
(2011) 08 MP CK 0095
In the Madhya Pradesh High Court
Case No : S.A. No. 468 of 1996

Rukmani Bai and others

APPELLANT

Vs

Chunnilal and others

RESPONDENT

Date of Decision : 02-08-2011

Acts Referred:

Civil Procedure (State Amendment) Act — Order 1 Rule 3, 131, 131(1)(2), 234, 235
Madhya Pradesh Land Revenue Code, 1959 — Section 131

Citation : (2011) 4 MPHT 251 : (2011) 4 MPJR 8 : (2011) 4 MPLJ 160

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

Bench : Single Bench

Final Decision : Allowed

Judgement

A.K. Shrivastava, J.

This Second Appeal was filed by Ramnarayan who was arrayed as defendant No. 1 in the suit having lost from two Courts below. During the pendency of this appeal he died and present appellants are his L.Rs.

The plaintiff (respondent No. 1, herein) Chunnilal filed a simplicitor suit more than 31 years ago for possession and removal of encroachment made by defendant No. 1 stating in the plaint that Khasra No. 144/3 area 5 acres has been reserved for "khalihan" and the same is also recorded in Wajib-Ul-Arzand Nistar Patrak. According to the plaintiff, defendant Nos. 2, 3 and 4 namely Amardas, Smt. Amrawati and Smt. Irawati (respondent Nos. 2 to 4 herein this appeal) are "Bhumiswami" of said Khasra No. 144/3. It has also been pleaded by amending the plaint that plaintiff is also using the "khalihan" for storing his agricultural produce and he is having easementary right on that area of land in which "khalihan" exists. However, it is pertinent to mention here that the area and dimension of "khalihan" has not been mentioned in the plaint. Further it has been pleaded in Para 4-A of the plaint that "khalihan" is being used from 15th October to 15th June and thereafter the "khalihan" is removed. For the rest of the period of the entire year "Bhumiswami" viz., defendant Nos. 2 to 4

(respondent Nos. 2 to 4) uses the land for their cultivation since they are the "Bhumiswami" of that land.

Further, it has been pleaded in Para 5 of the plaint that defendant No. 1 whose L.Rs. are present appellants have encroached upon "ka" "kha" "ga" and "gha" portion marked in the map admeasuring 30 paces by 30 paces and has grown up bushes there. Hence, it has been prayed that the encroachment made by defendant No. 1 be removed and obstructions of the bushes which he has erected be also removed and further the possession be delivered to the plaintiff.

The defendant No. 1 filed separate written statement while other defendant Nos. 2, 3 and 4 who are the "Bhumiswami" filed their separate written statement and they refuted the plaint averments.

Learned Trial Court framed necessary issues and after recording evidence decreed the suit and first appeal which was filed by defendant No. 1 has also been dismissed by impugned judgment and decree.

In this manner, this Second Appeal has been filed by defendant No. 1 who died during the pendency of this Second Appeal and the present appellants are his L.Rs.

This Court on 6-1-1997 admitted the appeal on the following substantial questions of law

(1) Whether in view of Exh. P-1, the respondent No. 1 Kunjilal could claim any easementary right over the suit land ?

(2) Whether in view of pleadings of the parties that the suit land is recorded as khalihan in the Nistar Patrak, the suit was maintainable in view of section 131 of M. P. Land Revenue Code ?

Vehemently, it has been put forth by Shri Vikram Johri, learned Counsel for respondent No. 1 appellants that if the provisions of section 131 of M. P. Land Revenue Code, 1959 (in short "Code") as well as a dictum laid down by the Division Bench of this Court Nathuram vs. Siyasaran, 1969 MPLJ 349 : 1969 JLJ 115, is tested on the present factual scenario and pleadings of the parties as well as all the documents and evidence which are placed on record, it would reveal that plaintiff has filed this civil suit which is not maintainable. Indeed, he should have gone to the Court Tehsildar u/s 131 of the Code in view of Division Bench decision of Nathuram (supra), hence, it has been prayed by him that since the civil suit is not maintainable, the same be dismissed.

By inviting my attention to material document (Exh. P-1), which is certified copy of "Wajib-Ul-Arz" as well as "Nistar Patrak" it has been submitted by learned Counsel that the suit property has been endorsed as "Khalihan" in this document and if that would be the position, the plaintiff cannot claim any easementary right for the simple reason that in view of section 237 of the Code all the inhabitants have right to use that particular area. Hence, it has been put forth by

learned Counsel that this appeal be allowed and by setting aside the judgment and decree passed by learned two Courts below the suit of plaintiff-respondent be dismissed.

None has appeared on behalf of respondent Nos. 1 to 4. Shri Akhilesh Singh, learned Panel Lawyer who is appearing for State of M. P. is a formal party as the State has been impleaded in view of Order 1, Rule 3(b), CPC (State Amendment).

Having heard learned Counsel for appellants and after going through the record of learned two Courts below, I am of the view that this appeal deserves to be allowed.

Regarding substantial question of Law No. 1 :

Section 234 of the Code throws sufficient light on the preparation of "Nistar Patrak" and according to this provision the Sub Divisional Officer shall prepare the "Nistar Patrak" embodying the scheme of all unoccupied land of all matters indicated thereto and particular matter specified in section 235. Section 235 of the Code relates to matters to be provided for in "Nistar Patrak" and according to this provision the matters highlighted from clauses (a) to (d) shall be dealt with under this provision. Section 236 of the Code speaks about provision in "Nistar Patrak" for certain other matters like free grazing of the cattle used for agriculture; etc. as envisaged in clauses (a) to (c). Sub-section (1) of section 237 empowers the Collector to set apart unoccupied land for certain purposes including for threshing of the floor. For ready reference it would be apt to quote relevant portion of section 237(1) and clause (f) of the Code, which reads thus :

237. Collector to set apart land for exercise of Nistar rights. (1) Subject to the rules made under this Code, the Collector may set apart unoccupied land for the following purposes, namely :

(a)

(b)

(c)

(d)

(e)

(f)

for threshing floor;

(g)

(h)

(i)

(j)

(k)

Looking to entire scheme of Chapter XVIII of the Code, which includes these sections, it is clear like a noon day that particular land will be reserved by the Collector for the purpose of threshing of the floor, i.e., "khalihan" for Nistari right of all the inhabitants of that particular village and therefore no individual of that village can enjoy that land exclusively for his own use.

On going through Exh. P-1, which is a material document going to the root of the matter on the basis of which the right of all the parties can be determined, this Court finds that it is a certified copy of "Nistar Patrak" and "Wajib-UI-Arz" mentioning the suit property as khalihan and further it has been stated in it that during the rainy season, it is demolished. This document has been proved by plaintiff in his evidence and he is relying upon it. I find sufficient force in the contention of Shri Vikram Johri, learned Counsel for appellant that plaintiffs own document speaks and proves that suit property is used for "Nistar" and "Wajib-UI-Arz" for the inhabitants of the village and if that would be the position the plaintiff exclusively cannot have any right of way because it is for the benefit and use of all inhabitants of the village and not for a particular person.

The substantial question of law No. 1 is thus answered in affirmity in favour of appellants and against plaintiff-respondent No. 1.

Regarding substantial question No. 2 :

To answer this substantial question of law it will be fruitful to quote section 131 (1), (2), which reads thus :

131. Rights of way and other private easements. (1) In the event of a dispute arising as to the route by which a cultivator shall have access to his fields or to the waste or pasture lands of the village, otherwise than by the recognized roads, paths or common land, including those roads and paths recorded in the village Wajib-ul-arz prepared u/s 242 or as to the source from or course by which he may avail himself of water, a Tehsildar may, after local enquiry, decide the matter with reference to the previous custom in each case and with due regard to the conveniences of all the parties concerned.

(2) No order passed under this section shall debar any person from establishing such rights of easement as he may claim by a civil suit.

On analyzing this section, it is luminously clear that Tehsildar has jurisdiction under this section in cases of disputes relating to "route by which a cultivator shall have access to his fields or to waste or pasture lands of the village and to the source from or course by which he may avail himself of water. This section applies to private rights in contradiction to public rights, i.e., by the recognized roads, paths and common land including those recorded in village Wajib-UI-Arz So far as the right of way is concerned, this section is confined to the private right of way of an individual cultivator through the field of another for purpose of having access to his field, or to waste or pasture land of the village. The scope of

inquiry by Tehsildar is also guided by this section that the matter is to be decided with reference to previous custom and with due regard to the convenience of the parties concerned.

Thus, I am of the view that irrespective of the fact that the plaintiff has perfected right of way under the Easement Act or not, he was, required to approach the Tehsildar u/s 131 of the Code for a decision in his favour on the basis of custom and convenience.

This section is enacted to exercise a right by villager to a limited nature and for the limited purpose specified- in this section. It should not be clubbed with general law, i.e., right of easement under the Easement Act. Sub-section (2) of this section speaks of the right of easement under the general law. To me, if it is put differently sub-section (2) of section 131 does not enable any person to bring a civil suit for establishing his right provided in sub-section (1) of section 131, i.e., access to the field or to waste or pasture land of the village. Sub-section (2) does not enable a civil suit to be instituted for a decision on a right provided in sub-section (1).

On going through the pleading of plaintiff pleaded in Paras 2 to 6 (B) of the plaint particularly Paras 4 (a) to 6 this Court finds that case of the plaintiff is that he uses the suit property as "Khalihan" and is using it for last 50 years on which by erecting the bushes the defendant-appellant has created obstruction and has encroached upon it and thus he is being debarred to use the suit property (khalihan). By testing the pleadings of the plaintiff on the aforesaid provision of section 131 of the Code, I am of the view that indeed the claim of plaintiff is that the approach has been obstructed by the defendant No. 1 and therefore, he was required to file necessary application u/s 131 of the Code before the Tehsildar and in that situation after holding the inquiry if the Tehsildar finds that there is some obstruction made by the defendant/appellant he could have passed an order u/s 133 of the Code for removal of obstruction.

Looking to the pleading of the plaintiff, I am of the view that his case is u/s 131(1) of the Code and in that situation the civil suit filed by him was not maintainable. On this point, I am placing reliance on Division Bench decision of this Court in Nathuram (supra).

The substantial question is thus answered that the civil suit filed by the plaintiff was not maintainable.

For the reasons stated hereinabove, this appeal succeeds and is hereby allowed. The judgment and decree of learned two Courts below is hereby set aside and suit of plaintiff-respondent No. 1 is hereby dismissed in toto. The plaintiff-respondent No. 1 shall bear the costs of this appeal. Counsel Fee Rs. 2,000/- if pre certified.