

JAMMU AND KASHMIR HIGH COURT

Radha Krishan Tickoo

Vs.

Bhushan Lal Tickoo

Second Appeal No. 14 of 1969

(Jaswant Singh and Anant Singh, JJ.)

26.08.1970

JUDGMENT

Anant Singh, J.

1. This is a second appeal by defendants 1 and 2 Pt. Radha Krishen Tickoo, and Pt. Vaid Lal Tickoo, against the Judgment, and the decree of the District Judge, Srinagar, dated 19-4-1964, decreeing without cost the plaintiff's suit for possession, but on payment of ₹ 1000 as compensation for improvements, over one half of a house after setting aside the judgment and decree, dated 19-11-1962 of the Sub-judge (Chief Judicial Magistrate) Srinagar, who had dismissed the plaintiff's suit.

2. The plaintiff-respondent also has filed before us cross-objections, asking for cost and mesne profits from the date of the suit. He has also challenged the order of the learned District Judge for payment of the compensation to the appellants.

3. The plaintiff, Shri Bhushan Lal Taploo, is the only son of Pt. Jia Lal Taploo, who was pro forma defendant No. 3, in the suit, and now respondent No. 3 in this appeal. Raja Ram was the father of Sridhar Joo Tickoo, the Original defendant No. 1, and Vaid Lal Tickoo defendant No. 2. Sridhar died after the filing of the suit, and his son Radha Krishen was since substituted in his place as defendant No. 1.

4. The house which is the subject-matter of the suit was admittedly an ancestral property of pro forma defendant No. 3, Jia Lal, having been acquired by his father. Jia Lal sold the entire house to Pt. Shridhar, since dead, and his brother Vaid Lal by a sale deed dated 23rd of Sawan 2001 equivalent to 7th August, 1944 for a consideration of ₹ 2000/-. The plaintiff filed the suit giving rise to the appeal on 26-6-1957 as a minor through his next friend with an averment that he was a coparcener with his father, having one half share in the house, sold by his father to the appellants and that the sale was without any legal necessity, and, therefore not binding on the plaintiff in respect of his half share. He therefore, sought a declaration to that effect, and asked for joint possession over his half share in the house with a further prayer for injunction restraining the

appellants from changing the condition of the house which is described in para 3 of the plaint.

5. The pro forma defendant No. 3, Jia Lal, did not appear at any stage to contest or support the plaintiffs suit.

6. The suit was contested only by defendants 1 and 2. They resisted it on the ground that the plaintiff was not even born on the date of the alienation, and, therefore, he had no share in the house sold. It was claimed that the house belonged exclusively to Jia Lal, and that he sold it as the Karta of his family for legal necessity, and for benefit of the estate, in that, the house being in a dilapidated condition beyond all repairs had to be sold so as to make some money out of it. They further asserted that they had spent about ₹ 4,000/- towards the improvements of the house by repairing it, and were, therefore, entitled to compensation in the event of the plaintiff's success.

7. The trial Court framed some 10 issues. The important issues are Nos. 1 and 2 bearing on the question if the plaintiff was born before the date of alienation of the house in dispute, entitling him to one half share in it.

8. Another issue, being issue No. 7, was, whether the sale deed was "for a legal necessity or to effect the repairs to the house to prevent it from being dilapidated."

9. Issue Nos. 8 and 9 are on limitation including adverse possession of the contesting defendants.

10. Issue Nos. 4, 5 and 6 relate to the claim of the contesting defendants regarding improvements said to have been made by repairing the house.

11. Issue Nos. 3 and 10 are only formal.

12. On behalf of the plaintiff, a number of documents were filed, and witnesses examined to show that the plaintiff was born on the 17th of Sawan 1999 Bk. equivalent to 1-8-42, about two years prior to the date of the alienation made on 7th August, 1944, entitling him to one half share in the house. The evidence consisted of a horoscope exhibit PI, said to have been prepared by PW Sham Lal Bayu, the family priest of the plaintiff and according to his evidence, he had prepared the horoscope at the time of the plaintiff's birth. The horoscope shows the date of the plaintiff's birth as 17th of Sawan 1999 Bk. In rebuttal of the evidence of Sham Lal Bayu, one Kashi Nath was examined on behalf of the defendants, and according to Kashi Nath, the horoscope was not in the handwriting of Sham Lal Bayu, for he claimed to have been familiar with his handwriting having worked with Sham Lal in the Dharmarth Department. The learned trial court did not accept the genuineness of the horoscope, and the evidence of Sham Lal Bayu, who came to prove it.

13. The other evidence regarding the plaintiff's being in existence before the date of the alienation consisted of four postcards, exhibits PW A, PW 3, PW 4 and PW 5. The writer of PW A is Shanker Nath a PW. It is dated 12 Magh 2001 and it is addressed to Jia Lal. It was written from Jammu, conveying by the writer to the addressee, his love to Bhushan Lal, the exact words being "Bhushan Lal Ko Bagalgiri".

14. The other three postcards, exhibits PW 3, PW 4 and PW 5, were written by Maheshwer Nath, another PW to Jia Lal, the plaintiffs father from Mansehra, District Hazara, where he had been working as an agent of Gilgit Transport Company. This Maheshwar Nath is a cousin of Jia Lal. The postcard exhibit P 3 bears the date as 12-2-43, PW 4 as 24-2-43 and P 5 as 18-5-43, all before the date of the alienation in 1944. In exhibits P 5 and P 4 there is a mention of the name of 'Bhushan Lal' the plaintiffs, conveying the writer's love or best wishes to him. In exhibit P 3, however, there is only an expression of the love of the writer to the "new born" (Naunihal). These postcards bear postal seals on them. The trial court, however, thought that these postcards could be manufactured after the alienation by Jia Lal in league with Shanker, and Maheshwar Nath the authors thereof.

15. A School certificate exhibit PW 1 dated 7-9-57 was also proved by a school teacher. PW Amar Nath Mirza of Hindu High School, Srinagar, showing therein the date of the birth of the plaintiff as 17th Sawan 1999 Bk. The trial court did not accept the authenticity of this school certificate either, mainly because it was issued by a private school, and because there was no evidence, how the plaintiff's age could come to be recorded in the school.

16. On behalf of the defendants, however, a record of the Municipality for the years from 1999 to 2001 BK was produced by DW Sayedud-din, a clerk of the Municipality, and Dr. Mohd. Sultan, Health Officer, wherein the birth of the plaintiff was not reported. The defendants also examined some witnesses like Som Nath, Kashi Nath and Gopi Nath who said that they had not seen the plaintiff ever before the date of alienation in the house of Jia Lal. Kashi Nath, is a purohit of the defendants, Gopi Nath a servant of some neighbor of the defendants and Som Nath lived in the neighbourhood of Jia Lal.

17. The learned trial Court accepted the defendants' version observing that the plaintiff was not born before the date of the alienation.

18. The learned District Judge, however, has set aside the findings of the learned trial Court in this regard and I think, quite rightly. He has quite carefully and exhaustively referred to all the evidence adduced by the parties on this point, and with the exception of the School Certificate, he has accepted all the plaintiff's evidence as quite convincing and genuine to prove the date of birth of the plaintiff as 17th Sawan 1999 Bk in preference to what the defendants' witnesses came to say. It is possible that Kashi Nath, Gopi Nath and Som Nath might not have noticed the coming in of the plaintiff in the house of his father. The municipal record for 1999 to 2001 might not have shown the birth of the plaintiff, not having been reported by any one to the Municipality. The learned District Judge has rightly pointed out that the plaintiff was very much in the land of living, and no municipal record was brought to show the date of his birth on any other date subsequent to the date of the alienation. The postcards, referred to above, are most important ones. It is too much to think that they could have been manufactured sometime after the date of the alienation. They all bear postal seals, and they are quite old ones having been written as far back as 1942 and 1943. There is no reason to think that these postcards were subsequently faked.

19. The learned counsel appearing for the appellants has, however, drawn our attention to the postcards Ex. p. 4, and Ex. p. 5, in which the writer has described himself as "Nath Ji." and it is said that there is no evidence to connect this 'Nath Ji' with Maheshwar nath the PW. But no question was asked of Maheshwar Nath about it. He has claimed that he is the author of these

postcards. Besides, exhibit P 4 Maheshwar Nath is written also in English I am in full agreement with the learned District Judge to treat these postcards as genuine.

20. The horoscope, exhibit P I, which has been proved by its author. Sham Lal Bayu, is enough to show the date of birth of the plaintiff as 17th of Sawan 1999 Bk. I agree with the learned District Judge that there is no reason to disbelieve the evidence of Sham Lal Bayu in preference to that of DW Kashi Nath, who came to repudiate the evidence of Sham Lal Bayu.

21. The learned District Judge, has however, ignored the evidentiary value of the School Certificate exhibit P 1, in deference to the arguments advanced before him on behalf of the defendants that it was not admissible under Section 35 of the Evidence Act, because the School which issued the certificate was not a Government, but only a private school. I do not think that he was quite correct in this regard. An entry in any record of even a private school as to the age of any student may be admissible, if the school is run under the Education Code framed by or under the authority of any Government of any State. An entry in a school register kept as required by the Bihar and Orissa Education Code was held admissible in *Bhim v. Magaram*¹, and in *Chunni Bai Madhoram v. Girdhari Lal Chunnial*², it was held that entries in application form for admission to a High School maintained under the rules of the Education Department are admissible. It is, however, another matter that no evidence was brought on the plaintiffs behalf as to the person on whose statement the plaintiff's date of birth came to be recorded in the school, and for this reason however, the value of the certificate may well be ignored.

22. The learned District Judge was quite right in holding on the basis of the other evidence, referred to above, that the plaintiff was born before the date of the alienation.

23. The learned counsel, Mr. Ishwar Singh, appearing for the appellants, has, however, contended that Jia Lal described himself in the sale deed as the sole owner of the house, and he could not do so, if the plaintiff was already born, but as it has been seen, the assertion of Jia Lal was not quite correct. It has also been adversely commented on the appellants behalf that Jia Lal who was the most competent person, has not been examined by the plaintiff to prove the date of his birth but, no adverse inference can be drawn from this fact alone. Jia Lal may have been reluctant to come to the witness box to repudiate his sale deed for more than one reason. There is absolutely no valid reason to interfere with the findings of the learned District Judge.

24. The property in question was the ancestral property of Jia Lal, and the plaintiff. They are Hindus governed by the Mitkshara School of Law. The plaintiff was

¹ AIR 1961 Pat 21

²150 Ind Cas 1007= AIR 1934 Nag 1

therefore, entitled to one-half share in the house property, there being no other coparcener in the family.

25. The next question for consideration is, if the sale by Jia Lal was for legal necessity or for the benefit of the estate made during the course of a prudent management. The two courts below have both found that there was no legal necessity for making the alienation. The learned trial Judge however, found that because the house was in a dilapidated condition, the alienation was for the benefit of the estate of the vendor. In support of his findings, he has relied upon the decision of the Bombay High Court in AIR 1922 Bombay 122. In that case, the house which had

been alienated was required by the municipality to be pulled down and it was under the duress of the order of the municipality that the vendor was held to have alienated it for the benefit of the estate. In the instant case there was no such necessity for Jia Lal to have alienated the house. The evidence adduced on behalf of the defendants to show that the house was sold by Jia Lal, because, it had become dilapidated, appears to be only an improvement, for, there is no such recital in the sale deed. On the other hand, a full description of the house as given in the sale deed, indicates, its existence, quite in order. Besides even if the house had become dilapidated, it cannot be said for that reason alone that its sale was the only remedy. The house has stood on an area of about 800 square feet. The main house is three storeyed, and there is another part of it, double storeyed, both made of bricks and stones with wooden roofing. As DW Som Nath has admitted, the financial condition of Jia Lal was good and that he was also running a cloth shop. If the house had to be saved from falling down, it could have been easily repaired by raising some loan by Jia Lal for its repairs even on the security of a part or the whole of the house. The remedy was not by a complete sale of it without even indicating, how the sale proceeds were to be utilized by making any better investment for the benefit of the family, consisting of Jia Lal and his son the plaintiff. It is not possible to hold that the alienation of the house by Jia Lal was for the benefit of the estate. The sale was, therefore, not binding on the plaintiff to the extent of his half share in it, and the land on which it stands.

26. The question of limitation was not canvassed before the two courts below, nor has it been canvassed before us. As a matter of fact, the question of limitation or adverse possession does not arise, for the plaintiff filed the suit during his minority through his next friend. He attained the age of majority when he filed his appeal before the learned District Judge.

27. Thus the appeal by the defendants has no merit.

28. Now I may consider the cross-objections of the plaintiff.

29. As to the question of compensation payable to the appellant towards the improvements said to have been made by them by repairing the house, both the two courts below have found in favour of the defendants. The learned trial Judge has fixed the amount of half of the compensation payable by the plaintiff, if his suit was to succeed, at ₹ 1500. But the learned District Judge, has slashed it down to ₹ 1000 and decreed the plaintiff's suit on payment of this amount.

30. The findings of the two courts below regarding the liability of the plaintiff for payment of compensation are concurrent. The difference is only with regard to the amount. Since the District Judge was the final court of facts, his findings with regard to the amount of compensation must be accepted. In equity, the plaintiff is liable to pay the compensation for his one-half share in the house towards the improvements made by the defendants in it.

31. The next question for consideration is, if the plaintiff is entitled to any decree for future mesne profits. No mesne profits appear to have been claimed as such by the plaintiff either in his plaint or in his memorandum of appeal or at the time of arguments before the District Judge.

32. The learned counsel, Mr. Raina, appearing for the plaintiff-respondent has, however, contended before us that mesne profits, pendente lite from the date of the institution of the suit

may well be awarded, even if there was no claim made for the same if once the possession of the defendants in respect of one-half of the plaintiff's share in the house has been found to be wrongful. His contention is that the relief for mesne profits from the date of the suit follows as a necessary corollary of the main relief for recovery of joint possession. This relief, according to him is covered under the residuary relief under issue No.10, which is "to what relief is the plaintiff entitled". The contention of Mr. Raina appears to be well founded. Section 2(12) of the Civil Procedure Code defines "mesne profits" of property as "profits" which the person in wrongful possession of such property actually received or might with ordinary diligence have received therefrom....."

33. Order 20, Rule 12, Civil Procedure Code provides for a decree for mesne profits, and according to clause 'C' the court at the time of the passing of the decree for recovery of possession can direct an enquiry as to the mesne profits from the institution of the suit till the delivery of possession to the decree-holder or the expiration of three years from the date of the decree whichever event first occurs.

34. It would appear that the cause of action for future mesne profits does not actually arise at the time of the filing of the suit and, therefore, a plaintiff suing for possession is not bound to ask for future mesne profits from the date of the suit in the event of his success. The power to grant future mesne profits is vested in the court decreeing the suit, even suo motu.

35. A Division Bench of the Oudh Chief Court in the case of *Mst. Chandrani v. Babu Singh*, reported in³ on the authority of a decision of the Judicial Committee in *Fakhar-ud-din Mohd. Ahsan v. Official Trustee of Bengal* reported in⁴ (being a mistake) has held,

"Whether the plaintiff does or does not claim future mesne profits the power to grant them vests in the Court. Subsequent profits, as the term implies, are profits accruing subsequent to the institution of the suit. There is no cause of action as regards such profits at the time of the filing of the plaintiff. It is by virtue of a special provision that such profits can be claimed or awarded. This

³ AIR 1946 Oudh 59

⁴(1882) ILR 8 Cal 179 (PC) (178)

is an exception to the general rule that the relief granted is confined to rights accruing before the date of the suit. The Legislature has expressly enabled the courts to grant such relief with the beneficent object of preventing unnecessary litigation.....

It is clear therefore, that it is not necessary to make a specific prayer in the plaintiff for future mesne profits."

36. In the case before the Judicial Committee, no doubt the question was one of interpretation of the decree, whether it awarded any future mesne profit, since the decree was silent on the point, though, the decree for possession was with 'wasilat'. The plaintiff does not seem to have asked for future mesne profits. The executing court awarded future mesne profits as well, and the Judicial Committee upheld its decision, observing that in view of the provision of the old Section 196 of Act 8 of 1859, which was similar to Order 20, Rule 12, Civil Procedure Code that "it was in the

power of the court, if it thought fit, to make a decree which should give the plaintiff 'wasilat' upto the date of obtaining possession".

37. In the Oudh case also, there was a claim made in the plaint for future mesne profits but the principle was laid down that future mesne profits can be granted even without there being any specific prayer to that effect in the plaint

38. In a suit by a member of a joint Hindu family for partition, to which Order 20, Rule 12, Civil Procedure Code does not apply, a Full Bench of the Madras High Court in *Basavayya v. Guravayya reported in*⁵ has held that although the preliminary decree for partition "does not direct an enquiry into profits subsequent to the date of the suit", it "does not preclude the parties from applying for, or the court from awarding such profits by its final decree."

39. It was also held in the same case that in a suit for recovery of possession of an immovable property from a person in possession without title, the plaintiff is entitled to recover mesne profits as defined in Section 2, Clause (12) Civil Procedure Code in the nature of damages.

40. In my opinion, a relief, though not specifically asked for in the plaint can still be granted by a court, even suo motu, if such a relief follows as a necessary corollary from the granting of another relief which has been in terms prayed for. The plaintiff can easily file another suit for future mesne profits when his title has been found. In equity and fairness he should not be driven to the necessity of filing such a suit, when the Court is competent to grant this relief in this very action.

41. It has been found that the plaintiff-respondent was wrongfully kept out of possession of his half share in the house by the defendants-appellants ever since the execution of the sale deed in 1944. The defendants-appellants even obtained a stay order from this Court as against the execution of the decree of the learned District Judge. He is surely entitled to future mesne profits from the date of the suit which is

⁵ AIR 1951 Mad 938 (FB)

26-6-1957, till the delivery of joint possession of his half share in the house and the land on which it stands. The amount of the mesne profits shall be determined by an enquiry by the trial court, and a final decree for the same shall be prepared on payment of the necessary court-fee on the amount found due.

42. As to the costs the plaintiff-respondent is clearly entitled to the costs of this appeal before us though not of his cross-objections, as they succeed only in part. He is also entitled to the costs of his appeal before the learned District Judge, and his suit before the learned trial Judge, when his claim has succeeded in full.

43. It is true that the costs are a matter in the discretion of a court but such a discretion has to be exercised judicially. The learned District Judge in refusing costs to the plaintiff-respondent, has given no reason whatsoever. If the plaintiff was required by the District Judge to pay a compensation of ₹ 1,000/- to the defendants before recovery of possession, he has been found entitled instead to mesne profits the amount of which may even exceed the amount of the compensation payable by him to the defendants. In this view of the matter, the plaintiff is entitled

to the usual costs not only of the appeal before this court but also of the two courts below. The amount of the costs and mesne profits as may be ascertained hereafter will be adjusted against the amount of compensation payable by the plaintiff to the defendants and the excess in favor of either party will be payable by the other party.

44. In the result the appeal fails and cross-objections succeed in part as indicated above. The judgment and the decree of the learned District Judge are modified accordingly.

Jaswant Singh, J.

45. I agree.

Appeal dismissed, Cross objections partly allowed.