SUPREME COURT OF INDIA

Beharilal

Vs.

Bhuri Devi

C.A.No.1320 of 1980

(K. Ramaswamy and K. Venkataswami JJ.)

05.12.1996

ORDER

1. This appeal by special leave arises from the judgment of the Division Bench of the Rajasthan High Court at Jaipur Bench, made on March 28, 1980 in LPA No. 147/69.

2. The undisputed facts are that the Government constituted a Mandi Committee duly nominating the members, at Neem-ka-Thana for sale of agriculture produce. The property was acquired by the Government. Allotments were made for construction of shops by traders. Plot Nos. A-1 and A-2 were allotted to the appellant on December 21, 1953 and on payment of consideration the patta was granted on June 21, 1954 and possession was delivered on the same day. The appellant also indisputably had raised construction on the plots. But in June 1956, the Committee appears to have impeded to proceed with further construction on the ground that one Jhutha Lal was carrying on construction. On that basis, on October 6, 1956, the patta was cancelled. On 7th October, 1956, Ram Gopal Gajanand, the husband of Bhuri Devi, the first respondent herein, made two successive applications. On the basis thereof, two plots came to be allotted to him on October 8, 1956 and possession also was given to him by beat of drum. This led to the filing of proceedings under Section 145, Cr. P.C. at the instance of Ram Gopal. Ultimately, proceedings under Section 145 ended in a direction by the High Court in criminal revision to lay the suit. Consequently, the

appellant filed civil Suit No. 3/59 in the Court of Senior Civil Judge, Jaipur on January 15, 1959 for possession and damages. The respondent-defendants filed the written statement on March 31, 1959 admitting the allotment of the land in favour of the appellant, but justified that the same came to be cancelled according to the rules and allotment was made in favour of Ram Gopal. The trial Court framed necessary issues and recorded the finding that cancellation of patta in favour of the appellant and allotment of patta in favour of Ram gopal was bad in law. The appellant was in possession of the property. The Mandi Committee was not justified in cancelling the grant of patta and allotting the land to Ram Gopal. On that basis, the trial Court decreed the suit. On that basis, the trial Court decreed the suit. On appeal, the main point addressed was on the legality of the cancellation of the patta granted in favour of the appellant and the grant of patta in favour of Ram Gopal. The learned single Judge upheld the findings of the trial Court holding that the cancellation of patta granted in favour of the appellant is bad in law and equally upheld the finding that the grant of patta in favour of respondent was bad in law. In the Letters Patent Appeal, the only question argued by the learned counsel appearing for the respondent before the Division Bench was as to the non-execution of the patta in compliance of Article 299 of the Constitution. The Division Bench upholding the contention, set aside the judgment and decree of the trial Court and that of the first appellate Court and dismissed the suit. Thus, this appeal by special leave.

3. Shri D.D. Thakur, learned senior counsel appearing for the appellants, contends that in view of the finding recorded by the trial Court as upheld by the single Judge that the appellant was in possession of the property, he is entitled to the decree for possession. The suit based on possessory title is, therefore, valid in law. He contends that Rules made by the Mandi Committee for allotment of the land were duly approved by Rajpramukh; the Tehsildar was empowered under Rule 5 to grant patta in favour of the allottee; the Tehsildar accordingly had granted the patta to the appellant; therefore, the grant is valid in law, though it was not executed in the manner contemplated by Article 299 of the Constitution. The appellant having paid the consideration and was put in possession and also having constructed shops up to plinth level, the non-compliance of execution of the deed in the letter and spirit of Article 299 does not take away the right of the appellant to be in legal and valid possession of the property. In support thereof, he placed reliance on Nair Service Society Ltd. v. Rev. Father K.C. Alexander, (1968) 3 SCR 163 : (AIR 1968 SC 1165), Chatturbhuj Vithaldas Jasani v. Moreshwar Parashram, 1954 SCR 817 : (AIR 1954 SC 236), M/s. Davecos Garments Factory v. State of Rajasthan, AIR 1971 SC 141 and M. Mohammad v. Union of India, AIR 1982 Bombay 443. He also contends that the respondent had not pleaded invalidity of the patta violating Article 299 of the Constitution. Therefore, the plea could not be permitted to be raised for the first time in the Letter Patents Appeal. In support thereof, he relied upon the decision of this Court in Nirod Baran Banerjee v. Dy. Commissioner of Hazaribagh, (1980) 3 SCC 5 : (AIR 1980 SC 1109). He contends that the appellant had constructed the shops; he was in possession and the finding that he is in possession would aid his right to seek possession even if he was wrongfully dispossessed by the respondent who has no better title than the appellant.

4. Shri Bhim Rao Naik, learned senior counsel appearing for the respondent, resists the contentions. According to the learned counsel, after the proceedings under Section 145 came to a terminus, the appellant filed a writ petition in the High Court seeking to quash the cancellation of the patta granted in favour of the appellant. The High Court while dismissing the writ petition has given liberty to the appellant to avail of the remedy of filing a suit for challenging the cancellation of the

patta; pursuant thereto, notice under Section 80, CPC was given but the appellant did not implead the Mandi Committee or the Government as con-defendant. Therefore, the suit is bad for non-joinder of necessary parties. The appellant had not pleaded nor sought declaration in the suit that the cancellation of the patta granted in his favour is bad or that the grant of patta in favour of the respondent is invalid. In their absence, the suit is not based either on title or on possession. Since he was not in possession and the suit was not filed within six months from the date of dispossession under S.6 of the Specific Relief Act, 1963, the suit as such is not maintainable. He also contends that without there being any attempt to seek a plea in the plaint for declaration of title, the findings recorded by the Courts below on invalidity of cancellation of appellants' patta or of the grant to the respondent are not sustainable in law. He also contends that the appellant had not objected in the High Court as to the invalidity of the patta being in violation of Article 299 of the Constitution. Since it goes to the root of the jurisdiction of the authorities, it could be raised at any time. In support thereof, he placed reliance on a judgment of this Court in Pavani Sridhara Rao v. Government of A.P., AIR 1996 SC 1134 : (1996 AIR SCW 1485). He further contends that the non-joinder of the necessary parties vitiates the decree for possession. In support thereof, he placed reliance of U. P. Awas Evvam Vikas Parishad v. Gyan Devi, (1995) 2 SCC 326 : (1995 AIR SCW 393). Lastly, it is contended that since the proceedings were pending for a long time and this is the third round of litigation, the parties may be directed to compromise each taking a plot and that the claimants are prepared to pay over necessary expenditure incurred by the appellants for raising the construction up to the plinth stage. He also contends that Bhuri Devi, the first respondent died, pending appeal; her legal representatives have not been brought on record and, therefore, the appeal is abated.

5. In view of the respective contentions, the first question that arises for considerations is : whether the appeal has abated on account of failure to substitute the legal representatives of the 1st respondent. It is seen that the original allottee, Ram Gopal is represented by his widow, Bhuri Devi and Kamla, the daughter. Kamla and Bhuri Devi are on record representing his estate. Therefore, on the demise of Bhuri Devi, Kamla being already on record, is representing the estate of her mother as well as her father Ram Gopal. Under these circumstances, the appeal has not been abated nor is there any need to bring separately the legal representatives of Bhuri Devi on record.

6. It is seen that the appellant was admittedly allotted the aforestand two plots after receiving consideration, i.e., Nazarana by the Mandi Committee for construction of shops. It is true that in the plaint, no specific prayer was made seeking declaration of the invalidity of the cancellation of patta granted to the appellant or invalidity of the patta granted in favour of Ram Gopal. In fact, in the written statement these pleas were raised by Ram Gopal, the respondent. On that basis, the issues came to be settled. The trial Court had gone into all the questions and recorded the finding against the respondents that grant of patta to Ram Gopal was invalid and also cancellation of patta of the appellant was illegal. Before the learned single Judge of the appellate Court, when the respondent carried the matter against the decree of the trial Court, the main concentration was on those issues. Even the finding of possession of the appellant was neither disputed nor directly addressed. Learned single Judge has gone in depth on those issues and held that the cancellation of the patta in favour of the appellant is bad in law. Equally, it was held that the grant of the patta in favour of the respondent was also not bona fide. Under these circumstances, the findings recorded by the trial Court that the appellant was in possession and that he remained in possession were allowed to become final. As

regards the findings as to the invalidity of the grant of patta in favour of the respondent and cancellation of the patta of the appellant, they were allowed to become final since these questions were not canvassed before the Division Bench in the LPA. As stated earlier, the only question was as to the invalidity of the patta not having been executed in compliance with Article 299, on the basis of several judgments in that behalf. The Division Bench came to the conclusion that execution of the patta in conformity with Article 299 of the Constitution is mandatory and the failure of compliance thereof renders the grant of patta void. The correctness of this proposition was not and could not be canvassed by Shri Thakur. But he focussed the attention on the Rules made by the Committee as approved by the Rajpramukh and the grant made in furtherance thereof to the respondent. Land was acquired by the Government for allotment to traders for construction of shops and Mandi Committee was duly constituted for that purpose. It is seen that, admittedly, after the Rules were made by the Mandi Committee, the same were submitted to the Government for approval. The Rajpramukh did give approval for the same. Thus, Rules had legal sanction for allotment of the plots to the traders in accordance therewith. The allotment requires to be made by the Tehsildar and the Chairman of the Committee and the Tehsildar under Rule 5 was empowered to grant the patta and deliver possession thereof. In fact, that procedure was followed, allotment of two plots was made to the appellant by the Committee and the Tehsildar granted patta. There was no vice or violation of Rules. No vice or violation of Rules was pointed to the Division Bench nor even to us. These facts are also not in dispute. Thus, it would be clear that the allotment made to the appellant was made in accordance with Rules for public purpose and the appellant was put in possession accordingly. He, as a fact, started construction up to plinth level. The cancellation was not valid as found by the trial Court and the learned single Judge.

7. Under these circumstances, the question arises; whether the failure to execute the patta in conformity with Article 299(1) of the Constitution renders the grant thereof to the appellant void ? It is seen that when the Rules are made for grant of patta, the necessary implication is that the grant must, of necessity be, in conformity with Article 299 (1) of the Constitution as modulated or modified as per the Rules made by the Government. In view of the finding recorded earlier that admittedly Tehsildar and Chairman of the Committee was authorised to grant patta, the Tehsildar did grant patta and deliver possession in terms thereof after receipt of the consideration and the Tehsildar put the appellant in possession of the plots. Thereby, he became the absolute owner of the property. It is seen that in a quick succession after the cancellation of patta on October 4, 1956, Ram Gopal made two successive applications on October 7, 1956, on the same day the patta was granted to him and possession was delivered on October 8, 1956. But the same was, admittedly, stayed by the Collector in his proceedings on the even date. In D.G. Factory case (AIR 1971 SC 141) (supra), the Inspector General of Police, Rajasthan had executed an agreement on March 22, 1960 with the appellant therein. The said agreement was not in conformity with Article 299 (1) of the Constitution. The Inspector General had duly been authorised to execute the agreement on behalf of the State. But he did not express that he had executed it on behalf of the Governor but he signed in his capacity as Inspector General of Police, Rajasthan. On those facts, this Court had held that the Inspector General, having duly executed the contract, though it was not expressed to be on behalf of the Governor and though it was not in full compliance with the requirement of Article 299 (12), it was in substance an agreement executed by the Rajpramukh. In Union of India v. A.L. Rallia Ram, (1964) 3 SCR 164 : (AIR 1963 SC 1685), the tenders were accepted by the Chief Director of Purchases on behalf of the Government. The question arose : whether it was in compliance of Section 175 (3) of the Government of India Act, 1935 which is analogous to Art. 299 (1). He has signed in his official designation, though he did not state that he had executed it on behalf of the

Governor General. The Court read into it and found that in the light of the applications undertaken, it would be reasonable to hold that the contract was executed on behalf of the Governor General. Thus, it would be clear that when the Rules, duly approved by the Rajpramukh, authorised Mandi Committee represented by the Chairman and the Tehsildar to allot the plots of land to the traders and did, in fact, in accordance with that Rules allotted the same after receipt of the consideration and subsequent thereto, the Tehsildar, having been authorised to deliver possession and did in fact deliver the possession, the execution of the grant of the patta who was in conformity with the Rules and in substance on behalf of the Governor. Thus, the grant of the patta to the respondent was still born. Under these circumstances, the trial Court as well as the learned single Judge rightly held that the cancellation of patta of the appellant is bad in law and the grant of patta to the respondent was not valid.

8. The next question is : whether the failure to implead the necessary partie, i.e., the Mandi Committee, renders the suit as invalid ? Order 1 Rule 13, CPC envisages thus :

"13. Objections as to non-joinder or misjoinder - All objections on the ground of non-joinder or misjoinder of parties shall be taken at the earliest possible opportunity and, in all cases where issues are settled, at or before such settlement, unless the ground of objection has subsequently arisen, and any such objection not so taken shall be deemed to have been weived."

9. Though the respondent has pleaded in the written statement the non-joinder of necessary parties and an issue was raised, the trial Court had negatived it and the same was reiterated and argued before the learned single Judge. The learned single Judge also has held that though the Government may be a proper party to the suit, but since claim for possession is not being sought for against the Government or Mandi Community ? they are not necessary parties. The decree for possession granted by the trial Court may not bind the Government on that ground. However, the omission to implead the Government or the Mandi Committee as a co-defendant is not vitiated by Order 1, Rule 13, CPC. Therefore, the suit need not be dismissed on the ground of their non-joinder. As seen, these findings were allowed to become final, since that aspect of the matter was not argued before the Division Bench. The respondent waived that objection before the Division Bench. Thus, it is not open to appellants to raise that objection in this appeal. It is accordingly rejected.

10. The next question is : whether the decree for possession could be granted in favour of the appellant. It is true that the suit was not filed within six months under Section 6 of the Specific Relief Act. But, as seen earlier, the proceedings under S.145 were initiated at the instance of the respondent Ram Gopal and were pending for long time until the revision was dismissed by the High Court giving liberty to the appellant to file the suit for possession. Under these circumstances, the suit came to be filed immediately after the proceedings came to a terminus, no doubt, after issue of notice to the Government under Section 80 CPC and after expiry of 60 days time required under S.80 CPC. Under these circumstances, it must be concluded that in substance the suit is one under S.6 of the Specific Relief Act.

11. This Court has elaborately considered in Nair Service Society's case (AIR 1968 SC 1165) as to when the suit for possession would lie. The society was granted patta of 160 acres of land and thereafter the appellant Society was granted possession of the same. The respondent-plaintiff filed the suit alleging that the respondent was dispossesed on his 130 acres of suit land by the society and for recovery of the same. The trial Court decreed the suit. But, on the appeal in the High Court, the Society applied, on the last day of the hearing of the appeal, for amendment of its written statement. The High Court rejected the application as belated and decreed the suit against the Society. When the matter had come up to this Court, this Court eleaborately considered the entire controversy and held thus :

"No doubt there are a few old cases in which this view was expressed but they have since been either overruled of dissented from. The uniform view of the courts is that if S.9 of the Specific Relief Act is utilised the plaintiff need not prove title and the title of the defendant does not avail him. When, however, the period of 6 months has passed questions of title can be raised by the defendant and if he does so the plaintiff must establish a better title or fail. In other words, the right is only restricted to possession only in a suit under S.9 of the Specific Relief Act but that does not bar a suit on prior possession within 12 years and title need not be proved unless the defendant can prove one. The present amended Articles 64 and 65 bring out this difference. Article 64 enables a suit within 12 years from dispossession, for possession of immovable property based on possession and not on title, when the plaintiff while in possession of the property has been dispossessed. Article 65 is for possession of immovable property or any interest therein based on title. The amendment is not remedial but declaratory of the law. In our judgment the suit was competent."

A person in possession of land without other title has a devisable interest, and the heir of his devisee can maintain ejectment against a person who had entered upon the land cannot hold title or possession in any one prior to the testator. No doubt, as stated by Lord Macnagthen in Perry V. Olissold, Due v. Brnard (supra) lays down the proposition that "if a person having only a possessory title to land be supplanted in the possession by another who has himself no better title and afterwards brings an action to recover the land, he must fail in case he shows in the course of the proceedings that the title on which he seeks to recover was merely possessory". Lord Macnagthen observes further that it is difficult, if not impossible to reconcile Asher v. Whitlock with Doe v. Barnart and then concludes:

The judgment of Cockburn, C.J., is clear on the point. The rest of the Court concurred and if may be observed that one of the members of the Court in Asher v. Whitlock (Lush, J.) had been counsel for the successful party in Doe v. Barnard. The conclusion at which the court arrived in Doe v. Barnard is hardly consistent with the views of such eminent authorities on real property law as Mr. Preston and Mr. Joshus Williams. It is opposed to the opinion of modern text-writers of such weight and authority as Professor Maitland and Holmes, J. of the Supreme Court of the United States (see articles by Professor Maitland in the Law Quarterly Review Vols. 1, 2 and 4; Holmes, Common Law p. 244; Professor J. B. Ames in 3 Harv, Law Rev. 324 n.")

The difference in the two cases and which made Asher v. White prevails is indicated in that case by Mellor, J. thus :

"In Doe v. Barnard the plaintiff did not rely on her own possession merely, but showed a prior possession in her husband, with whom she was unconnected in point of title. Here the first possessor is connected in title with the plaintiff; for there can be no doubt that the testator's interest was devisable".

12. On these findings it was held that the suit, as laid, was maintainable.

13. In Chatturbhus Vithaldas Jasani's case, (AIR 1954 SC 236) the question arose: whether the violation of the execution of the contract in conformity with Article 299(1) of the Constitution renders the contract void or any consequential rights would flow ? On consideration thereof, this Court had held thus :

"The contention was that as these contracts were not expressed to be made by the President they are void. Cases were cited to us under the Government of India Acts of 1919 and 1935. Certain sections in these Acts were said to be similar to Article 299. We do not think that they are but in any case the rulings under Section 30 (2) of the Government of India Act, 1915, as amended by the Government of India Act of 1919 disclose a difference of opinion. Thus, Krishnaji Nilkant v. Secretary of State (AIR 1937 Bom 449) ruled that contracts with the Secretary of State must be by a deed executed on behalf of the Secretary of State for India and in his name. They cannot be made by correspondence or orally. Secretary of State v. Bhagwandas, (AIR 1938 Bom 168) and Devi Prasad Sri Krishna Prasad Ltd. v. Secretary of State, (AIR 1941 All 377) held they could be made by correspondence, Secretary of State v. O. T. Sarin and Company, (ILR II Lah 375) took an intermediate view and held that though contracts in the prescribed form could not be enforced by either side, a claim for compensation under Section 70 of the Indian Contract Act would lie".

Following the above view, it was held that :

"None of these provisions is quite the same as Article 299. For example in Article 166, as also in S.40(1) of the Government of India Act of 1935, there is a clause which says that "orders" and "expressed" in the name of the Governor or Governor-General in Council and "authenticated" in the manner prescribed shall be called in question on the ground that it is not an "order" or "instrument" etc., "made" or "executed" by the Governor or Governor-General in Council. It was held that the provisions had to be read as a whole and when that was done it became evident that the intention of

the legislature and the Constitution was to dispense with proof of the due "making" and "execution" when the form prescribed was followed but not to invalidate orders and instruments otherwise valid. Article 299 (1) does not contain a similar clause, so we are unable to apply the same reasoning here.

In our opinion, this is a type of contract to which section 230(3) of the Indian Contract Act would apply. This view obviated the inconvenience and injustice to innocent persons which the Federal Court felt in J. K. Gas Plant Manufacturing Co. Ltd. v. The King Emperor, (1947) FCR 141 at 156, 157) and at the same time protects Government. We feel that some reasonable meaning must be attached to Article 299(1). We do not think the provisions were inserted for the sake of mere form. We feel they are there to safeguard Government against unauthorised contracts. If in fact a contract is unauthorised or in excess of authority it is right that Government should be safeguarded. On the other hand, an officer entering into a contract on behalf of Government can always safeguard himself by having recourse to the proper form. In between is a large class of contracts, probably by far the greatest in numbers, which though authorised, are for one reason or other not in proper form. It is only right that an innocent contracting party should not suffer because of this and if there is no other defect or objection we have no doubt Government will always accept the responsibility. It not, its interests are safeguarded as we think the Constitution intended that they should be."

Ultimately, it was held at page 835 thus :

"In the present case, there can be no doubt that the Chairman of the Board of Administration acted on behalf of the Union Government and his authority to contract in that capacity was not questioned. There can equally be no doubt that both sides acted in the belief and on the assumption, which was also the fact, that the goods were intended for Government purposes, namely, amenities for the troops. The only flaw is that the contracts were not in proper form and so, because of this purely technical defect, the principal could not have been sued. But that is just the kind of case that Section 230(3) of the Indian Contract Act is designed to meet. It would, in our opinion, be disastrous to hold that the hundreds of Government officers who have daily to enter into a variety of contracts, often of a petty nature, and sometimes in an emergency, cannot contract orally or through correspondence and that every petty contract must be effected by a ponderous legal document couched in a particular form. It may be the Government will not be bound by the contract in that case, but that is a very different thing from saying that the contracts as such are void and of no effect. It only means that the principal cannot be sued; but we take it there would be nothing to prevent ratification, especially if that was for the benefit of Government. There is authority for the view that when a Government officer acts in excess of authority Government is bound if it ratifies the excess : see The Collector of Masulipatnam v. Cavaly Venkata Narrainapah (8 MIA 529 at 554). We accordingly hold that the contracts in question here are not void simply because the Union Government could not have been sued on them by reason of Article 299 (1)."

14. It was accordingly held that though the contract was not executed in the form prescribed under Article 299 (1), nonetheless the consequential benefits could be had under the contract since the

Government was the beneficiary and restitution could be ordered under Section 70 of the Contract Act. The same view was reiterated in D. G. Factory case, (AIR 1971 SC 141).

15. It would, thus, be clear that though the contract was not executed strictly in conformity with Article 299(1) of the Constitution but it is in conformity with the Rules approved by the Rajpramukh. The contract is not void, though it was not executed in terms of Article 299(1). Here, we may dispose of this case with an observation that initial allotment itself was not tainted with fraud or illegal consideration or any such circumstances which would render the allotment as having been made in fraud or abuse of power or with oblique consideration.

16. The allotment having been made after receipt of the consideration, the patta came to be issued in favour of the appellant and possession was accordingly delivered. Thereafter, he started construction of shops for carrying on the business. It is seen that the object of allotment is to regulate the sale or purchase of the agriculture produce in a systamatic manner. The Committee came to be constituted and directed to allot the lands as per the Rules approved by the Government. It is not the case that allotment was not made in conformity with the Rules. Under these circumstances, we hold that though the contract was not executed strictly in conformity with Article 299(1) of the Constitution, as held earlier, it was done in furtherance of duly approved Rules to elongate public purpose, i.e. market yard. Thereby, the possession delivered to the appellant is valid in law. In view of the findings as accepted by the learned single Judge, that the cancellation of the patta granted to the appellant is invalid, the possession remains to be valid. Under these circumstances, he having come in possession lawfully into the property and started construction, cannot be unlawfully dispossessed and no such procedure was adopted to dispossess him. Therefore, his suit for possession was clearly maintainable.

17. It is true that a Court may go into a question at any stage if it goes to the root of the matter to decide its validity. Therefore, there is no quarrel on the proposition of law. But in this case, the failure to implead the necessary parties does not go to the root of the matter; nor does the execution of the contract in conformity with Article 299(1) of the Constitution render the grant of patta void. Under these circumstances, the respondent could not rightly raise that objection for the first time in the High Court before the Letters Patent Bench. No doubt, this objection was raised and we are not concluding this question on this technical ground alone, but we are satisfied, on merits, that the cancellation of the patta to the appellant was not valid in law. Equally, the grant of patta, as a consequence, to the respondent, also is not correct in law.

18. It is true that if proper and necessary parties, are not impleaded, no relief could be granted to a party by operation of Order 1, Rule 13, CPC as laid by this Court in paragraph 21 in Gian Devi's case, (1995 AIR SCW 393) (supra). As held earlier, this issue was raised and the learned single Judge has upheld the decree of the trial Court. As stated earlier, the same question was not argued before the Division Bench. Under these circumstances, we do not find that the Division Bench was justified in upsetting the decree of the trial Court as confirmed by the learned single Judge.

19. Though Shri Bhim Rao Naik has contended that an opportunity may be given to compromise the matter seeking allotment of one plot each, learned counsel for the appellant has stated that his client is not present in the Court to seek instructions; under these circumstances, they could not make any statement in that behalf. In view of the fact that this was raised at the fag end of the arguments, as last minute desperate attempt, we cannot detain the judgment any further.

20. The appeal is accordingly allowed. The Judgment of the Division Bench stands set aside and that of the trial Court as confirmed by the learned single Judge stands restored. No costs.

Appeal allowed.