

**Court No. - 34**

**Case :-** SECOND APPEAL No. - 2977 of 1984

**Appellant :-** Shesh Nath Singh And Others

**Respondent :-** Faizul Hasan

**Counsel for Appellant :-** A.N. Bhargava, A.K. Misra, J.P. Singh, Murlidhar, Rajiv Kumar Mishra

**Counsel for Respondent :-** M.A. Qadeer, M.A. Zaidi, P. Padia, Mohd. Iftexhar Farooqui

**Hon'ble Sudhir Agarwal, J.**

1. Heard Sri Vinay Kumar Rai, Advocate, holding brief of Sri Rajiv Kumar Mishra, learned counsel for the appellants, Sri M.A. Qadeer, Senior Advocate, assisted by Sri Shamim Ahmad, learned counsel for the respondents.

2. This is defendants' appeal under Section 100 C.P.C. The plaintiffs-respondent instituted Original Suit No.100 of 1978 in the Court of Civil Judge, Azamgarh for ejection of defendants-appellants from property in dispute, recovery of arrears of rent and mesne profits, damages etc..

3. It is not in dispute between the parties that a vacant land, which was part of Arazi No.291, a wakf property was let out to defendant on monthly rent of Rs.40/-. Since defendants raised construction over vacant land without consent of plaintiff, and also committed default in payment of rent, their tenancy was terminated and hence the suit was filed.

4. The defendant contested the suit alleging that construction was raised with the consent of plaintiff. The Trial Court formulated following eleven issues:

- “1. क्या वादोंलिखित निर्माण ध्वस्त कराये जाने योग्य है?
2. क्या प्रतिवादी वादग्रस्त भूमि से बेदखल होने योग्य है?
3. क्या वादी याचित किराये की रकम वसूलने का अधिकारी है?
4. क्या वादी याचित हर्जे की रकम प्राप्त करने का अधिकारी है?

5. क्या वाद पत्र के पैरा 2,3 में कथित कारणों से वाद पोषणीय नहीं है?
6. क्या वादी को वादाधिकार है?
7. क्या वाद विबन्धन से बाधित है?
8. क्या वाद वैध नोटिस के अभाव में अपोषणीय है?
9. क्या वाद आदेश 2 नियम 2 व्य0प्र0सं0 से बाधित है?
10. क्या वाद कालातीत है?
11. वादी किस, यदि किसी, अनुतोष को प्राप्त करने का अधिकारी है?"

English Translation by the Court

- “1. *Whether the construction mentioned in the suit is liable to be demolished?*
2. *Whether the defendant is liable to be evicted from the suit land?*
3. *Whether the plaintiff is entitled to realize the demanded amount of rent?*
4. *Whether the plaintiff is entitled to receive the demanded amount of compensation?*
5. *Whether the suit is not maintainable for the reasons enumerated in paras 2 & 3 of the plaint ?*
6. *Whether the plaintiff has a right to sue?*
7. *Whether the suit is barred by Estoppel?*
8. *Whether the suit is not maintainable for want of a legal notice?*
9. *Whether the suit is barred by the provision of Order II Rule 2 of the CPC?*
10. *Whether the suit is time barred?*
11. *Which relief, if any, the plaintiff is entitled to get? ”*

5. Issue no.5, relating to maintainability of suit, was determined in favour of plaintiff and against defendants. Issues no.2 and 3 were also returned in favour of plaintiff and against defendant. Thereafter issues 1, 7 and 10 were considered together and answered in favour of plaintiff. The Civil Judge IInd, Azagarh, vide judgment and decree dated 01.9.1981, decreed the suit. The operative part of the judgment reads as under :

“यह वाद सव्यय डिक्री किया जाता है और यह आदेश किया जाता है कि प्रतिवादी वादी लिखित भूभाग ए,बी,सी,डी, पर वादी को तीन माह के अन्दर दखल दे दे। उसे यह भी आदेश दिया जाता है कि उत्तर पश्चिम कोने पर निर्मित तीन कोठरियों को हटा कर भूमि पूर्ववत कर दे अन्यथा न्यायालय की सहायता से उसे ँ वस्त कराने का अधिकार वादी को प्राप्त होगा। वादी को प्रतिवादी से रू0 1440/- बकाया किराया व 40/- रू0 मासिक की दर से वाद की तिथि से दखल की तिथि तक हर्जा भी प्राप्त होगा।”

#### English Translation by Court

*"This suit is decreed with cost and it is directed that the defendant shall hand over the possession of the land marked with ABCD to the plaintiff within a period of three months. He is further directed to demolish the three attics constructed in the north west corner, thus bringing the land to its earlier position; otherwise the plaintiff shall have the liberty to get it demolished with the help of the court. The plaintiff shall be entitled to receive the outstanding rent of Rs 1,440 and the compensation amount to be calculated @ Rs 40 per month from the date of filing of this suit until the handing over of the possession."*

6. The defendants-appellants thereafter preferred civil appeal no.510 of 1981 wherein lower appellate court made following two points for determination :

“1. That the instant suit brought by Faizul Hasan Mutwalli, is

*not maintainable, inasmuch as, it should have been filed in the name of the Waqf Bari Tala, the owner of the disputed property, and*

2. *That besides Faizul Hasan plaintiff, there are two other Mutwallis of the aforesaid Waqf, namely, Badre Alam and Ali Hasan, and the instant suit was not maintainable on account of non-joinder of Badre Alam and Ali Hasan Mutwallis, as plaintiffs.”*

7. Point no.1 was answered in negative and point no.2 was answered in favour of plaintiff-respondent and against defendants-appellant. In the result, the appeal was dismissed vide judgment and decree dated 15.11.1984 by District Judge, Azamgarh.

8. This Court, while admitting appeal, observed that it shall be heard on the substantial questions of law, stated in paras 2, 3 and 4 on page 3 of the memo of appeal. These questions read as under :

- i. *Whether the present suit at the instance of Faizul Hassan only as Mutwalli is not maintainable?*
- ii. *Whether notice to quit under Section 106 T.P. Act was invalid and no suit for ejectment lay?*
- iii. *Whether deed of gift dated 20.8.1925 has been misconstrued by Courts below in holding that Badre Alam and Ali Hasan are not Mutwallis?*

9. This appeal came up for hearing before Hon'ble A.P.Singh J. when the appellant, instead of arguing appeal on the aforesaid questions, raised a new plea of applicability of Uttar Pradesh Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972 (U.P. Act No.13 of 1972) (*hereinafter referred to as "Act, 1972"*) and Section 29-A thereof.

10. The Court considered whether a new plea could be taken at the stage of second appeal when the appeal was being heard under Order 41 Rule 13. Vide judgment dated 18.9.1996 this Court held that issue relating to applicability of Act, 1972, whether disputed property was governed by Section 29-A of Act, 1972 was a relevant issue, which ought to have been framed by Courts below and thus it framed two issues and returned the matter to Lower Appellate Court with direction to permit parties to amend their pleadings, allow them to adduce evidence on those points and thereafter decide both the issues. This Court also observed that while doing so, Lower Appellate Court shall not feel constrained with the findings recorded by Trial Court on the point of consent of landlord in erection of construction in question and shall also deal with justifiability of that finding of trial court on the basis of evidence available on record.

11. The issues framed by this Court vide judgment dated 18.9.1996 read as under :

- “1. Whether the defendant was entitled to seek protection against his eviction from the land in suit under the provisions of Section 29-A of U.P. Act no.13 of 1972?*
- 2. Whether the provisions of U.P. Act 13 of 1972 was enforced and applicable in the town of Azamgarh where the land in suit is situate?”*

12. Pursuant to the above directions, Lower Appellate Court has considered the aforesaid two issues. It has considered question of applicability of U.P. Act, 13 of 1972 in the town of Azamgarh and has held that parties did not dispute that aforesaid Act was applicable and enforced in the town of Azamgarh, where land in suit was situated. Having said so, it has further held that since Act was applicable to a 'building' and not to 'vacant land' except where the case is governed by

Section 29-A therefore, other provisions of Act, 1972 would not be applicable to the premises in question subject to question whether Section 29A was attracted or not. Point no.2, then has been answered in the following manner:

*“No dispute has been raised by the learned counsel for the parties on this point and it has been admitted by both of them that provisions of U.P. Act no.13/72 was enforced and applicable in the town of Azamgarh where the land in suit is situate.*

*It has, however, been argued by the learned counsel for the respondent that though the provision of U.P. Act no.13/72 are applicable to the town of Azamgarh but such provisions are not applicable to the land in suit, as it was a grove and not a 'building'.*

*I am unable to accept the argument of learned counsel for the respondent for the reason that under (A) and (J) of Section 3, the word “land” has been substituted for the word “building”. Land has not been separately defined in section 3, which could exclude grove. In any case, it was the land which was let out to the predecessor-in-title of the defendant for carrying on wood-tall. **Thereafter, the provision of section 29A of U.P. Act no.13 of 1972 would be applicable to the land in suit.**”*

(emphasis added)

13. Thereafter, he considered point no.1, framed by this Court, whether defendant was entitled to seek protection against eviction from land in suit under the provisions of Section 29A of Act, 1972. Considering the evidence, adduced by parties, and argument advanced by their counsels, District Judge, Azamgarh, vide order dated 3.12.1997, has returned the aforesaid issue observing that since defendant-appellant has failed to prove that construction was raised

over disputed vacant premises with the consent of landlord, therefore, defendant was not entitled to seek protection against his eviction from the land in suit, under the provisions of Section 29-A of U.P. Act No.13 of 1972. The aforesaid issue, therefore, with regard to protection of defendant-appellant under Section 29-A has been returned by Lower Appellate Court, against defendant.

14. Counsel for the appellant did not address this Court on the three substantial questions of law framed by this Court but said that findings recorded by Lower Appellate Court that there were no consent is not proper since it has not examined the evidence correctly. However, despite repeated query, he could not show as to what evidence has not been examined by Court below. It is not the case of appellant that any relevant evidence was ignored or any impermissible or irrelevant evidence was taken into account or there is any other perversity, legal or otherwise, in the judgment impugned in this second appeal. In absence of any of these things or to show that findings recorded by Courts below is contrary to law, I do not find that on this aspect any substantial question of law arise since findings of fact has been recorded by Court below.

15. No other argument has been advanced.

16. Since learned counsel for the appellant has not addressed this Court on the substantial questions, as framed by this Court vide order dated 27.11.1984, I have no option but to answer the same against appellant.

17. In the result, the appeal lacks merit. Dismissed.

**Order Date :- 11.2.2015**

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