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(1963) 09 AHC CK 0010

Allahabad High Court

Case No: Second Appeal No. 4015 of 1958

Jwala and Another — APPELLANT

Vs

Ram Dutta and Others — RESPONDENT

Date of Decision: Sept. 13, 1963

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Section 9
- Easements Act, 1882 - Section 18
- Specific Relief Act, 1877 - Section 56

Citation: AIR 1964 All 437

Hon'ble Judges: S.N. Katju, J

Bench: Single Bench

Advocate: Jagdish Swarup and K.C. Saksena, for the Appellant; J.N. Chatterji and Shambhu Prasad, for the Respondent

Final Decision: Allowed

Judgement

1. This is a plaintiff"s appeal arising cut of a suit for injunction restraining the defendant-respondents from cultivating the plot in suit and from inter-changing with its use by the appellants and other members of the village community as a "marghat" (cremation ground). The suit was brought under Order 1, Rule 8, C. P. C., on the allegation that plot No. 3270-B, area 4.27 acres, situate in village Rampur Raja, district Etah, was a cremation ground and it had been used as such since time immemorial. It was alleged that the defendant-respondents Nos. 1 to 4 had obtained, leases of the land in suit from the Pradhan of the Gaon Sabha and had started cultivating a portion of the land for some time prior to the institution of the suit. It was contended that, the Gaon Sabha or the landlord had no right to grant the lease with respect to the land in suit and such grant of lease was void. It was further alleged that the respondents Nos. 1 to 6 were cultivating the land in suit which would interfere with the rights of the appellants.

2. The suit was contested by the respondents Nos. 1 to 6. They admitted having taken the leases and alleged that they were cultivating the land in suit. They denied that the land in suit was ever a cremation ground and contended that it was never used as such, that the appellants had no right to cremate dead bodies on the plot in suit, and that there was never any "marghat" in village Raja Ka Rampur. It was stated that the respondents had taken a lease of a portion of the plot in suit in 1355 Fasli from the Court of Wards and another lease in 1359 Fasli from the Court of Wards and the last lease had been taken in 1360 fasli from the Gram Sabha and they had been cultivating the land, in suit since 1355 Fasli and were in possession thereof. It was also alleged that an area of 1.37 acres of the plot in suit was still lying vacant and it was sufficient for the purposes of cremation. Lastly, it was contended that the suit for mere injunction was not maintainable.

3. The trial Court decreed the suit. On appeal, the Court below affirmed the finding of the trial Court that the plot in suit was Used as a cremation ground. It was found that the appellants and other residents of the village had acquired a customary right to use the entire plot as a cremation ground, although this right could not be supported on the ground of dedication or lost grant. The Court below, however, dismissed the suit on the ground that the provisions of Section 56(i) of the Specific Relief Act were attracted and the relief of injunction claimed by the appellants could not be granted because they had not asked for possession of the land in suit. The plaintiffs have now come to this Court in second appeal.

4. The first question for consideration, therefore, is whether it was necessary for the appellants to ask for possession of the land in suit. The Court below expressed the view that since a relief for possession had not been asked for, the appellants were not entitled to the grant of injunction as had been prayed for by them. The question whether it was necessary for the appellants to ask for possession must depend on the circumstances of the case and the necessary relief which must be asked for by the plaintiffs. If the plaintiffs were in possession of any property and have been ousted therefrom and have claimed an injunction restraining the defendants from interfering with the exercise of their possession, then in such a suit it is obvious that the. mere relief of injunction could not be granted because the plaintiffs being the owner of the land and having been dispossessed must ask for possession. In the present case, the appellants did not claim any title to the land in suit as owners or as persons possessing it. The members of the village community are only interested in the land in suit for the limited purpose of cremating the dead. It may be immaterial as to who is the owner of the land or who is in possession thereof so long as their right is not obstructed and they can peacefully enjoy it. It was, therefore, not necessary, under the circumstances of the case, for the appellants to claim any relief for possession.

None of the plaintiffs could have any title for possession of the land as such, except that they had a customary right to cremate their dead on the land in suit, Even if they had asked for any relief for possession, that would have been thrown out on the ground that there was no foundation for any such claim. The land in suit is burdened with the claim of

the appellants of cremating their dead on it. If the respondents had acquired any title to possess the land in suit then it is not necessary that they should be disturbed or ousted from possession so long as the right of the appellants to cremate their dead is not disturbed. The respondents would yet remain the possessors of the land in suit while permitting the appellants to exercise the customary right claimed by them. They could take the grass of the plot in suit, timber if any, and put the land to any use that could be done subject to the rights of the appellants to cremate their dead. In these circumstances, the Court below certainly came to an erroneous conclusion in holding that it was necessary for the appellants to seek a relief for possession of the land in suit, and in the absence of any such claim, the suit for injunction was barred by Section 56 (i) of the Specific Relief Act.

5. Learned counsel for the appellants strenuously argued that the respondents had a right to cultivate the land and they had lawfully entered into possession of the disputed land and the nature of the claim asserted by the appellants implied the denial of their right to possess the land in suit. As has been mentioned above, the appellants could have no interest to possess the land. The respondents could put the land to such use as they liked, provided it did not infringe the customary rights of the appellants. It, therefore, follows that the mere fact that the respondents had entered into possession of the land in dispute or had been cultivating it could not compel the appellants to sue for possession as well. If the respondents put the land under cultivation which would interfere with the right of the appellants to cremate their dead then it must follow that they have a lawful claim to seek an injunction restraining the respondents from obstructing the exercise of the customary right of the appellants. Therefore, it is not the nature of the possession claimed by the respondents which has to be looked into for deciding whether the appellants should have asked for the relief of possession. On the contrary, it is the claim of the appellants which must decide whether it was necessary that they should have asked for the relief of possession. As has been pointed out above, it was not at all necessary for the appellants to seek any relief for possession and they could only ask for the relief of injunction as has been claimed by them.

6. Learned counsel for the respondents relied upon Hashmat Husain and Others Vs. Inayatullah and Others, and Masjid Shahid Ganj v. Shiromani Gurdwara Prabandhak Committee, Amritsar AIR 1938 Lah 369. The facts in the aforesaid cases were not similar to the case in appeal. In the aforesaid cases it was necessary for the plaintiffs in the said suits in appeal that they should seek relief for possession and in the absence of such relief for possession the claim for mere injunction could not be granted. As has been pointed out above, in the present case, it was not necessary for the appellants to have asked for possession of the land in suit and, therefore, it must be held that the provisions of Section 56 (i) of the Specific Relief Act are not attracted. Learned counsel for the respondents further contended that the respondents had "sirdari" rights over the land in suit. The nature of the rights acquired by the respondents is not material. They are free to enjoy all rights which they could have under law subject to the right of the appellants to

exercise the customary rights vested in them.

Learned counsel further contended that the suit, as brought by this appellants, was not maintainable because the land in suit was alleged to be a cremation ground and it had vested in the Gaon Samaj under the Zamindari Abolition and Land Reforms Act and, therefore, the suit should have been brought by the Gram Samaj, and not by the appellants. It may be that the Gram Samaj would have a right to the land which is used as a cremation ground. But the fact remains that every member of the village community is interested in the right that is claimed in the suit in appeal, that is, the right to cremate the dead and it followed that every member of the village community could maintain the suit for the enforcement of the said customary right. In these circumstances, it could not be held that the suit, as instituted by the appellants, was not maintainable. Learned counsel for the respondents further contended that there was some open land which was about six or seven bighas which was still vacant for the purpose of cremating the dead of the village. The Court below has found that the alleged vacant land was not specified and thus it could not be specifically, located. Furthermore, it has been found by the Court below that the custom, as alleged by the appellants, extended to the whole of the land in dispute.

7. The decree of the Court below is set aside. The suit is decreed with respect to the relief "B", as claimed in the plaint. With respect to the relief "A", it is allowed to this extent that the respondents shall not cultivate the land but they could derive such benefit from the land which they can get without interfering with the rights of the appellants. With this direction the suit is decreed. The appeal is thus allowed to the extent indicated above. Parties shall bear their own costs throughout.