

Abdulkadar Vs. Mahomed

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Court : Chennai

Decided On : Sep-11-1891

Reported in : (1892)ILR15Mad15

Judge : Muttusami Ayyar and ;Parker, JJ.

Appellant : Abdulkadar

Respondent : Mahomed

Judgement :

1. It is argued that the defendant, as alleged in paragraph 4 of the written statement, has been in possession of the mosque and its endowment and that the suit for a declaration of title and an injunction without seeking possession is not maintainable under Section 42 of the Specific Relief Act. No specific issue has been framed as to this; and the fifth issue appears to have been framed on a special application with reference to the question whether a suit will lie for an injunction under Section 56 of the Specific Relief Act. Some evidence as to possession appears to have been given by the defendant and considered by the Subordinate Judge under that issue. If, as some of the witnesses assert, the defendant is in possession of the mosque and some of its emoluments, and if the tenants have attorned to him or paid rent to him and executed fresh marupats and agreed to hold under him, we should be inclined to hold that plaintiff must sue for possession. As plaintiff had to begin, and, as there was no specific issue on this point, he had no opportunity of producing evidence.

2. We shall therefore ask the Subordinate Judge to take evidence and try the following issue and to submit a distinct finding within two months, viz., whether the mosque and mukham and properties attached thereto and the office of Sheik and its emoluments, or any, and which of them, were in possession of defendant at the date of the suit, and, if so, what is the value of such property.

3. Seven days, after the posting of the finding in this Court, will be allowed for filing objections.

4. [In compliance with the above order, the Subordinate Judge submitted, his finding as follows:

My finding is that the mosque and mukham at Kallai and certain properties attached thereto, as shown in the subjoined list, were in the possession of the defendant on the date of the suit; that there is no reliable evidence that he was at the time in possession of the office of Sheik or of any of its emoluments over and above the sum of Rs. 22 and 150 dangalies of paddy a year, as deposed to by his seventeenth to nineteenth witnesses, and that the value of such property is Rs. 12,910 as shown below.]

5. The finding of the Subordinate Judge, on the issue referred to him for trial, is that the mosque and mukham at Kallai and certain properties attached thereto were in the defendant's possession at the date of the suit and that they are of the value of Rs. 12,910. After referring to the evidence we are satisfied that it warrants the conclusion at which he has arrived. We are further of opinion that there is sufficient proof that the defendant is also substantially in possession of the office of Sheik and of its emoluments. The evidence adduced for the plaintiff only shows that he has received Nircha in two cases, and we do not consider it sufficient to justify a finding that neither party was in possession of the office. Upon these facts we think that a suit for a declaration of the plaintiff's right to the office cannot be maintained under Section 42 of the Specific Relief Act without praying for possession of the mosque and its endowments. Though the plaint prays for a perpetual injunction restraining the defendant from interfering with the exercise by the plaintiff of his right to the office of Sheik, and, though an injunction is a form of consequential relief, yet it is clearly not sufficient, when the defendant is in

possession, to meet the requirements of Section 42. As observed by this Court in *Chokalinga Peshana Naicker v. Achiyar* I.L.R. 1 Mad. 40, no suit will lie under that Section unless there is no attempt either to evade the stamp law or to eject parties in possession under colour of a mere declaration of title. The reasonable construction of Section 42 is that the further relief which the plaintiff is bound to claim is such relief as he would be in a position to claim from the defendant in an ordinary suit by virtue of the title which he seeks to establish and of which he prays for a declaration.

6. Another contention urged upon us is that the plaintiff may be allowed on appeal to pay additional stamp duty and to amend the plaint so as to include a prayer for recovery of possession, and our attention is drawn to *Limba Bin Krishna v. 'Rama Bin Pimplu* I.L.R. 13 Bom. 548, *Choma v. Umma* I.L.R. 14 Mad. 46. It was held in those cases that, where the objection that the suit for a mere declaration of title was not maintainable was not taken in the Court of First Instance, the plaint might be allowed to be amended on appeal. Though in the present suit the defendant denied, in his written statement, that the plaintiff was in possession either of the mosque or of its endowments and contended that the relief claimed was irregular and ought not to be granted in the suit, yet he did not ask for a distinct issue at the first hearing as to whether the suit was maintainable under Section 42 of the Specific Relief Act.

7. The Subordinate Judge, however, in dealing with the fifth issue, incidentally discussed the evidence as to possession and came to the conclusion that neither party was in possession; but he now finds that defendant was in possession of properties to the extent of Rs. 12,000 and odd. But for the original finding of the Subordinate Judge on the question of possession, the plaintiff would have had an opportunity of amending the plaint in the Court below. Under the circumstances, we think we may allow the plaint to be amended. We allow the respondent-plaintiff three months' time to amend the plaint and to pay the additional stamp duty on the plaint so amended.

8. This appeal having come on again, after the plaint had been amended and stamp duty paid, in accordance with the foregoing order, the Court delivered

judgment as follows:

9. The respondent has now amended the plaint and paid the necessary stamp duty. We must therefore set aside the decree and remand the suit to the Subordinate Court in order that a revised decree may be passed in accordance with the amended plaint after such further inquiry as may be necessary.

10. The costs hitherto incurred will be provided for in the revised judgment

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