
(1993) 01 MP CK 0026
In the Madhya Pradesh High Court
Case No : S.A. No. 159 of 1985

Malti	Vs	APPELLANT
Deviram and Others		RESPONDENT

Date of Decision : 09-01-1993

Acts Referred:

Evidence Act, 1872 — Section 114
Limitation Act, 1963 — Article 65
Madhya Pradesh Land Revenue Code, 1959 — Section 117, 168(1), 185

Citation : (1993) 1 MPJR 347 : (1993) 38 MPLJ 882 : (1993) MPLJ 882

Hon'ble Judges : R.C. Lahoti, J

Bench : Single Bench

Advocate : R.D. Jain, for the Appellant; R.A. Roman and B.D. Jain, for the Respondent

Final Decision : Allowed

Judgement

R.C. Lahoti, J.

This judgment shall also govern the disposal of S.A. No. 147/85, the parties to both the appeals being common substantially, and the two appeals arising out of two cross suits, in the circumstances to be noticed hereafter. The main judgment is being delivered in this appeal, though instituted later in point of time before this Court, as this appeal arises out of the suit which had commenced earlier in point of time.

1. On 9-8-1974, Deviram, the respondent No. 1, instituted Civil Original Suit No. 92-A/74 impleading Maltibai, widow of Nicharelal, and sons and daughters of late Nicharelal as defendants seeking declaration of his title over land S. No. 241 area 1 bigha 16 biswas situated at village Alapur, tahsil Jaura, Distt. Morena. Nicharelal had expired sometime in the year 1971. The plaintiff Deviram alleged that late Nicharelal had inducted the plaintiff Deviram as sub-tenant on the suit land sometime in samvat year 2017 (near about B.Y. 1960), ever since when he had continued to cultivate the land. However, it was found that in the revenue

papers, he was merely recorded in the remarks column as the person in possession. Apprehending a cloud cast on his title, the plaintiff sought for declaration of his Bhumiswami rights in the background of the provisions of the M. P. Land Revenue Code, 1959 recognising sub-tenants as occupancy tenants and enlarging their rights into that of a Bhumiswami on failure of the Bhumiswami to resume the land.

2. Maltibai filed the written statement contesting the case of the plaintiff on all counts and further pleading that the plaintiff had never been in possession of the land owing to the fact of his being a sub-tenant though he had committed a trespass by taking forcible possession over the suit property on 22-10-1977 that is after the institution of the suit.

3. The trial Court dismissed the suit holding that the plaintiff had utterly failed in proving his possession over the suit property as a sub-tenant. Deviram preferred an appeal registered as C. A. No. 49A/82. The learned District Judge has allowed the appeal holding that the plaintiff Deviram had been in possession of the property as sub-tenant ever since samvat year 2017 and hence he became an occupancy tenant and then a Bhumiswami by operation of law. As against this judgment and decree dated 10-9-1985 of the District Court, Maltibai, the defendant No. 1, has preferred this appeal registered as S.A. No. 159/85.

1. On 12-11-1982, Maltibai filed Civil Original Suit No. 165-A/82 seeking declaration of her own Bhumiswami rights over the same land S. No. 241 area one bigha 16 biswas alleging Deviram to be a trespasser and hence also seeking recovery of possession. The foundation of the suit was the judgment and decree dated 3-8-1982 passed in Civil Original Suit No. 92-A/ 74, wherein the rights of the parties had stood adjudged. Deviram defended himself by taking similar pleas as he had taken as plaintiff in the earlier suit instituted by him. Bar of limitation was also pleaded stating that Deviram having been in possession of the suit property for over 12 years, the right of the plaintiff to seek recovery of possession was lost. Having tried this suit independently by framing issues and recording evidence, ultimately vide judgment and decree dated 13-11-1983 the trial Court decreed the suit.

2. Deviram preferred first appeal registered as No. 188-A/83. The learned District Court took note of the judgment and decree passed on that very day in First Appeal No. 49-A/82 holding Deviram to be a Bhumiswami of the land and consequently allowed this appeal too directing suit filed by Maltibai to be dismissed.

3. As against the abovesaid judgment and decree dated 10-9-1985 passed in First Appeal No. 188-A/83, Maltibai has preferred S. A. No. 147/85. Needless to say, the decision of this appeal hinges mainly on the decision of S.A. No. 159/85.

1. Vide order dated 25-1-1986, Second Appeal No. 159/85 was admitted by this Court for hearing parties on the following two substantial questions of law:--

(i) Whether respondent No. 1 plaintiff/Deviram was not entitled to the declaration regarding his accrual of Bhumiswami rights in the land in suit, without proof of his alleged earlier contract of sub-tenancy with late Nicharelal, predecessor-in-title of appellant Mst. Malti?

(ii) Whether finding of the lower appellate Court, holding the suit to be within limitation, is not in accordance with law?"

2. Vide order dated 3-3-1986, passed in S.A. No. 147/85, after hearing the learned counsel for the parties, the appeal was simply admitted for hearing parties directing its consolidation with S.A. No. 159/85 with an observation that the decision in the other appeal would govern the fate of this appeal also.

M. P. Land Revenue Code, 1959 came into force on 2-10-1959. Section 185 of the Code defines occupancy tenant as every person at the coming into force of the Code holding in the M. B. Region different categories of land referred to in clause (2) of Sub-section (1) thereof as a sub-tenant or as a tenant of a sub-tenant. The term "sub-tenant" is not defined in the Code. It was not defined in any of the Acts referred to in Section 185(1)(ii) of the Code. However, the Explanation to sub-section (1) of Section 168 of the Code defines the term "lease" as under:--

"Explanation --For the purposes of this Section -

(a) "lease" means a transfer of a right to enjoy any land, made for a certain time, expressed or implied in consideration of a price paid or promised or of money or any other thing of value to be given periodically to the transferor by the transferee who accepts the transfer on such terms;

(b) any arrangement whereby a person cultivates any land of a Bhumiswami with bullocks belonging to or procured by such person (lessee) and on condition of his given a specified share of the produce of the land to the Bhumiswami shall be deemed to be a lease;

(c) the grant of a right merely to cut grass or to graze cattle or to grow "Singhara" or to propagate or collect lac, pluck or collect Tendu leaves shall not be deemed to be a lease of the land."

Unless it be a case of arrangement or grant contemplated by clause (b) or (c) abovesaid, it has to be transfer of a right to enjoy land within the meaning of clause (a) so as to be a lease.

How a sublease is to be proved, is well settled by a catena of decisions of this Court.

Every possession over the holding of a Bhumiswami is not necessarily that of a sub-tenant or tenant of a sub-tenant. Possession may be in several capacities of which possession as sub-tenant is one. In *Kamarji v. Raghunath* 1983 R.N. 248, this Court held :--

"The question of sub-tenancy is a matter of contract and it should be established either by documentary or oral evidence."

The proof tendered should be directed towards the proof of the contract of tenancy. The contract may be oral or in writing. If the contract be in writing such as one evidenced by a Patta or Kabuliyat then there is no difficulty. If there is no document in writing, the evidence adduced must prove the existence of an oral contract of lease. There may be cases where direct evidence may not be available. In such cases, existence of a contract of tenancy may be inferred from the proved circumstances unerringly pointing out to the existence of such contract or relationship of tenant and sub-tenant between the parties. One such circumstance can be the proof of payment of rent or revenue by the alleged sub-tenant to the Bhumiswami.

Yet another recognised mode of proving the nature and character of possession as sub-tenant is by tendering in evidence certified copies of entries in revenue papers where the person in possession may have been entered as sub-tenant by the maker of the entries in ordinary course of discharge of his official duties which entries shall be presumed to be correct unless rebutted, as provided by Section 117 of the Code and Section 114 Illustration (e) of the Indian Evidence Act. A similar provision attaching a presumption with correctness of the entries made in the land records unless the contrary was proved, was to be found enacted in Section 52 of the M. B. Land Revenue and Tenancy Act, 1950. It has, therefore, been continuously held by this Court that even in the absence of proof of a patta or contract of tenancy entries in revenue papers could prove the existence of sub-tenancy (see: Aytannoorbai v. Suite of M.P. 1988 RN 150, Kranti (Smt.) and Ors. v. Smt. Punia and Ors. 1988 RN 171, Vaikunthibai v. State of M.P. 1987 RN 264, Chhotelal v. Rao Badalsingh 1987 RN 156, Bharat Singh v. Gyan Singh 1970 RN 426, etc.) The longer the period of entries, the stronger would be the presumption that is, if the entry continues to be repeated for a number of years, year after year, without being challenged, the presumption would gain better strength. Of course, it is true that in appropriate cases, where the Court is satisfied that the entries were suspicious or their credibility was otherwise doubtful, the Court may refuse to draw a presumption and insist on proof aliunde the entries, the presumption enacted being merely a rule of evidence dealing with onus of proof (see : Prabhudayal and Ors. v. Board of Revenue and Ors. 1986 RN 23).

In the case at hand, there is no deed in writing creating subtenancy in favour of Devirarn. No evidence was adduced directed towards the proof of sub-tenancy. Not a single receipt was filed showing payment of rent or revenue by Deviram to late Nicharelal or to any of his heirs after his death. In his statement, Deviram (P. W. 1) does not even state that he had at any time paid rent or revenue to the Bhumiswami.

None of the khasra entries records Deviram as sub-tenant in possession of the land in suit. For a few years, Deviram is recorded in possession of the land in

remarks column of the khasra. The lower appellate Court while reversing the finding of the trial Court has re-evaluated the evidence and recorded a finding vide para 5 that Deviram had been in possession of the land. Vide para 6, literally by a stroke of pen, the lower appellate Court has proceeded to record that Deviram's possession was that of a sub-tenant. Not a word has been stated by the lower appellate Court as to how it had arrived, at the finding that the nature of possession of Deviram was that of a sub-tenant. Independently of the judgment of the lower appellate Court, this Court has heard the learned counsel for the parties to find out if there was any evidence available on record to support that finding of the lower appellate Court and this Court has concluded by holding that there was none.

In *B. R. Singh v. State of M. P.* 1970 RN 60, their Lordships of the Supreme Court have held that merely because a person was entered as in possession in the remarks column of the khasra, the possession could not be attributed to ownership or tenancy of the property. So is the view taken by this Court in *Dimansingh v. Rameshwar* 1964 MPLJ 279, holding that patwari's entering a name in remarks column can at the worst lead to an inference that he was in occupation of that holding, but no more.

It is, therefore, clear that the finding of the lower appellate Court holding Deviram to be sub-tenant of the property is based on no evidence and hence does not bind this Court in second appeal. That finding is liable to be set aside, more so, when it has been recorded in reversal of the finding of the trial Court to the contrary.

The next question whether the suit filed by Deviram was within limitation or not, need not be examined inasmuch as it has been held that no title accrued to him in the suit land, he was liable to be non-suited. In so far as second appeal No. 159/85 is concerned, the appeal deserves to be allowed and setting aside the judgment and decree of the lower appellate Court, those of the trial Court deserve to be restored.

In S.A. No. 147/85, the only question that remains to be examined is whether the suit filed by the plaintiff/appellant was within limitation. It is submitted by the learned counsel for Deviram that assuming he had acquired no title to the property still he having been in possession for a period of more than 12 years prior to the institution of the suit for possession by Maltibai, the suit was bound to fail. Such a contention is based on a misapprehension as to law. The submission fails to take notice of the march stolen over by Article 65 of the Limitation Act, 1963 over its predecessor provision. Now, a suit for possession of immovable property based on title, and not mere previous possession, can be filed within a period of 12 years when the possession of the defendant becomes adverse to the plaintiff. In other words, once the plaintiff has proved his title to the property, his right to recover possession cannot be lost in spite of lapse of 12 years from the date of his dispossession or discontinuance of possession unless and until the defendant has pleaded and successfully proved extinction of

plaintiff's title by the defendant having prescribed title by adverse possession to him for the statutory period of 12 years. This is the well settled position of law. Reference may be had to recent decisions of this Court in Pataria and Ors. v. Mst. Chitia and Ors., 1992 (2) MPJR 281 and Toran Singh v. Komal Prasad and Anr. 1991 (2) MPJRSN 17.

It is also well settled that every possession is not necessarily adverse and mere continuance of unauthorised possession even for a period of more than 12 years would not be enough to hold acquisition of title by adverse possession (see : The General Alines and Quarries Ltd. v. Shri Kartar Singh 1992 MPLJ 563 : 1992 (1) MPJR 282.

There is yet another prominent feature of the case. Deviram in Civil Suit No. 92-A/74, as plaintiff, pleaded permissive possession over the suit property. He set up himself as a sub-tenant. There is no whisper in the entire plaint of the plea of acquisition of title by adverse possession. So also in the written-statement filed as a defendant in C.O.S. No. 165-A/82 Deviram as defendant has averred to have been in possession over the suit property for a period of 12 years but there too he does not make even a whisper of the plea of his having acquired any title by adverse possession. If his possession was permissive to begin with as having commenced as a sub-tenant, as per his own plea, the question would arise how and when did he abandon his that character and started prescribing adverse title on the property to the knowledge of the true owners. In the absence of plea and evidence to that effect, there would be no question of the possession being adverse (see : The State Bank of Travancore Vs. Aravindan Kunju Panicker and Others,

For the foregoing reasons, S.A. No. 147/85 too deserves to be allowed setting aside the judgment and decree passed in first appeal and restoring the judgment and decree of the trial Court.

Both the appeals are allowed. The judgments and decrees passed in first appeal are set aside in both the cases and those of the trial Court restored. In the peculiar facts and circumstances of the case, the parties are left to bear the costs as incurred throughout.