
(1985) 03 MP CK 0010
In the Madhya Pradesh High Court
Case No : Second Appeal No. 474 of 1974

Jinnatbai

APPELLANT

Vs

Indore Municipal Corporation, Indore and another

RESPONDENT

Date of Decision : 26-03-1985

Acts Referred:

Madhya Pradesh Municipal Corporation Act, 1956 — Section 79A(1), 79A(2)

Citation : (1985) MPLJ 454

Hon'ble Judges : G.G. Sohani, J

Bench : Single Bench

Advocate : S.D. Sanghi, for the Appellant; S.J. Dhanji with Iquabal Hussain, for the Respondent

Final Decision : Allowed

Judgement

G.G. Sohani, J.

This is plaintiff's second appeal arising out of a suit for declaration. Briefly, the plaintiff's case was that plaintiff was the owner of a plot of land admeasuring 40"x 40" situated at Juna Risala, Indore, on which a house bearing municipal No. 83 was built on a portion of the said plot of land measuring 40" X 30" and that to the East of the house was an Ota admeasuring 40" x 10" appurtenant to the aforesaid house. The plaintiff averred that she had purchased the aforesaid property from one Asgarali by a registered deed of sale dated 10-8-1961 and since then she was in possession of that property. It was further averred that as the defendant Corporation was denying the title of the plaintiff to the Ota appurtenant to the plaintiff's aforesaid house, a dispute was raised before the Collector u/s 79-A (1) of the M.P. Municipal Corporation Act, 1956 (hereinafter referred to as the "Act"), and that by the order dated 22-12-1967 passed by the Collector, the plaintiff's claim to the aforesaid ota was rejected. Hence, the plaintiff filed the suit as provided by section 79-A (2) of the Act. The suit was resisted by the defendant-Corporation inter alia on the ground that the title to the land on which ota was constructed vested in the defendant and that the

decision in the previous suit instituted by the husband of the plaintiff against the defendant, in that behalf, operated as *res judicata*. The trial Court, after appreciating the evidence on record, found that the decision in the suit instituted by the plaintiff's husband did not operate as *res judicata*. The trial Court, however, held that the title to the land in question vested in the defendant Corporation. In this view of the matter, the trial Court dismissed the plaintiff's suit. On appeal, the judgment and decree passed by the trial Court were upheld. Hence, the plaintiff has filed this second appeal.

At the time of hearing of this appeal, the learned counsel for the appellant invited my attention to two applications I.A. 864/1985 dated 26-2-1985 and I.A. No. 1095/1985 dated 20-3-1985. By I.A. No. 864/1985, the appellant has prayed that she be given opportunity to adduce additional evidence of certified copies of certain documents alleged to have been executed in the years 1933 to 1935, which throw light on the questions in controversy in this appeal. The only ground for not having adduced these documents in evidence in the trial Court as disclosed in the application is that the appellant's son had come to know about the existence of these documents from Mohammad Ibrahim on 24-2-1985. The appellant has not stated anything to show that notwithstanding the exercise of due diligence, the evidence now sought to be produced could not have been produced by her in the trial Court. Learned counsel for the appellant referred to the decision in *K. Venkataramiah Vs. A. Seetharama Reddy and Others*, . That decision is, however, distinguishable on facts. In that case, the Supreme Court upheld the order passed by the High Court admitting additional evidence to enable it to pronounce judgment. The Supreme Court, however, observed that such requirement was not likely to arise ordinarily unless some inherent lacuna or defect became apparent on the examination of the evidence. In the instant case, no ground in my opinion has been made out for admitting additional evidence at the stage of second appeal. The application is, therefore, rejected.

By application I.A. No. 1095/85, the appellant has prayed that she be allowed time to produce a certified copy of a cabinet resolution passed by the Government of the erstwhile Holkar State. No valid reason has been disclosed as to why the documents now sought to be produced could not have been produced for all these years. The application is accordingly rejected.

The main question arising in this appeal is whether the appellant has established her title to the strip of land 40" x 10", on which the "Otila" appurtenant to the house of the appellant has been constructed. Before I proceed to appreciate the contentions advanced in this behalf, I may briefly refer to the facts, which, as observed by the lower appellate Court in paragraph 6 of its judgment, were not disputed before it and could not, therefore, be disputed before me:

- (a) In the year 1938, the suit house belonged to one Mohammad Ibrahim, who sold it to Haji Taiyabali by a registered sale-deed dated 9-8-1945 (vide Ex. P-5).
- (b) Haji Taiyab Ali sold the suit house to the plaintiff's husband, Ahmed Shafi by

a registered sale-deed dated 25-9-1948 (Vide Ex. P-4).

(c) A transaction of sale coupled with agreement to repurchase was entered into between the plaintiff's husband Ahmad Shafi and one Asgarali and accordingly, Ahmad Shafi executed a registered sale-deed dated 12-8-1959 for Rs. 1,000 in favour of Asgarali (Vide Ex. P-3).

Thereafter by a registered sale-deed dated 10-8-1961 for Rs. 1,000 Asgar- ali sold the house to the plaintiff (Vide Ex. P-2).

The dimensions of the plot of land described in all the aforesaid sale-deeds are 40" x 40". The lower appellate Court has, however, held that Mohammad Ibrahim, who sold the plot of land in question in the year 1945, had no title to the suit land 40" x 10" out of the plot of land sold by the aforesaid deed. It is, therefore, necessary to examine the reasons given by the lower appellate Court in this behalf.

The lower appellate Court has observed that the suit land falls in Khasras Nos. 1020 and 1022, which were shown as "Banjar" in the year 1910. Learned counsel for the Corporation was unable to point out any provision of law in pursuance of which the aforesaid entries in the Khasra prepared by the then Municipal Corporation were made. He was also unable to point out any provision of law relating to any evidentiary value of the entries in these Khasras. In *Hakim Akmal Khan s/o Hakim Mohammad Afzal Khan v. The Municipal Council of Indore City and one another* 18 Indore LR 117, it was observed that. Municipal Khasra was no presumptive evidence of the entries made therein and that they were required to be proved like any other fact. I respectfully agree with that decision. The lower appellate Court failed to appreciate that apart from production of Municipal Khasra Ex. D-11, no attempt was made by the Defendant to prove that in the year 1910, the suit land was "Banjar" and formed part of the land bearing Khasras Nos. 1020 and 1022. Dw.-1 Sharad Chandra, the only witness examined by the Defendant had joined the service of the Corporation in the year 1954 and had neither prepared Khasra Ex. D-11 nor had verified that the suit land formed part of Khasras Nos. 1020 and 1022. He deposed that he was unable to state boundaries of the property described in Khasra Ex. D-11. He also deposed that there were no rules for the preparation of Municipal Khasras. In this state of evidence, the lower appellate Court could not have held, on the basis of Municipal Khasra Ex. D-11, that the suit land was Municipal land in the year 1910.

The lower appellate Court has then referred to a "dakhla" Ex. D-1 issued by the Corporation to Mohammad Ibrahim, the predecessor in-title of the plaintiff, which shows that the Corporation had admitted title of Mohammad Ibrahim to the plot of land 40 feet 2 inches x 16 feet only. The lower appellate Court observed that Mohammad Ibrahim did not take any further step in the matter and it would, therefore, be presumed that he remained satisfied with what was stated in Ex. D-1. The lower appellate Court has not referred to any provision of law nor was any such provision of law brought to my notice by the learned counsel for the

defendant, on the basis of which it could be held that it was obligatory on Mohammad Ibrahim to take further steps on receipt of "dakhla" Ex D-1 by him for its rectification and that failure to take any further step would preclude Mohammad Ibrahim from asserting title to the land in respect of which "dakhla" was not given by the Municipal Corporation.

The lower appellate Court has then referred to letter dated 18-1-1943 Ex. D-5. By that letter to Municipal Corporation intimated Mohammad Ibrahim as follows:--

From the aforesaid intimation, it is difficult to come to the conclusion drawn by the lower appellate Court, that Mohammad Ibrahim had come into possession of the suit land as a result of encroachment made by him on the municipal land. The lower appellate Court has then referred to Ex. D-3. This purports to be a copy of the application by Mohammad Ibrahim addressed to the Municipal Commissioner on 8-8-1945 praying for grant of lease of land shown in the map annexed to the application. The learned counsel for the defendant stated that the map annexed to Ex. D-3 was in the record of the Municipal Corporation but inadvertently, a copy of that map was not filed along with Ex. D-3 and that the suit land was shown in that map as the land required by Mohammad Ibrahim on lease from the Corporation. The lower appellate Court practically based its judgment on Ex. D-3 without caring to ascertain that there was no evidence whatsoever for proving that the application Ex. D-3 was submitted by Mohammad Ibrahim. No evidence was adduced on behalf of the Defendant to prove the signature of Mohammad Ibrahim on that application. The Defendant failed to prove that the application Ex. D-3 was submitted by Mohammad Ibrahim on 8-8-1945 and yet the lower appellate Court relied upon that application for coming to the conclusion that had Mohammad Ibrahim been in possession of the suit land, he would not have asked for lease of that land from the Indore Municipal Corporation. The lower appellate Court held that Mohammad Ibrahim had admitted the suit land to be municipal land, vide Ex. D-3. In absence of proof of the fact that Ex. D-3 was submitted by Mohammad Ibrahim, the lower appellate Court erred in holding that the aforesaid admission was made therein by Mohammad Ibrahim which was binding on the plaintiff.

The lower appellate Court then observed that in the sale-deed Ex. P-5 executed by Mohammad Ibrahim in favour of Haji Taiyab Ali on 9-8-1945, there was no mention of "otla". The lower appellate Court failed to appreciate that the dimensions of the plot of land sold by Mohammad Ibrahim as disclosed in Ex. P-5 was 40" X40". It is admitted that the land on which otla is constructed is included in the plot of land 40" X 40". Under the circumstances, absence of mention of "otla" in Ex. P-5 cannot justify the finding that the land beneath "otla" did not form part of the property sold by Mohammad Ibrahim to Haji Taiyab Ali.

There is overwhelming evidence on record to show that the plaintiff and the predecessor-in-title of the plaintiff were in possession of the suit land for a number of years. Even ignoring the testimony of Chand Mohammad P.W. 4,

brother of the plaintiff,--there is testimony of record of P.W. 1 Shamsheer Khan and P.W. 2 Chhotekhan. P.W. 1 Shamsheer Khan, a neighbour of the plaintiff, deposed that the ota appurtenant to the suit house was in existence as observed by him for the last 55 years. To the same effect is the testimony of P.W. 2 Chhotekhan, another neighbour of the plaintiff. The lower appellate Court has, however, disbelieved these witnesses because in the cross-examination, they stated that they were not aware of any previous litigation in connection with the suit land. This reason given by the lower appellate Court for disbelieving these witnesses is not justified. There is no material on record to show that the aforesaid two witnesses had knowledge of the previous litigation concerning the suit land. Under the circumstances, the reason given by the lower appellate Court for disbelieving the testimony of these two witnesses is not borne out by any material on record.

The lower appellate Court failed to appreciate that though D.W. 1 Sharadchandra, the solitary witness produced by the defendant, had deposed that on earlier occasion the ota in question was demolished by the Corporation, that a notice was given by the Municipal Corporation, in the year 1950 in connection with the unauthorised construction of the "Ota" that a copy of the notice was in the record of the Corporation, yet the Defendant did not produce any documentary evidence to show that the construction of "ota" was dealt with as an encroachment on the municipal land by the Defendant.

It is thus clear that the lower appellate Court took into consideration alleged admission of Mohammad Ibrahim, which was not proved according to law, disbelieved the evidence adduced by the plaintiff for reasons not borne out by the record and failed to take into account the impact of the provisions of section 110 of the Evidence Act in the light of the fact that it was proved that the plaintiff and her predecessors-in-title were in possession of the suit land for a number of years on the basis of registered title deeds. It was urged on behalf of the defendant that the provisions of section 110 of the Evidence Act were not attracted, and reliance was placed on the decision in *Codibai daughter of Pooran Murli v. The Municipal Commissioner, Indore City Municipal Corporation Indore* (Civil Second Appeal No. 198 of 1956) and *Daddo s/o Raju Harijan and another v. The Municipal Commissioner Indore* (Civil Second Appeal No. 394 of 1959). Both these decisions lay down that for the application of presumption u/s 110 of the Evidence Act, it must be proved that the possession is lawful. If a person is in possession of a land for a number of years on the basis of valid title deeds and there is nothing on record to show that the plaintiff or her predecessor-in-title had come into possession of the suit land as a result of encroachment on municipal land, possession of the plaintiff over the suit land cannot but be held to be lawful and the lower appellate Court erred in law in holding that the provisions of section 110 of the Evidence Act were not attracted. In *Panduranz son of Jagannath Kalar, Nagpur v. Municipal Committee Nagpur* M P S C 35, it has been held that by virtue of section 110 of the Evidence Act, the burden is primarily upon the person alleging an encroachment, to prove that it is an encroachment.

The Court below failed to appreciate that the Defendant had failed to discharge that burden in this case.

The learned counsel for the respondent faintly contended that the decision in the suit filed by the plaintiff's husband operated as "res judicata". Both the Courts below have, however, found that there was no material on record for holding that the plaintiff had purchased the suit house as a "benamidar" of her husband. The plaintiff not being a party to the earlier litigation, cannot be held bound by that decision.

For all these reasons, this appeal is allowed. The judgment and decree passed by the lower appellate Court and the order passed by the Collector u/s 79-A(1) of the Act, are set aside. The plaintiff's suit for declaration of her title to the land described in para 12 of the plaint is decreed. In the circumstances of the case, parties shall bear their own costs throughout.