
(2005) 09 MP CK 0056

In the Madhya Pradesh High Court

Case No : Second Appeal No. 294 of 1999

Smt. Aruna Devi

APPELLANT

Vs

Municipal Corporation and Others

RESPONDENT

Date of Decision : 27-09-2005

Acts Referred:

Madhya Pradesh Land Revenue Code, 1959 — Section 248

Citation : (2005) 4 MPHT 466 : (2006) 1 MPLJ 300

Hon'ble Judges : S.M. Samvatsar, J

Bench : Single Bench

Advocate : Pawan Vijayvargiya and D.D. Bansal, for the Appellant; K.B. Chaturvedi, Government Advocate, for the Respondent

Judgement

Subhash Samvatsar, J.

This appeal is filed by the plaintiff challenging judgment and decree dated 30-11-1998 passed by 9th Additional District Judge, Gwalior in Civil Appeal No. 42-A/97, whereby the First Appellate Court has confirmed the judgment and decree dated 14-10-1997 passed by Fourth Civil Judge Class-I, Gwalior in Civil Suit No. 1087-A/94.

The brief facts of the case are that the appellant- plaintiff filed a suit for declaration of title and injunction alleging that she is the owner of House No. 15/1011, situated at Thatipur, Gandhi Road, Morar. According to her, she is in possession of the suit property. The plaintiff alleges that he became owner of the suit property on the basis of the judgment and decree dated 16-5-1986 (Ex. P-2) passed in Civil Suit No. 22-A/80. The said house was her ancestral property and fallen to the share of father and mother of the plaintiff on the basis of partition taken place 50 years ago. According to her, the house in question is constructed 50 years back. In the year 1985, she had constructed some portion of the house after obtaining permission Ex. P-4 and P-5. It is alleged that the respondents want to demolish the said house and therefore on 28-4-1987 they went on the post for demolishing the house. Hence, she filed the present suit for declaration

that respondents have no right to demolish the house. She has also prayed for injunction that the respondents be restrained from demolishing any part of the house.

The defendants No. 2 and 3 filed their written statement alleging that they are not demolishing the entire building. In fact, in the year 1985 while reconstructing the house, respondents had encroached upon the land part of Survey No. 36 owned by the State Government to the extent of 34 mt. x 8.5 mt. and constructed the house on the Government land. According to the defendants, as the plaintiff has constructed a part of the building on the land owned by the State Government, hence the State Government has right to demolish the said part. The respondent No. 1 has filed a separate written statement stating that the respondent No. 1 is not at all concerned with the action.

Two Courts below after appreciating the evidence on record have concurrently found that the plaintiff has constructed a building on Survey No. 36. Survey No. 36 is recorded in the name of Government. This land is used by the Government for Parade of Military Department. The defendants have encroached upon Survey No. 36 to the extent of 34 mt. x 8.5 mt., i.e., total area 289 sq. ft. and therefore dismissed the suit by holding that defendants No. 2 and 3 have right to demolish the said portion. The First Appellate Court has confirmed the judgment and decree of Trial Court, hence this second appeal.

This second appeal is admitted by this Court on 3-8-2005 on the following substantial questions of law:

"(i) Whether the Courts below have committed mistake of law in not decreeing the suit of the plaintiff-appellant when it is admitted the fact that the disputed property falls within the area of Corporation to which respondents No. 2 and 3, Nazul Authorities have no authority to initiate the action ?

(ii) Whether the plaintiff can be denied injunction in her favour as the disputed property is existing for the last more than 50 years and on some part whereof the construction has been raised after taking due permission from the Corporation vide Ex. P-4, P-5 and P-6 ?"

The gist of question No. 1 is that whether the State Government has jurisdiction to demolish any building, which is situated on open land in Municipal limits.

The contention of learned Counsel for the appellant is that all the open lands in the Municipal limit vests in the Municipal Corporation and Nazul or Revenue authorities have no jurisdiction to demolish or take any action for the said purpose. In support of this argument, learned Counsel for the appellant has heavily relied on judgments of Division Bench of this High Court in the case of Municipal Council Mandsaur v. State of M.P. and Ors. 1972 J LJ 966, in the case of Municipal Corporation Indore v. State of M.P. and Ors. 1972 J LJ 614 and in the case of Sind Mahajan Exchange Ltd. v. State of M.P. 1980 MPLJ 834. In all these cases the Division Bench of this High Court has laid down that the land, which is

vested in the Municipality or Municipal Council can not be divested by the executive instructions or orders, and therefore Nazul authority has no jurisdiction to take any action in respect of said land.

As regards the case of Sind Mahajan Exchange Ltd. (supra) is concerned, the said case is reversed by the Apex Court. Though the Apex Court has not considered the question involved in this appeal and has reversed the judgment on the ground that the State Government was not party in the said petition. The Apex Court has also held that the question whether the State Government or Municipality is the owner of the property can be properly dealt with only in civil suit. Thus, the judgment of this Court in the case of Sind Mahajan (supra) is reversed, hence said judgment cannot be relied upon.

After perusing the judgment in the case of Municipal Mandsaur (supra), it appears that in the case the lands were recorded in the name of Municipal Council in pursuance of circular No. 3 of Samvat 1988 issued by the Gwalior State and these lands vested in the municipalities after coming into force of M.P. Municipal Corporation Act. In that case, it was alleged that all these lands were assessed to revenue lands and were recorded as municipal property and continued to be recorded until 1966-67. On 10-9-1964 the State Government issued certain instructions with regard to unoccupied land laying in the limit of municipalities stating that Circular No. 3 issued by the Gwalior State did not amount to transfer in favour of Municipal Council. Hence, Division Bench held that the rights which are already vested in the municipality can not be withdrawn by issuing administrative instructions. The Government can, however, withdraw the rights of the Corporation by following appropriate procedure.

In the case of Municipal Corporation, Indore (supra), the Division Bench has held that Section 82 of the Municipal Corporation Act makes it clear that all properties specified therein vest in the Corporation and shall be under the control and management of the Corporation subject to reservations and Sub-clause (h) of the said Section. Sub-clause (h) refers to all open lands which are neither the property of any person nor of the Government. The Division Bench, therefore, held that properties vested in the Corporation by virtue of Sections 80-82 of the Municipal Corporation Act can not be transferred back to the State Government and therefore Nazul authorities have no jurisdiction to deal with in respect of said property, but this is not a situation in the present case.

Both the aforesaid judgments are distinguishable and are not applicable in the present case. In the case of Municipal Council, Mandsaur (supra) the question is that the property vested in the Municipality under Circular No. 3 can be divested by executive orders, while in the case of Municipal Corporation Indore (supra), the question was the land vested in the Corporation by virtue of Section 82 of the Municipal Corporation Act can be divested by executive orders and the Division Bench held that the property vested in the Municipal Council and Municipal Corporation cannot be divested by executive orders.

In the present case, Khasra entry Ex. D-1 which is of the year Samvat 1977 shows that the land is recorded in the name of Government. As per khasra entry, the land continued to be recorded in the name of State Government. There is no entry on record to show that land was ever recorded in the name of Municipal Corporation. The land was in possession of the Military Department and was used for the purpose of Parade. The finding of two Courts below is that the plaintiff while constructing her house in the year 1985 has encroached upon the portion of the land and constructed her building. As already stated above, the land always continued to be recorded in the name of State Government and were never recorded in the name of Municipal Corporation in pursuance of circular No. 3 issued by the Gwalior State in the year Samvat 1988. Hence, the said land never vested in the Municipal Corporation. Section 82 of the Act reads as under:

"82. Property vested in Corporation.-- Subject to any special reservation made or to any special conditions imposed by the Government, all property of the nature hereinafter in this section specified and situated within the city, shall vest in and be under the control of the Corporation, and with all other property which has already vested, or may hereafter vest in the Corporation shall be held and applied by it for the purposes of this Act, namely:

(a) ... (b) ... (c) ... (d) ... (e) ... (f) ... (g) ... and

(h) all open lands which are neither the property of any person not of the Government."

From the perusal of this above section, it can not be said that in no situation the Government can own land in the Corporation limits. On the other hand, Sub-clause (h) of Section 82 of the Act provides that all open lands which are neither the property of any person or Government shall vest in the Corporation. Thus, the land recorded in the name of Govt. and not owned by the Government does not vests in the Corporation. Moreover, there is nothing on record to show that Municipal Corporation is claiming any right on the said land and Municipal Corporation is a party to the proceeding, but they never claimed any right over the suit property. In such circumstances, the cases relied on by learned Counsel for the appellant are quite distinguishable.

At the time of argument, learned Counsel for the appellant has also raised a plea that the construction in question is more than 50 years old, i.e., prior to 1950, hence the State Government cannot take any action u/s 248 of M.P. Land Revenue Code, as said section does not apply to the construction raised prior to 1950. This argument is also without any merit, particularly when the two Courts below have found that disputed construction was raised in the year 1985.

As regards question No. 2 is concerned, the said question is whether the plaintiff who is in possession of the suit property is entitled for injunction. It is no doubt true that present plaintiff is in possession of the property since 1985, though the said construction has been raised by her after encroaching upon the Government land. In such circumstances, the present plaintiff is entitled to an injunction to

the limited extent that construction can be demolished only after following due procedure laid down by law.

Thus, this appeal succeeds in part and judgments and decree passed by two Courts below are modified to the extent that the encroachment of the present plaintiff shall be removed only after following due procedure laid down by law, i.e., after following procedure as laid down u/s 248 of the M.P. Land Revenue Code.