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Court : Rajasthan

Decided On : Oct-30-1981

Reported in : 1981WLN(UC)335

Judge : M.C. Jain, J.

Appeal No. : S.B. Civil Second Appeal No. 130/1971

Appellant : Nabu

Respondent : Gani and anr.

Advocate for Def. : Mr. H.M. Parekh

Advocate for Pet/Ap. : Mr. S.C. Bhandari, Mr. Parekh

Disposition : Appeal dismissed

Judgement :

M.C. Jain, J.

1. This is an appeal by defendant No. 2 against the judgment: t and decree of the learned District Judge, Bikaner dated November 7, 19,70 whereby the appeal of the present appellant against the judgment and decree of the, learned Civil Judge, Ratangarh dated May 19, 1967 was dismissed and the decree passed by the learned Civil Judge in favour of the plaintiff-respondent Gani for possession of the

disputed Guwari, for injunction and for compensation of Rs. 50/-was maintained.

2. The plaintiff Gani instituted a suit for possession in, respect of the disputed 'Guwari', alleging himself to be the owner thereof. It was averred that the disputed Gawari belonged to his grand-father Kadarkhan. Kadarkhan had no male issue. Kadarkhan's brother Hussainkhah's son Idukhan went in adoption to Kadarkhan. Kadarkhan had a daughter Goga. The plaintiff Gani is the son of Idukhan. Smt. Goga became widow in her young age, so she left her in-laws place Darasar and started living at Rajaldesar with her brother Idukhan. It was stated that Smt. Goga lived in the 'Gawari' from S.Y. 1970 till her death in S.Y. 1981 and plaintiffs' father Idukhan died in the St. Year 2000. In the settlement of S.Y. 1979-80, the 'Gawari' was recorded in the name of Smt. Goga. There was one 'zhupa' and a kachha 'sal' in the 'Gawari'. The 'sal' fell down some 6-7 years back during the rains. The plaintiffs' case is that Mst. Halima wife of the appellant, was the Vice-Chairman of the Municipal Board. The defendant No. 2 husband of Halima was put into possession of the 'Gawari' on 25-11-J 964. The plaintiff was forcibly dispossessed from the 'Gawari' by the defendant No. 1, representing that patta, has been granted to defendant No. 2 Nabu. It was all done illegally by misuse of office or the authority. The plaintiff also claimed to be the owner of the 'Gawari' by adverse possession.

3. The Municipal Board in its written statement denied all the averments made in the plaint including the plaintiff or his predecessor's possession over the 'Gawari'.

4. The defendant No. 2 in his written statement, admitted that Idukhan was the plaintiffs' father. It was also admitted that Mst. Goga lived in Mohalla Dhobiyan after erecting a 'Gawari' in the S.Y. 1979-80 and that she died in the S.Y. 1981. It was denied that Idukhan or the plaintiff lived in her 'Gawari'. The adoption to Idukhan was denied. The defendant No. 2 alleged that in the land, which was in possession of Mst. Goga in her life time, in which she had erected a 'Gawari' the defendant started living in the northern portion thereof soon after the death of Mst. Goga and the defendant No. 2 also erected a 'Gawari' for his residence. The defendant No. 1 Municipal Board had executed the sale-deed on 16-5-1962 in favour of defendant No. 2 in respect of that land on the basis of his old

possession. His wife had no hand in the matter. It was stated that, the plaintiff was never in possession of that land, so the question of dispossession did not arise. The plaintiff trespassed over the adjoining land on the northern side of his land and put up a jhunpa there, That encroachment was removed by the defendant No. 1.

5. The trial court framed as many as 11 issues and recorded the evidence of both the parties. After hearing the arguments, the learned Civil Judge decreed the plaintiffs' suit. Issue No. 1 and 4 related to the plaintiffs' ownership and possession. Both the issues were decided by the learned Civil Judge in favour of the plaintiff. Issue No. 5 related to the plaintiffs' adverse possession, but in view of the finding of issue No. 4, it was stated that there is no need to decide issue No. 5. Consequently, the plaintiffs' suit for possession was decreed and the defendants were restrained from making; interference in the use of disputed gawari, in future. In respect of removal of the jhunpa, a decree for Rs. 50/- was passed against the defendant No. 1; Municipal Board, by way of compensation.

6. It is pertinent to state here that no appeal was preferred by the 'Municipal Board against the judgment and decree of the learned Civil Judge, Ratangarh and the decree became final against the Board, the defendant No. 2 Nabu preferred an appeal before the learned District Judge, Bikaner, but the same was dismissed on 7-11-1970. The learned District Judge concurred with the finding of possession, after evaluating the parties evidence and it was observed that 'when the possession of Idukhan over the suit property is believed to be the; even in the life time of Shit. Goga, the ownership of the plaintiff can not be challenged by the defendants on the present evidence. They are merely trespasser. Therefore, the suit was rightly decreed,'

7. Aggrieved against the judgment and decree of the learned District Judge, the defendant No. 2 has preferred this appeal.

8. I have heard Mr. H.M. Parekh, learned Counsel for the defendant appellant and Mr. S.C. Bhandari learned Counsel for the plaintiff-respondent No. 1 and perused the relevant record of the case.

9. Mr. Parekh, learned Counsel for the appellant 'submitted that even though, both the courts have found that the plaintiff and his predecessor were in possession of the disputed property, but the plaintiff has failed to establish his title over the property. The land in question, was 'Nazul land' which vested in' the States of Rajasthan' under section'88 of the Rajasthan Land Revenue Act, 1956 and the same has been placed at the disposal of the Board by the State Government under Section 102A of the Rajasthan Land Revenue Act; 'Thus, the Board had a right over the Nazul-land, which had been placed at its disposal and. its Board: has, thus a right to sell it and had a better title than the plaintiff. Unless, the plaintiff proves his title over the land by, adverse possession or otherwise, the plaintiff is not entitled to a decree for possession against the Board and consequently, against the appellants, in view of the plaintiffs-Own showing that the defendant No. 2 was put, into possession over the land in question by the defendant No. 1. Mr. Parekh submitted that the Board is entitled, to remove all encroachment made over the Nazul-land under Section 203 of the Rajasthan Municipalities Act, 1959, Mr. Parekh referred to the decisions in Secretary of State and Anr. v. Farid Uddip and Ors. AIR 1937 All 622, Vasta Balwant v. Secretary of State AIR 1921 Bom 177 and Pothakutdhi Appa Rao and Ors. v. Secretary of State AIR 1938 Mad 193.

10. Mr. Bhandari on the other hand submitted that it has been found in favour of the plaintiff that he was in possession of the disputed property since the time of his ancestors. He, being in prior possession as against the defendant No. 2, who' was put into' possession forcibly, after dispossessing the plaintiff by the Board, his possession is protected, in law and plaintiff is entitled to a decree on the basis of his prior possession. Mr. Bhandari submitted that even if it be taken that the land is a Nazul-land and it has been placed at the disposal of the Board, still the Board has no right to dispossess the plaintiff. If the plaintiff and his ancestors were in unlawful occupation of the land in question then the plaintiff could have been only dispossessed by recourse to the proceedings under Section 91 of the Rajasthan Land Revenue Act. Under Section 91, an application could be moved by the local authority at whose disposal, the land has been placed, to; the Tehsildar. But, no such action has been taken as is provided under Section 91 of the Rajasthan Land Revenue Act. It was also pointed out by Mr. Bhandari that the defendant have not even pleaded that the plaintiff was ever dispossessed from the land in question.

No such plea was raised by the Municipal Board, in its written statement that the plaintiff was at all dispossessed under Section 203 of the Municipalities Act as there was an encroachment over the land. Even, defendant No. 2 has stated that whatever property was in possession of Mst. Goga soon after her on an. he entered into possession over the northern portion of the property. It may be stated that the plaintiff claims only about 549 Sq. Yds. of the land and that land, which was in possession of Mst. Goga and not that land, which is said to have been encroached upon by the plaintiff as alleged by defendant No. 2 in the written statement. The dispute related to that property, which was in possession of Mst. Goga. There is no case of the defendant No. 1 that the plaintiff was removed from the remaining part of the land in possession of Mst. Goga. Mr. Bhandari submitted that the Municipal Board can exercise only those powers, which have been conferred on it by the State Government under the notification issued under Section 102-A and no such authority is conferred on the Municipal Board that it may dispossess those, who are in possession of the Nazul land. For such dispossession the only remedy was under Section 91 of the Rajasthan Land Revenue Act and Section 2CH will not apply and shelter under Section 203, cannot be taken by the defendant No. 1. For the submission, that when prior possession is proved, the plaintiff is entitled to a decree against the defendants, who are trespassers, reliance was placed by Mr. Bhandari on the Division Bench decision of this Court in Deep Lal and Ors. v. Parashwanath Digamber Jain Vidyalaya Maha Montri Gulabchand ILR (1956) 6 Raj 342 and reference was also made by him on the decision of the Supreme Court in Nair Service Society Ltd. v. R.C. Alexander and Ors. : [1968]3SCR163 . He also submitted that the three cases cited by Mr. Parekh are the cases, which have no application to present case, in view of the fact that the State Government is not a party in the present suit and question of better title of the State Government does not arise. He urged that the plaintiffs' suit has rightly been decreed by both the courts below.

11. Having heard the learned Counsel for the parties, I am of the opinion that this appeal has no merit and the submissions made by Mr. Parekh in the light of the fact and circumstances of the case are devoid of substance. On the question of possession, the first appellate court has relied upon the plaintiff's evidence particularly the statements of PW 2 Sukhram & PW 5 Goruram. I have also been

taken through the relevant evidence and I am continued that the plaintiff has proved that he was in possession of the disputed property since the time of his ancestors. Question of possession is a question of fact, and both the courts have concurrently found it in favour of the plaintiff. In this appeal, it is to be seen as to whether the plaintiff is not entitled to a decree for possession, even when he is found to be in possession of the disputed property prior to the year 1964. Mr. Parekh has made an attempt to justify the plaintiff's removal on the basis that the Municipal Board has all the powers of the State Government as an agent of it, as the land has been placed at the disposal of the Board. If the State Government has a better title as against the plaintiff, the plaintiff is required to establish his title as against the State Government and if the plaintiff fails to prove his better title, then the plaintiff is not entitled to a decree against the Municipal Board even when the State Government is not a party to the suit. In my opinion Mr. Parekh cannot be allowed to make such an attempt in the present case, for the simple reason that no such case was pleaded by the Board. The Board has not taken the stand that the land was placed at the disposal of the Board and the Board in exercise of its powers under Section 203 of the Municipalities Act, removed the petitioner's possession. Under Section 203, if the open space is vested in the State Government, then for removal of encroachment thereon permission is required to be obtained by the Board from the officer, who may be appointed or authorised by the State Government in that behalf. There was a bare denial on the part of the Municipal Board and even the defendant No. 2, in his written statement stated that he occupied the northern part of Goga's 'Gawari' soon after her death. It is also significant that defendant No. 2 does not aver that the plaintiff made any encroachment in the southern part of the 'Gawari' of Goga. His case is that the plaintiff encroached upon some land situated on the northern side of the land, occupied by defendant No. 2 & it is not averred by him that the plaintiff encroached upon the remaining northern part of Goga's property, in the absence of the case, having been pleaded by the defendants under Section 203 of the Municipalities Act, such a plea is now not open to the appellant. Besides that it has not been substantiated by Mr. Parekh that the Board can defend the suit on the basis that the pleas, which were available to the State Government, are available to it and it can be said that if the State Government has a better title as against the plaintiff,

being the agent of the State Government, a plea of better title is available to the Board. In my opinion, such a plea is not available to the Board and such a plea has neither been taken by the Board in its written statement. The cases, which have been cited by Shri Parekh are the cases, where the question has been considered as against the Government. The proposition laid down in these cases is not in dispute that where the possession over the land is claimed by the plaintiff and the Government is the owner of the land then the plaintiff is required to prove better title or adverse possession for 60 years. Now limitation is 30 years, after the enforcement of the Limitation Act (Act No. 36 of 1963), which had come into force on 1-1-1964 before filing of the suit on 19-3-1965. If the claim would have been made against the Government then the plaintiff would have been required to establish his better claim or adverse possession for 30 years against the Government. But, in the present Case as the State Government, is not a party, the proposition does not arise for consideration. It may be pointed out that the plaintiff does not claim or assert the title, and that sale-deed is not produced and proved and so the question of transfer of valid title to defendant No. 2 by defendant No. 1 does not fall for consideration. If the plaintiff has been dispossessed without the authority of law, then the plaintiff is entitled to get back possession. The plea of better title of defendant No. 1 does not arise and that plea could only be taken by the State Government, In Deep Lal's case (supra) it has been observed as under:

Possession is prima facie proof of title and, therefore, a previous possession can be a good foundation for a suit in ejectment even though plaintiff is unable to establish his title, provided the defendant is also unable to establish a better title to the disputed property. Where a person in peaceful possession of property without title is dispossessed by another, who also has no title the former is entitled to be restored to possession. The mere de facto and wrongful possession of land is a valid title of right against all persons who cannot show a better title in themselves, in other words, no defendant in an action for trespass can plead the right of possession outstanding in some third person as against the fact of possession in the plaintiff.

12. In Nair Service Society Ltd.'s case their Lordships of the Supreme Court observed as under:

Provision of Sections 8 and 9 of Specific Relief Act are not actually exclusive so that after the period of six months is over it cannot be said that a suit based on prior, possession alone is not possible. Section 8 of the Specific Relief Act does not limit the kinds of suit but only lays down that the procedure laid down by the C.P.C must be followed. This is different from saying that a suit based on possession alone is incompetent after expiry of six months. The correct position is that if Section 9 of the Specific Relief Act is utilised the plaintiff need not prove title and title of the defendant does not avail him. When however, the period 6 months has passed questions of title can be raised by the defendant and if he does so the plaintiff must establish a better title or fail. In other words, the right is only restricted to possession only in a suit under Section 9 of the Specific Relief Act but that does not bar a suit on prior possession within 12 years and title need not be proved unless the defendant can prove one. The present amended Articles 64 and 65 of the Limitation Act bring out this difference. Article 64 enables a suit within 12 years from dispossession, for possession of immovable property based on possession and not on title, when the plaintiff while in possession of the property has been dispossessed. Article 65 is for possession of immovable property or any interest therein based on title. The amendment is not remedial but declaratory of the law.

13. The plaintiff has proved his prior possession and it has not been established that he was put out of possession under the authority of law and the defendants have further failed to establish that they have got the better title, then the plaintiff is entitled to a decree for possession. As already considered; the matter can also be viewed in the light that the decree against the Municipal Board become final. The Municipal Board has been held to be a trespasser. The appellant is a transferee from the trespasser. So on that basis as well the decree for possession is not open to challenge by the appellant.

14. No other point has been pressed before me.

15. In the result, this appeal can not be succeed, so it is hereby dismissed with costs.

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