
(2006) 08 MP CK 0017

In the Madhya Pradesh High Court

Case No : Second Appeal No. 360 of 1992

Ram Narayan and others

APPELLANT

Vs

Ram Sakha and another

RESPONDENT

Date of Decision : 28-08-2006

Acts Referred:

Madhya Pradesh Land Revenue Code, 1959 — Section 116

Citation : (2007) 1 MPLJ 167

Hon'ble Judges : A.K. Shrivastava, J

Bench : Single Bench

Advocate : M.L. Jaiswal, with Manoj Kushwaha, for the Appellant; N.K. Patel, for the Respondent

Final Decision : Allowed

Judgement

A.K. Shrivastava, J.

This second appeal has been preferred by the Appellants/Defendants against the judgment of reversal passed by learned first Appellate Court, whereby the judgment and decree of the trial Court dated 28-7-1988 dismissing the suit has been reversed and set aside and the suit of Plaintiff has been partly decreed.

The original Plaintiff is Vishwanath, who filed a suit for cancellation of order dated 21-11-1983 passed by Assistant Settlement Officer, Panna No. 2 in Revenue Case No. 103/A-6-A/1982-83 and for permanent injunction in regard to a portion 0.11 hectare of Survey No. 334 and 335, new No. 37675 Ga and restraining Defendants from interfering in his possession. In the alternative it has also been prayed that if it is found that the suit land 0.11 hectare is in possession of Defendants, a decree of possession be also granted.

According to the plaint averments old survey No. 334, area 0.024 hectare and old survey No. 335, area 0.218 hectare were changed to new survey No. 376/5 Kha and 375/5 Ga, situated at village Shyamardada, Tahsil and Distt. Panna, is the ancestral property of Plaintiff Vishwanath and in the family partition these

survey numbers fell in his share. In these survey numbers the Defendants had no right, title and interest.

The Defendants submitted an application before the Assistant Settlement Officer, Panna which was registered as Revenue Case No. 103/A-6-A/1982-83 and vide order dated 21-11-1983 said authority without following the procedure prescribed under the law directed to include Survey Nos. 334 and 335. The suit property (0.11 hectare) which is a part of Survey No. 376/5 Ga (old Survey Nos. 334 and 335) has been illegally directed to be recorded in the possession of the Defendants though it has been mentioned that it is the property of Plaintiff and he is the Bhumiswami thereof. The said order has been passed u/s 116 of the M.P. Land Revenue Code, 1959 (hereinafter referred to as "the Code").

The Plaintiff challenged the order dated 21-11-1983 of Assistant Settlement Officer on the grounds that the application was time barred; u/s 116 of the Code the revenue record cannot be changed; Assistant Settlement Officer was not having any jurisdiction to record the suit property which is in Bhumiswami right of Plaintiff, as Abadi" land; and the order is ab initio void and without jurisdiction. The Defendants by taking assistance and aid of the said order of Assistant Settlement Officer treating the suit property as their own and want to construct the houses on the said land. Hence the suit was filed by the Plaintiff.

The Defendants/Appellants resisted the plaint averments by filing a joint written statement. According to the Defendants, old Survey Nos. 334 and 335 was not ancestral property of Plaintiff. However, they have admitted that the old Survey Nos. 334 and 335 were changed into new Survey Nos. 376/5 Kha and 376/5 Ga. It has been further pleaded that vide order dated 14-6-1943 passed by Tahsildar, Devendra Nagar of Ajaygarh State the suit property was given to the Defendants for residential purpose and the Defendants are possessing the said land and they have built their houses. It has been further pleaded in the written statement that Assistant Settlement Officer did not pass any new order, but has implemented the old order dated 14-6-1943 of Tahsildar, Devendra Nagar. After the order dated 14-6-1943 passed by Tahsildar, Devendra Nagar the Defendants constructed their houses and they are residing in these houses. A plea of limitation has also been raised by the Defendants and it has been further pleaded that without seeking relief to get the order dated 14-6-1943 cancelled, the Plaintiff is not entitled for any relief. In this manner, the Defendants have prayed that the suit of Plaintiff be dismissed.

The State of Madhya Pradesh was impleaded as a formal party in view of Order 1 Rule 3-B, CPC (M.P. State Amendment).

The learned trial Court after framing necessary issues recorded the evidence of the parties and after hearing arguments did not find any merit in the case of Plaintiff and dismissed the suit.

Plaintiff Vishwanath, feeling aggrieved by the judgment and decree of the trial Court filed an appeal before learned first Appellate Court which has been partly

allowed by the impugned judgment and decree. In this manner, the Defendants have come up in this appeal.

this Court on 3-11-1999 admitted the second appeal on the following substantial question of law:

Whether on the facts and in the circumstances of the case the finding of the first Appellate Court that the Plaintiff is the owner and in possession of the land in dispute is perverse ?

I have heard Shri M.L. Jaiswal, learned Sr. Advocate assisted by Shri Manoj Kushwaha for the Appellants and Shri N.K. Patel, Advocate for the Respondent No. 1.

It has been contended by Shri Jaiswal, learned senior counsel that learned first Appellate Court erred in substantial error of law in holding that the Plaintiff is the owner and is in possession of the land in dispute and the finding recorded as such is perverse inasmuch as learned first Appellate Court has misinterpreted and misconstrued Ex. D/4 which is Khasra of the year 1978-79 to 1982-83 in Column No. 10 of the said Khasra the suit property has been shown as Abadi land and in Column No. 12 it has been mentioned that the houses of Defendants are in existence. By inviting my attention to the order dated 14-6-1943 (Ex. D/3) passed by Tahsildar, Devendra Nagar of Ajaygarh State it has been vehemently argued by learned senior counsel that in the said order it has been specifically mentioned that 5 biswa land was given to Kashi Prasad and Vishwanath, 2 3/4 beegha land has been given to Dwarka for Abadi purpose and permission was granted in that regard. Thus it has been argued that on 2% beegha land Defendants have constructed their houses in pursuance to the said order passed by Tahsildar, Devendra Nagar. It has been put-forth by learned senior counsel that Dwarka, to whom 2 3/4 beegha land was given for Abadi purpose, was the father of Defendant No. 4 Swamideen and Defendant No. 5 Lallu and was the ancestor of other Defendants. Since on the suit property, the houses of Defendants are in existence, learned first Appellate Court erred in substantial error of law in holding that the Plaintiff is in possession of the suit property. By inviting my attention to the testimony of Plaintiff Vishwanath it has been contended by learned senior counsel that there is an admission that the land which was given to Dwarka was included in the Abadi land and on the said land houses are constructed.

On the other hand, Shri N.K. Patel, Learned Counsel for the Respondent No. 1 argued in support of the impugned judgment.

Regarding Substantial Question of Law After the dismissal of the suit of Plaintiff he preferred an appeal before learned first Appellate Court and during the pendency of the appeal he died, as a result of which present Respondent No. 1 was brought on record as his legal representatives on the basis of the Will of the Plaintiff.

Since substantial question of law which has been framed is in regard to the perversity of the judgment passed by learned first Appellate Court in regard to the ownership and possession of Plaintiff on the suit property, I am required to consider documentary as well as oral evidence in order to hold whether the finding arrived at by learned first appellate Court is perverse or not.

On going through the document Ex. D/3 which is a certified copy of the order of Tahsildar, Devendra Nagar of Ajaygarh State dated 14-6-1943, it is gathered that an application was submitted by Dwarka seeking permission to allot the land and to construct houses. Tahsildar, Devendra Nagar of Ajaygarh State by disposing of the application on 14-6-1943 passed an order that in Survey No. 221, 2 3/4 beegha land is given to Dwarka by giving permission to him for Abadi purpose, shown in the map, which would mean that 2 3/4 beegha land was given to Dwarka for construction of the house and rest 5 Biswa land was given to Kashi Prasad and Vishwanath. It has also been mentioned in the order that in the map the said 2 3/4 beegha land is on rear side. It would be quite relevant to mentioned here that in the written statement it has been specifically pleaded that in the year 1943 Tahsildar, Devendra Nagar of Ajaygarh State gave the land for residential purpose to the Defendants¹ predecessor Dwarka and the houses are constructed on the said land. Dwarka is the father of Defendants Swamideen and Lallu. Thus in old Survey No. 221, 2 3/4 beegha land was given to Dwarka which is in rear side in the map as mentioned in the order and 5 biswa land was given to Kashi Prasad and Plaintiff Vishwanath.

In para 5 of his deposition, Plaintiff Vishwanath (P.W. 5) has specifically admitted that land which was given to Dwarka was included in Abadi land and on that land houses are constructed. In the same para he has further admitted that it is correct to say that land which was given to Dwarka on that land the houses of Defendants are constructed. Thus there is clear admission of Plaintiff that 2 3/4 beegha land was given to Dwarka and that land was given for Abadi purpose and the house of Defendants are constructed on the said land. In para 2 of his testimony Plaintiff Vishwanath has specifically admitted that in Samvat 2000 land was given to Defendants and the same was separated. The order of Tahsildar, Devendra Nagar of Ajaygarh State is dated 14-6-1943 (year 1943 is corresponding year of Samvat 2000). The Plaintiff never challenged the order of Tahsildar, Devendra Nagar dated 14-6-1943. In the said order Plaintiff Vishwanath was also a party. Indeed 5 biswa land was allotted to him also.

Not only this, Plaintiff Vishwanath has also given statement (Ex. D/2) before Assistant Settlement Officer, Panna on 19-9-1983 in the case in which order dated 21-11-83 Ex. P-2 was passed that Bari No. 221 which was earlier to the settlement year, from this land 5 biswa was given to Kashi Prasad and 5 biswa to Plaintiff and rest of the land was given to Dwarka. He has further stated in his statement Ex. D/2 that with his permission the house was constructed. He has also admitted that the land was given by Tahsildar and by his permission house was constructed. Thus the houses of Defendants on the suit land are on the basis

of order of Tahsildar, Devendra Nagar of Ajaygarh State dated 14-6-1943 which was never challenged by the Plaintiff. Indeed he could not challenge the said order because 5 biswa land was also allotted and given to him.

In the certified copy of Khasra (Ex. D/4) which is of the year 1978-79 to 1982-83 in Column No. 10, the land has been shown as Abadi land and in Column No. 12 it is mentioned that the houses of Defendants are in existence.

Thus on the basis of clear admission of Plaintiff Vishwanath that in Samvat 2000 (corresponding year 1943) by the order of Tahsildar, Devendra Nagar of Ajaygarh State, 2 3/4 beegha land was given and allotted for residential purpose to Dwarka, who is predecessor of Defendants since he submitted an application for the allotment of the land seeking permission to construct the houses on the said land. The houses of Defendants are in existence on this land since 1943. The admission of Plaintiff Vishwanath has been totally ignored by learned first Appellate Court.

It is well settled in law that if material piece of evidence which goes to the root of the matter and by which the right of the parties can be determined, if ignored or misconstrued or overlooked, certainly this Court u/s 100, CPC can interfere in the judgment of the Court below. In this regard I may profitably rely the decision of the Supreme Court *Sundra Naicka Vadiyar (dead) by LRs. and another Vs. Ramaswami Ayyar (dead) by his LRs.*, in which it has been held that the High Court was right in interfering and vitiated the finding on the question of possession recorded by the two Courts below. The Apex Court held that since by ignoring some of the documents by the two Courts below which were vital for deciding the question of possession, High Court was right in setting aside the finding on the question of possession recorded by the two Courts below. In the said decision, the Supreme Court by considering the documents of that case held that there is recital of surrender of possession by one party and the said document was ignored. In the present case also the material document Ex. D/3 which is the order of Tahsildar, Devendra Nagar of Ajaygarh State dated 14-6-1943 has been misconstrued in the manner which I have discussed here-in-above. Thus the decision of *Sundra Naicka Vadiyar (supra)* is fully applicable in the present factual scenario.

On close scrutiny of the impugned judgment passed by learned first Appellate Court I have already held that there was no due and proper application of mind in interpreting the document specially Ex. D/3, the order of Tahsildar dated 14-6-1943 as well as the document Ex. P-1 which is the order of Tahsildar dated 17-5-1982 on which much emphasis has been put by the Plaintiff. I have already held hereinabove that in earlier order of Tahsildar dated 14-6-1943 (Ex. D/3) the Plaintiff was a party. However, in the later order of Tahsildar dated 17-5-1982 (Ex. P-1) neither Dwarka, who is predecessor of Defendants nor Defendants were parties. Thus the said order is not binding on the Defendants. The Supreme Court in the case of *State of Rajasthan Vs. Harphool Singh (Dead) Through His L.Rs.*, has held that where there are glaring inconsistencies and contradictions in

the evidence, the powers of High Court are not hampered by the provisions of Section 100, CPC from interfering with even concurrent finding of fact of lower Courts.

I have discussed in detail how and in what manner material piece of evidence in the form of admission of Plaintiff has been ignored, overlooked and misconstrued by learned first Appellate Court. Apart from this, Plaintiff nowhere challenged the order dated 14-6-1943 of Tahsildar, Devendra Nagar of Ajaygarh State and thus it became final.

Much emphasis has been placed by learned first Appellate Court on order of Additional Tahsildar, Devendra Nagar dated 17-5-1982 (Ex. P/1) in which it is held that Survey Nos. 376/5 Kha and 376/5 Ga were allotted to late Vishwanath in partition on the basis of his possession on these lands. I have also given my anxious and bestowed consideration to the said order dated 17-5-1982 (Ex. P/1) in Revenue Case No. 6A 27/1980-81. This case was filed by Plaintiff Vishwanath against Mst. Sakhia widow of Radhika Prasad for partition u/s 178/110 of the Code. In this case neither Defendants nor their predecessor Dwarka was the party and, therefore, whatever has been held and decided in the said order is not binding on the Defendants.

For the reasons stated hereinabove, the substantial question of law is thus answered that learned first Appellate Court erred in substantial error of law in holding that Plaintiff is the owner with possession of suit land area 0.11 hectare of Survey No. 376/5 Ga and the finding of learned first Appellate Court in that regard is perverse.

Resultantly this appeal succeeds and is hereby allowed with costs. The judgment and decree passed by learned first Appellate Court is hereby set aside and that of the learned trial Court is hereby affirmed. Counsel's fee Rs. 3,000/- , if pre-certified.