

(1986) 12 AHC CK 0016
In the Allahabad High Court
Case No : Second Appeal No. 1078 of 1978

Kesari Narain Sahai and Others

APPELLANT

Vs

Mahendra Pratap Singh and Others

RESPONDENT

Date of Decision : 17-12-1986

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 22 Rule 3, Order 22 Rule 4, Order 22 Rule 8

Citation : (1986) 12 AHC CK 0016

Hon'ble Judges : D.S.Bajpai, J

Final Decision : Dismissed

Judgement

D. S. Bajpai, J.—This is a plaintiff's second appeal against the judgment and decree dated 16.12.78 passed by the District Judge, Hardoi in Regular Civil Appeal No. 157 of 1977, setting aside the Judgment and decree passed by the II Additional Munsif, Hardoi, decreeing the claim for permanent injunction restraining the defendants from causing any interference in the plaintiffs' possession over two plots of agricultural land.

2. Facts giving rise to this appeal are that the plaintiffs Gopal Sahai and seven others filed a suit for permanent injunction for restraining the defendants 4 and 5, Jagdish Narain Sahai and Chhabi Mohan Narain, from interfering in the possession of the plaintiffs in the disputed two plots of land being Khasra nos. 2332 and 2336 as also 2352 situated in the city of Hardoi, on the allegation that the plaintiffs along with the defendants 4 and 5 had taken possession of the land in dispute from Babu Shiv Sahai whom the Zamindars of the Village had accepted as tenant. It was further alleged in the plaint that thereafter the plaintiffs and also the defendants 4 and 5 became tenants of the said plots of land and in any Case they had completed rights by adverse possession and the fight and title had been further matured in view of the fact that entries existed in their names since quite some time. Thereafter it is alleged that the defendants 1 and 2 on the strength of a forged and illegal sale deed dated 9.9.70 tried to interfere with the possession of the plaintiffs and defendants 4 and 5. There were

proceedings under section 145 of the Code of Criminal Procedure and the land in dispute was attached. The defendant No. 3 was appointed Receiver by the Court in the said proceedings and he took over possession of the property. The proceedings were completed and an order Was passed in favour of defendants 1 and 2. Before the Receiver could hand over the possession of the property in the land in dispute, the instant suit was filed on 14.4.73 and prayed for appointment of Receiver and the defendant No. 3 was appointed Receiver by the Court and he continued to be in possession till date. The suit was contested by defendants 1 and 2 alone who filed their Writtenstatement. They denied that the plaintiffs as also defendants 4 and 5 were the lessees of the land and also took a plea that the suit for permanent injunction was not maintainable. A further plea was taken that the plaintiffs as also defendants 4 and 5 had no right and title in the land in suit. It was asserted that the possession of the Receiver would be deemed to be the possession on behalf of the defendants 1 and 2 and that the contesting defendants being in possession, question of maintaining a suit for permanent injunction would not arise, On these pleadings the trial court framed issues and a finding Was returned by the trial court on issues Nos. 3 and 4 that the suit was Maintainable and the plaintiffs were not required to file a suit for possession. However, on issue No. 2 a finding was recorded by the trial court that the defendants 1 and 2 did not possess any right and title in the land in dispute and on issue No.1 a finding was returned that the plaintiffs and defendants 4 & 5 were the lessees of the land in suit as pleaded by them. The trial court decreed the suit with costs and issued the permanent injunction restraining the defendants 1 and 2 from interfering in the possession of the plaintiffs with a further direction to the defendant No. 3, the Receiver, to hand over the possession of the disputed land to the plaintiffs and the defendants 4 and 5. Aggrieved by the judgment and decree of the trial court, the defendants filed a regular civil appeal in the court of the District Judge who by this judgement & order dated 16.12.78 allowed the appeal with costs and dismissed the suit of the plaintiffs. The learned lower appellate court held that since a Receiver had been appointed on 20th June, 1970 and the criminal court had passed an order on 3rd April, 1973 holding that the defendants 1 and 2 were in possession of the disputed land on the date of the preliminary order as also two months prior to it, an order having been passed that the plaintiffs would not interfere in the possession of the defendants till evicted from the plots in due process of law, the instant suit was filed for injunction and application for appointment of Receiver was made. The lower appellate court did not hold that the possession of the defendant No. 3 was on behalf of the plaintiffs and proceedings under section 145 of the Code of Criminal Procedure having been decided against the plaintiffs and in favour of the said defendants, the plaintiffs were not in possession over the plots and the Receiver could not be said to be having possession over the disputed land on behalf of the plaintiffs. It held that in view of this the plaintiffs had no control or domain over the disputed plots which were in the possession of the defendants. The court further held that in this view of the matter on suit for injunction could be filed as injunction could only be granted in favour of the party

who was in possession of the property. The property being agricultural property or to be more precise, plots of agricultural land, suit for declaration and possession could only be filed in the revenue court and the jurisdiction of the civil courts was wrongly invoked in the instant case simply because the plaintiffs claimed that they were lessees of the land in dispute. The court further held that at the most the plaintiffs and defendants 4 and 5 were hereditary tenants and they could approach the competent revenue court for possession. Reliance was also placed by the lower appellate court on a case reported in AIR 1975 Allahabad 395 (Jagdish Vs. Rajendra) in which the Receiver appointed during the course of proceedings under the provisions of section 145 of the Code of Criminal Procedure was discharged and it was held that suit for injunction was not maintainable. With these findings the lower appellate court held that the civil courts had no jurisdiction to try the case and allowed the appeal.

3. It is this judgment and decree of the lower appellate court which has been assailed by the plaintiffs before this court through the present Second appeal. During the pendency of the appeal, the defendant No. 4 (respondent No. 3 herein) died and the learned counsel for the appellants having failed to move a substitution application for appointment of legal heirs and representatives of the deceased respondents the appeal against the said respondent was directed to stand abated.

4. I have heard the learned counsel for the parties and gone through the lower court record.

5. Learned counsel for the respondents at the very outset raised a preliminary objection that the appeal having abated as against defendant No. 4, the appeal as such stood abated in full since the cause of action was not separable and the relief for permanent injunction had been claimed by the plaintiffs for themselves as also for the defendants 4 and 5.

6. Learned counsel for the appellants, on the other hand, contended that the suit and the appeal could very well be maintained and that there would be no effect of abatement on the right and title of the parties inasmuch as the plaintiffs as also defendants 4 and 5 were coowners and any coowner could maintain the suit for his benefit as also for the benefit of all the coowners visavis a trespasser. It has also been urged by the learned Counsel for the plaintiff appellants that on the facts and circumstances of the case a suit for injunction was maintainable and no prayer for declaration and/or possession need be made for adjudication of the rights of the parties. It has also been urged that the matter could be agitated in a civil court and there was no lack of jurisdiction in a civil court in the instant case and the parties could not be relegated to a revenue court for adjudication of their rights.

7. It will be appropriate to take up the question of the appeal having been abated as a whole, as urged by the learned Counsel for the appellants, before coming to the second question of maintainability of suit in a civil court as also deciding

whether a suit for permanent injunction could be filed without claiming any relief for declaration and possession. Learned Counsel for the respondents has stated that relief (a) in the plaint unequivocally sought an injunction from the court below for the benefit of the plaintiffs as also for the benefit of defendants 4 and 5. The learned Counsel has contended that in view of the abatement of the appeal against defendant No. 4, no relief could be granted against him and so far as the heirs and legal representatives of the said defendant were concerned visavis the plaintiffs and defendant No. 5, there was a possibility of conflicting decisions. The question that has to be considered and looked into is as to whether the plaintiffs along with defendants 4 and 5 were the coowners and as to whether the defendants 1 and 2 were trespassers and the suit could be maintained by any of the coowners against defendants 4 and 5. There being a categorical finding of fact recorded by the trial court the plaintiffs had their right in the land which finding having been affirmed by the lower appellate court, the rights of the plaintiffs and defendants 4 and 5 cannot be readjudicated in the instant second appeal and it may involve consideration of evidence on the record of the trial court which is not the domain of the second appeal under section 100 of "the Code of Civil Procedure. This has, however, to be seen and ascertained as to whether the defendants 1 and 2 were trespassers. There is no finding by either of the two courts below to this effect. A finding has, however, been recorded by the trial court on issue No. 2 that the defendants 1 and 2 had failed to prove their right or title in the land in suit, but this aspect of the matter has not been considered by the lower appellate court inasmuch as the only consideration for reversing the decree of the trial court by the lower appellate court was the factum that the defendants 1 and 2 were held by the said court to be in possession, through the Receiver and as such the court was of the view that no suit for a mere grant of injunction could be maintained. The fact, however, remains that even though the trial court did not hold that the defendants 1 and 2 were trespassers but they continued to be in possession without any right or title. Right and title of the plaintiffs was, however, upheld by the trial court stating that they were hereditary tenants and lessees of the land in dispute and this finding has not been upset by the lower appellate court. The learned Counsel for the appellants, Sri H. N. Tilhari, has placed reliance on undenoted cases which lay down the propositions of law that a coowner could very well maintain the suit against a trespasser for his benefit as also for the benefit of all other coowners. These cases cited were:

1. AIR 1970 Calcutta 444 (Krishna Sardar Vs. Sindhu Bala Dasi) which lays down the principle that :

?The plaintiff can only get a decree for possession to the extent of his share, and accordingly, although the plaintiff's suit will be decreed, it will be decreed only to the extent of declaring his title to the share, claimed by him in the disputed property, and granting him a decree for joint possession along with the contesting defendant, however, much he may be a trespasser in the disputed land. ?

2. AIR 1964 Patna 31 (Johan Uran (Kkka) and another Vs. Sitaram Sao (Bhagat and others) in which it has been stated by the Court that :

?There is, therefore, no manner of doubt that a suit by one of joint owners to obtain possession by ejecting a trespasser is maintainable even though the other joint owners have not been impleaded as parties to the action. When, therefore, one of the plaintiffs, who were joint owners, died, the right to sue, in fact, survived to the other plaintiffs or other appellants or respondents, as the case may be, and in such a case it cannot be said that the right to sue did not survive. ?

3. AIR 1970 Patna 1 (Ram Niranjana and another Vs. Loknath Mandal and others) in which it has been held that :

?A coowner alone can institute a suit for recovery of possession of land held by him along with other persons against a trespasser who dispossessed all the coowners, and can obtain a decree for recovery of possession of the entire area, the judgment of the suit, however, not affecting the rights of the other coowners which would remain intact. ?

4. AIR 1953 Allahabad 331 (Mt. Ram Kali Vs. Pahawan Singh and others) as also 1955 All LJ 458 (Ram Adhar Vs. Gay a Din and others) where also it has been held that a cotenant is entitled to claim a right of possession of every inch of the joint holding as against a trespasser and he can sue to eject him.

8. Assuming that the plaintiffs were entitled to maintain a suit and also assuming that the defendants 1 and 2 were trespassers and that the appeal did not abate in view of the failure of the appellants to implead the heirs of the deceased defendant No. 4 against whom the appeal abated, it may be difficult to hold, as found and held by the court below, that a suit for possession and declaration was not required and that a mere suit for injunction could give the relief claimed to the plaintiffs,

9. The learned counsel for the appellants, however, contended that a mere suit for injunction was sufficient to serve their purpose and no suit for possession need be filed since the possession of the Receiver would be deemed to be possession of the court and not of the defendants 1 and 2. Learned Counsel placed reliance on a decision of their Lordships of the Privy Council reported in AIR 1958 PC 73 (Sundar Singh Mallah Singh Sanatan Dharam High School Trust, Indaura Vs. Managing Committee, Sunder SinghMallah Singh Rajput High School, Indaura & others). In this case their Lordships held that the possession of a person in his personal capacity on the agreement of the parties in proceedings under sections 144 & 145 of the Code of Criminal Procedure would not mean possession of a party which could not be delivered. But in the instant case what happened was that a final order had been passed by the criminal court directing delivery of possession to the defendants 1 and 2 whereafter the defendants No. 3 the Receiver, continued to hold the possession in the civil proceedings on behalf of the defendants 1 and 2 with their agreement and the case relied upon by the

learned Counsel for the appellants as such is distinguishable. Another decision which has been relied upon by the learned Counsel is reported in AIR 1958 SC 725 (Kashava Lal Vs. Dr. D. R. Banaji and others) in which their Lordships held that :

?If a court has exercised its power to appoint a Receiver of a certain property, it has done so with a view to preserving the property for the benefit of the rightful owner as judicially determined. ?

There is no dispute about this proposition but the fact that has to be considered here is as to the person from whom the possession was taken over by the Receiver and, in fact, the possession under the proceedings before the Criminal Court had undoubtedly been taken over by the Receiver, the defendant No.3, from defendants 1 and 2 who were held and found to be in possession two months prior to the institution of the proceedings and that is why by final order defendants 1 and 2 were directed to be delivered the possession of the property and continuance of the Receiver by the civil Court would only mean continuance of the status quo as it existed at the time of commencement of criminal proceedings. Another case relied upon by the learned Counsel is a Division Bench decision of this Court reported in AIR 1955 Allahabad 683 (Mahant Indra Narain Das Vs. Mahant Ganga Ram Das and another) wherein the Court held that where it was not possible for the Court to decide as to who was in possession of the property, a Receiver had to hold charge of the property and remain in its possession till decision on the title of the parties and in the case before their Lordships no order had been made in favour of the defendants by the revenue court prior to the date of the institution of the suit. This case also as such does not in any way help the appellants.

10. I, accordingly, hold: since the defendants 1 and 2 were ordered to remain in possession by the criminal court and since no relief for possession was made, the suit was not maintainable and there is no error in the judgment and decree of the lower appellate court.

11. In as far as the question about maintainability of the suit in a civil court in concerned, it is not necessary to record any finding at this stage in view of the observations made herein above. The lower appellate court has further recorded a finding that in so far as a suit for declaration and possession is concerned, it could only lie before a revenue court as provided under section 331 A of the U.P. Zamindari Abolition and Land Reforms Act read with Schedule II, column 3 and I do not find any error in the said finding which is confirmed.

12. The appeal, accordingly, fails and is dismissed. There will, however, be no order as to costs.

(Appeal dismissed)