

Khet Singh and ors. Vs. Hari Singh and ors.

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Court : Rajasthan

Decided On : May-15-1987

Reported in : 1987(2)WLN791

Judge : Ashok Kumar Mathur, J.

Appeal No. : S.B. Civil Regular Second Appeal No. 86 of 1976

Appellant : Khet Singh and ors.

Respondent : Hari Singh and ors.

Advocate for Def. : Mr. Mehta

Advocate for Pet/Ap. : Mr. Jain

Disposition : Appeal allowed

Judgement :

Ashok Kumar Mathur, J.

1. This is a second appeal against the judgment and decree of the Seamed Additional District Judge, Merta dated 5-12-1975.

2. The brief facts giving rise to his case are that the plaintiff-respondents filed a suit in the court of Munsif, Merta, for declaration that the Nohra situated in village Toonkaliya the boundaries of which have been given in Para 1 of the plaint as

under:

East: Bhakar of Mataji and thereafter village Pond;

West: Pole and vacant piece of land of plaintiff Hari Singh and others;

North: Bas of Bhambhis and Nohra of Gangaram;

South: Nohra of Hardev Singh and Ranjeet Singh;

is of the plaintiffs and it has been in possession of the plaintiff since long back. Thus, they prayed for a permanent injunction restraining the defendants from interfering with the possession of the plaintiffs over this Nohra and that the order of the Gram Panchayat, Talanpur dated 14-6-1966 may be quashed. In the plaint it is stated that this Nohra which is the subject-matter of the suit is the property of the plaintiffs from the time of his fore-fathers and came to his share in partition. He is in possession of the same since then. Defendants No. 2 to 4 were inimically disposed of towards him and in order to deprive him the suit land they moved an application before the defendant No. 1, Gram Panchayat, Talanpur with the false allegation that the plaintiffs had encroached upon the public way and the defendant No. 1, Gram Panchayat, Talanpur by its order dated 14-6-1966 declared the land of the Nohra of the plaintiff to be public way and ordered the demolition of the walls and also fined the plaintiff Rs. 11/-. This order has been challenged on the ground of malafide and being without jurisdiction. It is also stated that he raised a Pucca walls about 8 to 8-1/2', on all the four sides. As the defendants were trying to demolish the wall and interfering with the possession of the plaintiff, therefore, he filed the present suit for declaration and permanent injunction.

3. The defendants in their written-statement submitted that this was a public way for the villagers to reach village Pond and it was never in possession of the plaintiffs. On 26-5-1966 the plaintiff started constructing walls on the eastern and western sides of this plot of land and defendants No. 2 to 4 made an application to the Gram Panchayat, Talanpur complaining about this obstruction. On 30-5.1966 the Sarpanch and members of the Gram Panchayat inspected the disputed land

and found that the plaintiff encroached over this land. Thereafter, on 14-6-1966 the Gram Panchayat, after hearing the plaintiff, directed removal of this encroachment and imposed a fine on the plaintiff. It was also submitted that the plaintiff was neither the owner nor was in possession of this land at any point of time. It was also stated that the documents filed by the plaintiff are not genuine and these are inadmissible in evidence.

4. The plaintiff filed an appeal before the Panchayat Samiti and the same was dismissed and thereafter a revision petition was filed before the Collector and the same was also dismissed. Thus, a plea was taken that the order of the Gram Panchayat merged into the order of the Panchayat Samiti and the Panchayat Samiti is not a party in the suit. A plea of limitation was also raised.

5. On the basis of the pleadings of the parties the following seven issues were framed:

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2vk;k eqnk;yk ua0 1 xzke iapk;r Vkyuiqj dk Qslyk fnukad 14&6&1966 In~Hkkouk jfgr ,oa fcuk vf/kdkj gS ih

3 vk;k eqnbZ ewnk;yk ds fo:) gqDe bErukBZ nokeh ikus dk gdnkj gS ih

4ukSgjk eqrukTk rkykc tkus dk lkoZtfud jkLrk dk fgLIk gS vkSj eqnbZ us fnukad 26&5&1966 dks iwoZ if'pe o mRrj&nf;{k.k dh Hkrs cuokdj dCtk dj fy;k

5vk;k nkok fe;kn ds ckgj gS Mh

6vk;k iapk;r lfefr nkok gkTk es ykteh Qjhd eqdnek gS

7nknjlh

7. The learned Munsif, Merta decided issues Nos. 1, 2 and 3 against the plaintiff and issue No. 4 in favour of the defendants. He decided issues Nos. 5 and 6 against the defendants, and in favour of the plaintiffs. He held that the plaintiff has failed to prove that he was owner of the disputed Nohra and this disputed land is

used as a public way for going to village pond. Aggrieved against this, the plaintiff preferred an appeal before the learned District Judge, Merta and the learned Additional District Judge, Merta by his judgment dated 5-12-1975 reversed the finding of the learned Munsif, Merta and declared that the land in dispute belongs to the plaintiff and he is the Owner of this land. He granted a permanent injunction restraining the respondents from interfering with the possession of the plaintiff. Aggrieved against this order, the defendants have approached this Court by filing the present appeal against the aforesaid judgment and decree of the learned Additional District Judge, Merta dated 5-12-1975.

8. Mr. Jain, learned Counsel for the appellants, has strenuously urged that the finding of fact recorded by the learned Munsif should not be interfered with by the learned lower appellate court unless there are cogent and sufficient reasons for this purpose. In connection, learned Counsel has invited my attention to C. Sabhapathi v. G. Huntley AIR 1938 PC 91; Sarju Pershad Ramdeo Sahu v. Jwaleshwari Pratap Narain Singh and Ors. : [1950]1SCR781 ; Sara Veeraswami alias Sara Veerraju v. Talluri Narayyana(deceased) and Ors. AIR 1949 PC 32; Keshulal v. Ram Dayal 1960 RLW 595; Smt. Sonawati and Ors. v. Sri Ram and Anr. : [1968]1SCR617 ; Shikhar Chand Jain v. Digamber Jain Praband Karini Sabha and Ors. : [1974]3SCR101 ; Madhusudan Das v. Smt. Narayani Bai and Ors. : [1983]1SCR851 . Learned Counsel submitted that the learned Munsif on the appreciation of the documentary as well as oral evidence and after inspecting the site personally, has recorded his finding. But the learned lower appellate court without giving any cogent and sufficient reason has disturbed the finding of fact arrived at by the learned Munsif.

9. As against this, Mr. Mehta, appearing for the respondents, has submitted that in second appeal before this Court, this Court will not go into the question of appreciation of evidence. Learned Counsel submits that since the first appellate court after reviewing the evidence has reversed the finding of fact arrived at by the learned trial court, therefore, it is not proper for this Court to re-appreciate the finding of fact in second appeal. In this connection, Mr. Mehta, learned Counsel for the respondents has invited my attention to Deity Pattabhiramaswamy v. S. Hanymayya and Ors. AIR 1959 SC 57; V. Rama Chandra Ayyar and Anr. v.

Ramalingam Chettiar and Anr. : [1963]3SCR604 ; Mst. Kharbuja Kuer v. Jangbahadur Rai and Ors. : [1963]1SCR456 ; and Madamanchi Ramappa and Anr. v. Muthaluru Bojjappa : [1964]2SCR673 .

10. So far as the legal proposition is concerned, the same is not disputed. It is also true that it is settled proposition that the first appellate court should not normally interfere with the finding of fact recorded by the trial court as the trial court has occasion to watch the demeanour of the witnesses and specially in the present case, the trial court has occasion to inspect the site personally. At the same time, it is also true that normally in second appeal this Court is slow to appreciate the evidence. and to disturb the finding of fact. From the catina of cases cited before me there are no two opinions on the principles enunciated in these authorities. But the applicability varies from case to case. In the present case the trial court has taken one view of the evidence and the appellate court has reversed that finding. Thus, there are two contrary findings of fact before me and I have to decide which of the finding is correct. Thus, in order to decide that which of the finding is correct I will have to consider the reasons given by the trial court as, well as by the first appellate court for taking their views of the matter.

11. The plaintiff in order to substantiate his right over the property has relied upon three documents namely Ex. 1 partition deed and map attached to that partition deed Ex. 3A and Ex. 5 an agreement arrived at between his fore-fathers i.e. Radha Kishan brother of his grand-father and one Gopji. He has also led oral evidence. As against this, the defendant has relied basically on the inspection note prepared by the members of the Panchayat. The map is Ex. A 1 which was filed in the previous suit between plaintiff Hari Singh and one Mehraj DW 3 and others which was prepared by DW 5 Abdul Hakim in a dispute between plaintiff Hari Singh and others and DW 3 Mehraj and others and in that suit the present land has been shown as a public way for going to village Pond. Defendants led oral evidence also.

12. Now, coming to the documentary evidence first i.e. Ex 1, Ex. 1 is said to be a partition deed between Hari Singh plaintiff and his brother and it was prepared on 13-1-1958. Attached to this is a plan Ex. 2A. The learned Munsif did not believe

this document and found that it is not admissible in evidence as the same has not been a registered document as the valuation of the property in question is more than Rs. 100/. Secondly the learned Munsif also found that this is not a genuine document as it was not purchased by Hari Singh but it was purchased by one Kesari Singh and it was on a 4 Annas court fees stamp where as the minimum amount was 8 Annas at the relevant time. Learned Munsif also observed that had this document been available with the plaintiff he would have certainly produced it before Gram Panchayat. But the same was not produced. Though he filed the same along with the memo of appeal before the Panchayat Samiti. However, the learned Munsif held that since it is not a registered document, therefore, the plaintiff cannot claim any title on the basis of this unregistered document, but it can be used for collateral purposes. So far as the collateral purposes are concerned, he found that it is not a genuine document. The learned first appellate court, however, agreed with the learned Munsif to the extent that the partition deed Ex. 1 was not a registered document. Therefore, title cannot be claimed over this land on the basis of this unregistered document as this document is required to be registered under Section 49 of the Registration Act. But the learned first appellate court held that Ex. 1 and the site plan Ex. 2A show that the Nohra came in partition to Hari Singh plaintiff. The learned first appellate court however repelled the view of the learned Munsif that this is not a genuine document.

13. Now the question before me is whether the finding arrived at by the learned Munsif is correct or the finding arrived at by the learned first appellate court is correct. I am inclined to agree with the reasoning given by the trial court. The trial court has found that this document if at all was available with the plaintiff it would have been produced before the Gram Panchayat when the matter was heard. So far as the legal proposition is concerned that if the document is not registered then no title can be claimed over this land but it can be used for collateral purposes cannot be disputed. But the question is whether this document was in existence or not. Learned Munsif has given reasoning which appears to be correct. The learned Munsif has recorded that the stamp is said to have been purchased by one Kesari Singh. But in the endorsement of this stamp neither it bears the signature of Kesari Singh nor his thumb impression nor in the stamp it has been mentioned that for what purposes this stamp was purchased. In this background

the learned Munsif has observed that had this document been in existence the plaintiff would have at the first opportunity produced it before the Gram Panchayat but the same was not produced. Secondly, if this was in existence he would have mentioned the same in the application moved before the Gram Panchayat stating that this piece of land belongs to him and Ex. 1 is the partition by which it has come to his share. This application was of course returned back but in Ex. 8 he did not mention. He came with the plea that this document was not readily available with him. It is true that the document may not be readily available but there was nothing to prevent him from stating in the application that this plot belongs to him and there was a partition between him and his brother and he received this piece of land in his share in that application. Though during the appeal which was filed before the Panchayat Samiti this Ex. 1 was filed. But even the Panchayat Samiti did not accept the same and the Panchayat Samiti upheld the order of the Gram Panchayat. From this the learned Munsif has arrived at the conclusion that the genuineness of the document is doubtful. The first appellate court was impressed by the justification furnished by the plaintiff for not producing it earlier. But after going through both the reasoning, I think, the view taken by me learned Munsif appears to be more convincing than that of the learned first appellate court. The circumstances in which the so called partition deed being not registered, stamps having not been purchased in the name of the plaintiff Hari Singh, it is said to have been purchased in the name of Kesari Singh but that endorsement does not bear his signatures or thumb impression nor it has been mentioned for what purpose it has been purchased. It has been purchased on 10-12-1957 and the so-called deed appears to have been Written on 11-1-1958. This, raises a suspicion that the partition took place in 1958 where as the stamps has been purchased from the Sub-Treasury Merta on 10-12-1957. Thus, in this back-ground the document Ex. 1 creates suspicion and therefore, the view taken by the learned Munsif, Merta appears to be correct and I affirm this view.

14. The next question, which has been agitated by Mr. Jain relates to document Ex. 5. Ex. 5 has been produced by the plaintiff for showing that a dispute regarding this property arose between his fore-fathers and one Gopji. In this suit Ex. 5 which was an agreement arrived at between the brother of his grand-father and one Gopji was produced for showing that this part of the land comes in the share of his

fore-fathers. Original Ex. 5 has not been produced and copy of the document which is in his Bahi has been produced. No finding has been given by the learned trial court. But the learned first appellate court considered this document Ex. 5 and has drawn a presumption that since it is 30 years old document therefore presumption but its correctness can be drawn under Section 90 of the Evidence Act in the first appeal. Mr. Jain, learned Counsel for the appellants has submitted that this cannot be done. If the party has not argued that a presumption under Section 90 of the Evidence Act should be drawn in the trial court and the have gone on trial by leading necessary evidence regarding the correctness of this document and the contents thereof then the presumption under Section 90 of the Evidence Act cannot be drawn by the appellate court. In this connection, learned Counsel has invited my attention to Ram Chandra v. Usmangani 1953 RLW 153 and Gulam Rashool and Ors. v. Abdul Gaffar and Ors. 1982 WLN(UC) 224.

15. In Gulam Rasool' s case 1982 WLN (UC) 224 this Court observed as under:

The plaintiffs at the initial stage did not rely upon the presumption under Section 90 of the Evidence Act and did not make a request to the court to draw any such presumption but they went on to prove the rent deeds. It was only at the stage of arguments that the question of drawing presumption under Section 90 of the Evidence Act was raised, when the plaintiffs realised that they have not been able to prove the execution of the aforesaid rent deeds. In these circumstances, there was no reason for raising a presumption about the genuineness of the rent-deeds, Ex. 4 to 6, merely because they are more than 30 years old.

16. Similarly in Ram Chandra's case (supra) it was observed as under:

It is quite clear upon the plain language of Section 90 of the Evidence Act that it is not obligatory upon a court to raise any presumption under that section in favour of a person who desires to prove a fact. Of course if a party asks the court to make a presumption in his favour in accordance with the provisions of that section, it would be necessary for the court to deal with the matter. But where the party does not rely on this presumption and adduces evidence to prove the genuineness of the document he can have no grievance if the courts do not raise any such presumption.

17. Thus, Mr. Jain, learned Counsel submits that since the parties have led their evidence to show that this property was the subject-matter of dispute and an agreement was entered into between his fore-fathers and one Gopji it is not open for the appellate court to have drawn a presumption under Section 90 of the Evidence Act at the appellate stage. I uphold the contention of Mr. Jain. From the judgment of the trial court it appears that no argument was raised regarding drawing of a presumption under Section 90 of the Evidence about the correctness of the document. It is only for the first time it has been raised before the appellate court and a support has been sought from the document Ex. 5. Thus, it cannot be permitted as the parties having gone on trial on this issue that the document is genuine and led the necessary evidence like statement of Hari Singh. Although all the scribes of the document had died long back. In the absence of any argument regarding drawing of a presumption under Section 90 of the Evidence Act in the trial court it is not proper for the appellate court to draw a presumption in support of the contention of the plaintiff.

18. Apart from this, the basic infirmity in this document Ex. 5 is that it is not the original. Both the parties were shown Ex. 5 and it was found to be a copy of the Bahi only. Thus, as the original document has not been produced and a copy from some Bahi has been filed, therefore, no presumption even otherwise also under Section 90 of the Evidence Act can be drawn for the correctness of this document. Thus, this piece of evidence is also not worth itself & it does not support the contention of the plaintiff any longer and the appellate court has wrongly drawn a support to corroborate and to sustain the title of the plaintiff over this disputed land.

19. Mr. Jain has also invited my attention to Harihar Prasad Singh and Anr. v. Deonarain Prasad and Ors. AIR 1956 SC 305, where in it was observed as under by their Lordships of the Supreme Court:

The presumption enacted in Section 90 can be raised only with reference to original documents and not to copies thereof. Further if the document happens to be signed by the agent of the person against whom the presumption is sought to be raised and there is no proof that he was an agent, Section 90 does not

authorise the raising of a presumption as to the existence of authority on the part of the agent to re present that person.

Apart from this Mr. Jain pointed out that Ex. 5 nowhere says that in nor them side of this land there is a Nohra belonging to the plaintiff. On the contrary in Ex. 5 it has been clearly mentioned that in the northern side there is a bas of Bambhis. The relevant portion of Ex. 5 reads as under:

ds mrjknH cktw HkkafHk;ks dk ckl g SA

This also negatives the title of the plaintiff over this land. Had there been the Nohra belonging to the plaintiff, it would have certainly found mention in Ex. 5. Thus, I uphold the contention of Mr. Jain that no benefit can be given to the plaintiff on the basis of document Ex. 5.

20. This disposes of the documentary evidence, which has been led by the plaintiff in support of his long possession and title thereof.

21. As against this defendant has also produced documentary evidence i.e. Ex. A-3 which is an inspection note prepared by the members of the Gram Panchayat and they found that fresh construction was being raised. In order to substantiate this DW 6, 7, 8 and 10 have come into the witness box. Mr. Jain submitted that this aspect was not appreciated by the learned first appellate court. This is not correct. The matter has been dealt with by the appellate court but he did not attach much importance. I do not consider this evidence as important for this only shows raising of construction recently. But the basic question is the title of plaintiff on this piece of land. The burden is on the plaintiff. Therefore, this aspect does not help the defendant in any manner.

22. The next documentary evidence, which has been relied upon by the defendants is site plan Ex. A-1. This site plan was prepared by Abdul Hakim in the year 1950 in a suit between the plaintiff and one Mehraj. In this site plan a way over this disputed land has been shown for going to village Pond. DW 5 has come into the witness-box as well as Mehraj DW 3. DW 5 has proved this site plan and he has submitted that he has prepared this plan after going to the site at that time

when there was no dispute about this piece of land. Though Ex. 6 is the judgment, which has been delivered by the court between the plaintiff Hari Singh and Mehraj DW 3 which is on record. In that judgment the plan Ex. A-I was not relied upon. Mr. Jain submits that this is a very important piece of evidence which negatives the contention of the plaintiff and it has been completely disbelieved by the learned first appellate court.

23. Mr. Jain, learned Counsel for the appellant has also urged that whenever there is a recital about the boundaries then such recital should be read against the plaintiff and can be used against him as his own admission. Mr. Jain has invited my attention to *Madan Lal v. Durgadutt* 1957 RLW 441, and submitted that in Ex. A-1 the so-called site plan filed in the suit between plaintiff and Mehraj it has been mentioned that there is way over this disputed land. This shows that on this disputed land this way passes. This fact should be read against the plaintiff. In *Madan Lal's* case (*supra*), it has been held as under:

Correct legal position as to recitals of boundaries in documents is something like this. Where a recital has been made in a document 'inter parties', it would be a joint document made by the parties to the document and, therefore, relevant against them as a admission. Again, where the recital occurs in a document between a party and a stranger, it would be relevant against a party as an admission but not admissible in his favour. Where however, the recital is in a document between strangers, it is not a particular instance in which a right was claimed, recognised or exercised or a transaction by which a right was claimed or asserted within the meaning of Section 13 of the Evidence Act.

24. In view of the law laid down by this Court the recital of boundaries in Ex. A-I which shows that way passes on this disputed land only strengthens the contentions of defendants.

25. So far as the oral evidence is concerned, the same has been led from both the sides and the trial court has taken one view of the matter and the appellate court has taken another view of the matter. Both the sides have levelled allegations against each other. Some Civil and Criminal litigation is also going on between the parties. It has been said by the plaintiff Hari Singh that the present Sarpanch is

inimical towards him as he has contested election one time against him. Each has levelled allegations and counter allegations therefore I thought it proper not to lay much stress on the oral evidence. It is common knowledge that in a small village small rivalries between some members of the Panchayat and others is a common feature and it is just possible that each one is trying to oblige the other in support of their claims. Therefore, I do not want to lay much stress over the oral evidence and it is safer to concentrate over the documentary evidence. It has been admitted by the parties that Patta was not issued to the plaintiff and in so many other cases issuance of Patta was not prevalent at that time. Thus, we have to go on the basis of long possession only and to see the contemporary evidence of such long possession so as to give a declaration of the title over the property. But at the same time a care has to be taken that an illegal possession which is continued because of the negligence on the part of the revenue authorities should not be allowed to be perpetuated so as to cause inconvenience to the public. Keeping this in view, I have tried to examine the matter on the basis of the documentary evidence of long possession. Looking to the documentary evidence of long possession produced by the plaintiff I have come to the conclusion that the appellate court has not correctly approached in the matter.

26. As has been held in a number of authorities cited above that the appellate court should be slow in interfering with the finding of fact arrived at by the trial court except for compelling reasons. But in the present case, the learned Munsif has himself gone to the site on 16-7-1972 in the presence of both the parties inspected the site and after that he has recorded his finding on that basis. It is safer to accept his appreciation of the evidence and the conclusion arrived at unless there is any compelling reason for doing otherwise. In the present case, I do not find the reasons given by the learned first appellate court compelling enough to interfere with the finding of fact arrived at by learned Munsif.

27. Mr. Jain has also argued that there is non-compliance of Order 1, Rule 8, CPC as all the villagers have not been impleaded as a party to the suit and since the order of the Gram Panchayat has been merged with the order of the Panchayat Samiti the Panchayat Samiti should have been impleaded as a party. Therefore, the suit also fails on that count.

28. Mr. Mehta, learned Counsel for the respondents specially invited my attention to issue No. 6 which relates to the non-joinder of the Panchayat Samiti as a necessary party. But that issue has not been pressed before the trial court. So far as non-joinder of other persons as a complainant who have moved the complaint before the Gram Panchayat do not think they are necessary parties for the reason that since the Gram Panchayat who is the custodian of the whole village has been impleaded as a party, therefore, it is not necessary that all the persons who have made the complaint before the Gram Panchayat should be made parties. Thus, the contention of Mr. Jain does not appear to be well founded.

29. In the result, I allow the appeal, set aside the judgment and decree passed by the learned Additional District Judge, Merta dated 5-12-1975 and uphold the judgment of the learned Munsif, Merta dated 9-8-1972. The suit of the plaintiff is dismissed.

30. The parties are left to bear their own costs.