

Devi Singh

Vs

Municipal Corporation, Hyderabad

Civil Appeal No. 743(N) of 1967

(K. S. Hedge, A. N. Grover JJ)

20.07.1972

JUDGMENT

GROVE, J. -

1. This is an appeal by certificate from the judgment of the Andhra Pradesh High Court.
2. In the year 1953 the appellant instituted a suit against the respondent for a permanent injunction restraining the respondent from obstructing the appellant's possession and enjoyment of his property known as 'Jumerate Bazaar' and from collecting any amount therefrom except the prescribed municipal taxes. The suit was decreed by the trial court. On appeal by the respondent the decree of the trial court was reversed by the High Court and the suit was dismissed.
3. According to the allegations in the plaint the disputed property which was called "Maidan Bazaar Jamerath", hereinafter referred to as the "Bazaar" situate at Karvan Aspan and bounded on the east by canal and police station, on the west by "Bakar Mandi", on the north by cement road, graveyard and butts belonging to the plaintiff and on the south by land, huts and graveyards belonging to the plaintiff was the ancestral property of the plaintiff and was owned by him having been purchased by his ancestors. In the 1346 Fasli i.e. 1936, A.D. the Sarfe-Khas Mubarak which was the Department-in-charge of the personal estate of the Nizam of Hyderabad made efforts to acquire the possession of the Bazaar claiming title over it and actually took possession of the same. Under the terms of certain agreements between the Sarfe-Khas and the Municipal Corporation all the Bazaars in the possession of the Sarfe-Khas were entrusted to the Corporation on the condition that it should manage them and pay a specified amount to the Sarfe-Khas. The right to recover the tax was transferred from the Bazaarath Department of Sarfe-Khas to the Municipal Corporation but the property remained in the possession of the said Department of the Sarfe-Khas. The plaintiff laid claim with the Sarfe-Khas to the Bazaar and after full inquiry the title was admitted by the Sarfe-Khas Department over the Bazaar and other adjacent property which had been taken possession by the Sarfe-Khas. The latter relinquished its claim to the title of the entire property including the Bazaar and decided to restore the entire property to the plaintiff and pay him the mesne profits in compliance with the order, dated May 22, 1950, passed by the Minister concerned. The possession of the entire property to which Sarfe-Khas was claiming title but which actually belonged to the plaintiff including Bazaar was delivered to him. The defendant was informed by means of a letter, dated May 17, 1952, by the Sarfe-Khas about such delivery of possession to the plaintiff which belonged to him. According to the plaintiff the defendant had been obstructing his possession for the some time before the institution of the suit and proceedings under Section 107 of the Criminal Procedure Code were also taken against the plaintiff, but the case of the defendant was not accepted in those proceedings. The Plaintiff, therefore, claimed a permanent injunction in the terms stated before.

4. The defendant in its written statement denied that the Bazaar was ancestral property of the plaintiff and was owned and possessed by him. It was claimed that the suit land was owned and possessed by the defendant namely, the Municipal Corporation. As regards the judgments passed by the Sarfe-Khas and the order of the Minister it was stated that those were not binding on the defendant as the defendant was not made a party to those proceedings. Reliance was placed, in particular, on a Firman, dated April 20, 1939, issued by the Nizam. It was asserted that the plaintiff had never been given possession of the suit land nor did that land have any concern with the proceeding mentioned in the plaint. In Para 6 of the written statement it was averred that the true facts were that in compliance with the Firman mentioned above the City Improvement Board had given the land to the defendant extending from the Muslim Jang Bridge to the Old Bridge. It was further stated that the Municipal Corporation had been granted a contract of the Bazaar. Thus it was the Corporation which was the owner and which had been in uninterrupted possession for more than 12 years. In Parts 8 mention was made of compensation amounts having been paid after due inquiry. It was alleged that Dhan Singh the father of the plaintiff had received compensation for his right of possession. It was mentioned that in 1323 Fasli the Government had decided that the land situate on the bank of the river Musi and extending from Muslim Jang Bridge to Old Bridge should not be used for residential purposes but should be used only for public as playgrounds and parks. The City Improvement Board had, therefore, acquired the land and the house from those who possessed them after payment of compensation. The defendant denied the right of the plaintiff to maintain the suit as no notice had been issued under Section 447 of the Hyderabad Municipal Corporations Act, 1950, hereinafter called the 'Corporation Act'.

5. On the pleadings of the parties the following six issues were framed :

- (1) Is the plaintiff the owner and in possession of the suit land ?
- (2) Has the Municipal Corporation been in possession of the suit land for over twelve years ?
- (3) Is the plaintiff not entitled to sue on the ground that notice as provided by the Hyderabad Municipal Corporation Act was not issued ?
- (4) What relief is the plaintiff entitled to ?

But on the representation of the defendant the following issues were added on April 10, 1956, by the then Additional Chief Judge, Shri K. Umapathy Rao :

- (5) Whether the judgments referred to in Para 4 of the plaint were delivered by competent authorities and what is their effect on the suit ?
- (6) As the documents filed by the plaintiff binding and admissible in evidence ?

6. It is unfortunate that the trial court gave a painfully rambling judgment on which a great deal of labour was spent but which is hardly of much assistance in analysing the evidence which was of a complicated nature consisting of the document some of the which was quite old. In the judgment of the High Court also some of the material points were either decided erroneously or the evidence was not clearly and correctly appraised.

7. The plaintiff sought to base his title on the sale deed Ext. P-12 which was executed in 1889 A.D. in favour of his father Dhan Singh, the vendor was one Mohd. Sayeeduddin son of Chanda Saheb

residing in the locality near Karwan Aspan. It was declared in the sale deed that he was the owner and possessor of the land situate of Mohalla Kustaidpura, near Karwan Aspan. This land had been in the possession of the grand-father of the Dhan Singh. This property was sold for a consideration of Rs. 975/- (Hyderabad currency) to the Dhan Singh as per boundaries set out in the sale deed. It was further stated that the property in question had been mortgage at one time with Mohammad Jamal and all the title deeds including the mortgage deed together with the plan prepared by the Municipality, Hyderabad, dated Rajjab 2, 1295 Hijri concerning the whole land were handed over to the vendee. The boundaries of the property sold were as follows :

East : Path and Nala of the Musi River and graveyard included in the sale.

West : Mosque of Fateh Khan Saheb.

North : Public Road included in the sale.

South : Graveyard and Masan included in the sale.

It may be mentioned that the words "included in the sale" appearing after the description of each boundary do not seem to have any particular sense or significance nor have the counsel for the parties before us attached any importance to them. According to the trial court the above boundaries given in the sale deed were so old that they did not help the plaintiff in establishing that the Bazaar was part of the land which had been sold to the plaintiff's father by means of the sale deed Ext. P-12 in the year 1889 A.D. It is common ground that in 1908 there were heavy floods in the Moosi river by which the boundaries underwent drastic changes. It was pointed out by the trial court that the plan which was mentioned in the sale deed as also the mortgage deed had not been produced by the plaintiff show how much area was covered by the sale deed and to enable demarcation of the boundaries. In the judgments of the Sarfe-Khas Department there was a mention of the aforesaid plan and obviously it had been produced before the Sarfe-Khas authorities. Indeed by Ext. P-3 which was the judgment of Mohatamim Sarfe-Khas, dated 21-12-1358 Hijri it was directed that the land should be handed over to the plaintiff according to the sale deed of 1889 A.D. and the plan attached to it. The case of the defendant Corporation apparently was that the Dhan Singh owned one plot measuring 1250 square yards only for which compensation had been assessed and paid to him when the same had been acquired. Dhan Singh had file an objection petition in the year 1914, Ext. D-10 saying that a plot of open land bearing No. 5945/D situate at the Karwan Aspan and adjacent to the slaughter house in the prohibited area had been acquired. He has enclosed the plan for compensation being awarded. The only order on the record for awarding compensation to Dhan Singh is Ext. D-5. It is stated there in the heading "Settlement of compensation for lands bearing Nos. 1943 and 1944 CIB No. Nil, situated at Karwan Aspan". A sum of Rs. 393-3-9 was assessed as compensation and was directed to be paid to him for the right of possession to the land bearing Nos. 5943 and 5944. Dhan Singh filed an application Ext. D-19 in 1921 A.D. saying that his land measuring 2750 Square Yards and bearing Nos. 5943 and 5944 situated at Karwan Aspan had fallen into the prohibited area. Compensation had been awarded to him for 1250 Square Yards and not for the entire plot the area of which was 2,750 square yards. He asked for the site to be properly measured and more compensation being awarded. Exhibit D-6 is the order made on this application by the court of the City Improvement Broad. He was apparently absent nor was his pleader present as the time the order was passed. It was mentioned therein that the Sarfe-Khas had claimed compensation with regard to this plot but then the Director of Ecclesiastical Department in the proceedings taken before him had held that the land was in the exclusive possession of Dhan Singh. It was stated that in view of the sale deed and the order of the Ecclesiastical Department it was

proved that Dhan Singh had been continuously in possession for 33 years and therefore the Sarfe-Khas could not claim any right to recover the amount of compensation for possession. As regards the petition filed by Dhan Singh for additional compensation, his prayer to enhance the compensation was rejected inter alia on the ground that the application made by him was highly belated. Apart from that there was no reference in the title deeds of Dhan Singh to the area of the land on the basis of which its extent could be determined and it could be decided whether the area for which compensation had been paid was less or more. It was further stated as follows.

"Even if any person proves by submitting his "title deed" that the area of any land is so much it cannot constitute any reason for the payment of the compensation for the same extent of land, until and unless it is also proved from the 'title deed' that the entire extent of the land which he had acquired by virtue of the sale deed was in possession and that the Government had acquired it after declaring it to be within the prohibited boundaries."

Relying on all the above evidence the defendant maintained that the sole property which had been purchased by Dhan Singh by virtue of the sale deed Ext. P-12 had been acquired for which compensation had been paid to him and the present land comprising the Bazaar had nothing to do whatsoever with the land which was the subject-matter of the sale in favour of Dhan Singh in 1889 A.D.

8. The trial court did not accept the above case set up by the defendant. It relied on several other documents to show that even after receiving compensation Dhan Singh asserted his ownership over the suit property by collecting Tehbazari in 1338 Fasli. From the plan Ext. D-1 of the prohibited area it was established that there was some land for which compensation had not been paid by the City Improvement Board because in that plan some portion were shown with the remark that compensation had yet to be paid with regard to them. Thus from the record in the City Improvement Board and the Hyderabad Municipal Corporation pertaining to compensation it was clear that Dhan Singh was not paid compensation for the whole of the land purchased by means of the sale deed Ext. P-12. The trial court next referred to the Firman Ext. D-17 the material portion of which, as translated ultimately by the High Court and accepted by both sides as the correct translation, was in the following terms :

"The proposals of the City Improvement Board are in accordance with the opinion of the Exclusive Council and are approved."

This has to be read with the relevant part of Ext. D-16 which contained the proceedings of the 94th meeting of the Board held on September 28, 1938. Item No. 3 together with the resolutions was as follows :

"As recommended by the Executive Committee to handover to the Municipality the prohibited area along Musi river. Note attached.

Resolution :

The prohibited areas along the Musi river may be handed over to the Municipality. The construction of residential buildings should be prohibited on this area which can be utilised for parks and playgrounds."

The defendant Corporation had claimed that by virtue of the Firman the whole of the land from

Muslim Jang Bridge to Old Bridge which included the Bazaar and which constituted the prohibited area had been taken over by the Municipality. The trial court did not accede to that claim in view of the evidence of certain witnesses, D.Ws. 1 and 7 Sarvshri Chandulal and Mehboob Ali. According to the trial court it was clear from their evidence that actual possession from all the owners and occupants was not taken but only a portion of the alleged acquired land was shown in the plan and even after such acquisition it was admitted that there were certain usurpers having huts, etc. still left in the area. The Sarfe-Khas had also claimed possession over certain lands pertaining to Kiwan Ganj from Muslim Jang Bridge to Old Bridge. From Ext. D-55 it appeared that even with regard to the plot of Dhan Singh which had been acquired he had been paid only a sum of Rs. 393-3-8 and a sum of Rs. 325-8-4 had been reserved for the party claiming the right of ownership. As Sarfe-Khas had claimed the amount on account of ownership the amount of Rs. 325/- odd was directed to be paid to Sarfe-Khas. Consequently the trial court was of the opinion that the Firman issued by the Nizam (Ext. D-17) had not been fully acted upon and the plea of the defendant Corporation that the possession of the entire prohibited area had been taken over by it had not been proved.

9. The trial court referred to other evidence which it is unnecessary to mention in detail. We may advert only to one aspect pertaining to the right of collection of taxes relating to the Bazaar. The case of the plaintiff was that in view of certain agreements between the Sarfe-Khas and the Corporation the latter had been given the right of collection of taxes on payment of a stipulated amount. Although the Corporation had been summoned to produce those agreements but it failed to do so. Certain files were sought to be got produced but it was found that a number of letters therefrom were missing. The Trial Court drew an inference against the defendant Corporation for the non-production of the papers which had been summoned and held that the agreements alleged by the plaintiff between Sarfe-Khas and the defendant Corporation stood proved. The evidence relating to the auction of the Bazaar made by Sarfe-Khas was also considered and after referring to the various orders made by Sarfe-Khas Department directing release of the land including the Bazaar in favour of the plaintiff together with other evidence discussed by the trial court issues Nos. 1 and 2 were found in favour of the plaintiff and against the defendant. Issue No. 3 was decided against the defendant and in favour of the plaintiff. Issues Nos. 5 and 6 were also similarly decided and the suit was decreed.

10. Before the High Court three main submissions were made on behalf of the Corporation which was the appellant there: (1) Section 447 of the Corporation Act, barred the suit as no notice had been given; (2) The trial court had not properly appreciated the effect of the Firman issued by the Nizam, Ext. D-17 whereby all rights, if any, existing in the land, were extinguished and the land from Muslim Jang Bridge to the Old Bridge which included the land in suit was ordered to be handed over to the Corporation for a specific purpose; (3) While holding that the sale deed Ext. P-12 did not prove the title of the plaintiff to the suit land the trial court was wrong in decreeing the suit primarily on the basis of the orders made by the Sarfe-Khas authorities. The High Court was of the view that all these contentions were well founded. On the first point it was observed that the plaintiff's advocate could not indicate even approximately the extent of the land claimed in the suit. Exhibit D-1, the plan, showed that whatever was left after acquisition of suit property consisted largely of graveyard. The suit, therefore, could not be decreed in respect of uncertain and unidentifiable parcels of land. As regards the notice required by Section 447 of the Corporation Act, the High Court applied the analogy of Section 80 of the Code of Civil Procedure and held that that section applied to a suit for injunction. With regard to the legal effect of the Firman Ext. D-17, the High Court referred to certain judgments of this Court and came to the conclusion that the will of the Nizam as expressed in the Firman became the law of the land. The result was that the entire area comprising the suit land vested in the Municipal Corporation. The orders made by the Sarfe-Khas, it

was observed, were neither binding nor valid so far as the Corporation was concerned. The High Court, further held that the suit for injunction could not be decreed on the basis of stray acts of possession alleged by the plaintiff following the order Ext. P-4, made by the Sarfe-Khas authorities.

11. Learned counsel for the plaintiff-appellant has subjected the judgment of the High Court to a good deal of criticism. It has been pointed out that the property comprised in the Bazaar is of considerable value and a lot of evidence had been produced by both sides which was not considered by the High Court and the appeal was disposed of only on the three matters already mentioned.

12. We may dispose of the legal points. As regards the requirement of a notice under Section 447 of the Corporation Act, that section provides that no suit shall be instituted against the Corporation, Commissioner, Municipal Officer or servant in respect of any act done or purported to be done in pursuance of execution or intended execution of the Act, or in respect of any alleged neglect or default in the execution of the Act, until the expiration of one month next after a notice had been served on the Corporation or Officer concerned in the manner indicated in the section. This is what the High Court said on the point :

"It cannot be gainsaid that the acts complained of by the plaintiff were acts done by the Corporation in pursuance of its powers and duties under the Act. Under Section 59 of the Act the Corporation is empowered to make provision for public parks, gardens, playgrounds and recreation grounds, while under Section 56 of the Act the Corporation is empowered to remove obstructions upon public places."

The question whether a notice under the aforesaid section was necessary has to be decided on the averments made. It was never the case of the plaintiff that the defendant Corporation was acting or purported to act under the provisions of the Act. The dispute raised related to the ownership of the property as also its possession. We have not been shown any provision in the Corporation Act, by which the Corporation or its Officers were entitled to either take possession of another person's property or retain its possession or dispossess a person who is already in possession without having recourse to the ordinary remedies under the law. We are wholly unable to understand how Section 56 of the Corporation Act, could be of any avail to the Corporation in the matter of notice under Section 447 of the Act. The whole controversy between the parties centered on the question whether the Bazaar was the property of the plaintiff and was in his possession at the time of the institution of the suit. That had nothing to do with any act done or purported to be done in pursuance of execution or intended execution of any provision of the Corporation Act. The learned counsel for the Corporation has not been able to show how the suit as laid and framed attached the applicability of Section 447 of the Corporation Act. We would, accordingly, hold that under the aforesaid section no notice was necessary before the institution of the suit.

13. As regards the legal effect of the Firman Ext. D-17, the learned counsel for the Corporation has quite properly and fairly conceded that it could not be regarded as the law of the land. According to him it was an executive act and its legal effect had to be determined in its character as such. There can be no manner of doubt that the effect of the Firman as an executive order and its evidentiary value on the question in controversy between the parties had to be determined by the courts but the view of the High Court treating the Firman as a legislative enactment could not be upheld.

14. It is somewhat unfortunate that in a case of this nature and magnitude neither the parties nor the courts below made a genuine effort to investigate and decide the real points which were in controversy between the parties. The plaintiff had set up a sale deed executed in favour of his father

which was of the year 1889 A.D. in which the boundaries of the property which was purchased by the plaintiff's father Dhan Singh were set out. The plaintiff ought to have got produced the plan or the mortgage mentioned in the sale deed which would have established with greater certainty and clarity the extent of the area which was conveyed by that sale deed. The plan which the Municipal Corporation itself produced and to which reference has been made by the trial court showed that the eastern boundary of the Bazaar was similar to that given in the sale deed, namely, the Nala of the Musi river, etc. A careful examination of that plan shows that the plot for which compensation had been paid to Dhan Singh, for an area of 1250 square yards was far removed from the Bazaar and there were several other plots which intervened. It is somewhat difficult on the present state of the record to reconcile the case of the defendant Corporation that the entire area covered by the sale deed had been acquired for which compensation had been paid to Dhan Singh with the relative situation of the Bazaar and the plot measuring 1250 square yards. If a Commissioner had been appointed in regard to which the plaintiff ought to have taken appropriate steps in the trial court it would not have been difficult for him to make a local investigation and determine as far as possible which was the area covered by the boundaries given in the sale deed for which he could have even summoned the plan which had been produced before the Sarfe-Khas authorities by the plaintiff and further to ascertain what was the extent of the prohibited area contemplated by the Firman and whether the total prohibited area or part or parts thereof had been acquired by the City Improvement Board.

15. It is difficult to ignore the entire proceedings before the Sarfe-Khas and the documentary evidence according to which possession was given of the land or the property including the Bazaar by the Sarfe-Khas to the plaintiff after a full investigation of his claim in the matter. There was no allegation that all those proceedings were without jurisdiction or were collusive although it has now been suggested before us on behalf of the defendant Corporation that the Sarfe-Khas Department has ceased to exist in February 1949, by virtue of the Sarfe-Khas Merger Regulation, 1358 Fasli. There is no indication in the orders of the various authorities including that of the Minister that the Sarfe-Khas had ceased to have any jurisdiction about deciding whether the property over which the Sarfe-Khas laid claim was the property of a private individual or was part of the personal estate of the erstwhile Nizam of Hyderabad.

16. It has been maintained before us on behalf of the plaintiff that the orders made by the Sarfe-Khas were admissible and relevant under Section 13 of the Evidence Act. These points were not gone into by the courts below and have still not been decided and we do not wish to express any opinion on them. The agreements to which reference has previously been made by us and which were not produced by the Corporation before the trial court-would have also thrown a good deal of light on the points in controversy. In our judgment this is a fit case in which a remand is necessary to the trial Court. The Trial Court shall decide the matter afresh only on issues relating to title and possession of the parties with the exception of such legal points which have already been disposed of by us. Both the parties will be at liberty to ask for such amendments in the pleadings as may be strictly necessary for clarification on the question of title and possession. But no such pleas will be allowed to be introduced which may change the nature of the case. Fresh evidence can also be adduced confined only to these two matters by both sides. It will be for the trial court to get a complete investigation made with regard to the various matters already mentioned by us by a Commissioner if any of the parties make an application in that behalf. Both sides have expressed willingness to produce before the trial court all such documents which are relevant and which are in existence to enable the court to dispose of the question of title and possession of both the parties in a satisfactory manner.

17. The appeal is consequently allowed and the case is remanded to the trial court for disposal in accordance with law in the light of the direction given above. There will be no order as to costs.

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