

Rajendra Kumar and Others Vs. Lala Shree Chand Jain and Others

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Court : Allahabad

Decided On : Apr-24-1998

Reported in : 1998(3)AWC1990; II(1999)DMC645

Judge : O.P. Garg, J.

Acts : [Code of Civil Procedure \(CPC\), 1908](#) - Sections 100

Appeal No. : Second Appeal No. 413 of 1998

Appellant : Rajendra Kumar and Others

Respondent : Lala Shree Chand Jain and Others

Advocate for Def. : Ravi Kiran Jain and ;R.B.D. Misra, Advs.

Advocate for Pet/Ap. : Murlidhar and ;Ran Vijay Singh, Advs.

Judgement :

O.P. Garg, J.

1. This is defendants' second appeal against the decision dated 16.2.1998 in First Appeal No. 296 of 1997 decided by Sri M. P. Singh. District Judge, Saharanpur. The said appeal arose out of Suit No. 124 of 1967 which was decreed by Sri R. C. Pande, the then Civil Judge. (Senior Division) on 19.5.1977.

2. Heard Sri Murlidhar, learned Senior Advocate assisted by Sri Ran Vijay Singh for the defendants-appellants and Sri Ravi Kiran Jain, learned Senior Advocate, assisted by Sri R. B. D. Misra for the plaintiffs-respondents.

3. Sreechand Jain who is adopted son of late Lala Chetan Das instituted a suit against his natural father and mother and 6 real brothers for possession after ejectment from the property, which has been detailed in Schedules 'A' and 'B' of the plaint. Besides the relief of possession, he also sought declaration that he is owner in possession over the property detailed in Schedule 'C' of the plaint, in the alternative, relief of possession over the said property was also claimed. A claim for damages was also preferred.

4. It is accepted at all hands that Lala Chetan Das was the owner of the property in dispute, i.e., a Kothi known as old income Tax Office situated at Rampur Road (now known as Delhi Road) in the city of Saharanpur, which was purchased by him on an auction sale in the year 1942. The said Kothi consists of main building and outhouses. The remaining portion of the open land is in the form of a grove. Lala Chetan Das had no son. His daughter, Smt. Jain, was married to Lala Deep Chand Jain. Sreechand Jain, the plaintiff is one of their ten sons. Lala Chetan Das adopted Sreechand Jain who happened to be the son of his daughter, in the year 1942 and executed a memorandum of adoption. Lala Chetan Das, thereafter, relinquished his rights in the property in favour of the adopted son in his life-time through a gift deed dated 19.1.1945. Lala Chetan Das died on 14.12.1945. Deep Chand Jain became owner of properties of the adoptive father. Originally, Lala Deep Chand Jain and Smt. Jain along with their sons and daughters were residing with the plaintiff Sreechand Jain in the house in Mohalla Fatak. On account of expansion of the family, Lala Deep Chand Jain and Smt. Jain sought permission from the plaintiff-Sreechand Jain to reside in the house in suit. It is alleged that with the permission of the plaintiff-respondent, they shifted from Mohalla Fatak to the Kothi in suit along with their sons. The plaintiff-respondent revoked the licence in October, 1966 and asked the defendant-appellants and other defendants to vacate the Kothi in question. The plaintiff claimed himself to be the owner of the Kothi in dispute and alleged that the possession of the defendant-appellants was permissive and since their licence has been revoked, they are

liable to be evicted. Accordingly, with the above allegations, the suit was filed for the reliefs mentioned above. The defendant-respondents as well as other defendants filed their written statement. It was admitted that the plaintiff-respondent was adopted by Lala Chetan Das and that the Kothi in question which belonged to Lala Chetan Das, came to be owned by the plaintiff-respondent as the adopted son. It was further alleged that there was a family settlement between the plaintiff and his natural father-defendant No. 1 in the year 1944 by which it was settled that the plaintiff-respondent will give 1/3rd share of the property of Lala Chetan Das to his natural father Lala Deep Chand Jain. The plaintiff, it is alleged, refused to abide by the family settlement. Thereafter, it is alleged that Smt. Jain, natural mother of the plaintiff-respondent, started claiming the entire property as daughter of Lala Chetan Das and she also alleged that adoption of plaintiff by Lala Chetan Das was illegal. A new family settlement in August, 1949 was, it is alleged, entered into between the parties, as has been mentioned in paragraph 23 of the written statement, the Kothi in question was allotted in the name of Lala Deep Chand Jain along with the land appurtenant to it, that Lala Deep Chand Jain was given permanent licence of the construction in the appurtenant land to it and that he got the existing constructions repaired and incurred huge expenses. According to the defendants, the family settlement was binding upon the plaintiff.

5. On the pleadings of the parties, a number of issues were framed and after taking into consideration the oral and documentary evidence as well as the submission of learned counsel for the parties, the learned trial court (civil Judge) came to the conclusion that there was no agreement between the parties as alleged by the defendants and that Lala Deep Chand Jain-defendant No. 1 was not a permanent licensee of the disputed quarters along with the land appurtenant ; that the plaintiff was minor in March, 1944 and that the family settlement, if any, between the plaintiff and the defendants was void. It was further held that the defendants were licensees of the plaintiff in the Kothi detailed in Schedule 'A' and shown by letter 'A' in the plaint map and that the right and title of the plaintiff in the suit property have not been extinguished. As regards the disputed quarters detailed in Schedule 'B' it was held that the defendants illegally occupied the same and were trespassers, and, therefore, liable to be evicted. Accordingly, the suit was decreed by the learned civil Judge. The first appellate court, by its elaborate,

detailed and reasoned judgment confirmed the finding of the trial court. There are, thus, concurrent findings of fact, arrived at by the Courts below.

6. Learned counsel for the defendant-appellants urged that fine points of controversies, requiring scrutiny by this Court, are involved in the present second appeal and, therefore, even though there are concurrent findings of fact, recorded by the Courts below, it is an appeal which requires consideration by this Court.

7. To begin with, it may be mentioned that the scope of the second appeal is very limited. A second appeal lies to the High Court if it is satisfied that the case involves a substantial question of law. It is well-settled proposition of law that a finding of fact cannot be set aside in exercise of power under Section 100. Code of Civil Procedure. This Court is not competent to reverse findings of fact of both the Courts below unless it is found that the findings recorded by the Courts below are perverse or based on no evidence or are unreasonable and are vitiated by non-consideration of relevant evidence or by an essentially erroneous approach to the matter, interference in second appeal, therefore, is permissible only on question of law and that too if a substantial question of law is involved, in this connection, a reference may be made to the various decisions of the Apex Court, viz., Smt. Annapoorani v. G. Dhongapalam. (1989) 2 SCO 287 ; Doodhnath Pande v. Suresh Chand. : AIR 1986 SC1509 ; Kehar Singh v. Yashpal : AIR 1990 SC2212 : Ramaswami Kcdingaryar v. Mathayan Padayachi : AIR 1992 SC115 ; Jagdish Singh v. Nathoo Singh : AIR 1992 SC1604 . Learned counsel for the defendant-appellants urged that at least three legal questions are involved in this appeal, which if established, would entail in setting aside the decree of ejectment passed against the appellants. It was urged, firstly, that the adoption of the plaintiff-Sreechand Jain by his grand maternal father was illegal as the principle is that one cannot adopt a person whose mother who could not marry, as has been laid down in Bhagwan Singh v. Bhagwan Singh. 1899 IAVol XXVI 153 ; Sheokuar Bai v. Jeorqj AIR 1929 PC 77 ; secondly in view of the family settlement of the year 1949. the disputed Kothi was given to Lala Deep Chand Jain--defendant No. 1 on permanent licence and since he has effected certain alterations and Improvements, the defendants were not liable to be evicted and, thirdly, LalaDeep Chand Jain--defendant No. 1 was allotted the Kothi in question by the Rent

Control and Eviction Officer and in view of the order of allotment in favour of the defendant No. 1 passed by the competent authority, a decree of ejectment could not be passed unless the provisions of Section 20 of the U. P. Act No. XIII of 1972, had been complied with.

8. All the above submissions have been seriously challenged and repelled by the learned counsel for the plaintiff-respondent.

9. I have given thoughtful consideration to the matter and find that the so-called legal questions raised by the defendant-appellants are wholly wide off the mark and untenable. As a matter of fact, the Courts below have dealt with all the above points at considerable length.

10. As regards the first contention, mere ipse dixit will not negate the well-established factum of adoption of the plaintiff-respondent--Sreechand Jain by Lala Chetan Das Jain in the year 1942. As a matter of fact, no specific plea was raised on the point in the written statement filed in the present suit. Nevertheless the first appellate court has dealt with the question in all possible minute details. There is no dispute about the fact that the plaintiff-respondent was, in fact, adopted by Lala Chetan Das Jain on 5.2.1942 and a registered document, acknowledging the adoption, which has been brought on the record, was executed on the same day. Lala Deep Chand Jain--defendant No. 1 and natural father of Sreechand Jain had admitted and acknowledged in unerring terms at all the stages that he had given the plaintiff-respondent in adoption to Lala Chetan Das Jain. Not only this, Suit No. 74 of 1943 was filed by Lala Chetan Das Jain for declaration that the adoption of the plaintiff-respondent was illegal, void and inoperative, in that suit, Lala Deep Chand Jain--defendant No. 1 (since deceased), had filed a written statement and had taken an unequivocal stand that his son Sreechand Jain was given to and accepted in adoption by Lala Chetan Das Jain. Subsequently, the said suit resulted in a compromise decree and it was accepted that in reality, the plaintiff-respondent had been adopted by Lala Chetan Das Jain and being an adopted son, he was entitled to succeed to his properties, in the joint written statement filed in the present suit also, the fact of adoption has been reiterated and accepted. This fact is accepted even by Smt. Jain, the natural mother of the plaintiff-

respondent. There is, however, a faint suggestion in a different context in paragraph 23 of the written statement that Smt. Jain has challenged the adoption of the plaintiff-respondent by her father-Lala Chetan Das Jain. The fact remains that during the long period of more than two decades, Smt. Jain, the natural mother of the plaintiff-respondent, never challenged or assailed the adoption of the plaintiff-respondent by Lala Chetan Das Jain. As said above, a faint suggestion to challenge the adoption at the instance of Smt. Jain has been obliquely made in the written statement of the present suit.

11. Learned counsel for the defendant-appellants urged that under the Hindu Law, adoption of a male child could not be made by a person who could not marry the mother of the child and on the basis of this legal position, which is well-established and has been declared by the Privy Council in Bhagwan Singh's case (supra), Lala Chetan Das Jain could not adopt his daughter's son. This submission has been repelled by the learned counsel for the plaintiff-respondent. There can be no quarrel with the legal position that if there is a custom duly established in a particular community and area to adopt a daughter's son, such an adoption would be valid. Learned counsel for the plaintiff-respondent urged that according to the custom and practice prevailing amongst the Saraogi Agarwals, one of the numerous sub-divisions of the sect of Jains, daughter's son can be adopted. According to him, adoption of daughter's son is purely a creature of custom which has received Judicial recognition, in support of his contention, learned counsel placed reliance on the decision of the Privy Council in the case of Sheo Singh Rai v. Dakho and Murari. 1978 (1) ILR 688. In that case, in order to ascertain the custom, interrogatories were issued to the District Officers of Delhi, Mtithra (now Mathura). Benaras (now Varanasi) and Jaypore (now Jaipur) about the exposition of Jain law and custom on the questions in issue from Members of Jain Community. It was held that widow of a sonless Jain has power to adopt a son to herself and to her husband ; such son on his adoption standing in the position of a son begotten. The learned counsel for the defendant-appellants made a futile attempt to distinguish the above decision of the Privy Council in which it has been held that daughter's son can be adopted by a member of the Jain Community according to the custom prevailing in the area, on the ground that it was a case where Jain widow's right to make an adoption of her son's daughter was

recognised but it is not an authority on the point that a male Jain can adopt his daughter's son. This distinction is without any difference. The fact remains that there is no positive prohibition to adopt a daughter's son by a male Jain. The holding in Sheo Singh Rai's case (supra), was not set at naught or differed in the subsequent case of Bhagwan Singh (supra).

12. There is yet another aspect of the matter. Deep Chand Jain, the natural father of the plaintiff-respondent had filed a written statement in the earlier Suit No. 74 of 1943 filed by Lala Chetan Das Jain to challenge the adoption of the plaintiff-respondent, in paragraph 22 of the written statement of that suit. Deep Chand Jain has admitted about the existence of custom in Jam Community of Meerut Division of taking daughter's son in adoption and that the said custom has been recognised by the Court of law also. On the face of this admission, which was made more than two decades back, it does not now lie in the mouth of the sons of Deep Chand Jain, or for that matter, natural mother of the plaintiff-respondent to assail that Lala Chetan Das Jain could not adopt his daughter's son in the year 1942. The controversy about the legality or otherwise of the adoption, which has been raised obliquely after a passage of a long period of many decades, particularly taking into consideration that the adoption has, in fact, taken place and its acknowledgment was made by a registered document and that the natural father Lala Deep Chand Jain who was one of the defendants in the present suit, had accepted, acknowledged and supported the fact of adoption, and the natural mother Smt. Jain never challenged the same, cannot be allowed to be raised at the instance of the real brothers of the plaintiff-respondent with a view to disturb a fact of age-old adoption and undo and unsettle the things which have happened in the intervening period.

13. On the second and third points, there are concurrent findings of fact recorded by the Courts below that there has been no family settlement between the parties whereby the defendants were permitted to occupy the disputed Kothi permanently for life or for an indefinite period or that Lala Deep Chand Jain was allottee of the main building of the disputed property. The family settlements, set up by the defendants have been disbelieved and it has been held by the Courts below that the position of the defendants was merely permissive and no right to live

permanently in the Kothi in question was conferred on the defendants. Similarly, it has been held by recording a concurrent finding of fact that Lala Deep Chand Jain--defendant No. 1 was not an allottee of the main building of the disputed property and in any case, even if, at some point of time the order of allotment came to be made in his favour under the old Act of 1947, his possession and occupation was not as an allottee. Not only this, finding himself in deep waters, Lala Deep Chand Jain had withdrawn the plea of allotment by making an application in unflinching terms. This he did as the plea of allotment was destructive and incongruous to the plea taken in the written statement that he, his wife and sons were let into possession of the disputed accommodation to live in permanently without any fetters.

14. The above concurrent findings of fact, as said above, cannot be gone into, scrutinised or upset by this Court in exercise of its jurisdiction in second appeal. In *Mohd. Yunus v. Guru Bux Singh* : (1995)1SCC418 , it was held that where there is gross misappreciation of evidence which goes to the root of the matter, certainly the second appellate court can exercise its jurisdiction. To the same effect are the observations made in *Panchu Gopal Barua v. Umesh Chandra Goswami* : [1997]2SCR12 , in *Makhan Lal v. Asharfi Lal* : [1997]3SCR361 , the question before the Apex Court was whether the appellant was a licensee. The trial court and the appellate court having gone into the evidence and having appreciated the same, came to the finding of fact, which it was held, cannot be characterised to be surmises or in ignorance of material evidence, in another case *Ram Das v, Condia Bai.* : AIR 1997 SC1563 , it was observed that since no material evidence having a direct impact on the merits of the case was ignored by the first appellate court of facts, while arriving at the finding regarding appellant's adoption. High Court was not justified in interfering with the clear finding of fact arrived at by the first appellate court in favour of the plaintiff on the issue of adoption and the first appellate court's finding that the appellant was not adopted, must be treated to have been finally established on record.

15. In view of above discussion. I am constrained to observe that there is no legal question, much less, substantial question of law involved in the present appeal. It would not be out of place to mention that so far as interference on a question of

fact in second appeal is concerned, in view of Section 100, C.P.C. as amended by the C.P.C. (Amendment) Act, 1976, interference in second appeal has been made further stringent as Section 100 has undergone a sea change. Tersely put, the grounds of attack in second appeal are further abridged and insofar as the concurrent facts are concerned, there is hardly any scope for reopening the case at the behest of the appellants.

16. The Second Appeal, therefore, is not well merited and deserves to be dismissed.

17. While dismissing the appeal, I find it proper to grant some time to the defendant-appellants to vacate the disputed accommodation in respect of which a decree has been passed in the present suit. Allowing of time is necessary as prayed by the learned counsel for the defendant-appellants in view of the close relationship between the parties and taking into consideration the fact that the defendants are bound to suffer some hardship and would take some time in shifting to an alternative accommodation, in my view, six months' period to vacate the disputed property may reasonably be allowed to the defendants. It is, therefore, ordered that the decree for dispossession of the defendant-appellants shall not be executed till 30th November, 1998,. provided the appellants file an affidavit within a period of 20 days from today before the Court below that they, shall vacate the disputed property and hand over vacant possession to the plaintiff-respondent by the forenoon of 1.12.1998 and that they also deposit the entire decretal amount with damages to be calculated for the period upto 30.11.1998 within the aforesaid period of 20 days, in case the defendant-appellants fall to abide by either or both of the conditions, mentioned above, the decree for dispossession shall become executable all at once.

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