

Mohd. Amirullah Khan

Vs

Mohd. Hakumullah Khan

Civil Appeal No. 3028 of 1986

(B.N. Kirpal, U.C. Banerjee JJ)

23.03.1999

JUDGMENT

B.N. Kirpal, J.

1. The appellants filed a suit for declaration and possession in respect of Municipal House No. 1995 situated at Mohalla Hatai of Paithan District, Aurangabad. There was also a prayer for perpetual injunction restraining respondents Nos. 1 and 2 from interfering in the possession of the appellants/plaintiffs.

2. Briefly stated the averment in the plaint was that the father of the plaintiffs, Abdullah Khan, had three wives. The plaintiffs are the sons and daughters from the third wife. Abdullah Khan had bought the two adjacent houses in the name of plaintiff No. 1 and his brother one Nazifulla Khan. Nazifulla Khan died when Abdullah Khan was still alive. It was alleged in the plaint that thereafter Amirullah Khan, plaintiff No. 1, became the sole owner. It was further the case of the plaintiffs that defendant No. 1 was a son from the second wife of Abdullah Khan and defendant No. 2 was the daughter of the plaintiff's deceased brother. The said brother who was father of defendant No. 2 has died at the time when Abdullah Khan was still alive and the son from the second wife Lutfulla Khan, father of defendant No. 1, had also died earlier than Abdullah Khan. According to the plaintiffs, their mother brought to the house defendant Nos. 1 and 2 and looked after them and permitted them to reside in the house in question.

3. The mother of the plaintiffs died in 1955. Plaintiff No. 1 was not at Paithan at that time. In 1961, he got to know that the defendants were trying to assert themselves as owners of a part of the said house which had been re-numbered as 1995, the original number being 166. The plaintiffs thereupon filed a revision petition before the State Government contending that the property should be re-numbered to 166 instead of 1995. It was also prayed that the plaintiffs should be shown as owners and the defendants as occupiers. The State Government agreed to this contention and the name of the plaintiff No. 1 was shown as the owner of the premises in question. It is thereafter that in 1968 the suit was filed. In the written statement, the main contention which had been taken by the defendants was that the plaintiff No. 1 was only a benamidar of Abdullah Khan and he was not owner of the same by virtue of the sale deed in this favour. The defendants further claimed that they had been residing in that house since 1927 and they have a right to remain in possession thereof. On the pleadings before the court, the following issues were framed :

"1. Do the plaintiffs prove that they have become the owners of the suit premises in 1920 A.D. as alleged ?

2. Do the plaintiffs prove the dedegree as stated in para 6 of the plaint ?
3. Do the plaintiffs prove that the possession of the defendants on suit premises is permissive in nature ?
 4. Do the plaintiffs prove that entries of defendants in Municipal record are false and concocted ?
 5. Is the construction made on suit property is unauthorised and liable to be demolished ?
6. Do the defendants Nos. 1 and 2 prove that sale deed in favour of the father of plaintiffs in Benami Transaction ?
 7. Do the defendants Nos. 1 and 2 prove that they are the owners of the suit premises ?
 8. Is the court fee paid sufficient and the suit property valued ?
9. Are the plaintiffs entitled to the possession of the suit premises and the suit is within limitation ?
 10. To what relief the plaintiffs are entitled ?
 11. Are the plaintiffs entitled for mandatory injunction of demolition of the wall ?
 12. What order and what decree ?"

4. The trial Court decreed the suit. It had held that plaintiff No. 1 was merely a benamidar of his father Abdullah Khan. The court further came to the conclusion that under the law of inheritance, the children of the deceased sons of Abdullah Khan did not acquire any right in the property. It is the widow and the surviving children of Abdullah Khan who inherited the property and all of them had been impleaded as parties in the said suit. Decree for declaration was passed in favour of all the plaintiffs and the suit was decreed.

5. The lower appellate court dismissed the appeal of the defendants, but the High Court in second appeal reversed the same. The High Court *inter alia* came to the conclusion that because the case which was set up by the plaintiffs with regard to claiming the title to be derived from the sale deed was not correct as they were merely benamidar, therefore, the suit should have been dismissed. The High Court did not go into the question as to who would inherit the property after the death of Abdullah Khan.

6. In our opinion, the High Court fell in error in not going into the question as to in whom the title vested on the death of Abdullah Khan. It is not in dispute that all the legal heirs of Abdullah Khan were impleaded as parties to the suit. The surviving sons and daughters were impleaded as plaintiffs. Once it is found that plaintiff No. 1 was merely a benamidar of his father Abdullah Khan, then the question would arise that on the death of Abdullah Khan who would become the owner of the property. It is not disputed, and in our opinion rightly so, that the plaintiffs, namely, the surviving sons and daughters of Abdullah Khan would become the owners of the property in question. This

being so, the High Court fell in error in reversing the concurrent judgment of the courts below which had held the plaintiffs to be the owners of the property.

7. The High Court had also held that the defendants were in possession for a long time and that they had acquiesced to the said possession. This itself is stated to have created a right to possess the property in favour of the defendants and to that extent the defendants could resist the suit for ejection. We are unable to agree with this conclusion. The courts below had found that it is the plaintiffs' mother who had permitted the defendants to reside with her as a member of the family. This permissive occupation by the defendants could not in law convert into giving them any legal right to remain in the said property. The High Court had not found that by adverse possession, they had become the owners of the property. Even though the defendants do not acquire any right in the property, but considering the fact that the said defendants had been residing in the premises in question since 1927, it will be appropriate for this Court to mould the relief in such a way that undue hardship is not caused to them. We would like to make it clear that the High Court while hearing the second appeal ought not to have reappreciated the evidence and reversed the findings of fact arrived at by the lower appellate court.

8. While allowing the appeal and holding the appellants/plaintiffs to be the owner of the property in question and being entitled to the possession of the suit premises, we direct that the wife of defendant No. 1, who is defendant No. 2, should not be ousted from the property in question during her life time. Her children should be allowed to continue to remain there as long as she is alive and they should vacate the premises six months after her demise.

9. Parties to bear their own costs.