

(2001) 01 MP CK 0023

Madhya Pradesh High Court (Gwalior Bench)

Case No: Second Appeal No. 174/93

Nagar Palika Nigam, Gwalior

APPELLANT

Vs

Kailash Narain Srivastava and
others

RESPONDENT

Date of Decision: Jan. 11, 2001

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 41 Rule 33, 100
- Madhya Pradesh Land Revenue Code, 1959 - Section 257, 57, 57(2)

Citation: (2001) 3 MPHT 389 : (2001) 1 MPLJ 459

Hon'ble Judges: Mr. R.B. Dixit, J

Bench: Single Bench

Advocate: Shri P.D. Bidua, for the Appellant; Shri Ashok Velankar, Shri Sanjay Sandilya, Shri P.D. Agrawal and Shri K.K. Lahoti, for the Respondent

Final Decision: Allowed

Judgement

R.B. Dixit, J.

Respondent-plaintiffs had filed a civil suit No. 14-A/92 in the Court of Third Civil Judge Class I, Gwalior, for declaration and permanent injunction on the ground that their father late Anandi Prasad Shrivastava was owner and occupier of the Survey Nos. 1125, 1126, 1128, 1131 and 1132, situated at Morar. Out of the above survey numbers, in Survey Nos. 1128, 1131 and 1132 their father and defendant No. 3 (Saint Peter's Church) had also equal share while Survey Nos. 1125 and 1126 were in exclusive ownership and possession of his father. Thus, Survey Nos. 1125 and 1126 are referred as "disputed land".

The father of the plaintiffs died on 28-4-1982 and since then the plaintiffs are in possession as being his legal heirs and cultivating the suit land through one Gyasiram on the spot. On 12-12-1991 employees of Nagar Nigam and State Government tried to evict them which necessitated the filing of the suit.

Defendant No. 3 is exclusively claiming the right and possession over Survey Nos. 1126 and 1128 while in written statement filed on behalf of State Government and Municipal Corporation the disputed land is claimed to be a Government land and in possession of the Municipal Corporation. The jurisdiction of the Court to try the suit was also challenged. However, it seems that the question of jurisdiction was not seriously contested before both the Courts below and the case has been decided on merits.

The learned Trial Court by judgment and decree dated 7-4-1993 dismissed the suit as found not proved while in First Appeal No. 2-A/93 Eighth Additional Judge to District Judge, Gwalior by the impugned judgment reversed the judgment and finding of the Trial Court and decreed the suit. Against which this second appeal has been admitted on following substantial questions of law :--

"(1) Whether the suit was not maintainable in Civil Court ?

(2) Whether the judgment and decree passed by the Appellate Court is vitiated on account of misreading of evidence and putting the burden on wrong shoulders ?"

For the purpose of challenging the jurisdiction of Civil Court the learned counsel of the appellant has invited attention to the provisions envisaged u/s 57 of the Madhya Pradesh Land Revenue Code, which reads as follows :--

"57. State ownership in all lands.-- (1) All lands belong to the State Government and it is hereby declared that all such lands, including standing and flowing water, mines, quarries, minerals and forests reserved or not, and all rights in the sub-soil of any land are the property of the State Government: (Provided that nothing in this section shall, save as otherwise provided in this Code, be deemed to effect any rights of any person subsisting at the coming into force of this Code in any such property.)

(2) Where a dispute arises between the State Government and any person in respect of any right under sub-section (1) such dispute shall be decided by the Sub-Divisional Officer.

(3) Any person aggrieved by any order passed under sub-section (2) may institute a civil suit to contest the validity of the order within a period of one year from the date of such order.

[(3-a) (a) Notwithstanding anything contained in the Code of Civil Procedure, 1908 (V of 1908) no Civil Court shall, in a civil suit instituted under sub-section (3) on or after 24th October, 1983, by order of temporary injunction disturb the person to whom possession is restored u/s 250 if such person furnishes a reliance surety to recompensate the aggrieved party against any loss in case the Civil Court grants a decree in favour of the aggrieved party:

Provided that no surety shall be required to be furnished by a member of a tribe declared to be an aboriginal tribe under sub-section (6) of Section 165;

(b) Where a Civil Court by an order of temporary injunction disturbed the person referred to in clause (a) on or after 24th October, 1983 but before the publication of Revenue Department's Notification No. 1-70-VII-N-2-83, dated 4th January, 1984 such order shall abate on such publication and the Tahsildar shall restore possession to a person who is disturbed by such order.]

(4) Where a civil suit has been instituted under sub-section (3) against any order such order shall not be subject to appeal or revision."

Learned counsel of the respondent Nos. 1, 2 and 3 has contended that he claims title on the disputed land on the basis of revenue entries in name of his father and these entries relate back from much before time of coming into force of M.P. Land Revenue Code, 1959. In the circumstances, the question of jurisdiction of Civil Court is not involved. It is further submitted for the respondents that the appellant and other defendants have not specifically raised the question of jurisdiction of the Court on the ground of not invoking the provisions envisaged u/s 57 of the M.P. Land Revenue Code. Therefore, this legal question which was not raised even before the Courts below now can be raised in second appeal.

The learned counsel of the appellant on the other hand has argued that although the point of jurisdiction was not contested before both the Courts below, the question of jurisdiction has been specifically objected to in the written statement filed on behalf of appellant and respondent No. 4. In the facts and circumstances of the case, where a dispute had been arisen between the State Government and the plaintiffs in respect of rights over the disputed land, it ought to have been decided by the Sub-Divisional Officer under sub-section (2) of Section 57. Without taking the recourse to a remedy available under sub-section (2) of Section 57 of M.P. Land Revenue Code no civil suit can be entertained and is specifically barred under the provisions of Section 257 of M.P. Land Revenue Code. Reliance is placed on a decision of this Court in the case of [Hukum Singh and Another Vs. State of M.P.](#), It has been urged by the learned counsel of the respondent Nos. 1 to 3 that the question of jurisdiction of the Civil Court has to be examined in the facts and circumstances of this case. Where it is a suit for declaration of title, it can be tried by a Civil Court, as has been held by this Court in the case of Laxman Rao Vs. State and another [1998 (I) MPJR 336]. A Full Bench of Madhya Pradesh High Court in case of Ramgopal Vs. Chetu (1976 RN 146) has ruled that Revenue Authority had no jurisdiction to go into the question of title. Further reliance is placed on a decision of Hon'ble Supreme Court in the case of [Rohini Prasad and Others Vs. Kasturchand and Another](#),

In my opinion, since no specific plea has been raised regarding jurisdiction on the basis of provisions envisaged u/s 57 of M.P. Land Revenue Code and further since

the point of jurisdiction was not contested before both the Courts below, it is not permissible to raise such a point of law first time in the second appeal.

So far as the finding of First Appellate Court is concerned, the learned counsel of the appellant has submitted that the learned Appellate Court erred in law in relying upon the documents which were found manipulated by the Trial Court and further the Trial Court was agitated from the question of manipulation and interpolations in the documents to the extent that it ordered enquiry against the officials involved in creating such manipulation or interpolations for or against the parties. The learned Appellate Court further committed error in holding title of the plaintiffs to the disputed land on the ground of thirty years of adverse possession, while no plea of adverse possession was set up in the pleadings contained in the plaint. The simple case of the plaintiffs was that they are owners and occupiers of the disputed land from the time of their father. Absolutely, there is no pleading regarding source of title to the father of the plaintiffs. In the circumstances, the Appellate Court is not justified in carving out absolutely a new case for the plaintiffs which was even contrary to the pleadings on record. For setting up a plea of adverse possession, as held by the Hon"ble Supreme Court in the case of [D.N. Venkatarayappa and another Vs. State of Karnataka and others](#), claim of animus on the part of the person claiming adverse possession is necessary. It was observed that the petitioners were required to plead and prove that they disclaimed the title under which they came into possession, set up adverse possession with necessary animus of asserting open and hostile title to the knowledge of the true owner and the owner allowed them, without any let or hindrance, to remain in possession and enjoyment of the property adverse to his interest until the expiry of the prescribed period. That having not been done plea of adverse possession was not found proved.

I am of the considered opinion that the learned Appellate Court erred in law in holding plaintiff's title to the disputed land on the strength of adverse possession when no such plea has been raised nor the evidence has been led on this point.

It has further been argued for the appellant that admittedly the father of the plaintiffs died in the year 1982 while the present suit has been filed in the year 1992 and during these ten years the plaintiffs never tried to get their name mutated in place of their father. This shows that in fact the entries on some of the revenue papers in name of their father were got subsequently manipulated in collusion with the employees of the Government or Municipal Corporation. Had the father of the plaintiffs or plaintiffs themselves been in possession of the land and particularly when they are not illiterate persons, would have certainly tried to get their names recorded in place of their father. I am of the opinion that the name of plaintiffs father was recorded only in some of the khasra entries (Exts. P-1, P-2 and P-3) pertaining to Samvats 2010 to 2019 which, in the opinion of the Trial Court, are also found manipulated. Such entries in itself for few years do not create any title particularly when no source of title has been shown in favour of the person in whose

name such entries stand.

Since the burden to prove the title lies on the plaintiffs which they have failed to discharge, the learned Appellate Court erred in law in shifting the burden by carving out a new case of adverse possession in favour of the plaintiffs.

The learned counsel for the respondents has cited decision of Apex Court in the case of [Nair Service Society Ltd. Vs. Rev. Father K.C. Alexander and Others](#), for substantiating his argument regarding long standing possession of plaintiffs. No doubt, a person in possession of land in assumed character of ownership and exercising peaceably the ordinary rights of ownership as a perfectly good title and if the rightful owner does not come forward and assert his title by process of law, within a period prescribed by the provisions of statute of limitation applicable to the case, his right is forever extinguished as possessory owner acquires absolute title. However, in the present case, neither the source of title is pleaded nor entries, except for few years, are in favour of possession of plaintiffs' father. The Apex Court in the case of *Vyanhan Rajendra Singh Vs. State of Madhya Pradesh*, reported in 1970 RN 16, where the owner was shown in khasra as the "State Milkiyat Sarkar", the column regarding tenancy right was blank but the person was entered as in possession in remark column, has held that the possession cannot be attributed to ownership or tenancy of property. In the present case also, it is Municipality, which is recorded as owner and name of plaintiffs' father is found entered below it and in some entries also found entered in remark column.

There is no evidence to suggest that plaintiffs or their father had personally cultivated the land in dispute. Plaintiff Kailash Narain (P.W. 1) could also not make it clear as to by whose orders the name of his father was entered in revenue papers. He or his father had never paid any land revenue. It is not clear as to what prevented him from getting the name recorded after Samvat 2019 or after the death of his father. Witness Ramjilal Raihore (P.W. 2), had no knowledge about father of plaintiffs and he never visited the disputed land. According to Ramratan Das (P.W. 3), Gyasiram was cultivating the land on behalf of plaintiffs but Gyasiram was not produced in evidence. Thus, oral evidence also does not inspire confidence, regarding any actual possession of the plaintiffs or their father on the spot,

The learned counsel for the respondent has vehemently argued that the State Government and Municipal Corporation are estopped from challenging the findings of First Appellate Court, as they had previously withdrawn the appeal, and therefore, the findings against them operate as *res judicata*. Reliance is placed on a decision of Privy Council in the case of AIR 1931 231 (Privy Council), wherein it has been observed that for a decision to operate as *res judicata* as between co-defendants three conditions are requisite:

(i) There must be a conflict of interest between defendants;

(ii) It must be necessary to decide the conflict in order to give plaintiff relief as claimed; and,

(iii) The question between the defendants must have been finally decided.

However, I am of the opinion that no such conditions as pre-requisite to operate res judicata are available in the present case and further it is to be noticed that if the officials fail to protect the interest of State or Municipal Corporation, it is the duty of the Court to fairly decide the case on merits, by taking recourse to the provisions of order XLI Rule 33 of the Code of Civil Procedure, as has also been held in the cases of [Dwarka Nath Prasad Atal Vs. Ram Rati Devi](#), , and, State of Punjab Vs. Bakshi Singh, reported in 1999 (1) ATJ 191.

Learned counsel of the respondents has submitted that the Municipal Corporation has not produced the entries of its property register and, therefore, adverse inference be drawn against it. It is further submitted that in written statement of the State, there is no specific denial of the title of the plaintiffs. Such an evasive denial leads to the conclusion of admission on the part of the State. Reliance is placed on a decision of Apex Court in the case of [Jahuri Sah and Others Vs. Dwarka Prasad Jhunjhunwala and Others](#), .

I am of the opinion that although in para-wise reply of the written statement of the State no knowledge was shown regarding possession of the plaintiffs father; however, in special pleas, the title of plaintiffs has been specifically denied and ownership of the State and Municipal Corporation has been set up. Similarly, non-production of the property-register in itself is no ground to assume title in favour of the plaintiffs. The plaintiffs are not entitled to claim any title on the weakness of the case of the defence.

Lastly, learned counsel of the respondents contends that no interference can be made in the findings of the First Appellate Court in second appeal even if such findings are erroneous. Reference is made to decisions of Hon'ble Supreme Court in the cases of Deity Pattabhiramaswamy Vs. S. Ranymayya and others, reported in AIR 1959 SC 57; Paras Nath Thakur Vs. Smt. Mohani Dasi (deceased) and others, reported in AIR 1959 SC 1204; and, Ragavendra Kumar Vs. Firm Prem Machinery and Co., reported in 2000 MPLJ 186.

Learned counsel for the appellant, on the other hand, has contested the contention on the ground that no question of erroneous finding of facts is involved in the present appeal but the question of interpretation of evidence as made by the Trial Court and reversed by the First Appellate Court is to be considered in this appeal. From this aspect of the case it has to be noticed that the First Appellate Court had relied upon the documents for the purpose of ascertaining possession of the plaintiffs, which were held manipulated or interpolated by the Trial Court. The Appellate Court totally failed to appreciate these documents in the light of the evidence of the witnesses, who produced the documents and proved them.

Similarly, the First Appellate Court carved out a totally new case for the plaintiffs regarding adverse possession which was neither raised in the pleadings nor evidence was led on that point. In the circumstances, the findings of the Appellate Court were totally perverse and, in the circumstances, the same can be interfered with in second appeal by this Court. Reference is made to decisions of Apex Court in the cases of [Banarsi Dass Vs. Brig. Maharaja Sukhjit Singh and Another,;](#) and [Rajappa Hanamantha Ranoji Vs. Sri Mahadev Channabasappa and Others,.](#)

For the reasons stated hereinabove, since the findings of the First Appellate Court are vitiated in law, this appeal deserves to be and is hereby allowed. The judgment and decree of the First Appellate Court is set aside and that of the Trial Court is confirmed. Consequently it is held that the Trial Court has rightly dismissed the suit of the plaintiffs.

Second Appeal allowed.