
(2007) 01 RAJ CK 0004
In the Rajasthan High Court
Case No : Civil First Appeal No. 46 of 1988

Ram Gopal and Others

APPELLANT

Vs

Idol of Shri Radha Krishna Mandir and Another

RESPONDENT

Date of Decision : 10-01-2007

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 96
Criminal Procedure Code, 1973 (CrPC) — Section 107
Easements Act, 1882 — Section 60(b)

Citation : (2007) 2 CivCC 187 : (2007) 5 RCR(Civil) 553

Hon'ble Judges : Vineet Kothari, J

Bench : Single Bench

Advocate : Vinod Tamoliya for Mr. N.K. Maloo, for the Appellant; Parag Rastogi, for the Respondent

Final Decision : Dismissed

Judgement

Vineet Kothari, J.—This appeal U/s. 96 CPC is directed against the judgment and decree dated 02.02.1988, by which the learned District & Sessions Judge, Jhalawar decreed the suit for possession in favour of the plaintiff-Idol Shri Radha Krishan, who filed a suit for possession through next friend Shri Ram Swaroop S/o Shri Raghunath Ji Vijayvargiya against the three brothers (defendants)-Shri Ram Gopal, Shri Mishri Lal and Shri Pyare Lal, all sons of Bhanwar Lal Brahmin.

2. Civil Suit No.16/1982 was filed by the plaintiffs seeking possession of the property, a residential house, three shops and vacant land (Bada) situated at Rasta Mochi Pada in Jhalawar. The property in question originally belonged to one Mohd.Khan, whose grand son Sawai Khan vide a Gift Deed (Hibba) gifted the said property to five Panchas representing the Vijay Vargiya community, earlier known as "Bijan community" including the residential house situated adjacent to the said temple, which was also constructed by the said Mohd.Khan and property in the form of three shops and one well (Kuian) and a vacant land (Bada) situated opposite the road, on which the said temple of idol Radha Krishna is

situated and the possession of the said property was handed over to the said Idol represented through said five Panchas of Vijay Vargiya community. Accordingly, to the plaint, besides the aforesaid property described in Ex.14 & 15, given in gift by the said Mohd.Khan under a Gift Deed (Ex.1) executed by his grand son Sawai Khan, Panchayat Vijay Vargiya had purchased another vacant land (Bada) situated behind the temple itself for a sum of Rs. 10/- only and after obtaining permission for raising construction on 17.05.1939 the said Panchayat had also constructed a latrine (Sandas) in the year 1939-40. In the year 1943, the said Panchayat Vijay Vargiya had appointed Bhanwar Lal, father of the three defendants as Poojari for doing Seva Pooja in the said temple of Lord Radha Krishna and he did the said job for about 2-3 years and after him, his son Mishri Lal and Pyare Lal also did Seva Pooja. Since these persons were doing the job of Seva Pooja, the Panchayat Vijay Vargiya allowed the family members of Bhanwar Lal to live in the aforesaid property gifted by Mohd.Khan/Sawai Khan in the form of one house, three shops and vacant land (Bada), in which the defendant No.1 Ram Gopal-another son was also living with the other family members and in the vacant land, the live stock-animals of Mishri Lal were also being kept.

3. According to the plaintiffs on account of dis-satisfactory work of these Poojaries, they were removed from the said job on 24.08.1979 after a resolution to this effect was passed by the Panchayat Vijay Vargiya and they were asked to vacate the property and premises occupied by them and a notice to this effect was given by the Advocate on behalf of the plaintiffs on 26.04.1982, which they refused to take and thus the cause of action for filing the present suit arose to the plaintiffs and thus suit for possession was filed.

4. According to the defendants, who filed a written statement in the trial court, the defendants disputed the aforesaid position and denied that the said property was given in gift (Hibba) to the Panchas of Bijan (Vijay Vargiya community). The defendants also stated in the written statement that they were not living in the said property under the license from the plaintiffs and have also stated that since plaintiffs' trust is not registered under the provisions of Religious Trust Act, the suit could not be maintained. The question of locus-standi of plaintiff No.2-Ram Swaroop was also raised before the trial court. In the special pleas, the defendants also raised the plea of adverse possession that they were living in the said property for over 40 years in a peaceful and undisturbed manner and that the suit was filed because one of the defendants Pyare Lal had filed a criminal complaint against plaintiff No.2-Ram Swaroop and other members of the said community U/s. 107 Cr.P.C.

5. On the basis of the pleadings of the parties, the trial court framed as many as 11 issues, which are as under:-

1. "Whether the disputed house including three shops were given in gift on 03.05.1911 by Mohd.Khan and since then Panchayat Vijayvargiya is in possession of the said property as owner and for which Patta in favour of the temple and Panchayat was written?" (Plaintiff)

2. "Whether Panchayat Vijay Vargiya had purchased the vacant land (Bada), described in para 3 of the plaint, situated behind the temple, from Mandir Radha Raman Ji for a consideration of Rs.10/- ?"

3. "Whether the defendants are in possession of the said property and vacant land (Patta) on account of being Poojari as licensee?" (Plaintiff)

4. "Whether the suit is not maintainable as the plaintiff trust is not registered under Religious Trust Act, though the value of movable and immovable property of the temple Radha Krishan Ji is more than one lakh?" (Defendants)

5. "Whether suit can be maintained by Ram Swaroop as next friend?"

6. "Whether suit is barred by limitation?"

7. "Whether Ram Gopal has adverse possession over the suit property?" (Defendants)

8. "Whether the court fees paid in respect of property in possession of Ram Gopal having value of more than Rs.50,000/- is inadequate?" (Defendants)

9. "Whether Ram Gopal undertook construction activities in last 40 years spending hundreds of rupees and what is the effect of this in the suit?"

10. "Whether the defendants are entitled to special damages of Rs.3,000/-?"

11. Relief?

6. In support of its case, the plaintiffs produced seven plaintiff's witnesses and sixteen documents were exhibited before the trial court, whereas the defendants produced eight defence witnesses and exhibited three documents in support of its case.

7. As aforesaid, the trial court decided all the issues in favour of the plaintiffs and decreed the suit and being aggrieved by the same, the defendants have come up in appeal before this Court.

8. I have heard learned counsels at length and perused the pleadings and examined the various statements of witnesses and documentary evidence on record and the case law cited at bar.

9. Having considered the rival submissions and on the basis of material on record, this Court is of the opinion that this first appeal deserves to be dismissed. The reasons are as follows,

Validity of Gift (Hibba)

10. That as far as question of admissibility and authenticity of document Ex.1 the Gift Deed, said to have been executed on 3rd May, 1911 is concerned, there appears to be no doubt about it and the trial court has rightly found that the same was a correct and genuine Gift Deed. The said Ex.1 is copy bearing the stamp of State and Registration Department and Registry No.66 was an

admissible evidence. The contents of the said Ex.1-Gift Deed executed by Sawai Khan S/o Chhote Khan and grand son (Nabir) of Mohd.Khan Fotedar clearly stipulates that by the said Gift Deed one house in which the temple exists and the said house including or alongwith [Matter in vernacular omitted. Ed.] three shops and one house situated opposite his own residential house as well as the said house situated adjacent to the temple and the value of the property except temple is Rs.100/- and one well (Kuian) situated opposite his house, outside three shops vide Ex.14 were being given in gift to the Panchas-Manna Lal Ji, Tula Ram Ji, Bhol Nath Ji, Dalla Ji, Amar Lal Ji & Narayan Ji, by caste "Bijan" and the possession of which was also handed over to them in pursuance of the said Gift Deed. It has come in the statements of various witnesses that after the said date 03.05.1911, the said property was being looked after by Panchayat Vijay Vargiya including the defence witnesses, DW6 Shakoor Khan grand son of the said Sawai Khan who signed the Gift Deed also stated in his cross-examination that the said property was being looked after by the Vijay Vargiya community.

Here it would be relevant to state that as per the Chapter XI dealing with the gifts in "Principles of Mohammedan Law" by Mulla in Section 149-150 it is clearly stated that the three essentials for validity of a gift under the Mohammedan Law are:- (1) a declaration of gift by the donor, (2) an acceptance of the gift, expressed or implied, by or on behalf of the donee, and (3) delivery of possession of the subject of the gift by the donor to the donee. If these conditions are complied with, the gift is complete.

Section 150 stipulates that it is essential to the validity of gift that there should be a delivery of such possession as the subject of the gift is susceptible of. As observed by the Judicial Committee, "the taking of possession of the subject-matter of the gift by the donee, either actually or constructively," is necessary to complete a gift.

This is what was held by the Division Bench of Madras High Court also in Qhamarunnissa Begum Vs. Fathima Begum and Others, wherein reiterating the aforesaid three essential requisites for a valid gift under the Mohammedan Law, the Court further held that in case where the donor gifted some properties to the grand children, whose father was alive and such father acknowledged that the donor had told him about the gift he was making and that he also drew on the interest accrued on the gift, it was held that the acceptance by the father of the donee could be inferred constructively. The Court further held that for a gift under the Mohammedan Law to be valid, there must be clear intention on the part of the donor to divest himself in preseanti of the subject matter of the gift. A gift cannot be made of anything to be performed in futuro or of future property.

11. Thus the contents of Ex.1, which clearly shows the intention of the donor Sawai Khan S/o Chhote Khan and grand son of Mohd.Khan, the original owner to divest himself of the property described in the said Gift Deed and acceptance of the same by the donees thereof, which fact is also recorded in Ex.1, there remains no doubt about the validity of the gift. This Court is also of the view that

the learned trial court committed no error in treating the said document as an admissible evidence. It may also be stated here that at this belated stage, the question of admissibility of this document, which is not specifically raised in the grounds of appeal filed by the defendants, cannot be allowed to be raised, moreso when a gift even without a document in writing having fulfilled the aforesaid three essentials, is equally acceptable under the Mohammedan Law. Accordingly, no infirmity is found in the findings of the trial court in this regard and the same are upheld.

12. Locus standi of plaintiff No.2-Ram Swaroop

There is no doubt about the fact that idol of Lord Radha Krishna being a perpetual minor could not maintain a suit by itself and had to act through human agency. There is also no dispute that plaintiff No.2-Ram Swaroop is a person belonging to Bijan (Vijay Vargiya community) and, therefore, had interest in the welfare of the said property of idol Radha Krishna and was a resident of the same place. He was not a stranger to the said property or temple. The welfare and safe upkeep of the property belonging to the idol of Lord Radha Krishna vested in him with a right to sue. The Hon"ble Supreme Court in Kalyan Singh Vs. Smt. Chhoti and Others, in para 13 & 14 held that the suit could be instituted by representative of the particular community, but that by itself was not sufficient to constitute the suit as a representative suit. For a representative suit, the Court's permission under Order 1 Rule 8 is mandatory. However, any member of a community may successfully bring a suit to assert his right in the community property or for protecting such property by seeking removal of encroachments from there. Such a suit need not comply with the requirements of Order 1 Rule 8. To the same effect is the judgment of Allahabad High Court in Shiva Nand and Another Vs. Shri Shankerji Maharaj Birajman Mandir and Others, , wherein the Court held that where the person claiming to be the manager of the temple filed a suit to prevent un-authorized use of the property of the temple, then even if the plaintiff was not the Manager of the temple, yet being a Hindu and also a member of the public interested in the welfare of the deity and proper management of its properties, he could maintain the suit to prevent such trespass on the property of the deity.

Thus this court finds no force in the argument of the learned counsel for the appellants-defendants that Ram Swaroop-plaintiff No.2 could not maintain the suit without obtaining permission under Order 1 Rule 8 of the Court to maintain the representative suit. The trial court has rightly held that the said person could maintain the suit as next friend of deity and being a member of the Vijay Vargiya community he in his own right also could maintain the said suit.

13. Case of Adverse Possession set up by the Defendants:

The Hon"ble Supreme Court has laid down the law relating to pleading and proof of adverse possession in Karnataka Board of Wakf Vs. Government of India and Others, in para 11 as under: -

In the eye of the law, an owner would be deemed to be in possession of a property so long as there is no intrusion. Non-use of the property by the owner even for a long time won't affect his title. But the position will be altered when another person takes possession of the property and asserts a right over it. Adverse possession is a hostile possession by clearly asserting hostile title in denial of the title of the true owner. It is a well-settled principle that a party claiming adverse possession must prove that his possession is "nec vi, nec clam, nec precario", that is, peaceful, open and continuous. The possession must be adequate in continuity, in publicity and in extent to show that their possession is adverse to the true owner. It must start with a wrongful disposition of the rightful owner and be actual, visible, exclusive, hostile and continued over the statutory period. Physical fact of exclusive possession and the animus possidendi to hold as owner in exclusion to the actual owner are the most important factors that are to be accounted in cases of this nature. Plea of adverse possession is not a pure question of law but a blended one of the fact and law. Therefore, a person who claims adverse possession should show, (a) on what date he came into possession, (b) what was the nature of his possession, (c) whether the factum of possession was known to the other party, (d) how long his possession has continued, and (e) his possession was open and undisturbed. A person pleading adverse possession has no equities in his favour. Since he is trying to defeat the rights of the true owner, it is for him to clearly plead and establish all facts necessary to establish his adverse possession.

Though learned counsel for the appellants rightly submitted that plea of adverse possession can be raised even against the property belonging to idol, relying on *Chitar Mal Vs. Panchu Lal and Others*, , *Dasami Sahu Vs. Param Shameshwar Uma Bhairabeshwar Ban Lingeshar and Another* and *Palaniandi Gramani Manickammal Vs. V. Murugappa Gramanani*, , but in the opinion of this Court, the defendants have not only not pleaded specifically and clearly about their possession becoming adverse to the owner of the property and as to on which date it so happened and thereafter it happened to be continuous and peaceful possession thereby giving them right to remain in possession on account of plea of adverse possession, but he has also failed to prove any such thing before the learned trial court. As against this, the case of the plaintiffs in plaint as well as evidence is clear that the father of the defendants Bhanwar Lal and thereafter one of the defendants Mishri Lal were acting as Poojaries in the said temple and were, therefore, given permission to live in the disputed suit property, but with the removal of those persons from the said position of Poojaries, their license or permission to live in the said property automatically stood terminated and it is well settled that the permission under a leave and license by the owner of the property can be revoked at any time. The Poojari of a temple does not have any right to live in the property belonging to the temple and he can use the property only under the permission from the management of the temple only so long as he continues to discharge his duty as Poojari and once his services as Poojari are dispensed with, no further right remains with Poojari and he has to vacate the

property of the temple without any demur or objection. In the present case though the burden of this issue No.7 was on the defendants, the defendants have not pleaded anything much less established as to how they continued to have peaceful and undisturbed possession of the said suit property in the form of a hostile possession or adverse possession. In the absence of any such pleadings or proof, the learned trial court, in the opinion of this court, rightly held that the defendants were not entitled to any relief on this ground.

14. The Delhi High Court in Wg. Cdr. (Retd.) R.N. Dawar Vs. Shri Ganga Saran Dhama, held that mere long possession of property is not necessarily adverse possession. A person who claims title to a property by adverse possession must definitely allege and prove as to how and when the adverse possession commenced and what was the nature of his possession and whether the fact of his adverse possession was known to the real owner. The mere fact that he was in uninterrupted possession for several years and in that way he acquired absolute right and title, is not enough to raise such a plea. The same is the position in the judgment already cited (supra) of Hon'ble Supreme Court Karnataka Board of Wakf Vs. Government of India and Others, . The plea of defendants in this regard in para 5 of the additional pleas in the written statement is nothing more than making merely a bold statement or rather bald statement that defendant Ram Gopal is in actual and continuous possession over 40 years over the said property and the same is in the knowledge of all persons including the plaintiff Ram Swaroop.

This, even if taken to be proved, in the opinion of this Court, is not sufficient to give any benefit to the defendants on the ground of adverse possession and, therefore, the findings of the trial court in this regard are also confirmed.

15. Construction as Licensee by the defendants:-

The defendants in para 11 of the additional pleas of the written statement and whereupon the issue No.9 was also framed by the trial court, have stated that if the defendants are treated as licensees in the suit property, then the said license could not be revoked by the licensor in view of Section 60(b) of the Indian Easement Act, 1882, which says that a license may be revoked by the granter, unless, be the licensee, acting upon license, has executed a work of permanent character and incurred expenses in the execution.

Learned counsel for the appellants submitted that the defendants had converted all the three shops with one door each into two doors by raising a partition wall in between the said shops and thereby gave a shape of a house to the said shops and in view of this permanent nature of construction raised by them by spending about Rs.18,000-20,000 they, therefore, became entitled to protection under the aforesaid provisions and the license could not be revoked by the granter. He relied upon a judgment of Supreme Court in Ram Sarup Gupta (Dead) by Lrs. Vs. Bishun Narain Inter College and Others, , wherein granter had given a property to the school by way of donation and upon such declaration, the Education

Department of the State Government recognized the said institution and the licensor did not realize any rent from the school and he allowed the school to occupy the building and the open land attached to it for the use of the school. Thereafter the said licensor executed a sale deed transferring the property in dispute to the plaintiff and the plaintiff filed a suit for possession and in such circumstances the Hon''ble Supreme Court gave the protection to the defendant holding the license to be irrevocable in view of Section 60(b) of the Easement Act. Such are not the facts in the present case and no such acquiescence or intention of donation, etc., can be inferred in the present case on the part of the Idol or Vijay Vargiya Panchayat, therefore, the said judgment relied upon by the learned counsel {or the appellants is clearly distinguishable and the benefit of Section 60(b) of the Easement Act cannot be given to the appellants in the present case. The defendants have also not produced any evidence showing the permanent nature of construction or spending of such a huge sum. In para 11 of the written statement, the defendants had stated that they had spent hundreds of rupees whereas in the statement DW-1 Ram Gopal talks of having spent Rs.18,000-20,000/-, which is also not corroborated by any other witness. Thus, the argument of appellants on this ground also deserves to fail and is hereby rejected.

16. Thus, in view of the aforesaid, this Court is of the firm view that this appeal has no force and the same deserves to be dismissed and the same is accordingly dismissed with no order as to costs. However, it is made clear that if the possession of the suit property is not handed over by the defendants/their legal representatives to the plaintiffs within a period of one month from today, the mesne-profit, as determined by the trial court at Rs.125/- per month shall stand increased to Rs.10,000/- per month on the expiry of said one month from today.