

(1972) 02 AHC CK 0001
In the Allahabad High Court
Case No : S.A. No. 3143 of 1959

Ram Dayal

APPELLANT

Vs

L. Misri Lal and Others

RESPONDENT

Date of Decision : 09-02-1972

Acts Referred:

Uttar Pradesh Tenancy Act, 1939 — Section 180(2), 3(9)

Uttar Pradesh Zamindari Abolition and Land Reforms Rules, 1952 — Rule 4, 5

Citation : (1972) 42 AWR 232

Hon'ble Judges : Satish Chandra, J

Bench : Single Bench

Advocate : Gyan Prakash, for the Appellant; K.B.L. Gaur, for the Respondent

Final Decision : Dismissed

Judgement

Satish Chandra, J.—This is a Defendant's appeal. The suit was for demolition of certain constructions and possession. Reliefs of injunction and damages were also claimed.

2. The dispute related to plot No. 148. The Plaintiff-Respondent claimed that he was the proprietor of 11 Biswa area of this plot while the Defendant was the zamindar of the balance 10 Biswa area thereof. In October, 1946, the Defendant made constructions on this plot. The Plaintiff complained that the constructions had been made on the Plaintiff's 11 Biswa area. He filed suit on 18th October, 1946, for demolition of the constructions and injunction, possession and damages.

3. The defence was that the constructions had been made in the 10 Biswa area of the plot belonging to the Defendant.

4. The trial Court as well as the lower appellate Court have recorded a concurrent finding of fact that the constructions had been made by the Defendant-Appellant in the 11 Biswa area of this plot of which the Plaintiff was the proprietor. On this finding the suit was decreed for demolition of the constructions and for an

injunction restraining the Defendant from interfering with the Plaintiff's possession over the land in dispute. The relief for damages was, however, dismissed.

5. At the hearing of the second appeal the pleadings were amended and thereafter some fresh pleas were raised. I framed and remitted the following issues to the Courts below for finding:

1. Whether the land in dispute was a khudkasht of the Plaintiff on the date of the suit?

2. Whether the civil court had jurisdiction to try the suit?

3. Whether the suit was liable to abatement Under Rules 4 and 5 of the rules framed under the ZA and LR Act?

4. Whether the State Govt. and the Gaon Sabha were necessary parties to the suit?

5. Whether the Plaintiffs are estopped from pleading that the land was their khudkasht, in view of the allegations in para. 10 of the additional written statement?

6. Whether the land in dispute would be deemed to have been settled with the Plaintiffs u/s 9 of the ZA Act ?

6. The trial Court as well as the lower appellate Court have concurrently held that the Plaintiff was the khudkasht-holder of the land in 1352F and that he continued to be so on the date of the encroachment by the Defendant as well as on the date of vesting. It has been held that the civil Court had jurisdiction to try the suit and that the suit was not liable to abatement Under Rule 4 or 5. The further finding was that the State Govt. or the Gaon Sabha were not necessary parties to the suit and that the Plaintiff will not get any rights u/s 9 of the ZA Act. Issue No. 5 was not pressed by the Defendant before the Courts below.

7. The learned Counsel for the Defendant-Appellant has filed objections to the findings. He has raised three basic submissions:

(1) The Plaintiff ceased to be a khudkasht-holder prior to the date of vesting.

(2) The Defendant acquired rights u/s 9, ZA Act.

(3) The suit was not maintainable in the Civil Court.

8. The finding of fact is that the Plaintiff cultivated the land in dispute in 1352F after having got it relinquished from the then existing tenant and so he became a khudkasht-holder in 1352F. This finding is not attacked on behalf of the Defendant-Appellant. Learned counsel urged that a reading of the judgments of the Courts below would show that the Plaintiff did not establish that he continued to cultivate the land in 1353 F., a year in which he admittedly remained in possession without interference by the Defendant because the Plaintiff himself

alleged that the Defendant had encroached upon the land in October, 1946, which fell in 1354F.

9. It appears that the Plaintiff, who had become khudkasht-holder in 1352F, remained in possession of the land in 1353F, but did not cultivate it actually. The question is whether by this omission he ceased to be the khudkasht-holder of the land.

10. Section 3(9) of the UP Tenancy Act defined "khudkasht" to mean land other than sir cultivated by a landlord and under-proprietor or permanent tenure-holder as such either himself or by hired labour.

11. If a proprietor cultivates land, he becomes a khudkasht-holder. There is no minimum period of cultivation necessary before khudkasht rights accrue. This definition does not indicate as to how khudkasht rights can be lost. u/s 180(2) of the Tenancy Act, if a trespasser remains in possession without a suit for his ejectment having been filed within the prescribed period of limitation or without a decree for ejectment having been executed, he becomes a hereditary tenant. In the case of khudkasht land, if a trespasser becomes a hereditary tenant, it is obvious that the proprietor's khudkasht rights will be extinguished.

12. In *Sahdeo Pande v. Govt. of UP* 1966 AWR 22 S.N. Singh, J. held that if a plot of land which assumed the character of khudkasht land and was in possession of an intermediary although it had not been cultivated by the intermediary before the date of vesting, still it will be deemed to be the khudkasht land of the intermediary for the purposes of Section 18, UP ZA and LR Act. In order to be a khudkasht-holder u/s 180(2), UP Tenancy Act, exclusive possession is necessary and not self-cultivation. According to this authority, if the proprietor acquires khudkasht rights, he does not lose them merely because he omits to cultivate the land for a year. In our case the omission to cultivate was only during 1353F because towards the beginning of 1354F the Defendant trespassed upon the land and made a constructions upon it, thereby precluding the Plaintiff from cultivating it even if he wanted to do so. With respect, I am in agreement with the view expressed by S.N. Singh, J. and I am of the opinion that mere omission to cultivate khudkasht land for one year will not deprive the land-holder of his khudkasht rights.

13. In *Sher Singh v. Joint Director of Consolidation* 1969 AWR 202 a Division Bench held that if a land once acquired the character of khudkasht, it could not be deprived of that character on account of a trespass so long as the trespass was liable to be removed under the law. So long as a dispossessed khudkasht-holder had the right to recover possession of his khudkasht land, the land could not be regarded as having lost its khudkasht character and it was only when that right was lost that the land could be said to have ceased to be khudkasht. According to this view, if a suit for ejectment is brought within the prescribed period of limitation, the pre-existing khudkasht rights would revive to the land-holder when he regained possession after ejectment of the trespasser. This would

tend to support the view that khudkasht rights do not cease merely because of an omission to cultivate. In the present case cultivation became impossible by trespass of the Appellant. I see no principle or authority for distinguishing such a case and a case where for certain reasons the land-holder does not cultivate the land for one year.

14. Learned counsel for the Appellant relied upon the decision of a Bench of this Court in *Rama Kant Singh v. Deputy Director* 1965 AWR 125. It was observed there that it is not correct to say that cultivatory possession of a co-proprietor is cultivatory possession of all co-proprietors. Khudkasht rights should derive from cultivatory possession and not from possession over proprietary rights. There can be no quarrel with this proposition. Actual cultivation is necessary for acquisition of khudkasht rights. In this case the question as to when does a land-holder lose his khudkasht rights was not discussed. The question as to the position between co-sharers in proprietary rights actually cultivating the same land by turns does not arise in the present case. The situation as to what will happen if khudkasht land is trespassed by a stranger was not considered in that decision. That case is not applicable.

15. In my opinion, the Plaintiff having acquired khudkasht rights continued to remain a khudkasht-holder on the date of vesting and so he became a bhumidhar u/s 18 of the ZA Act.

16. Rules 4 and 5 of the ZA Rules provide for stay or abatement of certain classes of suits. Sub-clause (v) of Rule 4(2) provides for the stay of suits u/s 180 of the UP Tenancy Act or of similar nature pending in Civil Courts, but there is an exception and the exception was that this provision will not apply where the land was, inter alia, khudkasht of an intermediary. On the finding that the land in dispute was khudkasht of the Plaintiff, the present suit was not liable to stay or abatement.

17 The third point was that the Civil Court had no jurisdiction to try the suit. In 1946 revenue Courts did not have jurisdiction to try suits for demolition of constructions made upon khudkasht land. Such a suit lay in the Civil Court. That situation has remained unchanged ever since even after the coming into force of the ZA Act; see *Ram Awalamb v. Jata Shankar* 1968 AWR 731 FB.

18. Learned Counsel then urged that the Defendant would acquire rights u/s 9 of the ZA Act. Section 9 provides that buildings situate within the limits of an estate belonging to or held by an intermediary or tenant or other person shall continue to belong to him and the site thereof with the area appurtenant thereto shall be deemed to be settled with him by the State Govt. The crucial thing is whether the building standing on the land in dispute belonged to or was held by the Defendant-Appellant. On the findings, the Defendant-Appellant was not the tenure-holder or the proprietor of the site of the building. The Plaintiff was the khudkasht-holder thereof. Learned Counsel argued that since the Defendant has spent money and labour in making the constructions and since the Appellant was

the owner of the materials used in the constructions, he would in law be the owner of the constructions as they stood. No authority was cited in support of this proposition. I find it difficult to agree.

19. The Transfer of Property Act applies throughout the country and to all kinds of land except those provisions thereof which are excepted by Section 1. Sections 3 and 8 are not amongst these exceptions. These provisions will, therefore, apply even to agricultural land and its proprietors. Section 8 provides:

Unless a different intention is expressed or necessarily implied, a transfer of property passes forthwith to the transferee all the interest which the transferor is then capable of passing in the property and in the legal incidents thereof.

Such incidents include, where the property in land, easements annexed hereto, the rents and profits thereof accruing after the transfer and all things attached to the earth.

Thus the owner of land is the owner of the legal incidents thereof which include all things attached to the earth. Section 3 defines the phrase "attached to the earth" to mean-

(a) rooted in the earth as in the case of trees and shrubs; (b) imbedded in the earth, as in the case of walls or buildings; or (c) attached to what is so imbedded for the permanent beneficial enjoyment of that to which it is attached.

20. It will be seen that walls or buildings which are imbedded in the earth, are attached to the earth. Reading these two provisions together, it will be apparent that the owner of land is the owner of walls or buildings imbedded in the earth. From this point of view, the legal title in the constructions standing upon the land will if at all, vest in the owner of the land. If that be so, the trespasser who actually spends money or labour in making the constructions will not be the lawful owner of the constructions if he is not the owner of the land underneath them. In my opinion, the Defendant-Appellant cannot say that the building "belonged" to him, because he had no valid title in it. At best he could claim that he was the owner of the materials so that if demolition is decreed, he may, in the process of obeying the decree, remove the materials and appropriate them. But that is different from saying that he is the lawful owner of the building. In my opinion, the Defendant-Appellant cannot gain any assistance from Section 9 of the ZA Act.

21. In the result, the appeal fails and is accordingly dismissed with costs.

22. Learned counsel prays for some time to remove the materials from the land in dispute in compliance with the decree for demolition. Learned counsel for the Respondent has no objection. The Defendant-Appellant is given three months from today to remove his materials.