

Om Prakash and anr Vs. Ashok Kumar and anr

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Court : Madhya Pradesh

Decided On : Jan-04-2013

Appellant : Om Prakash and anr

Respondent : Ashok Kumar and anr

Advocate for Pet/Ap. : Shri. Mohd. Ali

Judgement :

M.A. 1061/2003 1 HIGH COURT OF MADHYA PRADESH JABALPUR SINGLE BENCH: HON'BLE SHRI JUSTICE A.K. SHRIVASTAVA M.A. No.1061/2003Appellants:

1. Om Prakash S/o Shri Sitaram Jadiya 2. Ramesh Kumar, S/o Shri Gouri Shankar Jadiya Both residents of Khiriyia Ward, Beena, District Sagar. VersusRespondents:

1. Ashok Kumar, S/o Shri Aasan Das, R/o Shiv Ward, Beena, District Sagar.

2. State of Madhya Pradesh, Through The Collector, District Sagar (M.P.)
----- Appellants by -
Shri Mohd. Ali and Shri Vijay Shukla, Advocate Respondent No.1 by - Shri Ishtiaq Hussain, Advocate. Respondent No.2 by - Shri Rahul Jain, Govt. Advocate
----- Date of hearing:

12. 12/2012 Date of Judgment: /01/2013

ORDER

(/01/2013) This Misc. Appeal has been filed under Order 43 Rule 1 of the Code of Civil Procedure, 1908 against the judgment dated 12.03.2003 passed by learned Second Additional M.A. 1061/2003 2 District Judge, Sagar, Camp Khurai in Civil Appeal No.140-A/2002 whereby the appeal has been allowed and the case has been remanded back to learned Trial Court to decide the suit on merits.

2. In brief the suit of plaintiff (respondent no.1 herein this appeal) as pleaded in the plaint is that he is the Bhumiswami of the agricultural land in question, the description whereof has been mentioned in the plaint. According to the plaintiff, the defendants no.1 and 2 are the members of the Joint Hindu Family. In the revenue record, Khasra No.823 (old Khasra No.468/1) area 1.73 hectares situated in Village Beena Itawa has been recorded in the name of first defendant Om Prakash (appellant no.1 herein this appeal) while Khasra No.824 (old Khasra No.468/1), area 1.21 hectares has been recorded in the name of second defendant Ramesh Kumar (appellant no.2 herein this appeal). At the spot, both the khasra numbers are in the form of 'maidh' and the total area is 2.940 hectares upon which these two defendants are cultivating the land jointly. Further it has been pleaded by the plaintiff that on the basis of muscle power these two defendants are trying to grab the land owned by the plaintiff. First of all, in the year 1984 the second defendant Ramesh Kumar encroached upon certain part of land of which plaintiff is the Bhumiswami but on getting it demarcated, he delivered the possession of the encroached portion back to the plaintiff. Thereafter the M.A. 1061/2003 3 defendant no.1 Om Prakash by embedding the flag stones on plaintiffs land bearing survey No.829, area 1 acre illegally dispossessed the plaintiff. Eventually, on 1.7.1992 the demarcation and the measurement was made in Revenue Case No.5-A/2012 Year 1991-92 wherein the illegal possession of first defendant was found upon the plaintiffs land, area 0.42 hectares but he did not deliver the possession to the plaintiff, on the contrary on the basis of possession by showing him to be the Bhumiswami submitted necessary application in the Revenue Court for correction of the map. Further, it has been pleaded that the first defendant is also cultivating the crop and thereby causing monetary loss @ ` 900/- per annum to the plaintiff and, therefore, the plaintiff is entitled for the decree of compensation

@ ` 900/- per annum for three years. Hence, the present suit has been filed for possession of the disputed property on the basis of Bhumiswami right and also on the basis of the terms of the demarcation which was made in favour of plaintiff by the Revenue Court with a further relief that the defendants be directed to pay damages of ` 2700/- and for mesne profit @ ` 900/- per annum.

3. The first and second defendants filed a joint written statement and denied the plaint averments. In a special plea, it has been pleaded that by mistake in the demarcation proceedings, the land of plaintiff was found but the settlement which was made in favour of plaintiff has been M.A. 1061/2003 4 later on set aside. According to the defendants, their father bought the property in question vide registered sale deed although the land has been bought in the name of defendants. The State of M.P. however did not file any written statement.

4. The learned Trial Court framed necessary issues and after recording evidence of the parties dismissed it on merit by further holding that in view of the Full Bench decision of this Court Ramgopal Vs. Chetu 1976 JLJ 278. the suit for declaration of Bhumiswami right and possession, if it is filed, the same is maintainable in the Civil Court under Section 9 CPC, but since the plaintiff has not sought any relief of declaration of Bhumiswami right, therefore, the suit was held to be not maintainable.

5. Against the aforesaid judgment and decree of learned Trial Court, the plaintiff-respondent no.1 filed First Appeal before learned First Appellate Court. During the pendency of the first appeal, an application on 16.1.2003 for demarcation as well as for measurement of the land in question was filed under Order 26 Rule 9 CPC praying that by appointing Revenue Inspector Itawa Circle as Court Commissioner, the land in question be get demarcated. The learned First Appellate Court by the impugned judgment held that civil suit for possession is maintainable and by allowing the plaintiff's application under Order 26 Rule 9 CPC directed learned Trial Court to get the land demarcated and to pass a M.A. 1061/2003 5 fresh judgment after examining the Court Commissioner. In this manner, this Misc. Appeal has been filed by defendants 1 and 2.

6. The contention of Shri Mohd. Ali, learned counsel for the appellants is that since admittedly the suit for declaration of Bhumiswami right has not been filed and simplicitor suit is for possession of agricultural land has been filed, therefore, the remedy is available to the plaintiff under Section 250 of the M.P. Land Revenue Code, 1959 (for short, the 'Code'). According to learned counsel, simplicitor suit for possession is barred under Section 257 (x) of the said Code. In support of his contention, learned counsel has placed heavy reliance on the Full Bench decision of this Court Ramgopal (supra) and also on Munne Khan Vs. Abbas Khan 1989(1) MPWN 84 Lal Kunwar and others Vs. Shivnarain and another 1998 RN 8. and Dhudo Bai Vs. Bajirao and another 2004(4) M.P.L.J.

364. 7. On the other hand Shri Ishtiaq Hussain, learned counsel appearing for plaintiff/respondent no.1 argued in support of the impugned judgment and submitted that the Full Bench of this Court has categorically held that if a suit has been filed on the basis of title, the same is maintainable in the Civil Court and, therefore, the Full Bench decision Ramgopal (supra) is not against the plaintiff, rather the said decision has strengthened the case of plaintiff. Learned counsel has also placed reliance upon certain other M.A. 1061/2003 6 decisions of this Court Champalal Vs. Seva 1979(1) MPW N, Panch Chatriya Khatik Vs. Amanw atibai 1980(1) MPW N 204. Siphia Vs. Ramdasw a 1985 MPW N 22. and Hariram Lehrumal Sindhi Vs. Anandrao Narayanrao Mukati and others 1992 M.P.L.J.

373. It has been propounded by learned counsel for plaintiff/respondent no.1 that there appears to be a dispute about the demarcation of land in question and, therefore, rightly an application was submitted before learned First Appellate Court by the plaintiff praying to appoint a Revenue Inspector as Court Commissioner which has been rightly allowed and it has been directed to appoint competent Revenue Officer as Court Commissioner to get the land demarcated and measured directing the parties to file objections upon the Commissioner's report and further directed learned Trial Court to keep the Commissioner present for cross examination. Learned counsel submits that since the application under Order 26 Rule 9 CPC has been allowed, therefore, the civil Court is having jurisdiction. Hence, it has been prayed that this appeal be dismissed.

8. Having heard learned counsel for the parties, I am of the view that this appeal deserves to be dismissed.

9. On bare perusal of the plaint averments, it is gathered that on the basis of title the suit for possession has been filed by the plaintiff and in this regard paras 1, 3 and 4 are quite relevant. In para 6 of the plaint, the plaintiff has M.A. 1061/2003 7 averred that he had sent notices to the defendants. On bare perusal of the notice dated 21.9.1992 Ex. P/1 sent by plaintiff to the defendants by registered AD Post through his counsel, it is gathered that specifically it has been stated that plaintiff is the Bhumiswami of the land in question upon which defendants have illegally encroached upon and, therefore, the possession of the land in question be delivered to the plaintiff on the basis of his Bhumiswami right. In this notice, the amount of damages has also been claimed. The plaintiff has also filed copy of Aks Ex. P/2, copy of Khasra Panchshala of the year 1980-81 to 1988-89 Ex. P/3 and other revenue records Ex. P/4 and P/5 in order to demonstrate that he is the Bhumiswami of the land in question. The plaintiff in his testimony has also stated that he is the Bhumiswami of the land in question and he has been illegally dispossessed by the defendants. They delivered the possession to the plaintiff earlier, but again the land has been encroached upon by defendants. The defendants thereafter stated that the demarcation be made and accordingly plaintiff also filed an application for demarcation in the Revenue Court in which the land in question has been found in possession of defendants and their possession has been found to be illegal holding that the disputed land belongs to plaintiff's Bhumiswami right. However, when the defendants refused to deliver possession back to the plaintiff's land for which he is M.A. 1061/2003 8 claiming the Bhumiswami right, the present suit has been filed. Thus, according to me, the plaintiff on the basis of his title i.e. Bhumiswami right has filed the present suit for possession which cannot be said to be barred in any manner in civil Court.

10. True, in Full Bench decision Ramgopal (supra), the civil suit for declaration and possession was filed but in the same decision it has also been categorically held in para 10 by Full Bench of this Court that determination of the question of title is the province of the civil Court and unless there is any express provision to the contrary, exclusion of the jurisdiction of the civil Court cannot be assumed or

implied. Further it has been held that although a speedy remedy is provided under Section 250 of the Code to a Bhumiswami but he is not bound to avail that remedy and it is open to him to take recourse to the summary remedy under Section 250 or even without it straightway the plaintiff can bring a suit in the Civil Court for declaration of his title and possession. Further it has been held in para 17 that even if there has been a decision under Section 250 by a revenue Court, the party aggrieved may institute a civil suit to establish his title to the disputed land. Nowhere in this decision it has been held that simplicitor suit for possession is not maintainable if it has been filed on the basis of title and, therefore, according to me, learned counsel for the plaintiff/respondent no.1 was right in his submission that the M.A. 1061/2003 9 Full Bench decision of this Court in Ramgopal (supra) does not go against the plaintiff rather it strengthen the case of plaintiff. I may further add that the Full Bench decision Ramgopal (supra) has been affirmed and approved by the Apex Court twice. Firstly, in Rohini Prasad and others Vs. Kasturchand and another (2000) 3 SCC 66. and secondly in Hukum Singh (Dead) by LRs and others Vs. State of M.P. (2005) 10 SCC 124. In these two decisions also it has been held that the jurisdiction of civil Court is not barred under Section 257 in respect to question of title. In the case of Rohini Prasad (supra), a simplicitor suit for possession on the basis of title was filed which was decreed by High Court in Second Appeal although the mesne profits were not directed to be paid. The Supreme Court has categorically held that the suit for possession on the basis of title is not barred under Section 257 of the Code. The decision of Rohini Prasad (supra) was also taken into account in later decision by the Supreme Court in Hukum Singh (supra) and in para 8 of the said decision again the Supreme Court affirmed the Full Bench decision of this Court Ramgopal (supra). Hence, I am of the view that learned First Appellate Court rightly held that civil suit is maintainable and the findings recorded by learned Trial Court while deciding issue no.5 holding that civil suit was not maintainable was rightly set aside. M.A. 1061/200

11. On going through the impugned judgment and looking to the controversy, rightly the application under Order 26 Rule 9 CPC filed by plaintiff has been allowed by directing learned Trial Court to appoint a Revenue Officer as Court Commissioner to demarcate the land of the parties and to measure the same with

further directions mentioned in the impugned order. In the present case, earlier there were demarcation proceedings in the Revenue Court which ended in plaintiff's favour but, if such an application is filed in a civil suit for possession based upon title, filing of such application is not barred in Civil Court and the Civil Court can issue fresh Commission in order to provide justice to the parties and take out grains from the chaff. In this regard, I may profitably place reliance upon the Division Bench decision of this Court Keshav Singh Vs. Dhantobai and others 2009(1) MPJ.162 wherein in para 9 it has been categorically held that any report by Revenue Officer which could be collected before filing of the suit would have been evidence in favour of the plaintiff but there cannot be any bar in the facts and circumstances of the case to file fresh application in the Civil Court. For better understanding it would be fruitful to quote para 9 of the said decision which reads thus:- M.A. 1061/200

9. So far as question of demarcation by a Revenue Officer before filing of a suit is concerned, the same, in our considered opinion, shall not provide any solace to the defendants. Rule 9 of Order 26 relates to the directions by a Court. Any report by Revenue Officer which could be collected before filing of the suit would have been evidence in favour of the plaintiff but the commission report in the present set of the circumstances would not be evidence in favour of the plaintiff but would be an actual report of the spot.

. Even otherwise, learned counsel for the appellants has not assailed that part of the order. He has simply pressed the point that the suit is not maintainable which I have already held hereinabove that the same is maintainable.

12. Resultantly, this appeal fails and is hereby dismissed with costs. Counsel fee ` 2000/- if pre-certified. (A.K. Shrivastava) Judge rao

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