

Board of Revenue Uttarakhand, Dehradun

Second Appeal No. ¹⁹³ of 2009-2010 under Section 333 of the UP Zamindari Abolition and Land Reforms Act as applicable to the State of Uttarakhand

Kanti Prasad Joshi s/o Kameshwar Prasad (deceased) substituted by (1/1) Smt Kusumlata Joshi w/o Kanti Prasad and (1/2) Master Shivam Joshi s/o Kanti Prasad r/o Kali Mandir Marg Uttarkashi

Appellants

Vs

1. Pashupalan Adhikari Uttarkashi through Chief Veterinary Officer Uttarkashi
2. Nagar Palika Uttarkashi through Executive Officer Nagar Palika Uttarkashi
3. State of Uttaranchal through Collector Uttarkashi

Respondents

Present: Shri P.S. Jangpangi Member (Judicial)

Advocate for Appellants : Shri Prem Chand Sharma

Advocate for Respondents : Shri Vinod Kumar Dimri, District Government Counsel (Revenue)

Judgment

This Second Appeal has been preferred against the Judgment and Order dated 7.8.2009 passed by Commissioner Garhwal in First Appeal No 2/2008-09- Chief Veterinary Officer Animal Husbandry Department Uttarkashi Vs. Kanti Prasad Joshi and others- reversing the Judgment and Decree dated 8.4.2008 passed by Assistant Collector I class Bhatwari District Uttarkashi in a suit for ejection whereby the latter allowed the suit filed by the present Appellant/ Plaintiff.

The brief facts giving rise to this second appeal are: the plaintiff/ appellant filed a suit under Section 209 of the UP Zamindari Abolition and Land Reforms Act (hereinafter referred to as the Act) for the ejection of the respondent no 1/ defendant no 1 as unauthorized occupant from the land owned by the former bearing khasra no 2831 m measuring 0.0018 ha situate in village Gyansu tehsil Bhatwari distt Uttarkashi: the Assistant Collector decreed the suit: aggrieved, the respondent/ defendant no 1 preferred first appeal in the court of Commissioner Garhwal who allowed the appeal by his judgment and order



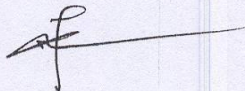
dated 7.8.2009 setting aside the judgment and decree of the former. Hence, the instant second appeal.

The grounds of the second appeal are; the appellant/ plaintiff is the recorded bhumidhar of the land in dispute; the respondent/ defendant no 1 occupied this land in 1985 without any authority and permission of the appellant/ plaintiff and upon opposition and protest of the plaintiff/ appellant the respondent / defendant no 1 assured the former that the land in question was needed by the latter for which the former would be adequately compensated; even after long and continuous correspondence between years 1985 and 2001, neither the promised compensation was paid nor was the land in dispute vacated by the latter; the Assistant Collector Bhatwari saw merit in the suit and decreed it but the Commissioner admitted and found merit in new facts introduced in the first appeal and thus allowed the first appeal without framing fresh issues and ordering evidence to be led on them upsetting the trial court's judgment and decree. The Memo of Appeal cites the following substantial questions of law to be involved in the instant second appeal-

1. Whether the State Government or any of its department can occupy land of a bhumidhar illegally without following any lawful process?
2. Whether the long illegal possession by the State government or by any of its department over a bhumidhar's land can extinguish the title of such bhumidhar ?
3. Whether any new fact can be raised in the first appeal that has not been included in either the plaint or the written statement ?
4. Whether the first appellate court can allow the appeal reversing the judgment and decree of the trial court without considering the findings and conclusions of the latter on each issue?
5. Whether the fresh issues can be decided at the appellate stage without calling for or production of evidence on them?
6. Whether the State Government who is duty bound to protect the right of a bhumidhar can occupy illegally a bhumidhar's land without paying him due compensation? and
7. Whether there is a limitation for the ejection of the State Government from a bhumidhar's land?

The above mentioned substantial questions of law were framed for the determination of the instant second appeal notwithstanding the divergent judicial precedents about the applicability of Section 100 Civil Procedure Code to an appeal filed under Section 331 of the Act.

I have heard the learned Counsel for the Appellant and the learned District Government Counsel (Revenue) and also gone through the relevant files.

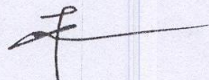


The learned Assistant collector Bhatwari framed five issues and after proper trial decreed the suit on 8.4.2008. On the contrary the learned Commissioner Garhwal set aside the judgment and decree in appeal on three grounds, namely, 1) the land in dispute is no longer land as it is being used for non agricultural purposes and revenue courts have no jurisdiction over such land; 2) the other co-tenure holders have not been made parties; and 3) the suit is time barred.

The plea of non joinder of necessary parties ought to have been raised at the first instance but the respondents / defendants did not raise this plea at the trial stage and their written statement does not contain this pleading. The plea of the land in dispute not being land, so as to oust the jurisdiction of revenue courts, was not distinctly and clearly raised in the pleadings of the respondents/ defendants but the Assistant Collector did order an enquiry in this regard on their application dated 20.2.2004. There are two reports submitted by the Revenue Inspector concerned dated 31.5.2005 and 17.7.2006(paper no aa 57/1 and aa 68/1 respectively) but there is no determination of the issue in as much as the judgment and decree of the trial court does not makes any mention of this. There should have been a clear and unambiguous averment in the pleadings of the respondents/defendants and based on such plea an issue ought to have been framed which could be taken up as a preliminary issue or otherwise decided with other issues. The learned Commissioner could also have remanded the suit for framing of this issue and disposal of the case afresh. The appellate court does have the powers of the trial court to decide the issues overlooked or omitted by the trial court if there are pleadings to such effect and sufficient material and evidence but in the matter of a declaration u/s Section 143 of the Act only the Assistant Collector I class in charge of the sub-division is competent and unless there is a declaration under the said section and the land in dispute continue to be recorded in the relevant khatauni the revenue courts have jurisdiction over it. The learned Commissioner has overlooked this legal aspect and erred in holding otherwise.

The question of the suit being time barred ought to have been similarly averred in the pleadings at appropriate stage of the trial and based on which an issue ought to have been framed. Any new fact or pleading at the appellate stage requires amendment to the pleadings and if such amendments are allowed the contesting opposite party would have to be afforded opportunity to contradict or rebut them. Not only this but also, new issues will have to be framed and the respective parties will have to be given opportunity to lead/ adduce evidence on such issues. The learned Commissioner has not followed this process and decided new issues travelling beyond the pleadings of the contesting parties.

On a perusal of the record of the trial court, it is evident that the land held by the contesting respondent/ defendant together with the land in dispute was initially

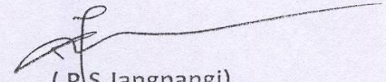


comprised one khasra number. Also, there are several co tenure holders of the relevant khata and there is no lawful division/partition between them till date. The question that naturally arises is " whether the land in dispute is identifiable ? Unless the land in dispute is proved to be identifiable the presumption of joint possession over it would legally arise and there would be no case of adverse possession and consequently question of ouster would also not arise. I, therefore, consider the framing of another issue on the identifiability of the land in question as necessary for the proper decision of the case.

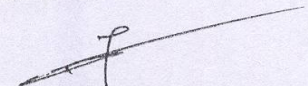
In view of the above discussion and the legal and material position, the appeal deserves to be partially allowed and the suit remanded to the trial court for framing of additional issues discussed above for which the respective parties may also be allowed to amend their pleadings. The lacuna of non joinder of parties may also be rectified so that there is no failure of justice. Accordingly, other contentions of the learned Counsels need not be dealt with at this stage which shall be open to be raised before the trial court.

Order

The Second Appeal is partially allowed and the impugned appellate judgment and order passed by the learned Commissioner and the judgment and decree of the trial court are both set aside and the suit is remanded to the trial court for decision afresh in the light of the observations in the preceding paragraph which shall be treated as the directions of this court. The files of the courts below be sent back at the earliest and that of this court consigned.


(P.S.Jangpangi)
Member (Judicial)

Pronounced, signed and dated in the open Court today i.e. 13.7.2016.


(P.S.Jangpangi)
Member (Judicial)