
(2005) 11 MP CK 0085
In the Madhya Pradesh High Court
Case No : S.A. No. 1056 of 1996

Ram Dayal and others

APPELLANT

Vs

State of M.P. and another

RESPONDENT

Date of Decision : 21-11-2005

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 100
Madhya Pradesh Land Revenue Code, 1959 — Section 162, 57(2)

Citation : (2006) 1 MPLJ 506

Hon'ble Judges : U.C. Maheshwari, J

Bench : Single Bench

Advocate : Kuldeep Singh, for the Appellant; Sudesh Verma, Government Advocate for Respondent No. 1 for State, for the Respondent

Final Decision : Allowed

Judgement

U.C. Maheshwari, J.

Appellants/plaintiffs have filed this appeal u/s 100 of the CPC being aggrieved by the judgment and decree dated 7-12-1996, passed by the Second Additional District Judge, Sidhi in Civil Regular Appeal No. 55-A/1995, whereby the judgment and decree dated 12-3-1968 regarding dismissal of suit passed by Civil Judge Class-II, Baidhan in Civil Suit No. 11-A/1980 has been upheld.

As per factual matrix of the case the appellants had filed a suit for declaration and injunction against the Respondents in respect of Revenue Land bearing Survey Nos. 348, 349/3 and 354 total area 19.50 acres situated at village Madhauri Tahsil Singrauli District Sidhi M.P. According to the appellants, they had possession of the said land since last 40 years, earlier as "Gair Hakdar Kashtkar"; and on coming into force the Madhya Pradesh Land Revenue Code, 1959 (hereinafter referred to as "the Code") they have acquired the right of Bhumiswami. It is also pleaded that some Patta was given to the appellants, by the then erstwhile Estate on coming into force the aforesaid Code. An application u/s 162 of the Code was filed before Tahsildar, on consideration by order dated

13-2-1965 in Revenue Case No. 93A/74/6364 appellants names were directed to be mutated as Bhumiswami. Such order was not challenged by Respondent No. 1 within prescribed limitation but subsequently in a suo motu revision bearing No. 12 Nigrani/73-78 by order dated 23-6-1996 Collector Sidhi has set aside the said order. The same was challenged before the Commissioner Rewa in Revision No. 3-A/74-75-76 but it was dismissed on dated 20-3-1977 on which the Board of Revenue was approached by the appellants by Revision No. 183-IIIrd 77 with Revision No. 356-1/77 but appellants could not get success and it was also dismissed by order dated 20-7-1979 then the impugned suit to declare them Bhoomiswami and also for protecting their possession was filed by the appellants.

By filing written statement on behalf of Respondent No. 1 State, it was contended that the lands in question are reserve forest land and was never remained in possession of the appellants. The order passed by Tahsildar Singroli in favour of appellants was illegal as it was under the contravention of the concerning Rules and Regulations. appellants had no rights or title over the aforesaid land, the suit is not maintainable and prayed for dismissal of the suit.

While Respondent No. 2 who was as alleged subsequent allottee of some part of the aforesaid lands for the purpose of constructing the Petrol Pump by filing his written statement he has stated that he acquired right under the lease agreement from Respondent No. 1. He has already started the construction for Petrol Pump. appellants had no right and interest over the property. The lease granted in his favour was justified by saying that the State is the only authority to grant lease for such land and prayed for dismissal of the suit.

After framing the issues the evidence was recorded on appreciation of it, the suit was dismissed by the trial Court on appeal it was also dismissed by the impugned judgment and decree. Hence this Second appeal.

This appeal was admitted for final hearing by order dated 29-1-1997 on the following substantial questions of law:

(1) Whether on the facts and in the circumstances of the case, the first Appellate Court was justified in holding that as the appellants did not challenge the interlocutory order passed by the trial Court refusing to summon the witnesses by way of revision the order has become final and cannot be challenged in appeal?

(2) Whether on the facts and in the circumstances of the case, the first Appellate Court was right in holding that in view of Section 57(2) of the M.P. Land Revenue Code, Civil Court would have no jurisdiction?

(3) Whether on the facts and in the circumstances of the case, the Appellate Court was justified in holding that the appellants have failed to prove their possession while from the records it appears that the appellants were delivered possession and were not dis-possessed thereafter?

Shri Kuldeep Singh, Learned Counsel for appellants has submitted that an

application, for examination to concerning Halka Patwari by calling some revenue record was filed in trial Court on 8-12-1987 by showing sufficient cause and relevancy with the case as the concerning certified copies of such documents were not made available to the appellants. In the facts and circumstances of the case such record and statement of Patwari was necessary but the same was dismissed by trial Court vide order dated 8-12-1987. Although the then revision was not preferred against this interlocutory order but on final adjudication this order was also challenged in the appeal but the Appellate Court without considering the merits of this application has negated this plea on the ground that the order dated 8-12-1987 was not assailed by filing the revision on passing it thus in appeal it could not be raised. According to his submission, the approach of the Appellate Court is contrary to the provisions of Section 105 of Code of Civil Procedure. Which gives the right to challenge the interlocutory order at the stage of appeal along with other grounds.

In respect of second substantial question of law he has submitted that the approach of the First Appellate Court was apparently wrong because it was not necessary for the appellant to approach first to the Sub Divisional Officer to adjudicate their dispute while the matter was already decided up to the Board of Revenue and in peculiar circumstances of the case such dispute could have been adjudicated only by the Civil Court. In support of his contention he placed reliance on a decided case by the Full Bench of this Court in the matter of State of M.P. and Ors. v. Balveer Singh and other reported in 2001 (2) MPLJ (FB) 644 : 2001 (3) MPHT 255 (FB) and submitted that in view of this decision the approach and finding of the Appellate Court in this regard is erroneous and not sustainable under the law.

So far third question is concerned he has submitted that sufficient opportunity to lead the evidence was not given to the appellants as prayed by them even an application for calling the record and examining the Patwari was also dismissed by the trial Court whereby they were restrained to adduce the evidence on record. It was also submitted that on deciding aforesaid two questions in favour of the appellants the trial will be reopen in such circumstance this third question could be decided only after adducing additional evidence thus this question could not be decided in the absence of such evidence. Thus this question has to be kept open to decide afresh by the Courts below but subject to decision of aforesaid two questions and prayed for setting aside the impugned judgment and decree by allowing their appeal.

On responding the aforesaid arguments Shri Sudesh Verma learned Government Advocate has not disputed the legal position and provision of Section 105 of Code of Civil Procedure. On the contrary, he conceded that the interlocutory order could also be challenged in the appeal. He also conceded that without approaching to S.D.O. u/s 57 of the Code the appellants were having right to approach the Civil Court regarding adjudication for their dispute.

So far third question is concerned he has submitted that findings of Courts below

on this question is a finding of fact. The same could not be interfered u/s 100, CPC at the stage of Second Appeal. As per his submissions in the facts and circumstances the suit of the appellants was rightly dismissed by Courts below and justified the impugned decree and interlocutory order dated 8-12-1987 in alternate he submitted that in any case the suit could not be decreed at this stage it can only be remitted back to the trial Court or the Appellate Court with appropriate direction.

Having heard the Learned Counsel for the parties, for consideration of their submissions. I have gone through the record and judgments of both the Courts below. It appears from the order sheet of trial Court dated 8-12-1987, the application, which was supported with an affidavit, for calling the record and examining the concerning patwari filed by appellants was dismissed without considering the merits of it. As per contention of it, on non-availability of the copies of relevant revenue record it was filed in order to prove material facts in favour of appellants but by dismissing this application they were deprived to adduce material evidence on record although the then it was not challenged by revision but on dismissal of the suit such interlocutory order was assailed in appeal along with other grounds but Appellate Court has not examined the correctness of this order by saying that it was revisable but the same was not filed thus it could not be considered in appeal and ground was answered negated against the appellants. But in view of provisions of Section 105 of CPC such approach cannot be sustained. Section 105, CPC reads as under:

105. Other orders.- (1) Save as otherwise expressly provided, no appeal shall lie from any order made by a Court in the exercise of its original or appellate jurisdiction; but, where a decree is appealed from, any error, defect or irregularity in any order, affecting the decision of the case, may be set forth as a ground of objection in the memorandum of appeal.

(2) Notwithstanding anything contained in Sub-section (1) where any party aggrieved by an order or remand from which an appeal lies does not appeal therefrom, he shall thereafter be precluded from disputing its correctness.

The aforesaid question was considered and answered by the Apex Court in the matter of Achal Misra Vs. Rama Shanker Singh and Others, in which it was held as under:

12. In Sheonath v. Ramnath, (1865)10 MIA 413 the Privy Council reiterated that a party is not bound to appeal from every interlocutory order which is a step in the procedure that leads to a final decree. It is open on appeal from such final decree to question an interlocutory order.

In view of the aforesaid provision and the decision of the Apex Court it is apparent that Appellate Court has committed grave error in not considering the merits of the interlocutory order while it was related with the valuable right of appellants. In view of said this Court is having two options: either this question be decided here or it be sent back to Appellate Court for considering the merits

of the said application. The suit was instituted in the year 1980. Thus, looking to the long pendency I deem fit to decide this question here only.

Considering the application of appellants filed on 8-12-1987 I deem fit to provide an opportunity to appellants for adducing the evidence by calling the concerning record otherwise appellants would be deprived from: his right to adduce the evidence. Thus by virtue of provision under Order 16, Rule 1, CPC the said application is allowed and the appellants are permitted to summon such record and examine the concerning witness thus the first question of law is answered accordingly.

So far second substantial question of law is concerned, before giving any finding I would like to refer the aforesaid cited case Balveer Singh (supra) in which it has been held as under:

66. In view of what has been discussed and noticed hereinabove, the question referred to for consideration are answered as follows:

Question No. (1) - The "right" contemplated u/s 57(2) of the Madhya Pradesh Land Revenue Code, 1959 is a right other than the cultivatory right in respect of the land as defined u/s 2(1)(k) which stands secured in favour of a Bhumiswami, occupancy tenants or a Government lessee as defined under the said Code and this right has to be taken to be confined to the proprietary rights including those rights which vested in the State by operation of law under the enactments in force prior to the coming into effect of the aforesaid Code. Question No. (2) - There can be no distinction as to the forum with respect to the rights of Bhumiswami acquired after coming into force, of the Madhya Pradesh Land Revenue Code, 1959 and the Bhumiswami rights acquired on the basis of pre-existing rights, xxx xxx xxx

The question referred to in Second Appeal No. 165 of 1998 is answered as follows:

A civil suit is directly maintainable in respect of the disputes with the State other than the disputes contemplated u/s 57(1) of the Code as indicated in our answer to question No. 1 referred to hereinabove.

The aforesaid dictum of the Full Bench is directly applicable to the case at hand and finding given by the Courts below that the suit was not maintainable by virtue of Section 57(2) of the Code is not sustainable because such dispute could only be adjudicated by the Civil Court. It does not require any elaborate reasons or findings thus this question is also answered in favour of the appellants and it is held that appellants had a right to file the civil suit without approaching to the Sub Divisional Officer u/s 57 of the Code.

So far as third substantial question of law is concerned, in view of the answer of the aforesaid questions this question could be decided only after recording additional evidence in view of answer of question No. 1. Looking to the nature of this question it is apparent that it is related with the appreciation of the

documents and the evidence on calling the other revenue record and examining the witnesses such documents and evidence. Yet other evidence is to be adduced by parties in view of this judgment. Thus, in the facts and circumstances this question shall remain open for adjudication before trial Court on remanding this matter the question is answered accordingly.

In view of the foregoing discussion, by allowing this appeal in part along with the aforesaid application dated 8-12-1987 the judgments and decrees of both the Courts below are hereby set aside. The matter is remitted back to the trial Court for deciding afresh without influencing by the earlier impugned judgment and decree but after giving an opportunity to lead evidence to appellants as per their application dated 8-12-1987 and also for rebuttal to Respondents if so desire. There shall be no orders as to costs.

The appeal is allowed in part. The decree be drawn-up accordingly.