Musammat Murti Dussadhin and Others

Vs

Surajdeo Singh and Others

Civil Appeal No. 625 of 1960

(S. M. Sikri, K. Subha Rao JJ)

11.08.1964

JUDGMENT

SIKRI J.

One Mohd. Mir Khan brought a suit in the Court of the Munsif Aurangabad against a number of persons for a declaration that 8 bighas of land under khata No. 22, situate at Mauza Gopalpur, Dis. Gaya constituted the bakasht interest of the plaintiff, who had been in possession and occupation thereof, and he prayed in the alternative "that if in the opinion of the Court the plaintiff be deemed to have been dispossessed form the suit land under s. 144 (Cr. P.C.), in that case, the plaintiff may be put in sir possession thereof on dispossession of the defendants and a decree for future mesne profits from the date of dispossession till the date of realisation, may also be passed in favour of the plaintiff". He alleged in the plaint that the said sir land had been in sir possession of the plaintiff and 9.81 acres (including the said 8 bighas) is recorded in the Record of Rights, i.e., Survey Khaitan, as the bakasht land of the plaintiff. He further alleged that he had sown seeds in two bighas in the month of Asadh 1353, when defendants 2, 3 and 5 interfered with his possession. Proceedings under s. 144, Cr. P.C., were started which resulted in a decision against him. He asserted that defence of the above defendants in s. 144 proceedings that plots Nos. 587, 832 and 846 and portion of 881 had been settled by him and that they were in possession, was false. He further stated that after the s. 144 proceedings he grew rabi crop in the suit land after cultivating the same with his own plough and bullock and was still in possession but since a cloud had been cast over the title of the plaintiff due to the decision in s. 144 proceedings, the plaintiff was entitled to get his title to possession over suit land confirmed by court.

It is apparent form the above recital that, except in the relief clause, the plaintiff asserted that he had been in possession and continued to be in possession and that he had title to the land. It was in the alternative that he prayed for possession if the plaintiff be deemed to have been dispossessed.

The defendants in their written statement did not deny the title of the plaintiff to the suit land but asserted that "the plaintiff being the only member in his house used to remain outside in some service and consequently he gave the entire area of the lands in khata No. 22 to these defendants to cultivate them on batai over more than 25 years ago, and since then the defendants have been and are in peaceful cultivating possession over the same and have also acquired occupancy rights in them". They further alleged they have been dividing crops regularly to the plaintiff but the plaintiff never granted any receipt to them.

The Munsif held that the plaintiff settled these lands with the defendants some 28 years ago. On the question of possession he held that ever since the settlement, the defendants have been in possession

and cultivating the lands, and that the plaintiff since after the settlement has not been in possession. He concluded that the plaintiff having been out of possession for more than 12 years was not entitled to possession. He in consequence, dismissed the suit with costs. The plaintiff appealed and succeeded before the Appellate Court. The Additional Sub-Judge was of the view that "the ones was on the defendants to prove that they were raiyats of the lands and unless they succeeded in proving these, they could not successfully resist the plaintiff's suit." After going through the evidence, he came to the conclusion that the defendants had not been able to prove their case settlement and possession.

Five defendants appealed to the High Court. It was contended before the High Court on behalf of the defendants that the Appellate Court had wrongly put the ones on the defendants, but the High Court, relying on Jaldhari v. Rajendra Singh (A.I.R. 1958 Pat. 386) did not accede to this contention. The High Court held that the title of the plaintiff had been admitted by the defendants and their case of settlement and possession for 12 years had been rejected by the Appellate Court. The plaintiff had never alleged that he had been dispossessed. The learned Judge further observed as follows :

> "As the defendants never got possession since the case of the defendants have been rejected and the plaintiff having never alleged that he has been dispossessed, it is clear that once title has been admitted by the defendants, on the pleadings it follows that the landlord is in possession and if the landlord is in possession, on the pleadings of the parties in the present case there can be no question of coming to a formal finding of fact that the plaintiff was in possession because on the pleadings the plaintiff never claimed that he had been ejected or dispossessed and the defendants never asserted that they forcibly ejected the plaintiff".

In conclusion, the learned Judge held that having regard to the facts and circumstances of this particular case, the burden was on the defendants to show whether they have been in possession for 12 years or more. In the result he dismissed the appeal. The defendants having obtained leave form this Court, the appeal is now before us for disposal.

It has been argued on behalf of the appellants that the Full Bench judgment relied on by the learned Judge was wrongly decided and that on the facts of this case, Art. 142 and not Art. 144 governed the case. We are of the opinion that the Full Bench was correctly decided and that Art. 144 applied to the facts of this case.

The learned counsel for the appellant urged that in an action in ejectment, one of the things that the plaintiff must prove is his title to immediate possession. This is true and there is no dispute about this proposition. He further urges that where the plaintiff does not admit tenancy, although the defendant alleges tenancy, he must show possession within 12 years of the suit. He says that the defendants have admitted title of the plaintiff but not possession. To support his proposition, the learned counsel for the appellant, apart from Patna cases which have been overruled by the Full Bench, relied on The Official Receiver of East Godavari v. Chava Govinda Raju (I.L.R. 1940 Mad. 953) and Behari Lal v. Sundar Das (I.L.R. (1935) 16 Lah. 442). In the former case, an auction purchaser was obstructed by a person who claimed it as his own ancestral property. The auction purchaser used for declaration and injunction. The facts are quite different and in none of the cases discussed by the learned Chief Justice in his judgment a defendant had claimed possession under the plaintiff but had asserted right by adverse possession.

In Behari Lal v. Sundar Das (I.L.R. (1935) 16 Lah. 442) the facts as stated in the headnote were these :

> "The plaintiff instituted a suit for possession of a house against N.B. and N.D., alleging that in 1927 they had rented the house to N.B., who had sublet it to the defendant N.D. The plaintiffs stated in the plaint that they were the owners of the house and that they had instituted a suit previously for recovery of rent against both the defendants, but N.D. had asserted his own title to the property and the suit had been dismissed against him, but had been decreed against N.B".

The High Court held that the plaintiffs clearly pleaded possession and dispossession, i.e., possession through their tenant N.B. and dispossession by the latter's sub-tenant N.D., when he set up a title of his own. This case is again distinguishable for the subtenant had clearly asserted his own title and denied that of the plaintiff.

Another case cited by the learned counsel for the appellant is Kumbham Lakshmanna v. Tangirala Venkateshwarlu, ((1948-49) L.R. 76 I.A. 202) in which the Privy Council reviewed most of its earlier decisions on this branch of the law. In this case, a holder of a minor inam used to eject the tenants from the holding, and the Privy Council held that the burden was on the plaintiff to make our a right by proving that the grant included both the melvaram and kudivaram interests, or that the tenants or their predecessors were iet into possession by the inamdar under a terminable lease. One of the cases referred to is Seturatnam Aiyar v. Venkatachala Gounden. ((1919) L.R. 47 I.A. 76) and with reference to it the board observed at p. 224, as follows :

> "In the above case it was either admitted or found as a fact that the tenants had been let into possession by the landlord who was the absolute owner. When the tenant claims rights of occupancy in such circumstances their Lordships, in Nainapillai Marakayar v. Ramanathan Chettiar, (L.R. 51 I.A. 83) laid down the principle that the burden will be on him to prove that he has such rights".

Is the position the same when the plaintiff does not admit any tenancy but the defendant alleges tenancy but of a permanent nature ? It seems to us that if a defendant not only admits title of the plaintiff but also admits that he derived possession form the plaintiff as a tenant, the case must proceed on the defendant's plea, and for the purpose of deciding whether Art. 142 or Art. 144 applied, it must be assumed that the plaintiff has not been dispossessed or has not discontinued his possession within the meaning of Art. 142, for neither the plaintiff nor the defendant alleges dispossession or discontinuation possession.

Construing the plaint as a whole, it is clear that the plaintiff never alleged dispossession or being out of possession. He asserted ownership of the suit land and claimed that he was in possession. Section 144 Cr. P.C. proceedings seemed to have cast a doubt on his title and he accordingly brought a suit for a declaration. It is true that in the alternative he prayed for a decree for possession and mesne profits. He was careful even in this alternative prayer to say that he could only be deemed to be dispossessed by s. 144 proceedings. The defendants did not deny the title of the plaintiff to the suit land but asserted that they had been settled and acquired occupancy rights. On these facts it seems to us that it was Art. 144 and not Art. 142 that applied.

In the result, agreeing with the High Court, we hold that the suit was not barred. Accordingly, the appeal fails and is dismissed, but as there is no finding by the courts below that the plaintiff is in

possession, the decree will be modified and limited to a decree for possession of the land in dispute.

In the circumstances of the case the parties will bear their own costs in this Court.

In view of our decision on the question of limitation, it is not necessary to deal with the point of abatement of the appeal raised by the learned counsel for the respondents.

The appellants will pay court fees, which would have been paid by them if they have not been permitted to appeal as paupers.

Appeal dismissed and decree modified.

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