

Bahor Singh Vs. Devi and ors.

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Court : Madhya Pradesh

Decided On : Aug-05-1999

Reported in : 2000(1)MPHT468; 2000(1)MPLJ126

Judge : S.S. Jha, J.

Acts : Madhya Bharat Zamindari Abolition Act, Savat 2003 - Sections 4 and 41; Madhya Pradesh Land Revenue Code, 1959 - Sections 237 and 237(2); [Code of Civil Procedure \(CPC\), 1908](#) - Sections 96 and 96(2) - Orders 8, Rules 1, 3, 4, 5, 9 and 10 - Order 15, Rules 1 and 2(1)

Appeal No. : Second Appeal No. 307/95

Appellant : Bahor Singh

Respondent : Devi and ors.

Advocate for Pet/Ap. : K.S. Shrivastava, Adv.

Disposition : Appeal dismissed

Judgement :

S.S. Jha, J.

This appeal is admitted on the following substantial questions of law :--

(i) 'Whether the party having not chosen to contest the suit in the trial Court and has a right of appeal under Section 96 C.P.C. ?

(ii) Whether in view of the provisions of Order 8 Rule 10 C.P.C. no appeal could be preferred by the defendant ?

(iii) Whether the lower appellate Court had made out a new case against the pleadings of the parties ?

(iv) Whether the decree passed by the lower appellate Court is against the provisions of law and is perverse ?'

2. Before adjudicating upon the questions of law, facts giving rise to this appeal are necessary :

The plaintiff-appellant has filed a Civil Suit that the suit land bearing Survey No. 18, having an area 1.872 hectare situated in village Padrat, Tehsil and District Vidisha is held by him as Bhumiswami. The plaintiff pleaded that the suit land originally belonged to his father Karan Singh and cousin Veersingh. The plaintiff is using this land continuously for grazing his cattle. The suit land can be used by the plaintiff only for agricultural purpose. The plaintiff's ancestors were holding the suit land on Zamindari and after the abolition of Zamindari under the Madhya Bharat Zamindari Abolition Act, the suit land was recorded as Khudkasht. The land was partitioned prior to abolition of Zamindari. After partition, the suit land had fallen in the share of the plaintiff. Two years prior to filing of the suit, the plaintiff has cultivated over two bigha of the suit land and harvested the crop. Defendant No. 2-State of Madhya Pradesh without inviting any objection or proclamation allotted the suit land to village Chowkidar on lease. This lease is of service land. The plaintiff also claimed his title through adverse possession.

3. The defendant No. 2-State of Madhya Pradesh was proceeded ex parte in the trial Court. However, defendant No. 2 Devi filed his written-statement and denied the claim of the plaintiff and pleaded that any share of the Government land in partition will not confer any right, title or interest to the plaintiff. The Government after following rules has allotted lease of the suit land to the ex Chowkidar.

4. The trial Court decreed the suit of the plaintiff. However, in appeal by the defendant-State of M.P., the suit was dismissed holding therein that the suit land on the date of abolition of proprietary rights was recorded as 'Charnoi' and the 'Charnoi' land had vested in the State under Section 41 of the Madhya Bharat Abolition of Zamindari Act.

5. Now I proceed to decide the question of law No. (i).

Any party may not choose to contest the suit in the trial Court, if on perusal of the plaint, the party had a feeling that the suit is liable to fail. But once an adverse order is passed *ex parte*, the aggrieved party has a right to file an appeal. Section 96 of the Code of Civil Procedure provides that an appeal shall lie from every decree passed by any Court exercising original jurisdiction, to the Court authorised to hear appeals from the decisions of such Court. Sub-section (2) of Section 96 C.P.C. also provides that an appeal may lie from an original decree passed *ex parte*. The decree passed by the trial Court was *ex pane*. Therefore, under Section 96(2) C.P.C., *ex parte* decree can be challenged. Accordingly, even if a party has not chosen to contest the suit in the trial Court it has a right of appeal under Section 96 C.P.C.. Substantial question of law No. (i) is answered accordingly.

6. For deciding the substantial question of law No. (ii) an interpretation of Order 8 Rule 10 C.P.C. is necessary. Order 8 Rule 10 C.P.C. is reproduced below :--

'Where any party from whom a written-statement if required, fails to present the same within the time permitted or fixed by the Court, the Court shall pronounce judgment against him, or make such order in relation to the suit as it thinks fit.'

It thus provides that where any party which has to file written-statement under Order 8 Rule 1 or Rule 9 C.P.C. fails to present written-statement within time permitted or fixed by the Court, the Court shall pronounce judgment against it or make such order in relation to the suit as it thinks fit. Thus the consequence of non-filing of written-statement is that the Court shall proceed *ex parte* against the party who has failed to present written-statement and pronounce judgment on the plaint-averments or it may pass such order as it thinks fit. Thus discretion is left to

Court either to pronounce judgment or proceed with the case as it thinks fit.

7. For further considering the provisions of Rule 10 of Order 8 C.P.C., it is necessary to see the provisions of Rule 5 of Order 8 C.P.C. It provides that every allegation of fact in the plaint is to be denied or admitted specifically. On failure of defendant to file pleadings, it shall be lawful for Court to pronounce judgment on the basis of facts contained in the plaint, but the Court may in its discretion, require any such fact to be proved.

8. Order 15 Rule 1 C.P.C. provides that where at the first hearing of a suit it appears that the parties are not at issue on any question of law or of fact, the Court may at once pronounce judgment. Sub-rule (1) of Rule 2 of Order 15 C.P.C. provides that where there are more defendants than one, and any one of the defendants is not at issue with the plaintiff on any question of law or of fact, the Court may at once pronounce judgment for or against such defendant and the suit shall proceed only against the other defendants.

9. Thus, from the scheme of the Code, the discretion is left to the Court either to pronounce judgment or to proceed with the case as it thinks fit. Rule 5 of Order 8 C.P.C. provides that the Court may in its discretion direct a party to prove its case. However, any judgment and decree passed under Order 8 Rule 10 C.P.C. for non-filing written statement is subject matter of appeal and an appeal lies against such judgment and decree. Question of law No. (ii) is answered accordingly.

10. Learned counsel for the appellants has relied upon a Supreme Court's decision in the case of Badat & Co. v. East Indian Trading Co. (AIR 1964 SC 538) and invited attention to the provisions of Order 8 Rules 3, 4 and 5 C.P.C.. The provisions have been amended in the year 1977. Therefore, the authority relied upon by the learned counsel for the appellants is of no assistance.

11. As regards question of law No. (iii), learned counsel for the appellant submitted that the first appellate Court has made out a new case against the pleadings of the parties, Counsel for the appellant has invited attention to the plaint and submitted that the plaintiff has pleaded that the suit land is surrounded by the lands held by the plaintiff's father Karansingh and his cousin Veersingh and the plaintiff is using

the suit land for grazing his cattle from past many years. The plaintiff alone is competent to carry on agricultural operations over the suit land. This land belonged to Zamindar of plaintiff s ancestors. The plaintiff pleaded that he is in continuous possession over the suit land, therefore, he has acquired Bhumiswami rights.

12. These facts were denied by the defendant No. 1 in his written-statement. The defendant has denied the rights of the plaintiffs.

13. The plaintiff has filed documents Exs. P-1, P-2 and P- 3 in which the suit land is recorded as 'Charnoi'. The plaintiff has also examined himself as P.W. 1 and P.W. 2 Dilip Singh, both the witnesses have stated that the disputed land had fallen in the share of the plaintiff in a partition.

14. The documents Ex. P-1 to Ex. P-3 filed by the plaintiff demonstrate that the land was recorded as Charnoi. The documents Ex. P-4 and Ex. P-5 relate to Khasra entries of Samvat 2009 and 2008 respectively, in which the land is recorded as 'Charnoi'. Ex. P-6 relates to Khasra of the year 2007 in which the land is recorded as 'Charnoi'. Once the land is recorded as 'Charnoi' unless orders are passed by Competent Authority, changing its nature, the land shall remain as 'Charnoi'. No document or order of the Competent Authority is filed to demonstrate that the nature of the land has been changed.

15. Section 237 of the M.P. Land Revenue Code, 1959 provides that the Collector shall set apart land for exercise of Nistar rights. Therefore, under Section 237(2) of the Code, land reserved for pasture, grass-bir or fodder reserve can be changed. Even otherwise, under Section 4 of Madhya Bharat Zamindari Abolition Act the land had vested in the State.

16. On these facts, the first appellate Court has not made out any new case against the pleadings of the parties. The plaintiff himself has come up with the case that the land is recorded as 'Charnoi'. He has also pleaded that the land in dispute belonged to his ancestors who were Zamindars. Therefore, Section 4 of the M.B. Zamindari Abolition Act will apply to the present case.

17. In the facts and circumstances of the case, it is held that the first appellate Court has not made out any new case against the pleadings of the parties.

18. As regards adverse possession, the burden is upon the plaintiff to plead and prove his possession. But in the present case, possession is not proved by the plaintiff. The judgment sought to be relied upon by the learned counsel for the appellant in the case of Ramu v. Government of M.P. (1988 RN 152) is of no assistance to the appellant.

19. As regards question of law No. (iv) the decree passed by the first appellate Court is according to the provisions of law and is not perverse. Question of law No. (iv) is answered accordingly.

20. In the result, the appeal has no merit and is dismissed with costs.

Counsel's fee as per schedule.

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