

Moti Vs. Roshan and ors.

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Court : Himachal Pradesh

Decided On : Mar-10-1971

Reported in : AIR1971HP5

Judge : M.H. Beg, C.J.

Acts : Himachal Pradesh (Courts) Order, 1948; ;[Delhi High Court Act, 1966](#) - Section 17; ;[State of Himachal Pradesh Act, 1970](#) - Sections 23 and 25; ;[Code of Civil Procedure \(CPC\) , 1908](#) - Order 6, Rule 2; ;[Limitation Act, 1963](#) - Schedule - Article 64; ;Hindu Law

Appeal No. : Second Appeal No. 27 of 1966

Appellant : Moti

Respondent : Roshan and ors.

Advocate for Def. : Chhabil Dass, Adv.

Advocate for Pet/Ap. : S. Malhotra, Adv.

Disposition : Appeal dismissed

Judgement :

M.H. Beg, C.J.

1. The plaintiff-appellant had sued for declaration and joint possession of land, 62 Bighas and 3 Biswa in area, situated in Mauza Devki, Pargana Bharmour, in Khata No. 62 Khatauni No. 92 Khasra Nos. 1134, 1135, 1140, 1142, 1144, 1147 to 1150, 1166 and 1168. The only basis of his claim disclosed in the plaint dated 12-12-1957 was that he was entered as owner of a half of the above-mentioned land and that the defendants were entered as owners of the other half. The defendants, who are the sons of a man called Saraf and grandsons of Chand, denied the right and title of the plaintiff to any part of the land in dispute despite the entry of his name in the revenue records which, according to the defendants, was erroneous. The plaintiff is a nephew of Chand mentioned above. He set up, in the course of evidence, a right flowing from a gift by Smt. Diu-kari, the widow of Chand, who was alive at the time when the suit was brought and is presumably still alive but was not examined as a witness. His case, taken up in evidence, was that Smt. Diukari, the step-mother of Saraf, had been given the land in dispute under a will made by Chand. It was also submitted that Smt. Diukari had already obtained possession of the land in dispute against Saraf after filing a suit in 1942 against Saraf who had been disinherited by Chand.

2. An examination of the plaint in the instant case discloses an attempt to overcome the defect that the plaintiff was actually out of possession. After asserting that the plaintiff and the defendants were co-owners, presumably by reason of the entries as co-owners in the revenue record only, the plaintiff went on to assert that the defendants were refusing to give him his rights as a co-owner and excluding him from actual possession so that he was compelled to bring the suit. It seems to me that the following observations made by Sulaiman, C. J. in *Bin-dhyachal v. Ram Gharib*, AIR 1934 All 993 (FB) at p. 998. are applicable to cases of this very type:

'Personally speaking, I do not think that the plaintiff can by cleverly drafting his plaint evade the burden of proof which Article 142 casts upon one who is suing for possession on the ground of dispossession. When a plaintiff falsely alleges that he is in possession and wants a relief, to which the owner in possession is entitled, e.g., for partition, injunction, joint possession etc., and it is found that he was in fact not in possession but had been dispossessed, technically speaking the suit

would fall under Section 42, Specific Relief Act, and would be dismissed on the ground that he had omitted to ask for a consequential relief and had failed to prove his case. But, a Court may allow him to change his ground and give him a decree for possession, treating his claim as one for recovery of possession on the basis of dispossession, provided he succeeds in showing that his dispossession took place within 12 years. In such a case, the claim would still be regarded as a claim either on the basis of dispossession or discontinuance of possession and the same principles would govern such a suit.'

3. Although the Senior Subordinate Judge, Chamba, who tried the suit, framed an issue on adverse possession governed by Article 144, Limitation Act only, and, thereby placed the burden of proving such adverse possession upon the defendants, the first issue framed relates to the alleged right and title of the plaintiff as owner and the burden of proving this certainly lay on the plaintiff. In my opinion, the learned Judge ought to have framed another issue and placed the burden of proving his own possession within 12 years also on the plaintiff. However, inasmuch as the effect of Sections 3 and 28 of the Limitation Act is to make it obligatory upon the plaintiff to prove, as a part of the burden of proving his subsisting title, that a suit on the basis of dispossession is not barred by time, it could be said that Issue No. 1 covers the defendants' objection that the plaintiff should prove possession within 12 years as a part of proof of subsisting title after admitting dispossession in his plaint. I think that the plaintiff's admission, in the plaint, that the defendants were excluding him from the benefits of his alleged ownership and possession, amounted to an admission of dispossession.

4. The trial Court had proceeded on the assumption that the land in dispute was included in a testamentary disposition made in favour of Smt. Diukari by Chand and that it was in respect of this very land that Smt. Diukari had filed a suit for possession against Saraf, the father of the defendants, who had not been heard of for a number of years. The trial Court also assumed, without discussing relevant evidence, that Smt. Diukari had obtained possession of the land now in dispute after obtaining a judgment against Saraf of which a copy is Ex. P.W. 6/D. The trial Court also held that on 16th September, 1954. Smt. Diukari had made an oral gift of half the land in dispute to the plaintiff and of the other half to the defendants. It

relied on the record of the mutation proceedings (Ex. P-A) to uphold this transaction and to assume a delivery of possession. It held that the defendants had not established their adverse possession, and, therefore, it decreed the plaintiff's suit.

5. The District Judge of Chamba had allowed the defendants' appeal on the ground that the gift by Smt. Diukari in favour of the plaintiff had not been proved. He held: firstly, that the plaintiff, after having stated that there was a registered deed of gift, had not filed a copy of it; and, secondly. Smt. Diukari, the alleged donor, who was alive, had not been produced to support the plaintiff's case. Accepting the plaintiff's version that Saraf had been disinherited by his father Chand, he held that the adverse possession of Saraf started from the date of his dis-inherison as he was in possession on that date. The plaintiff's suit was thrown out by the District Judge mainly on the grounds that neither the alleged declaration of gift, on which the plaintiff relied nor the plaintiff's possession after that declaration had been proved.

6. The plaintiff has come up in second appeal to this Court and assails the judgment and decree of the lower appellate Court both on questions of fact and of law. It appears that, under Paragraph 32 of the Himachal Pradesh (Courts) Order, 1948, read with Section 17 of the [Delhi High Court Act, 1966](#), and Sections 23 and 25 of the [State of Himachal Pradesh Act, 1970](#), a second appeal lies on questions of law as well as of fact when the judgment and decree of the trial Court is reversed by the first appellate Court and the value of the subject-matter, where it is land, is more than Rs. 250/-. These conditions are satisfied by the case before me.

7. It is not necessary for me to examine the correctness of the finding at the lower appellate Court that the possession of Saraf became adverse .on the date of his disinherison by his father Chand. The will under which Saraf was disinherited has not been duly proved although a copy of the alleged will was filed. It is certainly doubtful whether Saraf, even if he had been disinherited, could be said to be in adverse possession against his father if he had been given possession by Chand himself. There could, however, be no doubt that the possession of Saraf would be adverse to Smt. Diukari after the death of Chand if the property in dispute was

really included in the will in favour of Smt. Diukari

8. The plaintiff has, however, not been able to connect the numbers involved in the instant suit with any numbers given in any will made by Chand. The judgment in the suit brought by Smt, Diukari in 1942, after Chand's death, relates to some land and a water-mill and a house situated in Pargana Sinhuta and also to 8 Acres 6 Kanals and 1 Maria land and a water-mill situated in Parganal Bharmour. The numbers given in the judgment of that case also do not tally with any of the numbers given in the plaint in the instant case. Nor is there any 'Fard Mutabikat' or a comparative table giving the corresponding numbers of the plots in dispute now and those in 1942.

9. Learned counsel for the plaintiff-appellant has, however, strenuously urged that, in the course of evidence, the identity of the land had not been questioned. The contention, therefore, was that it should be assumed that the land in dispute in the instant case was also involved in suit brought by Smt. Diukari in 1942 and that the possession said to have been delivered to Smt. Diukari in the year 1949 should also be deemed to be in respect of the land in dispute. It was submitted that, after the decision in the earlier suit and the alleged delivery of possession to Smt. Diukari, the defendants could not set up a claim of a matured adverse possession to the land in dispute. On the other hand, learned counsel for the respondents has pointed out that the plaintiff did not even disclose in the plaint the basis of the right and title set up by him in evidence. . It is urged that, even if want of particulars in the plaint is not held to have prejudiced the defendants, the plaintiff had failed to prove either the actual delivery of possession of land in dispute to Smt. Diukari as a consequence of her suit of 1942 against Saraf, or to the plaintiff after the alleged declaration of gift to him by Smt. Diukari, The defendants' contention is that, without satisfactory proof of actual and physical delivery of possession to the plaintiff-appellant, neither the previous suit of Smt. Diukari against Saraf nor a declaration of a gift by her to plaintiff-appellant, even if assumed to relate to land in dispute, could help the plaintiff.

10. It is true that a suit should not fail for mere vagueness or uncertainty in pleadings which ought to be interpreted liberally in this country. Interpretation of

pleadings is, however, one thing and complete absence of material facts and particulars, which may prejudice another party, is a different matter. It is the duty of the trial Court to scrutinize the pleadings carefully and to require statements of material facts and particulars where pleadings are not fair and precise enough and particulars may be required. In the instant case, particulars of the basis of the right of the plaintiff will certainly include some particulars of the manner in which he obtained an alleged gift and possession of the disputed land from Smt. Diukari and also of her own right to make such a disposition of the property. The plaintiff had not disclosed these material facts as required by Order 6, Rule 2, Civil Procedure Code. The trial Court did not either call for necessary particulars or record statements of counsel under Order 10, Rule 1, Civil Procedure Code, in order to ascertain the exact nature of the questions involved on which evidence was to be led. It admitted evidence tendered by the plaintiff in support of his title without considering its admissibility or relevance. The result was that the trial Court was misled into assuming that a connection had been established between property involved in the former suit filed by Smt. Diukari against Saraf and the land in dispute in the instant case. As already indicated by me, I am unable to find necessary evidence to connect the land in suit now with the land for which Smt. Diukari had sued in 1942. The mere fact that the defendants did not bring out this gap in the plaintiff's evidence by cross-examination of witnesses could not be held to fill the lacuna in the plaintiff's evidence. If the plaintiff had disclosed in the plaint the transactions relied upon by him, the defendants would have been better able to question their character and bearing on the case.

11. The trial Court should not only ascertain the matters really at Issue between the parties, but it should also take care to see that the evidence given by each party corresponds to the claim or right pleaded by the party. In other words, it has to see that the pleadings and proof correspond. In the instant case, the trial Court failed to perform that elementary duty. The plaintiff cannot take advantage of it and ask this Court to hold that the gap in evidence had been filled up because neither the plaintiffs nor the defendants had seen it earlier.

12. Learned counsel for the defendants-respondents contended that even if it be assumed that the former suit by Smt. Diukari related to the land which is the

subject-matter of the suit now before me, the evidence given by the plaintiff himself shows that actual possession was not given to Smt. Diukari, My attention has been drawn to the report of the bailiff who is alleged to have delivered possession to Smt. Diukari after the decree in the suit of 1942 by her against Saraf. The bailiff reported that he went to the house of the judgment-debtor in compliance with the order of the Court and the judgment-debtor paid him Rs. 31/- as costs and stated that he was giving up possession. Nevertheless, according to the report, the family of the judgment-debtor was occupying the house and the decree-holder herself refused to accept the costs and also did not take possession of any property but stated that the bailiff or Kardar will have to be responsible for her protection and safety before she could accept possession. The bailiff also recorded the statement of Saraf on 29th Sawan, 2006, which corresponds to 12-10-1949, that Saraf had given up possession of the land, house, and Gharat (i.e., the water-mill). It is apparent from the report, read as a whole, that, although Saraf stated that he had given up possession, Smt. Diukari was too frightened to actually go and occupy the property in respect of which she had obtained a decree and that Saraf's family continued in actual possession. If this was the actual state of affairs, as it transpires from the report of the bailiff, the mere statement of Saraf that he had given up possession could only be interpreted to mean that he was .not prepared to quarrel with the bailiff or resist the order of the Court. Unless Smt. Diukari actually occupied the property In dispute, it could not be said that she had taken physical possession. Therefore, the report Itself (Ex. P.W. 4/B) proves that Smt. Diukari did not obtain actual physical possession.

13. It was strenuously contended on behalf of the plaintiff-appellant, on the strength of *Mir Akbarali v. Abdul Aziz*, ILR 44 Bom 934 = (AIR 1920 Bom 61) and *Mahadevappa Dundappa Hampi-holi v. Bhima Doddapa Maled*, ILR 46 Bom 710 = (AIR 1922 Bom 27 (2)), that the decree of Smt. Diukari against Saraf would put an end to Saraf's claim of adverse possession. Learned counsel, however, conceded that, in later cases, such as *Bhogilal v. Ratilal*, AIR 1939 Bom 261 and *Narayan v. Gurunathgouda*, AIR 1939 Bom 1. the earlier view was dissented from by the Bombay High Court itself relying upon the decision of the Privy Council in *Subbayya Pandaram V. Mohamad Mustafa*, 50 Ind App 295 = (AIR 1923 PC 175). The later view, expressed in *Jaimni Das v. Phulla Khan*, AIR 1930 Lah 472 by

Addison J., was:

'A decree not accompanied by actual effective assertion of rights and taking possession of these rights does not help to stop adverse possession running.'

14. Another, question canvassed was whether mere symbolical possession in execution of a decree arrests the running of time in favour of the judgment-debtor in adverse possession. On this question also, there has been some conflict of authorities. On the one hand, it has been held that mere delivery of formal or symbolical possession to a decree-holder in an execution of a decree cannot prevent limitation running in favour of the judgment-debtor where the latter remains in actual possession (see *Raghunath Waman Matapurkar v. Kondiba Babaji Mokashi*, ILR 46 Bom 932 = (AIR 1922 Bom 2) and *Jang Bahadur Singh v. Han-want Singh*, ILR 43 All 520 = (AIR 1921 All 9) (FB). On the other hand, the Privy Council held in *Radha Krishna v. Ram Bahadur*. 43 Ind Cas 268 = (AIR 1917 PC 197 (2)) that symbolical possession is sufficient to interrupt adverse possession where the person setting up adverse possession is a party to the execution proceedings in which the symbolical possession is given. The latter view ultimately prevailed in the Supreme Court in *Mani-kayala Rao v. Narasimhaswami*, AIR 1966 SC 470 and there seems to be overwhelming authority to support this view.

15. In order to meet the last mentioned contention, learned counsel for the defendants-respondents fell back on the submission, which had been accepted by the learned District Judge, that a delivery of possession through the bailiff to Smt. Diukari was itself illegal and not in accordance with the procedure laid down by Order 21, Rule 35, Civil Procedure Code, read with Section 141 of the Punjab Land Revenue Act, which had been applied to Himachal Pradesh by Himachal Pradesh (Application of Laws) Order, 1948. He also relied on the Merged States (Laws) Act, 1949, by which also the Civil Procedure Code of 1908 was made applicable here. It was contended that, although the bailiff may have been authorized to deliver possession so long as there was the State of Chamba, where the property in dispute was situated, this was no longer the position when this State merged in the province of Himachal Pradesh.

16. It appears that the order itself for delivery of possession was directed to the Kamdarans instead of to the Collector as it should have been. Nevertheless, in view of the final order on the execution application and the facts noticed above, it could not be said that there was even a formal delivery of possession. The final order on the execution application of Smt. Diukari given on 18-11-1949 was:--

'The counsel for the decree-holder does not want to prosecute the application at the moment as the warrant is not returning. Consigned to record room.'

In these circumstances, it will be fair to Infer that Smt. Diukari had resigned herself to not asserting her rights even tinder the decree obtained by her against Saraf. I am unable to hold that, on these facts, she obtained formal or symbolical possession under the decree in the suit of 1942 against Saraf, even if it could be assumed, for the sake of argument, that the decree was in respect of any land included in the suit before me now.

17. Learned counsel for the appellant also relies strongly on the mutation proceedings as evidence of a completed gift by Smt. Diukari to the plaintiff in 1954. The record of the mutation proceedings (Ex. P-A) shows that Smt. Diukari, accompanied by Moti appellant, had made a gift of some 'ancestral property' to Moti in Mohal Pahalda and of the remaining 'ancestral property' to Singhu, one of the defendants-respondents and others. It also shows that this transaction took place before some members of the public and a Tehsildar. But, no signatures anywhere of any parties to these proceedings were proved. Moreover, it could not be said that Singhu was a representative of all the defendants-respondents and could agree to any gift on their behalf. If Smt. Diukari had already lost any right over the property, she could not gift it. The suggestion that the principle of estoppel could, on facte proved, operate against the defendants is far-fetched. Moreover, the property said to have been gifted was described as 'ancestral property' and shown as situated in Mohal Pahalda. I am, therefore, unable to hold that, from this document, showing some kind of purported mutation, it could be inferred that actual transfer of possession of any part of the plots in dispute to Moti took place.

18. The position, therefore, is that there is no tangible evidence, apart from the assertions of Moti, that either Smt. Diukari or Moti himself ever obtained possession of any part of the land in dispute. It is not possible to apply the principle here that possession of a co-sharer is the possession of other co-sharers because Moti, plaintiff-appellant, had failed to prove that he ever became a co-sharer of the plots in dispute as a result of any legally valid transaction.

19. Reliance was also placed by learned counsel for the plaintiff-appellant on Section 45 of the Himachal Pradesh Land Revenue Act, 1953, which runs as follows:--

'An entry made in a record of rights in accordance with the law for the time being in force, or an annual record in accordance with the provisions of this Chapter and the rules thereunder, shall be presumed to be true until the contrary is proved or a new entry is lawfully substituted therefor:

Provided that notwithstanding anything contained in this section any entry made during the period between the first day of April, 1948 and the first day of April 1956 in record-of-rights or in an annual record whereby the land is shown as under self-cultivation shall not be presumed to be true.'

20. Learned counsel for the plaintiff-appellant contended that, after mutation proceedings, the name of the plaintiff-appellant came to be recorded in the Jamabandi over half the land in dispute as a co-sharer. He, therefore, relied upon the presumption found in the section quoted above.

21. As I have already indicated, I am not satisfied that the name of the plaintiff-appellant was recorded as a co-sharer of the plots in dispute in accordance with law or rules which provide for preparing the record of rights on the basis of possession. It is difficult to see how a record of rights could be correct when a party, without obtaining any kind of possession, is recorded as a co-sharer in possession under a gift. Moti appellant has not been able to prove that Smt Diukari had any subsisting right to make a gift in his favour in 1954 of any share in the land in dispute. Hence, any entry which may have been made as a result of any assertion of a right by Smt. Diukari over the land in question in 1954 could only be

fictitious and contrary to law. As I have already mentioned, all the defendants-respondents were not shown to be parties to the mutation proceedings and even the signature of Singhu in any such proceeding has not been proved. It is, therefore, not necessary for me to go into other questions. I may, however, observe that, in the circumstances indicated above, the failure of the plaintiff to produce Smt. Diukari, from whom he claims to have derived his right and title, was not insignificant. It provided a very good ground for the adverse inference rightly drawn by the District Judge against the plaintiff. The plaintiff's attempt to prove his alleged possession by producing some receipts for payment of land revenue during the pendency of the instant suits is no less suspicious and unsatisfactory than other evidence tendered by him.

22. It is stated by learned counsel for both sides that a registered document was not necessary in Himachal Pradesh for effecting a gift because under some notification said to have been made under Section 1 of the Transfer of Property Act the territory now in Himachal Pradesh was excluded from the operation of the provisions of Section 123 of that Act. It was, therefore, argued that the District Judge had erred in requiring the production of a registered document to evidence the gift. The District Judge had not required a registered document as a condition for validating the alleged gift in the instant case. He had only observed that the plaintiff had stated that there was a registered gift-deed in his favour but had not produced it. In other words, he relied upon the well-known presumption from the non-production of material evidence which was admitted to be in existence. Even if the explanation given by the learned counsel for the appellant is accepted, that the plaintiff was under a misapprehension and only meant that there was a mutation proceeding, the statement of the plaintiff-appellant indicates how little he knew about the exact nature of the transaction on which he relied. In any case, the plaintiff-appellant had not been able to prove that, as a result of some gift to him, a delivery of possession of any part of the plots in dispute took place at all. Under the ordinary Hindu Law delivery of possession is essential to complete a gift, and even registration of a deed of gift has been held to be insufficient to overcome the defect of want of delivery of possession (see *Vasudev v. Narain*. (1883) ILR 7 Bom 131 and *Lakshmimoni v. Nitya-nanda*. (1893) ILR 20 Cal 464).

23. The result is that, agreeing with the findings of the learned District Judge, I dismiss this appeal with costs.

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