintiff of suit no. 86/79 has given the aforesaid agriculture land to the defendant on lease, therefore, the ownership of the aforesaid land is vested in the defendants under Section 165 of Zamindari Abolition and Land Regulation Act. The aforesaid judgment document no 32 was revisioned and the copy of revision of the court i.e. document no. 11 ga has

been produced before this court. In the document no. 11 ga, judgment passed in original suit no. 86/79 has been upheld.

8. The trial court has further recorded the finding that so far as the aforesaid judgments are concerned, the small causes court had no jurisdiction to decide the ownership and, therefore, the judgment passed in document no. 32 ga and 11 ga have no binding over the present court. Further, the trial court has recorded the finding that the defendants in the present suit were not parties in the aforesaid suit and, therefore, the documents i.e. paper nos. 32 ga and 11 ga have no effect over the defendants of the present suit in accordance with the provisions contained in Section 43 of Indian Evidence Act.

9. The trial court has further placed reliance on paper no. 22 ka i.e. registered sale deed which shows that the defendants have purchased 25 acres land out of khasra no. 343 form Anand Priya. Reliance has been placed on paper no. 23 ka/1 which is copy of khatauni which shows the ownership of the defendants over the land in dispute. On the basis of these documents, the trial court has recorded the finding that the defendants are the owners of 25 acres of land of khasra no. 343. Further, the trial court has recorded the finding to the following effect :-

In the present suit, it appears that the dispute between the plaintiffs and the defendants are mainly with regard to boundaries which comes in the jurisdiction

of revenue court. For deciding the aforesaid issue, the best way is the survey of the property in dispute. In the present suit, survey of the property in dispute has been made and the survey report of the property in dispute i.e. paper no. 76 ga and survey map i.e. paper no. 87 ga have been made available on the record. Aforesaid survey report has been confirmed by the court on the basis of evidence adduced by the parties. The plaintiffs have shown the paimaish of the property in their plaint which shows that East-North South 130 feet, towards the West-North Sourth 140 feet, towards the North-East West 14 feet and towards the South-East West 105 feet. Thus, according to the paimaish shown by the plaintiffs, the property in dispute is not in the shape of rectangle but is in a shape of triangle.

10. On the basis of the aforesaid, the trial court has recorded the finding that the land in dispute is not the same as mentioned by the plaintiffs in their plaint and the plaintiffs have failed to prove the identification of the land in dispute and, therefore, the plaintiffs cannot be held as owners in possession over the land mentioned by them in their plaint.

11. While deciding as to whether the order passed by Munsif, Kashipur in suit no. 86/1979 Anand Priya v. Habib Ahmad and other has any effect over the instant defendants, the trial court has recorded the finding that it is well established principal of law that the small causes court has no jurisdiction to decide the ownership and, therefore, the judgment passed in the suit no. 86/79 and revision thereof have no binding over the present court. Further, the trial court has recorded the finding that the defendants in the present suit were not parties in the suit no. 86/79 and, therefore, the aforesaid judgments have no effect over the defendants of the present suit in accordance with the provisions contained in Section 43 of the Indian Evidence Act.

12. While deciding as to whether the property in dispute is situate towards North of wall Da, Sa, Kha, Ga as shown by the map paper no. 17 ga/5 annexed with the written statement, the trial court has recorded the finding that the defendants have not filed any evidence to prove this issue inspite of the onus was lying upon him. Therefore, this issue was decided against the defendants.

13. On the basis of the aforesaid, the trial court has dismissed the suit of the plaintiffs.

14. Aggrieved by the judgment and decree passed by the trial court, the plaintiffs went in appeal.

15. The appellate court while deciding as to whether the plaintiffs are the owners in possession of the land in dispute has taken into consideration paper nos. 9 ga, 10 ga, 63 ga and 64 ga which are copies of khatauni and khasra and show the name of the plaintiffs- appellants. Further, the appellate court has placed reliance on the judgment passed in S.C.C. suit no. 86/79 which was filed for the eviction of the plaintiffs-appellants from the land in dispute and the order passed in favour of the plaintiffs-appellants. In the aforesaid judgment, the Small Causes Court has held that the ownership of the land in dispute vested in the plaintiffs-appellants in the year 1966 by virtue of Section 165 of the Zamindari Abolition and Land Regulation At. So far as the findings recorded by the trial court that the Small Causes Court has no jurisdiction to decide the ownership is concerned, the appellate court has recorded the finding that the judgment passed in S.C.C suit no. 86/79 is the judgment passed by the competent court wherein the plaintiffs have been held as unauthorized occupants. Further, the appellate court has recoded the finding that the plaintiffs are in possession over the land in dispute prior to the year 1979 i.e. from the filing of the S.C.C. suit no. 86/79 and, therefore, the plaintiffs have become the owners of the land in dispute on the basis of adverse possession/ The appellate court has recorded the finding to the following effect:

Thus, from the aforesaid it appears that the plaintiffs are the owners of the property in dispute and the plaintiffs are in possession over the land in dispute prior to purchasing

of 0.25 acre land by the defendants and in the S.C.C. suit no. 86/79 the possession of the plaintiffs have been held and the names of the plaintiffs-appellants are recorded in khasra-khatauni and he is in unauthorized possession. The plaintiffs have become the bhumidhars of the land by virtue of Sections 165 and 189 of Zamindari Abolition and Land Reforms Act on which they were in possession. The defendants are trying to interfere the land unauthorisedly. Thus, the plaintiffs are the owner in possession of the land in dispute. The defendants have no right to interfere with their possession.

16. On the basis of the aforesaid, the appellate court has set aside the judgment and decree passed by the trial court and allowed the appeal preferred by the plaintiffs-appellants.

17. Counsel for the respondent has referred the judgment of the Division Bench of the Uttaranchal High Court in **Kulwant Kaur Sidhu v. Smt. Rahiman Bai Guddi (deceased), through L.Rs 2006 (1) Uttaranchal Decision 658**. In paragraph 7 to 11 it has been observed as under:-

“7. In **Ram Avalambh Vs. Jata Shankar & others 1968 Revenue Decisions 470 (Full Bench)**, it has been clarified by the Allahabad

High Court that where the plaintiff is not a recorded tenure holder and seeks relief of injunction, it can be said that he is seeking declaration of title but where he is a recorded tenure holder, it cannot be said that the suit is not within the jurisdiction of civil court for granting relief of injunction in respect of agricultural land.”

“8. On behalf of the appellant, it is contended that the defendant is also recorded tenure holder in respect of the land khasra Nos.- 180 and 181, with one Ved Prakash. It is further submitted that the defendant/ applicant is recorded tenure holder in respect of plot No. 184 also. Perusal of the written statement, shows that it has nowhere been pleaded by the defendant that the land in suit lies over Khasara No. 180, 181 or 184. It is not disputed that the defendant’s land lies in the east of the plaintiff’s land. The question involved in the suit is whether defendant by opening her door towards west of her plot, has started using the disputed strip of land, shown as ‘alleged raasta’ towards highway shown in the plaint map- on west land – ‘Aa’ Ba’ ‘Sa’ ‘Da’) and is the plaintiff entitled to the injunction against the defendant. In the above facts and circumstances, no remedy of injunction could have been sought by the plaintiff in the revenue court. As such, since the plaintiff has come up with a case that the defendant is

attempting to use a part of the land of which plaintiff is the recorded tenure holder and in possession, it cannot be said that the suit is barred by Section 331 of U.P. Zamindari Abolition and Land Reforms Act, 1950.”

“9. Shri Sudhanshu Dhulia, Senior Advocate learned counsel for the appellant, drew attention of this court to the principle of law laid down in **Chandrika Singh Vs. Raja Vishwananth Pratap Singh (1992) 3 S.C.C. Pg. 90** and argued that revenue court has jurisdiction in respect of the controversy as to the use of the land whether it is an agricultural land or not? We have gone through said case law. We are of the view that it is not applicable to the present case for the reason that in said case of Chandrika Singh (supra), defendant was a recorded tenure holder over the land in suit as such, the Apex Court rightly held that the controversy as to the user could have been determined by the revenue court. In the present case, it is the plaintiff who has pleaded an established that she is a recorded tenure holder as well as in possession of the land in suit.”

“10. Our attention has also been drawn to the case law reported in **Kamla Shankar Vs. IIIrd Additional District Judge, 1998 (89) R.D. Pg. 484**. In said case also, the defendant was a recorded tenure holder of the land in suit in respect of which the plaintiff has sought the

relief. As such, the principle of law laid down in said case cannot be applied to the present case. Similarly in **Sayed Muhammed Mashur Kunhi Vs. Badagara Jumayath Palli (2004) 7 Supreme Court Cases 708**, relied on behalf of the defendant/ appellant also does not help him as unlike in said case, the plaintiff has been successful in the present case, in proving her case at her own strength and not on the weakness found in the defendant's case."

"11. Lastly, on behalf of the appellant, our attention was drawn to **Heera Vs. Civil Judge, Gyanpur, Varanasi (1993) Allahabad Civil Journal Pg. 57**, in which it has been held that revenue court could have issued the injunction. On going through said case law, we found that it pertains to civil suit of 1973 of land situated in Gyanpur to which Banaras Tenancy Act, 1949, was applicable. And under Section 153 of Banaras Tenancy Act, it was found that the revenue court could have issued the injunction. In the present case, the land is not covered by Banaras Tenancy Act, 1949, nor is there any parallel provision in U.P. Zamindari Abolition and Land Reforms Act, 1950."

18. In view of the aforesaid, I do not find any illegality in the findings recorded by the lower appellate court being findings of fact. As such, the substantial questions of law

involved in the second appeal are decided against the appellants.

19. In ***H.P. Pyarejan Vs. Dasappa 2006 AIR SCW 715***, the Apex Court has observed as under:-

“Under Section 100 of the Code (as amended in 1976) the jurisdiction of the High Court to interfere with the judgments of the courts below is confined to hearing on substantial questions of law. Interference with findings of fact by the High Court is not warranted if it involves re-appreciation of evidence.”

20. In ***Commissioner Hindu Religious & Charitable Endowments v. P. Shanmugama and others (2005) 9SCC 232***, it has been filed under:-

“14. In our view, High Court has no jurisdiction in the second appeal to interfere with the finding of facts recorded by the first appellate court after careful consideration of the evidence, oral and documentary, on record. It was not open to the High Court to reverse the findings of fact as it has done.”

21. In view of the aforesaid, second appeal is liable to be dismissed being devoid of merit. However, in case any suit for title is filed by either of the parties, the same shall be decided in accordance with law.

22. Consequently second appeal is dismissed. No order as to costs.

(Rajesh Tandon, J.)

31.12.2007
Avneet