Shikharchand Jain

Vs

Digamber Jain Praband Karini Sabha and Others

Civil Appeal No. 1598 Of 1967

(P. Jagmohan Reddy, S. N. Dwivedi, P. K. Goswami JJ)

11.01.1974

JUDGMENT

DWIVEDI, J. -

It is the defendant's appeal. The plaintiff Digamber Jain Praband Karini Sabha, manager, instituted a suit against the defendant Shikharchand Jain for recovery of possession over certain agricultural lands situate in mauza Imlai. Smt. Rajrani, fifth defendant (now dead) was the proprietor of a Patti in mauza Imlai. The land is dispute fell in that Patti. It was her sir. The area of the land is 12.86 acres. Smt. Rajrani became malik maqbooza of the land on the abolition of the proprietary rights in the State in 1951. On January 18, 1954, she gifted the land by a registered gift deed in favour of the plaintiff (which is registered under the Madhya Pradesh Public Trust Act, 1951). Ram Das and Ballu, the third and fourth defendants, were cultivating the land. The plaintiff instituted a suit against them on July 15, 1954. In the said suit they pleaded that Shikharchand had sub-let the land to them. The suit was decreed. Their appeals were dismissed on May 4, 1957. Shikharchand also instituted a suit on November 3, 1955 against the plaintiff and Smt. Rajrani for a declaration that the gift made by her would be void after her death. We are told that the suit has been dismissed in default. As the aforesaid defendants are disputing the plaintiff's title, the suit was instituted. All the defendants except Smt. Rajrani filed a joint written statement. They denied the plaintiff's title to the land. Smt. Rajrani held a limited estate in the land and the gift deed would be ineffective after her death. She could not gift the entire property. Shikharchand has been in possession over the land since 1937 as an owner thereof and has acquired rights of an owner by adverse possession for more than 12 years. Smt. Rajrani filed a separate written statement. She has supported the case of the plaintiff. The trial Court framed a number of issues. Of them, only two now survive for consideration. They are issues Nos. 1 and 4 :

> "1 (a) Whether the defendant No. 5 (Smt. Rajrani) was the owner of the suit fields till 18.1.1954 ?
>
> (b) whether she was also in possession of the suit fields till 18.1.1954 ?"
>
> "4 (a) whether defendant No. 1 (Shikharchand) has been in exclusive, continuous and uninterrupted possession of the suit fields since 1937 adversely to the defendant No. 5 and the plaintiff ?
>
> (b) whether, therefore, the defendant No. 1 has perfected his title by adverse possession ?"

Issue No. 1 was answered in favour of the plaintiff. Issue No. 4 was answered against Shikharchand. The trial Court held that he was in possession for and on behalf of Smt. Rajrani and not in his own right. The trial Court granted a decree for possession to the plaintiff.

2. Defendants Nos. 1 to 4 went in appeal. The first appellate Court allowed the appeal and set aside the decree of the trial Court and dismissed the suit. The plaintiff then filed a second appeal in the High Court of Madhya Pradesh. The High Court has reversed the decree of the first appellate Court and restored that of the trial Court. Hence this appeal by Shikharchand.

3. The first appellate Court has held that Shikharchand was in possession over the disputed land since 1937 and has become the owner thereof by adverse possession before Smt. Rajrani transferred the land to the plaintiff. Sri Tarkunde, Counsel for Shikharchand, says that it is a finding of fact and that accordingly the High Court could not interfere with it in second appeal. It appears that the High Court was aware that it was interfering with a finding of fact in a second appeal. So the High Court has explained :

> " (Defendants Nos. 1 to 4) clearly failed to establish by positive evidence the adverse possession of (Shikharchand) for more than twelve years at any point of time so as to rebut the statutory presumption of possession arising in favour of the appellant and its predecessor-in-title Smt. Rajrani. Therefore, with due respect to the learned appellate Judges, I might say that the question has been absolutely mis-conceived by him and he has not approached the question in a proper and legal manner with a view to apply the law to the facts found established from the record. In this view, the decree passed by the first appellate Court cannot be sustained either on facts or law."

So according to the High Court the finding recorded by the first appellate Court was arrived at by overlooking the statutory presumption of possession in favour of the plaintiff and Smt. Rajrani and his approach to the issues before him was not proper and legal. In other words, the High Court intervened under cl. (c) of Section 100(1) of the Code of Civil Procedure. According to the High Court, the finding of the first appellate Court suffered from a "substantial error or defect in the procedure provided..... by any other law for the time being in force, which may possibly have produced error or defect in the decision of the case upon the merits."

4. It is now to be seen whether the first appellate Court's finding really falls within the grip of Section 100(1) (c) of the Code of Civil Procedure. In this written statement Shikharchand has admitted Smt. Rajrani's ownership of the land. But he has pleaded that he has become the owner of the land on account of the adverse possession for more than 12 years from 1937. The burden of proving the acquisition of ownership by adverse possession lay on him. The Khasra entries from 1937-38 to 1941-42 and 1943-44 to 1951-52 are all in favour of Smt. Rajrani. They show that she was in possession over the land during those years. Khasra is a record of right according to Section 45(2) of the Central Provinces Land Revenue Act, 1917. Section 80(3) of that Act provides that entries in a record of right shall be presumed to be correct unless the contrary is shown. This provision raises a presumption of correctness of the aforesaid Khasra entries. The burden of proving adverse possession accordingly was a heavy one. The judgment of the first appellate Court shows that it has not kept in mind this aspect while examining the evidence. In the first step, it has proceeded to assess the evidence adduced by Shikharchand. After discussing that evidence, it has recorded a finding that he was in possession. Thereafter, in the second step, it has proceeded to take the view that no reliance can be placed on Khasra entries. It has summed up the discussion thus :

> " (A) In these witnesses (of Shikharchand) have stated that the possession of the fields was with Shikharchand. Their statements are further supported by documentary evidence and, therefore, there is no room for any doubt that the possessions was not with Shikharchand. It is true that in Patwari papers Mst. Rajrani's name appears and that the dues were deposited on behalf of Mst. Rajrani. But in my opinion the entries in Khasra and the fact that the receipts were issued in the name of Mst., Rajrani would not by themselves establish the fact of possession. It is settled law that entries in Khasra have only presumptive value, and it is difficult to conclude from these entries that the possession was with Mst. Rajrani. The falsity of the entries in Khasra is clear from the fact that from 1937 to 1947 the name of Mst. Rajrani appeared in the Khasra Panchsala and yet Mst. Rajrani's admission in D/1 shows that she was not a possession. This fact is enough to show that no reliance could be placed on the Khasra entries."

5. As already pointed out, this passage shows that the first appellate Court proceeded in the reverse order. Moreover, the Khasra entries have been discarded solely for the reason that Smt. Rajrani has admitted in Ex. D/1 that she was not in possession. But Ex. D/1 has been entirely misunderstood by the first appellate Court. Exhibit D/1 is a copy of the plaint filed by Smt. Rajrani in a suit for profits against Shikharchand. Shikharchand was Lambardar of the muhal in which the Patti belonging to Smt. Rajrani was situate. In the first paragraph of her plaint she has mentioned this fact. Thereafter she went on to say that she was entitled "to get her share of profits from the defendant". In paragraph 2 she has said :

> "That the defendant is in possession of all the Sir and Khudkasht land of her full..... patti of the village.... that as the defendant did not render an account, nor paid any thing inspite of repeated demands and a notice by the plaintiff, he is liable to pay interest by way of damages at the rate of - /8/- per cent per month"

and the amount detailed in the schedule of accounts attached to the plaint. In the schedule she has shown the amount of rent recovered by Shikharchand from the tenants. She has also shown the estimated income from sir and khudkasht land belonging to her. After making certain deductions, a total amount of Rs. 318/7/- was claimed from Shikharchand. The suit was filed in July, 1942. The suit for profits related to a period between 1938-39 and 1940-41. We do not think that paragraph 2 of the plaint can be read in the manner it has been read by the first appellate Court. It was a suit for profits by a co-sharer against the Lambardar. It was not a suit for mesne profits which an owner of land may claim from a trespasser. It was really a suit for accounts from the Lambardar. So it is not possible to spell out from paragraph 2 on admission from Smt. Rajrani that Shikharchand was in adverse possession over her sir land. Further, Shikharchand did not file a copy of his own written statement, nor a copy of the judgment in the suit. If he had denied his possession over her sir land, the suit for profits from sir land would have been dismissed. If he had pleaded adverse possession, over her sir, then also her suit for profits from sir land would have been dismissed. If, on the other hand, the suit for profits of sir land were decreed, it would follow that Shikharchand was held to be in permissive possession and not in adverse possession. In the result, we are of opinion that the first appellate Court was wholly wrong in discarding the Khasra entries on the solitary statement in paragraph 2 of her plaint. The High Court could, therefore, interfere with its finding under Section 100(1) (c).

6. The High Court has considered afresh the entire evidence on record and has held that Shikharchand has failed to establish by positive evidence his adverse possession for more than 12

years. The appellant could not show to us that the finding is not sustainable on the evidence on record. It is not necessary for us to reappraise that evidence again, but we may point out two circumstances which heavily tell against the appellant. Assuming that this his adverse possession started in 1937 and continued till 1949, he became the owner of the land in dispute in 1950. Nevertheless he did not move the appropriate revenue authority for the correction of the entries in the record of rights. He did not get the name of Smt. Rajrani expunged from the record and his name entered therein. Again, Beni Ram, one of his witnesses, has admitted that Shikharchand had been paying rent of the sir hand of Smt. Rajrani on behalf of Smt. Rajrani until 1958-59. Had he become an owner by adverse possession in 1950, he would never have paid rent on behalf of Smt. Rajrani.

7. Counsel for the appellant has referred us to Maharaja Srischandra Nandy v. Baijnath Jugal Kishore, Beity Pattabhiramaswamy v. S. Hanyamayya, and R. Ramachandran Ayyar v. Ramalingam Chettiar. But none of these cases help the appellant on the facts of this case. In the last case this Court said :

> "(I) in dealing with a question of fact the first appellant Court has placed the onus on a wrong party and its finding of fact is the result, substantially of this wrong approach, that may be regarded as a defect in procedure under Section 100 (1) (c)."

The same view has been expressed in Ladli Prasad Jaiswal v. Karnal Distillery Co. Ltd. In this case the High Court has upset a finding of fact recorded by the lower appellate Court inter alia on the ground that the burden of proof was wrongly placed on the plaintiff. Shah, J., while affirming the judgment of the High Court, said :

> "A decision of the first appellate Court reached after placing the onus wrongly..... is not conclusive and a second appeal lies to the High Court against that decision.

8. In Jai Krishna v. Babu, it was held that possession of a non-owner after partition is adverse. No exception may be taken to this preposition. But we fail to understand how this case will assist the appellant.

9. We now pass on to another aspect of the case. During pendency of this appeal Smt. Rajrani died on December 5, 1968. The appellant first filed C.M.P. No. 1377 of 1969 for his substitution in place of Smt. Rajrani, the fifth respondent, as her legal representative. No order has yet been made on this application. Now he has made another application in the course of hearing. By this application he seeks to amend his written statement. He wants to make this addition to the written statement :

"12 (a) that the gift deed dated 18.1.1954 was executed by Smt. Rajrani who was a limited owner having a widow's estate on the date of the execution of the gift deed. Assuming though not admitting the said gift deed was valid it is sub-mitted that the above gift could at most enure for the life of the defendant no. 5. The plaintiff cannot have any rights in the suit lands after the death of Smt. Rajrani and the defendant as the sole surviving reversioner becomes the owner of the lands and resist the claim of the plaintiff.

(b) that the geneology of the family is an under :

Bihari Lal | ---------- | | | Dalchandji Bhagwandasji Shrichandji died issulese) | | | | | | | Nathoolalji | (died issulese, husband of defendant No. 2) | | | |---------- | | | Nacoolalji Kapoorchandji (died issueless) Shikharchand (Plaintiff)##

(c) that the deceased Smt. Rajrani could not transfer the suit property even for the religious and charitable purposes as it was the entire property she had and such a transfer is not binding on the defendant after her death."

10. He also prays for the renumbering of present paragraph 12 as paragraph 13 of the written statement. Sri Tarkunde has submitted that if the assertions made in the new paragraph 12 are accepted by the Court, the respondent's suit will have to be dismissed. It is also said that the new situation arising on the death of Smt. Rajrani during pendency of the appeal can be considered by the Court in order to mould the decree in the suit out of which this appeal has arisen. In out view, Mr. Tarkunde, is right in this submission. Ordinarily, a suit is tried in all its stages on the cause of action as it existed on the date of its institution. But it is open to a Court (including a court of appeal) to take notice of events which have happened after the institution of the suit and afford relief to the parties in the changed circumstances where it is shown that the relief claimed originally has (1) by reason of subsequent change of circumstances become inappropriate; or (2) where it is necessary to take notice of the changed circumstances in order to shorten the litigation; or (3) to do complete justice between the parties. (See Sai Charan Mandal and Another v. Biswanath Mandal and Others v. Biswanath Mandal and Others. ")

11. Sri Chagla, Counsel for the respondent, has submitted that the application for amendment of the written statement should not be allowed. It is said that the appellant has alleged in his written statement that Smt. Rajrani could not transfer the disputed land as she was a limited owner having a widow's estate. The trial Court had framed a specific issue on this aspect and recorded a finding against the appellant. The trial Court said :

" (Smt. Rajrani) is a Jain widow and therefore she is competent to transfer the suit lands for religious and chartiable purposes."

The trial Court decreed the suit. The appellant filed an appeal. The appeal was allowed and the decree of the trial Court was set aside. The respondent then filed a second appeal in the High Court. As already stated, the High Court set aside the decree of the first appellate Court and restored the decree of the trial Court. It is said by Sri Chagla that as the appellant did not challenge the validity of the gift either in the first appellate Court or in the High Court, he should not be allowed to challenge it now by an amendment of his written statement. We find it difficult to accept this submission of Sri Chagla. Even if the assertions made in the application for amendment of the written statement are found to be true, the appellant could not have non-suited the respondent during the life time of Smt. Rajrani. The gift was valid during her life time. Her death gives a fresh cause of action to the appellant who claims to be her next reversioner. It appears to us that it will be just and proper to allow the amendment sought for. It will shorten litigation.

12. Sri Chagla has also pointed out that the respondent has acquired new rights under the Land Reform measures passed by the Madhya Pradesh Legislature. It will be open to the respondent to file a reply to the amendment when the case goes back to the trial Court and raise any plea which according to it is likely to defeat the appellant's new claim.

13. So we allow the application for amendment of the written statement on payment of Rs. 200 as costs to the respondent. The case will now go back to the trial Court. The trial Court will allow reasonable time to the respondent to file a reply to the amended written statement. Thereafter the trial Court will record evidence on the new plea raised by the appellant by his amendment and by the respondent in its reply. The trial Court - will then record its findings and forward them to this

Court through the High Court. The trial High Court should send the findings within four months of the receipt of the record from this Court. C.M.P. No. 1377 of 1969 is dismissed as infructuous. On receipt of the findings, the appeal will be listed for hearing before the Court.

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