

Hashmat Husaln and ors. Vs. Inayatullah and ors.

Hashmat Husaln and ors. Vs. Inayatullah and ors.

SooperKanoon Citation : sooperkanoon.com/464511

Court : Allahabad

Decided On : Nov-26-1957

Reported in : AIR1958All706

Judge : D.N. Roy and ;J.N. Takru, JJ.

Acts : Specific Relief Act, 1877 - Sections 56

Appeal No. : Second Appeal No. 528 of 1950

Appellant : Hashmat Husaln and ors.

Respondent : inayatullah and ors.

Advocate for Def. : B.D. Gupta, Adv.

Advocate for Pet/Ap. : B.C. Saxena and ;G. Kumar, Advs.

Disposition : Appeal allowed

Judgement :

D.N. Roy, J.

1. This second appeal by the defendants came up before a learned single Judge of this Court and he has referred it to a Division Bench. It raises an interesting question of law as to whether the plaintiffs-respondents who claimed the disputed land as their private or family grave-yard would be entitled to seek relief for

injunction when they are out of possession and when the defendants have been in possession and have made certain constructions over part of the land.

The trial Court was of the opinion that that land is not a grave-yard and that in any event the present suit for injunction was not maintainable as the plaintiffs were clearly out of possession and they ought to have sought relief for possession, The lower appellate Court on the other hand, came to the conclusion that this was the family grave-yard of the plaintiffs and that for the protection of the graves from being desecrated which are thirty in number, the plaintiffs were entitled to a relief for injunction restraining the defendants from making in future any construction over this land. The lower appellate Court did not direct demolition of the constructions nor did it consider the question as to whether the plaintiffs ought to have prayed for relief for possession.

2. The suit which was filed in representative capacity under Order 1, Rule 8 of the Code of Civil Procedure was for all practical purposes not pursued as such, because from the record we are unable to find that the necessary notices were published or issued in accordance with the rules so as to confer upon the decision a representative character.

In any event having regard to the provisions of Order 1, Rule 9 of the Code of Civil Procedure, we have to consider the claims of the contending parties who are before the Court because Rule 9 provides that no suit shall be defeated by reason of the misjoinder or nonjoinder of parties and the Court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it. It is therefore upon that footing that we proceed to examine the matter.

3. The defendants contended that this property was the private property of Jarrar Ghaus defendant who had transferred it to the other defendants by a sale deed dated 7th of February, 1946. They contended that in the year 1936 the rights of Jarar Ghaus had been invaded and interfered with by Rahim Bux and others (not parties to the present suit), who claimed it to be a grave-yard and that this led to Suit No. 228 of 1936 by Jarar Ghaus against Rahim Bux and others and in that litigation Jarar Ghaus in Civil Appeal No. 269 of 1936 obtained the relief that it is

still the private property of Jarar Ghaus and he was entitled also to the other reliefs that were granted to him.

It appears that when that case was fought out there existed three graves over this land. During the pendency of the present suit a commission was issued and the commissioner prepared a report and map in which he indicated that there are at present thirty graves over it. That report was made the subject of criticism by the Courts below. But the view that was taken by the lower appellate Court was to the effect that, in fact, there exist thirty graves over this land.

The existence of so many graves over part of the disputed land might confer upon that area the nature and status of a grave-yard. But the question would still be, is it the private grave-yard of the plaintiffs? And the question would again be that even if it is the private grave-yard of the plaintiffs, can the plaintiffs get relief for injunction when they are admittedly out of possession and the defendants are in possession and have made construction over the open piece of land adjacent to the grave-yard?

It has been argued by Mr. B. D. Gupta that the plaintiffs being beneficiaries of a trust or wakf which the grave-yard must assume for its character, it was not necessary for the beneficiaries to seek relief for possession and that injunction was the proper relief. It has further been argued by Mr. Gupta that Section 56 (i) of the Specific Relief Act has got no application to the present suit and that equally efficacious remedy could not have been envisaged by his clients by making a relief for possession in the same proceeding.

4. To take up the second point first we have to refer to Section 56 (i) of the Specific Relief Act. That Section provides that an injunction cannot be granted when equally efficacious relief, can certainly be obtained by any other usual mode of proceeding except in case of breach of trust. The Section itself therefore makes an exception in the case of breach of trust and that is not a case which we have to consider here.

The argument which has been advanced upon the interpretation of Section 56 (i) of the Specific Relief Act by Mr. Gupta is that since the Section requires that when

equally efficacious relief can certainly be obtained by any other usual mode of proceeding, it would imply that there should be two proceedings, one of which might be affecting the other. We are of opinion that this argument is untenable. The point is covered by authority.

The earliest case that we have been able to lay our hands upon is the case of Bhramar Lal v. Nanda Lal, 18 Cal WN 545: (AIR 1915 Cal 23) (A). The question in that case was whether a suit was maintainable by a plaintiff who was out of possession and who sought relief for injunction only. A Bench of the Calcutta High Court, relying upon certain English cases, inclusive of the leading case of Davenport v. Davenport, (1849) 7 Hare 217 (B), laid down that the Court will not interfere by way of injunction when the plaintiff is out of possession unless there is some privity between the parties.

They went on to observe that in a case in which an action of ejectment was also pending, the Courts in India would probably grant an injunction. They also observed that it certainly seems to be wrong that when a plaintiff avers that the defendant is on his land without any right whatsoever, he should be allowed to sue for injunction when he ought to sue for recovery of the land. They were of the view that in a case like the one which they were dealing with relief can be obtained by the usual proceeding in ejectment and Section 56 of the Specific Relief Act would bar such a suit for injunction.

5. The next case which need be noticed is the decision in Kanakasabai v. Muttu, ILR 13 Mad 445 (C), where a Division Bench of the Madras High Court held that in a suit for a perpetual injunction to restrain the defendant from preventing the plaintiff from entering a certain house where it was alleged that the defendant had been in exclusive possession for more than six years before the suit, Article 120 of the Limitation Act, Second Schedule, applied to the suit and the suit was therefore barred by limitation.

Adverting to the question which had been raised in connection with the frame of the suit the learned Judges observed that they thought it right, although it was not necessary for their decision to state their opinion that as the plaintiff was out of possession, it was open to him to sue for such possession as he might be entitled

to; and that being so, the subordinate Court rightly decided that the exceptional form of relief by way of perpetual injunction was not open to the plaintiffs.

6. We now come to a single Judge decision of the Lahore High Court in *Santu v. V. Narain Singh*, AIR 1931 Lah 494 (D). There a suit was instituted against the defendant by some of the proprietors of the village for a mandatory injunction on the allegation that they had made certain buildings on the shamilat land which is used as a passage for all the village proprietors.

An objection was raised on behalf of the defendants that no suit for an injunction lay and the plaintiffs must sue for possession. Reliance was placed on Section 56 (i) of the Specific Relief Act. The learned Judge accepted the contention of the defendant and held that Section 56 (i) precluded the Courts from granting injunction in a case where the plaintiff was able to claim some other effective relief.

7. A Full Bench of the Lahore High Court in *Masjid Shahid Ganj v. Shromani Gurdwara Parbhandak Committee*, Amritsar, AIR 1938 Lah 369 (E), took a very much similar view. There a suit for declaration and injunction was filed on behalf of the Mahommedan community which could have sued for possession of a mosque in possession of non-Muslims. It was held that where a suit is filed on behalf of the Mahommedan community which could have sued for possession of a mosque in possession of non-Muslims even though the individuals of that community could not sue for such relief but the relief asked for was for a mere declaration and injunction and the suit was not maintainable. Again at page 386 of the report it was observed:

'Again according to Section 56, Clause (i) of the same Act (the Specific Relief Act) no relief by way of injunction (which is purely discretionary) can be granted when an equally efficacious relief could be obtained by other usual modes of proceeding.'

It was further observed that it was well established that when it was open to a person to sue for possession, he cannot be granted any relief in the shape of a mere injunction.

8. In *Abdul Nabi Sahib v. Bajan Sahib* : AIR1944 Mad221 , property had been in the possession of an agent during the subsistence of the agency. It was observed that it cannot be assumed that the moment such an agency is terminated legal possession of the property must be deemed to have passed back to the principal although the property continues to be in the enjoyment of the agent. It was observed that to maintain a suit for mere injunction without a prayer for possession, if the plaintiffs had not got possession of the property, it would not be sufficient to show that he has constructive possession; there must be actual possession.

It was further observed that where it was found that the defendant who was in possession of the property as the agent of the plaintiff and had renounced the agency, set up title in himself as donee by adverse possession and refused to surrender possession to the plaintiff and the plaintiff sued merely for injunction for restraining the defendant from interfering with the plaintiff's peaceful possession and enjoyment and did not claim possession, the prayer asked for was not maintainable.

9. The preponderance of opinion therefore veers round the proposition that where the defendant is sued as a trespasser, relief can be obtained by the usual proceeding in ejectment and Section 56 of the Specific Relief Act which provides for exceptional relief by injunction would come in the way of granting a decree for mere injunction. We are of opinion that the view taken in the aforesaid decisions laid down sound law.

10. Certain cases have been cited by Mr. B. D. Gupta to support his contention that in the case of a wakf of property which is in the nature of a grave-yard though it may be a grave-yard of a particular family, the plaintiffs as beneficial owners need not have to sue for possession and a relief for injunction would be permissible under law. The earliest case relied upon by him is the case of *Kazi Hasan v. Sagun Balkrishna*, ILR 24 Bom 170 (G).

There the plaintiffs sued to recover possession of certain lands alleging that they had been granted in wakf to their ancestor and his lineal descendants to defray the expenses for or connected with the services of a certain mosque; that their father

and cousins who were defendants to the suit and who were mutwallis in charge of the said property had illegally alienated some of these lands and had also ceased to render any service to the mosque, whereupon they the plaintiffs had been acting as mutwallis in their stead.

They therefore claimed to be entitled as such to the management and enjoyment of the lands in dispute. It was contended inter alia, that the plaintiffs could not sue in the lifetime of their father, the father not having transferred his rights to them. It was held that the plaintiffs were entitled to sue to have the alienations made by their father and cousins set aside and the wakf property restored to the service of the mosque.

It was further held that they were not merely beneficiaries but members of the family of the mutwallis and were the persons on whom on the death of the existing mutwallis the office of the mutwalli would fall by descent if indeed it had not already fallen upon them, as alleged in the plaint by abandonment and resignation. It was also held that wakf property cannot be alienated and any person interested in the endowment can sue to have alienations set aside and the property restored to the trust.

It is quite evident from the facts stated above that the form of that suit and the relief claimed therein were distinct from the form of the present suit and the reliefs claimed hereunder. That decision will therefore not be applicable to the present case. As we have already mentioned above Section 56 (i) of the Specific Relief Act itself makes exception in the case of breach of trust.

11. The other case cited by Mr. Gupta is the one in Noor Mahommad Saib v. Karima Bibi Ammal, AIR 1915 Mad 687 (1) (H). The report of the decision is a short one and the facts have not been clearly stated in it. What has been stated there is lower Courts seemed to have rightly held that the suit for possession of the mosque properties could not be maintained by the worshippers in their individual or collective capacity, as the plaintiffs had not established that by Mahomedan Law the worshippers as a body can be collective mutwallis of the mosque and the suit had been brought by the plaintiffs as trustees and not as merely belonging to and representing the community of worshippers. That decision

is hardly of any assistance for the disposal of the present case.

12. The third case relied upon by Mr. Gupta is an Oudh decision in *Sharf-uz-Zaman v. Sir Henry Stanyon*, AIR 1923 Oudh 80 (I). That again was a case of trust and the point involved was a point under S, 42 of the Specific Relief Act. In the peculiar circumstances of that case it was held that the trustees and not the beneficiary are entitled to possession so that he cannot ask for possession. The facts having been different, we are of opinion that the Oudh decision is also of no assistance for the decision of the present case.

13. *Indra Narain v. Ganga Ram* : AIR1955 All683 , which has next been relied upon was again a case where the proviso to Section 42 of the Specific Relief Act had to be considered and not a relief which comes within the mischief of Section 56 (i). This decision is therefore beside the point for our present purposes.

14. In interpreting the relevant provisions of Section 56 of the Specific Relief Act Mr. Gupta has cited three other cases before us. One is a Division Bench decision of the Bombay High Court in *Chunilal v. Surat City Municipality*, ILR 27 Born 403 (K). The other is a Full Bench decision of the Lahore High Court in *Montgomery Municipal Committee v. Sant Singh*, AIR 1940 Lab 377 (L), and the third case is a decision of this Court in *Municipal Board Mathura v. Dr. Radha Ballabh* : AIR1949 All301 .

In all these cases the question was as to whether Section 56 of the Specific Relief Act could be invoked where equally efficacious relief could or could not be obtained under the Municipalities Act. In the Bombay case, it was held that injunction prayed for could not be granted under Section 56 of the Specific Relief Act because equally efficacious relief could be obtained under Section 86 of the Bombay Act (3 of 1901).

It was also observed that Section 86 gave a remedy to the plaintiff but instead of resorting to it he filed the suit for an injunction. It was further observed that it was discretionary for a Court to grant an injunction and that discretion must be exercised judicially with extreme caution and only in very clear cases. In the Full Bench decision of the Lahore HighCourt it was observed that the question whether

an 'equally efficacious relief can certainly be obtained by any other usual mode of proceeding is a question of fact to be determined in each case on its own circumstances, and no hard and fast rule can be laid down in the matter; that the remedy provided in Section 84 of the Punjab Municipal Act applied only to those cases which arose under the act and was not meant to meet those which were outside the Act; and the prescribed remedy cannot therefore be considered as a usual mode of proceeding in cases where illegal taxation was objected to.

The decision in : AIR1949 All301 , by a learned single Judge of this Court was to the effect that injunctions are generally matters in the discretion of the Court but Section 56 imposes an absolute bar to the granting of an injunction in cases where equally efficacious relief can certainly be obtained by any other usual mode of proceeding except in case of breach of trust; that a person who is threatened by an illegal recovery of taxes may wait till such time as the money is realised from him in the hope that he will obtain adequate relief by means of a suit for damages or by means of a suit for refund of the amount illegally realised, but it could not be said that it would be an equally efficacious relief because an equally efficacious relief would be a relief which would put him in the same position in which he would have been if he had not asked for a relief for injunction; and that in such a case it cannot be held that an equally efficacious relief is otherwise possible and that therefore the suit is barred under Section 56 of the Specific Relief Act.

It is obvious that the facts and circumstances of those cases were entirely different and there were special laws under which the plaintiff could obtain equally efficacious remedy except in the Allahabad decision cited above where Section 56 (i) could not at all have been invoked.

15. Shorn of all embellishment the position in the present case would in our opinion, be this. The defendants are alleged to be trespassers over the land. They have made certain constructions over this land and are in possession over the same. In a case like this relief can be obtained by the usual mode of proceeding in ejectment. Consequently Section 56 of the Specific Relief Act which lays down that the exceptional relief by injunction should not be allowed, will be applicable.

16. There is another aspect of the matter which cannot also be overlooked; and it is this. The decree which has been granted by the lower appellate Court, to which the plaintiff has submitted, is in these terms :

'The result is that the judgment of the lower Court dismissing the suit is set aside and this much relief is granted to the appellants that the defendant-respondents will not make any construction over this land. They are restrained permanently from doing so. The land and the grave thereon will be protected in this manner.'

17. What therefore the lower appellate Court has granted to the plaintiffs is a decree for injunction restraining the defendants from making any future construction over this land. The decree did not provide that the construction which has already been made by the defendants over this land should be demolished and that the land should be restored to its original condition or that the defendants should withdraw themselves from this land. The result therefore will be that the defendants would continue to be in possession of the land and over the buildings which they have made thereon.

If the decree of the lower appellate Court were to stand and to continue, the effect of it would be that the defendants would remain in occupation of the land and the building and would not make any future construction over the land. That will not prevent the defendants from making any other use of the land, for example, by bringing the open bits not covered by graves into cultivation or by planting fruit trees or other trees over such bits of land. The decree would thus be in the nature of a *brutum fulmen* which cannot in our opinion be maintained.

18. Under the circumstances we are of the view that the decree granted by the lower appellate Court is erroneous and it must be vacated. We allow the appeal, set aside the decision of the lower appellate Court and restore that of the first Court with costs to the defendants in all the Courts.

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com