

(1999) 12 MP CK 0029
In the Madhya Pradesh High Court
Case No : Second Appeal No. 3/92

Shankerlal and Others

APPELLANT

Vs

Smt. Pankunwar Bai and Others

RESPONDENT

Date of Decision : 10-12-1999

Acts Referred:

Bhopal State Land Revenue Act, 1932 — Section 188, 51
Civil Procedure Code, 1908 (CPC) — Section 100
Evidence Act, 1872 — Section 114
Limitation Act, 1963 — Article 65
Madhya Pradesh Land Revenue Code, 1959 — Section 165(6)

Citation : (2000) 2 MPHT 140 : (2000) 1 MPLJ 473

Hon'ble Judges : S.P. Khare, J

Bench : Single Bench

Advocate : L.S. Baghel and G.S. Baghel, for the Appellant; R.D. Hundikar and M. Shrivastava, for the Respondent

Judgement

S.P. Khare, J.

This is defendants' second appeal u/s 100 C.P.C.. The following substantial questions of law were formulated by Order dated 3-7-1992 at the time of admission of this appeal:--

(1) Whether on the basis of documents Ex. P-17 and Ex. P-18, the lower appellate Court was right in holding that the suit land was purchased by the appellants in the year 1940 from one Kunwarji, the predecessor-in-title and the father of respondent No. 1 by the alleged oral sale-deed.

(2) Whether on the evidence brought on record the lower appellate Court was right in holding that the appellants were in possession of the suit land ever since the date of the alleged oral sale-deed and had perfected their title by adverse possession.

The facts relevant for the decision of the questions referred above are that Kunwarji was Khatedar of 25.60 acres of land of Khasra Nos. 524, 528, 529, 530,

531, 532, 533, 534, 535, 539, 540, 541, 543, 544 and 546 of village Badodia Gadri, Tehsil Ashta, District Sehore. Plaintiff Ratanlal claimed that (a) he had orally purchased these lands from Kunwarji for Rs. 100/- on 13-5-1940 and (b) he has perfected his title to these lands by adverse possession by remaining in actual possession from 1940 to 1962. The suit has been filed in the year 1970. The trial Court negatived his claim on both the counts and dismissed his suit for possession. In appeal the first appellate Court affirmed the finding on the first point. The oral sale was not upheld firstly because there was no registered sale-deed and secondly the permission of the Collector for transfer of these lands as per Section 188 of the Bhopal State Land Revenue Act, 1932 was not obtained. This Section provided that permanent transfer of the lands could be effected to a person who was not an agriculturist by profession with the sanction of the Collector and no such sanction was obtained. The plaintiff was not the holder of any agricultural land at that time. He was not Khatedar. Therefore, the plaintiff's case on the basis of oral sale could not succeed.

The first appellate Court reversed the finding of the trial Court on the second point and held that the plaintiff has acquired title to the lands by adverse possession. The question is whether the view taken by the first appellate Court is correct.

In the plaint it has been stated that there was oral sale by Kunwarji. Plaintiff Ratanlal (PW 1) has deposed in para 1 that there was a written sale-deed. But no such sale-deed has been produced. The first document relied upon by the plaintiff is the statement which is said to have been made by Kunwarji on 14-5-1940 before the Tehsildar in Revenue Case No. 188/460 of 1940. That is marked as Ex. P-17. Its Hindi translation is Ex. P-17-A. It has been stated by him that he is transferring 'eqUrfdy dj jgk gS' the lands for Rs. 100/- out of which he has received Rs. 50/- and the remaining amount of Rs. 50/- is due. The first appellate Court has not referred to the statement of plaintiff Ratanlal on the same date i.e., 14-5-1940 in the same case. That is marked as Ex. D-6. Its Hindi translation is Ex. D. 6-A. It has been stated by him that Kunwarji is transferring 'eqUrfdy dj jgk gS' the land from Fasli 48 for which he has paid Rs. 50/- and he would further pay the remaining amount of Rs. 50/- on receipt of the permission 'eUtwjh ds ckn vnk d:~xk?'. The plaintiff has further stated therein that he was not holding any agricultural land at that time. It is clear from a reading of these statements that the revenue case in which these statements were made was for grant of permission to sell the land. In this case the Order passed by the Tehsildar is dated 22-10-1940 (Ex. P-18-A) and in this Order also it is mentioned that Kunwarji wants to transfer the land to Ratanlal 'eqUrfdy dj jgk gS'. The Tehsildar in the concluding part of the Order refused to grant the permission because the land revenue was outstanding against Kunwarji.

The documents referred above go to show that the transaction fell through in the absence of the permission of the Tehsildar. There is no averment in any of these documents that the possession of the lands had been delivered by Kunwarji to

Ratanlal. The use of the present continuous tense in all the three documents goes to show that- Kunwarji was intending to transfer the lands to him subject to the permission of the Tehsildar and when that permission was not given it should be presumed that the possession of the lands continued with Kunwarji who was Khatedar. The plaintiff has wrongly stated in the plaint that the case before the Tehsildar was a mutation proceeding. It was a case for permission to transfer the land. There was no transfer of title or possession.

The first appellate Court has mainly relied upon the Khasra entries for upholding the acquisition of title by the plaintiff by adverse possession. These entries are Ex. P-I to Ex. P-16 and Ex. P-19 and Ex. P-20. In the khasras for the years 1942 to 1950 the name of Kunwarji continues as Khatedar. In column No. 11 the name of Ratanlal has been shown as "Shikmi" i.e., as sub-tenant. It is not the case of the plaintiff that he was sub-tenant of Kunwarji on these lands. The possession of a sub-tenant is always permissive, that is with the leave and licence of the true owner, and it is never adverse to the title of the true owner. Therefore, the khasra entries of the years 1942 to 1950 do not support the case of the plaintiff regarding his adverse possession. These entries appear to be manipulated. The first appellate Court has not at all examined this aspect of the case. In the khasras for the years 1950 to 1959 the name of Ratanlal is recorded in the remarks column whereas in the column of the Khatedar the name of Kunwarji continued. It has been held by a Division Bench of this Court in *Churamani v. Ramadhar*, 1991 MPLJ 311, that no presumption of correctness can attach to an entry made by the Patwari in the remarks column of a khasra showing therein some third party/trespasser to be in possession of the land held by a Bhumiswami and recorded as such in his name in the land records. The provisions of the Code or the rules made thereunder do not require the Patwari to make any entry in the remarks column and if such an entry is made, the same cannot have any presumptive value as regards its correctness. As there is no duty cast on the Patwari to make an entry in the remarks column there arises no question of drawing any presumption u/s 114(e) Evidence Act regarding any act of the Patwari having been regularly performed. The first appellate Court has not followed the principles laid down in this ruling. The khasra entries do not establish the adverse possession of the plaintiff for twelve years.

Now coming to the oral evidence Rugga (PW 2) Sardar (PW 3), Bapu (PW 4) and Deva (PW 5) have stated that the plaintiff was in possession of the lands in dispute for about 20 years. Ratanlal (PW 1) has stated in cross-examination in para 13 that he never cultivated the lands personally and he got it done through halts (labourers). He knew that his possession is being recorded as shikmi and he never told the patwari that he is in possession of the lands as shikmi. Rugga (PW 2) has stated that he ploughed the lands at the instance of Ratanlal for nine years. His evidence is so cryptic and unsatisfactory that no reliance could be placed on it. On the other hand Shankerlal (DW 1) son of Kunwarji has deposed that the plaintiff was never in possession of the lands in dispute. Hari Singh (DW 2), Bhera (DW 3), Kalu (DW 4) and Ranchand (DW 5) have supported him on

this point. According to them Kunwarji and after his death his son cultivated these lands. The trial Court has held in para 14 of its judgment that the evidence adduced by the defendant is more reliable and trustworthy. The first appellate Court has not even referred to the testimony of the five witnesses examined on behalf of the defendant and concluded that the evidence of the plaintiff is more satisfactory. The view taken by the trial Court regarding the oral evidence must be preferred.

It follows from the above discussion that the finding of the first appellate Court on the point of adverse possession of the plaintiff is wholly perverse, highly unreasonable and totally unjust. It has been held by the Supreme Court in *Annasaheb Bapusaheb Patil and others Vs. Balwant alias Balasaheb Babusaheb Patil (dead) by LRs. and heirs etc.*, , that under Article 65 of the Limitation Act, 1963, burden is on the defendant to prove affirmatively that he is in possession in hostile assertion i.e., a possession which is expressly or impliedly in denial of title of the true owner. The person claiming adverse possession must establish when the adverse possession commenced and the nature of such possession *Dr. Mahesh Chand Sharma Vs. Smt. Raj Kumar Sharma and others*, . 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 the facts necessary to prove adverse possession. Limitation under the third column of Article 65 starts from the date when the possessor of the defendant becomes adverse. As already discussed, the possession of plaintiff Ratanlal from the years 1942 to 1950 is recorded as shikmi, that is, a permissive and therefore there could not be adverse possession of the plaintiff during that period. If that is excluded from consideration, the possession of the plaintiff even on the finding of the first appellate Court from the years 1950 to 1959 could not be for the statutory period of twelve years. Therefore, the plaintiff cannot be said to have perfected his title by adverse possession.

There is another legal hurdle in the way of the plaintiff. Section 188 of the Bhopal State Land Revenue Act, 1932 is as under :--

"188. Permanent transfer:-- (1) An occupant is entitled to transfer permanently his holding or a part of his holding to--

(a) an agriculturist by profession, or

(b) any person who has acquired the right to occupy land u/s 51 and is entitled by virtue of any Rule made under this Act to acquire such holding or part of such holding permanently.

(2) The Collector may, after due enquiry according to rules under this Act, sanction the permanent transfer of a holding or part of a holding to any person not entitled to acquire it under Sub-section (1)".

It has been found that the plaintiff was not an agriculturist by profession and no sanction of the Collector was obtained for transfer of the land by Kunwarji" -to

plaintiff Ratanlal. Similar provision for sanction for transfer of land by a member of aboriginal tribe to a person not belonging to such tribe has been made in Section 165 (6) of the M.P. Land Revenue Code, 1959. The word "transfer" in this context was the subject matter of interpretation by this Court in *Chambaram v. Chanda* 1993 MPLJ 80, in which it has been held that the word "transfer" has to be liberally construed assigning an extended meaning to cover every contingency which results in depriving the aboriginal holder of title and vesting the same in favour of any non-aboriginal. Acceptance of claim of the plaintiff of acquisition of title by adverse possession over agricultural holding of the defendant would result in extinction of the defendant's title violating the express provision contained in Section 165 (6) of the M.P. Land Revenue Code, 1959. Any other interpretation of the term "transfer" would defeat the purpose of enactment. In this case reliance has been placed on a decision of the Supreme Court in *Pandey Orson Vs. Ram Chander Sahu and others*, . Similarly in the present case if the plaintiffs case of acquisition of title by adverse possession is accepted, that would result in violation of the provisions made in Section 188 of the Bhopal State Land Revenue Act, 1932. The word "transfer" used in Section 188 of the Act would include extinction of the ownership of the occupant and creation of the same in favour of the "transferee and that is not permissible without the sanction of the Collector. Something which cannot be done directly cannot be permitted to be done by an indirect or circuitous route. The law interdicts such a device.

In view of the above discussion, the judgment and decree of the first appellate Court holding the acquisition of title by the plaintiff by adverse possession are not well merited. Therefore, these are set aside and the judgment and decree of the trial Court are restored. The result is that the plaintiff's suit for possession and mesne-profits is dismissed. Costs as incurred.