

Sitaram Vs. Ram Charan and ors.

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Court : Madhya Pradesh

Decided On : Apr-23-1994

Reported in : AIR1995MP134; 1995(0)MPLJ818

Judge : S.K. Dubey, J.

Acts : Evidence Act, 1872 Sections 35 and 79; Madhya Pradesh Land Revenue Code, 1959 - Sections 117; [Code of Civil Procedure \(CPC\) , 1908](#) - Order 13, Rule 1

Appeal No. : Second Appeal No. 186 of 1985

Appellant : Sitaram

Respondent : Ram Charan and ors.

Advocate for Def. : S.P.P. Shrivastava, Adv.

Advocate for Pet/Ap. : K.K. Lahoti, Adv.

Disposition : Appeal dismissed

Judgement :

S.K. Dubey, J.

1. This is defendant's second appeal who has lost in both the Courts below. The suit instituted by the plaintiff/ respondent No. 1, is for permanent injunction

restraining the defendant from interfering with his possession of the agricultural suit land consisted in Survey Nos. 46/2 and 47/1, admeasuring 2 Bighas and 4 Biswas and 1 Bigha and 18 Biswas respectively, situated at village Mahiba, Tahsil Ater, District Bhind. The defendant also claimed mesne profits for the damage caused to his crops. It is not in dispute that the plaintiff and defendant Nos. 1 to 5 were co-owners (Bhumiswamis) of the land situated in Survey Nos. 46 and 47 along with other land. The Tahsildar, under Section 178 of the M.P. Land Revenue Code, 1959, for short, the 'Code', in Case No. 17/71 -72-27, vide order dated 3-9-1973 (Ex. P/1), ordered partition of the land between the co-owners. Suit land comprised in Survey Nos. 46/2 and 47/1, fell in the share of the plaintiff, while the land comprised in Survey No.46/2 with other land fell in the share of defendant No. 1, Buddhe, father of appellant/defendant No. 6. The Patwari gave a report of partition on 24-4-1978 (Ex. P/2) which was partitioned at the spot on 18-8-1977 after dividing the land as directed by the order of partition. Defendant No. 6, taking advantage of the land being adjacent to the land of plaintiff, situated at Survey No. 46/2, tried to take possession and to cultivate it. Therefore, with the help of the Patwari, a demarcation was made between the two lands by raising a 'medh' (a mud wall) on 18-8-1977. The parties, on partition, on their specific areas land khasra numbers were entered in the record of rights, i.e., the Records of khasra in respect of their title as bhumiswami and in possession. The plaintiff cultivated the land by sowing the crop of Bajra in Samvat 2034, but the defendant, by encroaching, damaged the crop. A Police report of this was made a criminal case was registered before the A.D.M.. at No. 339 of 1978.

2. Thereafter, on 7-11-978, the plaintiff instituted the suit for permanent injunction and mesne profits. The defendants denied the claim of the plaintiff. Defendant No. 6, i.e. the appellant, came with the defence that on 4-7-1976, the plaintiff gave the land on lease and he is sub-tenant since then on payment of Rs. 4/- per year as land revenue. The lease so granted was for a period of eight years. To support his defence, he produced a copy of khasra entry for the year 1978-79 (Samvat 2025), issued by the Patwari (Ex. D/1) wherein, in Col. 2, after plaintiff's name, Sitaram is entered as permanent sub-tenant. Ex. D/2 is the copy of Khasra Panchsala wherein the entry for the year 1979-80 is shown as in Ex. D/1.

3. The trial Court disbelieved the defence and also discarded Ex. D/1 and D/2 as the documents were not duly proved by examining the Patwari. The trial Court found that the defendants have admitted the possession of the plaintiff over the land of Survey No. 47/1, but they deny the possession of the plaintiff over Survey No. 46/2. Therefore the dispute only remained with respect to land Comprised in Survey No. 46/2. The trial Court held that the plaintiff as co-owner was in possession and after partition, he is in possession as sole-owner over the suit land of the two Survey numbers and thus decreed the suit for permanent injunction, but did not grant damages as mesne profits. Defendants No. 6, aggrieved of the judgment and decree, preferred an appeal.

4. The appellate Court, after reappraisal of the evidence in detail and the genuineness of the two documents (Exs. D/1 and D/2) confirmed the findings of the trial Court and dismissed the appeal holding that the two documents were not duly proved, the story set up of sub-tenancy is false and contradictory to the defence evidence produced by defendant himself. Hence, this second appeal was admitted by this Court on the following two substantial questions of law:

'1. Whether the certified copies of the public records coming from proper custody of Patwari have wrongly been excluded from consideration, vitiating the judgment of the lower appellate Court?

2. Whether the documents allowed to be exhibited without objection ,at the time of recording evidence were wrongly excluded from consideration from the evidence at a later stage, vitiating the judgment of the lower appellate Court?'

5. Shri K.K. Lahoti, Counsel for the appellant and Shri S.S.P. Shrivastava with Shri Deepak Shrivastava, Counsel for Respondent No. 1 are heard.

6. It was contended on behalf of the appellant that the findings of the two courts are not binding as the findings recorded are illegal and perverse as the documentary evidence was ignored. Under Section 117 of the Code, there is a presumption of the entries in Revenue records being correct until the contrary is proved and it was not obligatory on the defendant/appellant to examine the Patwari to prove the entries contained in Ex. D/1 and D/2 as the said documents

were admitted in evidence and were marked as exhibits. The entry in copies of Khasra issued by Patwari was admissible under Section 35 of the Evidence Act which was sufficient evidence to prove sub-tenancy and for that, production of rent receipt was not necessary. The two courts below ought to have raised a presumption under Section 79, Evidence Act that the certified copies of the documents are genuine and also that the Patwari signed Ex. D/1 and Ex. D/2 in his official capacity in discharge of his official duties. It was also contended that the suit for permanent injunction was not maintainable as the plaintiff was not in possession. Shri Lahoti, to support his contentions, pressed into service the decisions in *Dilbagrai v. Sharad Chandra* 1988 Jab LJ 560 : (AIR 1988 SC 1858); *Shikharchand v. D.J.P. Karini Sabha*, AIR 1974 SC 1178; *Kranti v. Punia* 1988 RN 171; *Bharat Singh v. Gyan Singh* 1970 RN 426; *Madho v Chhotelal* 1960 RN (SN) 26; and *Chandanmal v. Chouthmal* 1963 Jab LJ (SN) 290.

7. On the other hand, the learned counsel for the respondent contended that the appellant/defendant came with the case that he was in possession prior to 1976 and in the year 1976, the suit land was given to him on Patta, but neither any entry in the Revenue records, nor any receipt, nor any lease agreement, nor even any oral evidence was produced to prove the said fact. This theory of grant of lease is improbable also as the land itself was partitioned in the year 1977 and thereafter was demarcated. So, how the land could have been granted on lease in the year 1976? The khasra entries are spurious and not genuine. Moreover, the said entries were got prepared after the institution of the suit. Therefore, such document cannot be taken into account for considering the possession of the defendant over the suit land. Marking of exhibit on a document does no dispense with the proof. As the documents were not duly proved by the Patwari, therefore, no question arises of raising a presumption, particularly when the genuineness of the documents is in question which are post item mortam and as such, were not admissible in evidence under Section 35 of the Evidence Act. The findings arrived at after appreciating documentary and oral evidence cannot be interfered with in second appeal. To support the contentions, learned counsel placed reliance on *S.T. Khimchand v. V. Satyam*, AIR 1971 SC 1865; *Vishwa Vijay v. Fakhrul Hassan*, AIR 1976 SC 1485; *State of Bihar v. Radha Krishna Singh*, AIR 1983 SC 684; *Gani Khan v. Amnabhai* 1983 RN 213; *Rajkumar v. Desai* (1981) 2 MPWN

1072 and Hazara Singh v. Attar Kaur, AIR 1976 Punj & Har 24.

8. After hearing counsel on both sides and on going through the record, I am of the opinion that this appeal has no merit. No doubt, under Section 117 of the Code, there is a presumption of correctness of all entries made in land records under Chapter IX of the Code unless the contrary is proved. But, this presumption is confined to land records prepared in the manner prescribed. Under the Code, certain records are finalised after inviting objections, such as records of rights, Nistar Patrak, Wazib-ul-arz etc. and in such cases, there is a higher presumption of correctness while certain entries are made by the Patwari on the basis of his observation on the site or on information and for such entries, the presumption is weaker, notwithstanding it is there unless it is rebutted. In the second category of the cases, too, there should be an evidence that the copy issued by the Patwari is signed by him in his official capacity and the entry was made and the copy issued in the manner prescribed in the form provided by law. Therefore, the defendant was bound to lead evidence to prove that the entry in the Khasra was made according to the manner prescribed in the rules and also the copy so issued. Then only, under Section 79 of the Evidence Act, the inference could have been drawn that the document is genuine and not spurious. Section 35 of the Evidence Act requires the following conditions to be fulfilled before a document can be held to be admissible under this Section. (1) The document must be in the nature of an entry in any public or other official book, register or record, (2) it must state a fact in issue or a relevant fact and (3) the entry must be made by a public servant in the discharge of his official duties or in performance of his duties especially enjoined by the law of the country in which the relevant entry is kept. (See *State of Bihar v. Radha Krishna Singh*, (AIR 1983 SC 684) (supra). In the present case, there is no evidence that the entries were made by the Patwari in Khasras and Khatoni in the manner prescribed under the rules and he issued certified copies. In such circumstances, particularly when the evidence is of after the commencement of the lis, to eliminate the element of concoction, the Patwari ought to have been examined to prove the correctness of the entries made by him.

9. It is well settled that mere marking of a document as an exhibit does not dispense with its proof. See the decision of the Supreme Court in *S.T.*

Khimchand's case (AIR 1971 SC 1865) (supra) and a decision of the Punjab and Haryana High Court in Hazara Singh's case (AIR 1976 Punj and Har 24) (supra). In the present case, it is an admitted fact that the suit land was partitioned and fell into the share of the plaintiff who was put in possession on his specific share of the land, which was demarcated by raising a mud-wall, Therefore, when the Patwari who demarcated the land, how he made the entry in favour of the appellant is indeed not known. Whether any notice was issued of this fact to the plaintiff, that also not on record. Therefore, in the facts and circumstances of the case, it was essential to examine the Patwari to prove the entries of Ex, D/1 and Ex. D/2. Even assuming for the argument's sake that the entry is genuine, but that evidence has no relevance to the case, as it is well established general rule of practice that in any litigation, the rights and obligations of the parties are adjudicated as they obtain at the commencement of the lis. See Ramesh Kumar v. Kesho Ram, 1992 AIR SCW 336 : (AIR 1992 SC 700).

10. In the case of Rameshwar v. Jot Ram AIR 1976 SC 49, the Supreme Court, following the earlier decision in the case of P. Venkateswarlu v. Motor & General Traders AIR 1975 SC 1409 has ruled that it is basic to our processual jurisprudence that the right to relief must be judged to exist as on the date of a suit or institution of the legal proceedings. This is an emphatic statement that the right of a party is determined by the facts as they exist on the date the action is instituted. Granting the presence of the such facts, a party instituting the proceeding is entitled to its enforcement. Later developments cannot defeat his right. See, also a Division Bench decision of this Court in the case of Chandra Kumar v. Jaidev Nainani 1994 (1) Vibha 203.

11. It is not a case of exception to the rule where the defendant came with a defence of subsequent event. In such circumstances, even assuming that the documents were admissible in evidence, but admissibility is one thing and its probative value quite another -- these two aspect cannot be combined. A document may be admissible and yet may not carry any conviction and weight or its probative value may be nil. See, Radha Krishna Singh's case (AIR 1983 SC 684) (supra). In the circumstances, as the two courts have come to a finding that the Revenue entries of Exs. D/1 and D/2 are not genuine, by taking them to be

fraudulently or surreptitiously obtained, the presumption was not rightly raised by the two courts and this finding is arrived at by the two Courts after appreciating the material on record and is a finding of fact which cannot be interfered in second appeal. See Vishwa Vijaya's case (AIR 1976 SC 1485) (supra).

12. Coming to the last contention of Shri Lahoti about the maintainability of the suit, suffice it to say that the suit for perpetual injunction restraining the defendant from interfering with the possession under Section 34 of the Specific Relief Act was founded on the title of the plaintiff which is clear from reading of the entire plaint and not merely the relief portion and the fact that the plaintiff was found in possession of the land and his title was also found to be proved by the two courts below. The suit for permanent injunction was maintainable and was not liable to be dismissed. If any authority is needed, See, Corporation of Bangalore City v. M. Papainah, AIR 1989 SC 1809 in which it has also been held that finding arrived at after interpreting the Revenue record, is a finding of fact and cannot be interfered in second appeal by the High Court.

13. In the result, the appeal has no merit and it is dismissed with costs, Counsel's fee, Rs. 250/- if pre-certified.

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