
(1999) 07 MP CK 0017
In the Madhya Pradesh High Court
Case No : S.A. No. 292 of 1996 (G)

Harnam Singh and Another	Vs	APPELLANT
Vijay Singh and Another		RESPONDENT

Date of Decision : 08-07-1999

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 1 Rule 8

Citation : (2000) 2 MPJR 384

Hon'ble Judges : R.P. Gupta, J

Bench : Single Bench

Advocate : Arun Mishra, for the Appellant; S.B. Mishra, Advocate for respondents 1 and 2 and Mr. S.S. Chouhan, Advocate, for the Respondent

Final Decision : Allowed

Judgement

R.P. Gupta, J.

This second appeal arises from the judgment dated 19-7-96 in Civil Appeal No. 26A/96 passed by the IV Addl. Distt. Judge Bhind reversing the judgment and decree of Civil Judge Class-I, Mehgaon in C.S. No. 268A/84 decided on 2-1-85.

This relates to a century old user of the disputed land by villagers as cremation ground and thrashing ground (Khalihan). The appellate court had reversed the judgment and decree of the trial court and the decree of the trial court was in favour of the plaintiff for declaration of rights of the user of the land of survey No. 59 of village Sunarpura, district Bhind for cremation of his dead family members and similarly using survey No. 58 as khalihan (crop thrashing ground). An injunction was also granted against the defendants not to interfere with these respondents from use of the respective survey numbers.

The appellate court reversed the judgment and decree of the trial court on grounds that the suit of the plaintiffs was not representative in character while they were claiming community of interest for all other villagers of Sunarpura and they had no personal exclusive rights. It was further found that in the land in

dispute, the defendants (now respondents) had bhumiswami rights as recorded in revenue records since Samvat 2008 having been so recorded as Pucca Krishak ever since. It was found that these properties were not established to be the common cremation ground for use of the village community or as common thrashing ground for all or any section of the people of the village. The finding of the trial court was reversed on these material aspects, by the appellate court.

It will be appropriate to note in brief the pleadings of the parties. The short history of the case is that the appellants/plaintiffs had filed this suit, purporting to be filed in a representative capacity, on behalf of the village people with permission to sue in a representative capacity under Order 1 Rule 8 C.P.C. The claim was that the land of survey No. 59 had been used as cremation ground for about 100 years by all the villagers including the plaintiffs. The land of survey No. 58 was urged to be common khalian of the village to be used as such. It was urged to be common property before coming into force of Madhya Bharat Zamindari Abolition Act, Samvat 2008 (hereinafter referred to as the Act). After coming into force of the Act, the land vested in the State Govt. Earlier it was the land belonging to Shyamlati Thok Nawabsingh and defendants never possessed this land nor have any exclusive rights nor cultivated it when the Act came into force.

The trial Court gave notice of the petition under Order 1 Rule 8 C.P.C. to the listed persons in the prescribed manner but above persons denied that they had any rights of such user and denied that they wanted to be represented by the plaintiffs. On that basis, vide order dated 28-12-76, the application under Order 1 Rule 8 C.P.C. was declined by the court and permission was not granted to the plaintiffs to sue. The plaintiffs, then, sought amendment by permission of the court, amended the plaint by omitting allegations of the suit being in representative capacity and urging that they themselves, along with other villagers, had right to use this property as cremation ground and threshing ground respectively.

The defendants had contested the suit urging that although the land was recorded as vested in the State after coming into force of the Act. But in Samvat 2007 it was recorded pucca tenancy of the defendants and ultimately they became bhumiswami. It was denied that the land was ever used by village people as common cremation and threshing ground. Of course, they urged that the land of survey no. 59 was used by them and their family members as cremation ground and some memorials of their family members were built there upon. The trial court framed the following issues-

- (i) Whether the plaintiffs and other villagers had been using the suit land as khalian and Marghat for the last 100 years,
- (ii) Whether the defendants got their names recorded in the revenue records by collusion with the revenue authorities,
- (iii) Whether the plaintiffs were entitled to use the suit land as khalian and

marghat and were entitled to declaration of that right.

(iv) Whether the plaintiffs were entitled to injunction against the defendants.

(v) Whether the plaintiffs and others were in possession of the suit land.

(vi) Relief and expenditure.

(vii-a) Whether the defendants had been using the suit land as Khalihan since before 2-10-51 i.e. before vesting of the land in the State.

(vii-b) Whether the defendants were pucca krishak at the time when the Act came into force i.e. since before 2-10-51.

The trial court decided issue Nos. i, iii and iv in favour of the plaintiffs. Issue No. v was decided against the plaintiffs. Issues vii a & b were also decided against the defendants. Hence the decree.

The first appellate court decided the entire issues involved in the suit under one composite question whether the land in dispute was under ownership and possession of the defendants and not for the community as alleged by the plaintiffs for cremation ground and threshing ground. The appellate court proceeded on the assumption that the names of the defendants were on the record as pucca krishak in revenue record of Samvat 2008 in the column of cultivator. Ex. P-30 is copy of khasra of Samvat 2008. The entry was followed in subsequent years from Samvat 2009 to 2021 as revealed by khasra nos. 4 to 7. The appellant court, however, accepted the fact that the land had vested in the State under the Act on the basis of entry of Samvat 2007 where it was recorded as Samilati Thok Nawabsingh. The appellate court failed to apply its mind as to this sudden change of entry regarding possession of Samvat 2007 as Samilati Thok Nawabsingh was recorded in possession as is clear from Ex. P-2 and the nature of the land was "Oosar" i.e. Banjar and some wild trees were growing thereon and in one part of the land of Khasra no. 59, there was Sati Ka Chabutara. In a part of this land "kabja Chhotasingh" was recorded in the "Kafiyat column". In samvat 1997 in khasra Ex.P-1 the entries were that it was a land of Samilati Thok Nawabsingh which was "Oosar". The change was sudden in Samvat 2007 in favour of the defendants by recording them as "pucca krishak" as it was not considered by the appellate court and it was taken on its face value under presumption of correctness arising for entries in such revenue records.

The trial court had proceeded on the ground that the land has been used as cremation ground and in revenue records there was such mention and there were Chabutaras of some dead persons. The defendants had admitted that in Survey No. 59, they were cremating their dead family members, although they denied user by others. The land had been mentioned as "Oosar" throughout till "Samvat 2016". The land of Survey No. 59 was recorded as "Marghat and on another part of the land of Survey No. 58 a village road had been built and the rest was lying as "Oosar". These entries continued from Samvat 2012 to 2031. In view of these entries the trial court accepted the oral evidence of plaintiffs and

their witnesses that various persons of the village who died were cremated in this land of survey no. 59, and land of survey no. 58 was used as common threshing ground. In view of this fact that the type of land was recorded as "Oosar", there could be no scope for defendants cultivation in the land and their assertion of cultivation was false. For the same reason it was held that the entry of "pucca krishak" from Samvat 2007 was against this fact and therefore could not be acted upon. The land continued to be vested in the State.

This court has heard at length the learned counsel for the parties and the entire record has been carefully seen with their assistance. At the time of admission this court had framed the following substantial questions of law:-

- (i) Whether in view of S. 4 (2) of the Zamindari Abolition Act the rights of tenancy could not be acquired by the defendants-respondents ?
- (ii) Whether the suit was not maintainable in view of the fact that proper procedure for filing suit in representative capacity was not followed ?
- (iii) Whether the claim of the defendants-respondents on the basis of the lease was neither pleaded nor proved and the finding of the first appellate court is perverse in that respect ?
- (iv) Whether the suit with the prayer for declaration and title was maintainable without the prayer for recovery of possession of injunction ?

One thing which is noticed in this case is that both the courts have misread certain parts of the entries of the survey numbers. They have assumed as if Nawabsingh was recorded owner of this land in or before Samvat 2007. This was a total misunderstanding. In fact the recorded proprietor in Samvat 2007 as per Exs. P-1 and P-2 was "Samilati Thok Nawabsingh". The word "Thok" represents a revenue estate of definite part of the revenue State as recognised for the purposes of assessing land revenue. The land was thus belonging to all the proprietors of "Thok Nawabsingh". That was the name of the particular or specified part of the revenue state. So they have misunderstood that the land was recorded as ownership of Nawabsingh. It was a joint land of all the co-owners of that Thok. In some places the entire village is one revenue estate but some times the land is so much that for convenience of assessing the revenue it is divided into pattis and Thoks, which were defined portions of revenue estate. The land recorded as "Samilati Thok" is so recorded because it is owned by all the land holders of that Thok. So it was not the land of Nawabsingh before the Act. It was a samilati land. Nobody was in possession. It was a "Banjar" land uncultivated with some wild trees on it and on survey no. 59 there was process of cremation going on, and one Sati ka Chabutara was recorded in the revenue record. The defendants and their family were using it as cremation ground. It suggests that it was used as cremation ground. The appellate court gave no weight to this plea for understanding these entries in the revenue records while totally misunderstanding the entry in the column of ownership.

The trial court proceeded on consideration of oral evidence of witnesses of the plaintiffs. The plaintiffs asserted that their dead relatives were cremated there. There is not only Sati ka Chabutara but later on another Chabutara of Goresingh was recorded in Samvat 2013. The defendants case is that Goresingh was grandfather of Jagdish defendant as admitted by P.W. 1. The trial court relied on the entries from Samvat 2013 to 2017 and in entries of Samvat 2018 to 2021. In similar entries, survey no. 58 was shown as khalian.

Even the defendants did not deny the fact that in Samvat 2007 the land vested in the State. How it was that in Samvat 2008 the defendants were recorded as Pukhta tenants. The land was not cultivated. They gave their own explanation about it. Section 54 (vii) of Madhya Bharat Revenue Administration and Ryatwari Land Revenue and Tenancy Act, Samvat 2007, which was prevalent in areas not settled under Zamindari system, defines pacca tenant as under:-

Pakka tenant means a tenant who has been or whose predecessor in interest had been lawfully recorded in respect of his holding as a "Ryot Pattedar" and "Pukhta Maurusi", "Gair Maurusi" "Patteddar tenant" and "Pukhta Maurusi" when this Act comes into force or who may in future be duly recognised as such by a competent authority.

Explanation - The term "Pukhta Maurusi" includes Istam Maurardar tenants, Malikana Haq-holder tenants, Hakkiyat Mutafarrikat, Sharah Muayyana and Sakitul Mikiyat tenants.

This definition was adopted in S. 2 (o) of the M.B. Zamindari Abolition Act Samvat 2008. The word "khudkast" is defined in S.2(c) of the Act as under:-

Khudkast means land cultivated by the Zamindar himself or through employees or hired labourers and includes sir lands.

M.B. Zamindari Abolition Act, Samvat 2008 dealt with rules settled under the zamindari system.

Section 38 of the Zamindari Abolition Act deals with conferral of pucca tenancy right on tenants and sub-tenants which is as under:-

28. (1) Subject to the provisions of this section every tenant of a proprietor shall be deemed to be pacca tenant of the land comprised in his holding from the date of vesting.

(2) Every sub-tenant or tenant of a sub-tenant who deposits with the Tehsildar within the period specified in sub-sections (3) and (4) the following amount to be paid to the proprietor, or tenant or sub-tenant as the case may be, shall be deemed to be a pacca tenant of the land comprised in his holding. Till amount is deposited, his former status shall continue. The right of becoming a pacca tenant by depositing money shall firstly be that of the tenant of the sub-tenant, if any, and if he fails to deposit money shall be that of the sub-tenant.

(a).....

(b).....

(c).....

(d).....

(3).....

(4).....

When we consider the revenue entries existing in Samvat 2007 which is the relevant year, it becomes clear that the defendants were not cultivating this land nor were in possession in any capacity whatsoever. No cultivation existed in Samvats 1997 and 2007 and thereafter (Ex.-1 to P7) even upto 2021. The land had vested in the State Govt. in Samvat 2007 (Ex.P-3). The defendants came to be entered as either Gair Mourusi or pacca krishak in samvat 2008. The entry in samvat 2008 is like this after the names of the defendants, they were recorded as "Gair Mourusi". These words "Gair Maurusi" were then scored off and the word pacca krishak" was recorded. There is no evidence whatsoever for this sudden introduction of the defendants names without change of nature of the land. It is not the State who granted such rights to these defendants. It is not the case here. There is no allegation that they received patta from the State. The previous nature of user of the land which remained "Oosar" (Banjar) had not warranted such change as there was no change in the land. So the reasoning of the first appellate court that the entries of the khasra in the samvat 2008 till 2021 are entitled to presumption of correctness is erroneous. The appellate court was called upon to consider the legality and validity of such change and whether it was warranted by the circumstances. The finding of the appellate court is that the land vested in the State and at the same time that later on the defendants became "pacca tenant". If the defendants had been in cultivating possession, their rights would have been recorded in samvat 2007 and could be protected u/s 4 (2) of the M.B. Zamindari Abolition Act, 2008. That was not done so. The nature of land never changed from "Banjar". There was never any actual cultivation recorded. Thus the finding of the appellate court that the revenue entries where the defendants were recorded as "pacca tenants" and thereafter bhumiswami, is entitled to presumption of correctness, is an erroneous finding without considering the real effect and without considering that no rights of the defendants exists at the time vesting. So the defendants had not become bhumiswamis of this land. That finding of the appellate court on that issue is reversed.

Now we proceed to consider whether these properties are being used for common purpose such as cremation ground in survey No. 59 and common threshing ground in survey No. 58. In revenue records it was so recorded at least in samvat 2013. Prior to that, in survey no. 59, the record shows "sati ka Chabutara" and later on "chabutaras" Goresingh and Chhotesingh. These facts along with the pleas of the defendants show that the land of survey no. 59 was being used as cremation ground.

The question is whether it was exclusive cremation ground of the family of the defendants. The claim of the defendants is based on the fact that Chhot Singh and Goresingh were their ancestors and this is admitted by the plaintiffs witnesses. But nobody knows who was Sati whose chabutara was recorded in records. The inference from this record is that the land was being used as common cremation ground. The court can take judicial notice of this fact that the Hindus in cremation grounds some times build chabutara in the memory of the their dead. It is only for some important persons that they build small chabutaras. The village people would not allow the defendants or any body to exclude them from cremating their dead persons in such place. Generally among Hindus there are common cremation grounds. Amongst christians and mohemaddans, there are burial grounds. Some people of these communities some times have their exclusive private burial grounds. But among Hindus personal cremation grounds are hardly noticed. These common facts of life have to be taken into consideration by this court, as they are related to common experience.

When the land of Survey No. 59 is recorded as "Marghat" i.e. "cremation ground" for so long in revenue records and the dead are actually cremated there, in these circumstances the burden was on the defendants to prove that this land of Survey No. 59 was being used as their exclusive cremation ground. They have failed to do so. They have no evidence. The evidence of the plaintiffs and their witnesses has rightly been believed by the trial court. The trial court had rightly taken support of this evidence. So the trial court was right in its findings that the land of Survey No.59 was always being used as cremation ground and at least was so recorded since samvat 2007. In these circumstances, the inference was rightly drawn that this land was used as cremation ground by the villagers. They have thus common users right over this land. Every house-holder can use it for that purpose.

It is a small village of about 50-60 families. So it is not every day that a person would die. All the villagers have similar rights about cremation in this land. The plaintiffs too have that right.

The Supreme Court in the case of Kalyan Singh Vs. Smt. Chhoti and Others, had an occasion to consider the rights of individual members of the community to enforce that right which they were entitled to enjoy as all other community members. Their Lordships pronounced that any member of the community may bring the suit to assert his right in community property or for protecting such property by seeking removal of encroachments. Earlier, Privy Council in the case of AIR 1950 56 (Privy Council) observed that a claim by the inhabitants of a village to the use of certain area as a cremation ground of the village can only be supported on ground of custom and they also said that for establishing such right the dedication of the property need not be established. Again the Allahabad High Court in the case of Jwala and Another Vs. Ram Dutta and Others, had observed that in a suit for injunction restraining the defendants from cultivating the plot in

suit and interfering with its use by the plaintiff and other members of village community, as cremation ground, it is not necessary for the plaintiff to ask for possession of the land.

In view of the above discussion, the following facts are established-

- (i) The land did not belong to defendants and was samilati land.
- (ii) The land vested in the State under the M.B. Zamindari Abolition Act.
- (iii) The defendants were never in possession and cultivation of this land.
- (iv) The land was being used customarily as cremation ground by all the villagers since before samvat 2007. In fact this user is ancient.
- (v) The plaintiffs too have a right to use it so.

It is inferable beyond doubt that this was a land being used by the villagers of village Sunarpura as cremation ground. The defendants have no right to exclude them. It was their right also as villagers to use this land as cremation ground. That finding of the trial court is correct.

Reverting to common threshing ground in survey no. 58, the entries in revenue records are similar as already noticed except that this portion is recorded as "Khalihan" since samvat 2014. Before that, it was recorded as "Oosar" land. This land also vests in the State and earlier it was a samilati land. It was being used as "Khalihan" as stated by the plaintiffs. The defendants plea was similar to that regarding survey no. 59 that they were using this land as their own threshing ground. But that is not supported by revenue records. The land vested in the State since samvat 2007. It was recorded as "Kahlihan". It could not be exclusive Khalihan of the defendants. About survey no. 58, it was rightly accepted by the trial court that it was being used as threshing ground. The statement of defendant Jagdish that he was exclusively using it as Khalihan was rightly treated as false statement. The finding of the appellate court that there was no customary rights of using these lands as cremation ground and threshing ground by community of the village is reversed and the findings of the trial court are restored and affirmed.

As regards the plaintiffs' rights as members of the community, to get the declaration of such character of this land, it is clear in view of the observation of the Supreme Court in the case of Kalyansingh (supra) that any member of the community could use the land whenever occasion arises.

In the facts and circumstances of the case, it is clear that the defendants tried to use the land exclusively and to exclude others. Every villagers will rightly feel a sense of personal damage. He can seek a declaration that the property is subject to the customary rights of the village community, including the plaintiffs. Any member of such community has right to seek an order against the defendants restraining him from excluding him or community members from enforcing the customary rights. So there is no lack of locus standi. The findings on this point

by the appellate court are against law and erroneous.

In view of the discussion above, the appeal succeeds. The decree of the trial court is restored. The defendants shall pay the costs of this appeal as well as costs of the first appellate court.