
(1994) 05 MP CK 0019
In the Madhya Pradesh High Court
Case No : Second Appeal No. 55 of 1980

Chironjilal and Others

APPELLANT

Vs

Khatoon Bi and Others

RESPONDENT

Date of Decision : 27-05-1994

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 9
Evidence Act, 1872 — Section 13

Citation : AIR 1995 MP 238 : (1994) 39 MPLJ 923 : (1994) MPLJ 923

Hon'ble Judges : S.K. Dubey, J

Bench : Single Bench

Advocate : Arun Mishra, for the Appellant; K.B. Chaturvedi, for the Respondent

Final Decision : Dismissed

Judgement

S.K. Dubey, J.

The defendants No. 4 to 7 have preferred this second appeal against the judgment and decree dated 28-1-1980 passed by First Additional District Judge (Camp Basoda) Vidisha in Civil Appeal No. 23-A/ 1978, preferred against the judgment and decree dated 20-2-1978 passed in Civil Suit No. 502-A of 1975 by Civil Judge, Class I, Basoda.

Material facts leading to this appeal are these :-- The plaintiff-respondent No. 1 instituted a suit on 21-10-1975 against the respondents No. 2 to 4 (defendants No. 1 to 3) and the appellants-defendants No. 4 to 7, in respect of the suit land, area 90 bighas and 10 biswas, described in para 3 of the judgment of the First Appellate Court, for declaration and possession and for mesne profits at the rate of Rs. 1,000/- per annum on the averments, that the plaintiff is the sole owner of the suit land, the sale deed executed on 23-6-1973 by the defendant No. 1 the mother of defendants No. 2 and 3 as their guardian for half of the land in favour of the defendants No. 4 to 7 is ineffective and void. The defendant No. 1 admitted the claim of the plaintiff and also contended that the defendant,

Chironjilal, got executed the sale-deed by playing fraud upon her as towards consideration of Rs. 15,000/- only Rs. 4,000/- were paid. Defendant Nos. 2 and 3 also admitted the claim of the plaintiff and contended that their mother, Khatoonbi was not authorised to execute the sale-deed on their behalf. The defendants No. 4 to 7 contended that they are the Bhumiswamis of the land and are in possession of the same. The land was a joint holding of plaintiff and Hassu Khan, who is recorded as co-owner in revenue records, the heirs of Hassukhan, the defendants No. 3 and 4 have transferred their right, title in the suit land by way of sale-deed executed by their mother, Khatoonbi, as guardian, the defendants No. 4 to 7 are in possession since 26-9-1973 on the basis of sale-deed.

The trial Court after appreciation of evidence and material on record, recorded a finding that original land-owner was Niyamat Khan, who had two wives, one legally wedded wife, from whose wed-lock Dakar Moham-mad was born and the other was Bhuribai, a concubine, who gave birth to Hassu Khan, but he was not illegitimate because of presumption of long (lengthened) cohabitation of Niyamat Khan with Bhuribai. Plaintiff is the son of Bakar Mohammad, while Khatoon Bi is the wife of Hassu Khan and defendants No. 2 and 3, Ismile and Chhutta are sons of Hassu Khan. Both, Bakar Mohammad and Hassu Khan were co-owners of the suit land and were recorded as such in revenue records. Therefore, long sole possession of Bakar Mohammad in the absence of ouster of Hassu Khan, even though Hassu Khan with his wife left the village and was residing in village Biladana, right of Hassu Khan did not extinguish. As regards the sale-deed the trial Court recorded a finding that the plaintiff and the defendants being Sunni Mahomedan the sale-deed executed on behalf of defendants No. 2 and 3 by the defendant No. 1, the mother, as guardian was illegal and void, as u/s 359 of the Principles of Mahomedan Law a mother as guardian of the property of minors cannot transfer the same. However, the suit was dismissed as the plaintiff was not found to be the sole-owner.

In appeal preferred by the plaintiff the suit was decreed holding that Hassu Khan was the son of concubine of Niyamat Khan, who was turned out of the house in the year 1939, since then plaintiff and his predecessor were in exclusive possession. The sale was void because Khatoon bi, the mother as guardian was not authorised to execute the sale-deed, the defendants No. 4 to 7 have no right or title to the land, which was forcibly occupied by them. Aggrieved of this judgment and decree, this second appeal was admitted by this Court on the following substantial questions of law:--

(i) Whether in absence of evidence to contrary the presumption of law ought to have been made in favour of valid marriage when there had been a lengthened and continuous cohabitation especially where alleged marriage took place long ago?

(ii) Whether possession of the co-owner is presumed to be the possession of all co-owners is unless it is established that possession is in hostility to co-owners ?

(iii) Whether plaintiff can acquire the rights of Bhumiswami over the suit land on the basis of adverse possession under the Tenancy Law (M.P. Land Revenue Code, 1959)?

(iv) Whether the admission of Defendants No. 1 to 3 is admissible in evidence under the provisions of Section 18 of the Evidence Act when defendants have parted with their interests and property ?

(v) Whether the Court can award mesne profits for ante date of suit for which plaintiff has not sought a relief in plaint ?

(vi) Whether the Judgment and decree passed by the learned Additional District Judge suffers from infirmity of misreading of material evidence documentary as well as oral evidence on record and therefore are eminable to interest under Order 41 Rule 31 C.P.C. in view of Section 100 CPC ?

Shri Arun Mishra, learned counsel for the appellants contended that admittedly Bhuribai, who was Dasta, was living as wife of Niyamat Khan. It is well established on evidence that because of long cohabitation of Niyamat Khan with Bhuribai, Bhuribai acquired the status of wife. Hassu Khan was the off-spring of Niyamat Khan and Bhuribai, which was well acknowledged by Niyamat Khan and because of the long and continuous cohabitation for a number of years Niyamat Khan with Bhuribai there is a presumption u/s 114 of the Evidence Act in favour of marriage and against concubinage and the legitimacy of Hassu Khan, Therefore, Hassu Khan was owner of half of the property, counsel placed reliance on decisions - Syed Habibur Rahman v. Altaf Ali AIR 1922 PC 159, Fatma Binti Hafidh v. Administrator General Zanzibar AIR 1949 PC 254 and Gokal Chand v. Parvin Kumar AIR 1952 SC 231.

It is not necessary for this Court to deal with this question as the First Appellate Court has not recorded any finding about the presumption of marriage and legitimacy of Hassu Khan. But, on the other hand, while confirming the findings of trial Court holding that the sale-deed executed in favour of the purchasers by Khatoon Bi on behalf of minors was void decreed the suit of the plaintiff.

Mulla, the learned Author, in his book of Principles of Mahomedan Law has dealt with the subject of "Guardianship of Person and Property", in Chapter XVIII, Section 359 of which specifies the persons, who can be legal guardian of minor's property, which are-- (1) the father, (2) the Executor appointed by the father's will, (3) Father's father, and (4) the Executor appointed by the will of father's father. Mother, brother, uncle etc. are excluded. Hence, a mother being not legal guardian of the property of her minor children, she cannot bind the children by any act in relation of the property. Therefore, the mother has no power to alienate the interest of minor in the property, any alienation, sale, mortgage of minors' Immovable property by mother on behalf of minors is void and not binding. See Gurubax Singh v. Begum Ra-fiva, AIR 1979 Madh Pra 66 and Parshotamdas Narsimbhai and Others Vs. Bai Dhabu and Another, and Bhikaji Ramchandra Shimpi Vs. Ajagarally Sarafally Bohori,

Submission of Shri Mishra relying on a Privy Council decision in case of *Imambandi v. Mutsaddi* 45 Ind App 73 : AIR 1918 PC 11 that in the absence of legal guardian mother was acting as a de facto guardian, the sale was valid, but, the decision is of no help. On the other hand, it supports the view that such de facto guardian has no power to deal with the Immovable property as de facto guardian acts merely a custodian of the property of a minor. De facto guardian has been dealt with by Mulla in his book in Section 361 of Chapter XVIII. A person may neither be a legal guardian (S. 360), but have voluntarily placed himself in charge of the person and property of a minor, such a person is called de facto guardian is merely a custodian of the person and property of minor.

8A. It is settled law that a de facto guardian of muslim minor has no power to transfer any right or interest of the minor and such transfer is not merely voidable but void ab initio qua all the parties including those who were sui juris. See *Matadin v. Amhad Ali* (1912) 39 IA 49, *Imambandi's case* AIR 1918 PC 11 (supra), *Mohd. Amin and Others Vs. Vakil Ahmed and Others*, and *Ali Mohammad Vs. Ramniwas and Another*,

Next, it was submitted that the minors upon attaining majority did not object to sale executed by the de facto guardian on their behalf, nor took any action for setting aside the sale, by their conduct, the defendants Nos. 2 to 3 have ratified the sale, has no merit as under the Mahomedan Law a void transaction in respect of minor's share is considered not voidable but is void, hence, cannot be ratified, nor any question of its ratification arises. See Privy Council decision in *Imambandi's case* AIR 1918 PC 11 (supra), *Mt. Anto Vs. Mt. Reoti Kuar and Others*, , *Kharag Narain Vs. Mst. Bibi Hamida Khatoon and Others*, and *Vemana Ramachandrayya Naidu Vs. Abdul Kadar Chisthi*, and Mulla's *Principles of Mahomedan Law*, Nineteenth edition, page 296, (S. 364).

In view of that the sale-deed executed by Khatoon Bi, on behalf of minors relating to the shares of minors in the property being void, no title passed to defendants Nos. 4 to 7, under such unauthorised transfer, the position of the defendants Nos. 4 to 7 is no better than trespassers, therefore, they cannot resist an action for possession. See *Imambandi's case* AIR 1918 PC 11 (supra).

Coming to the next question that Hassu Khan was a "co-owner" and the plaintiff did not perfect his title by remaining in continuous long possession of more than 12 years of agricultural fields. In view of Khasra entries wherein Hassu Khan is recorded as co-owner and that entry was never challenged, and there is no evidence of exclusive ownership of plaintiff's predecessors and plaintiff, and the ouster of Hassu Khan. Therefore, it was submitted that any statement or admission made by the defendants Nos. 1 to 3 after parting with interest is no admission u/s 18 of the Evidence Act. The admission of a person could be an admission only if it would be made during the continuance of his interest but once he has parted with his interest in property his admission is not admissible. That would be manifestly unjust that a person who has parted with his interest in property should be empowered to divest a right of another claiming in him by

any statement which he may choose to make subsequently, reliance was placed on two decisions of this Court in case of Dharamsingh v. Jalima 1980 Jab LJ 738 and Shafiullah Khan v. Abdul Wahab 1963 Jab LJ (SN) 14.

Therefore it was submitted that in between the co-owner's possession of one co-owner will be that of on behalf of all and the ordinary classical requirement of adverse possession is that it should be *nec vi nec clam nec precario* i.e. possession required must be adequate in continuity, in publicity and in extent to show that it is possession adverse to the competitor, as it is well settled that in order to establish adverse possession of one co-owner as against another it is not enough to show that one out of them is in the sole possession and enjoyment of the profits of the properties. Ouster of the non-possessing co-heir by the co-heir in possession should be made out, as a co-heir in possession is prescribed to be in possession on behalf of joint title, reliance was placed on P. Lakshmi Reddy Vs. L. Lakshmi Reddy, , Syed Shah Ghulam Ghouse Mohiuddin and Others Vs. Syed Shah Ahmed Mohiuddin Kamisul Quadri (Died) by Lrs. and Others, , Shikharchand Jain Vs. Digamber Jain Praband Karini Sabha and Others,

Shri K. B. Chaturvedi, learned counsel for plaintiff/respondent, placing reliance on decisions of the Supreme Court in case of AIR 1981 707 (SC) and a decision of this Court in case of Gyan Singh v. Saran Singh (1992) 2 MPWN 33 contended that since 1939 Hassu Khan was ousted and plaintiff's predecessors we're cultivating the land, ouster was not secret but open with assertion of hostile title, the exclusive possession of agricultural fields with its enjoyment by the plaintiff and his predecessors to the knowledge of Hassu Khan fully establishes ouster. Therefore, even Hassu Khan was having any right in the property as co-heir his right of ownership extinguished ripening in the title of the plaintiff.

It is not necessary for me to deal with this question of adverse possession and acquiring Bhumiswami rights by the plaintiffs over the suit land on the basis of adverse possession under M. P. Land Revenue Code, 1959, though it is settled that even a person can acquire Bhumiswami rights by adverse possession, but, as alluded, the sale in favour of defendants Nos. 4 to 7 executed by Kha-toon Bi on behalf of minors was void, and that sale has also been challenged not only by minors but by Khatoon Bi also, by such sale no title convey to the defendants, therefore, even for argument's sake, plaintiff did not acquire title by adverse possession in the suit land, the defendants Nos. 4 and 7 do not get any advantage of that, as their position was that of a trespasser and a suit by a co-owner having an interest jointly in the property with others can maintain a suit against a trespasser, even if other co-owners are not made parties to the suit, which is not the case here, however, the heirs of Hassu Khan have supported the claim.

In regard to other substantial questions of law framed by this Court, no arguments were advanced by counsel for parties, hence, it is not necessary for me to decide those questions. However, Shri Mishra in para 10 of his written-submissions has submitted that the defendants Nos. 4 to 7 have purchased 45

bighas of land and they were in possession only of that area, and that land is under attachment since 1981, hence when the possession of the purchasers was not in excess of the share of vendors then possession can be retained till actual partition is effected between the plaintiff and heirs of Hassu Khan. How, this question arises as the sale was void ab initio the position of the purchasers is that of trespassers, therefore, they have no right to retain possession in any manner.

As regards mesne profits it is not necessary for this Court to observe anything as no material has been placed before this Court, that land is under attachment since 1981, even if it is under attachment that question shall be determined at the time of execution.

In the result, the appeal has no merit, and is dismissed with costs. Counsel's fee Rs. 500/-, if pre-certified.