
(2003) 12 CHH CK 0007
In the Chhattisgarh High Court
Case No : Misc. Appeal No. 433 of 2003

Smt. Kamta Bai and Others	Vs	APPELLANT
Inderchand Parekh and Others		RESPONDENT

Date of Decision : 17-12-2003

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 39 Rule 1, Order 39 Rule 2, Order 43 Rule 1

Citation : (2004) 1 CGLJ 92

Hon'ble Judges : Fakhruddin, J

Bench : Division Bench

Advocate : P. Diwakar, for the Appellant; B.P. Sharma, for Respondent No. 1, Vinod Lalchandani and Sandeep Dubey, for Respondents Nos. 4, 6 and 7, for the Respondent

Judgement

Fakhruddin, J.—Defendant Nos. 1, 2 and 4/Appellants have preferred this appeal under Order 43 Rule 1(r) of the CPC against the Order dated 09-05-2003 passed by the 5th Additional District Judge, Raipur in Civil Suit No. 136-A of 2002

2. Briefly stated facts of the case are that the Appellant No. 1 is a Sister-in-law of Plaintiff Respondent No. 1, Appellant No. 2 and Appellant No. 3 are Nephew and Niece of Plaintiff Respondent No. 1 respectively. Plaintiff Respondent No. 1 is an old man. He is also said to be handicapped. The Respondent No. 1 Plaintiff filed suit for partition and permanent injunction against the present Appellants and present Respondents No. 2 to 7. It is stated that one Dharam Chand Parekh was the ancestor of the property in question. He had three sons namely, Deepchand, Sheetalchand and Inderchand. Deepchand and Sheetalchand died. The Appellants are the legal representatives of late Deepchand. Inderchand filed the suit in question. Alongwith the suit, an application (Annexure P/3) under Order 39 Rule 1 Order 39 Rule 2 CPC was also filed. Suit map was also filed along with the plaint.

3. The contention of the Plaintiff is that there was a common passage marked by red ink in the plaint map, which was utilized by all the co-owners. There existed

a temporary partition but Defendants No. 1, 2 and 4, who are the Appellants, have removed the said temporary partition and have put shutters, thereby permanently closing the common passage. The Defendants however denied this. It was contended by the Defendants that partition by metes and bounds has taken place between the parties and the Plaintiff has no right or title over this property. By filing application under Order 39 Rule 1 Order 39 Rule 2 CPC right to use passage to and fro was claimed. The Defendants filed reply to the application under 1 Order 39 Rule 2 CPC. The Defendants No. 1 to 4 opposed the prayer for grant of temporary injunction whereas Defendants No. 5 to 9 supported the Plaintiff's case. Prima facie, the learned trial Court for the purposes of grant of temporary injunction considered the matter and passed the impugned order whereby it has allowed the application filed by the Plaintiff under 1 Order 39 Rule 2 CPC and directed that the Defendants No. 1 and 2 shall not interfere in the usage over the common passage shown in red ink and the door which exists there shall not be closed.

4. Counsel for the Appellants has challenged the said order on the ground that the Plaintiff is not residing in the suit house and therefore the injunction ought not to have been granted, as it will create nuisance. It is submitted that there exists no common passage.

5. It is pertinent to mention here that Deepchand died on 15-5-1999. The Plaintiff served a notice upon the Defendants on 26-03-2002 and the suit has been filed on 15-05-2002. The Court below has considered all the ingredients necessary for grant of injunction or otherwise. It has specifically considered the pleadings of the parties and the map appended with the plaint. The Court has also considered the affidavits filed by the respective parties. The Appellants herein did not file any map controverting plaintiff map. The Court has taken this factor as well for consideration. It is also stated that Plaintiff is in possession of the first floor of the suit house and if passage is closed, then Plaintiff will suffer great and irreparable loss.

6. Learned Counsel for the Defendants Appellants submits that document regarding partition has been filed. It is submitted that the Defendants Appellants are living with their families in the suit house. On the other hand, learned Counsel for the Plaintiff Respondent No. 1 submitted that there is no document to show that a partition by metes and bounds has been effected.

7. So far as the law is concerned, the question whether the partition by metes and bounds has been effected or not can be adjudicated only when a finding is recorded after parties get opportunity to lead evidence in this regard.

8. Learned Counsel for the Plaintiff/Respondent No. 1 and Respondents No. 6 and 7, who are sons of Plaintiff, submit that possession of a property belonging to several co-sharers by one co-sharer shall be deemed that he possesses the property on behalf of other co-sharers and mutation in the revenue record in the name of one co-sharer would not amount to ouster unless there is a clear

declaration that title of the other co-sharers was denied. Reliance has been placed on the case of Darshan Singh and Ors. v. Gujjar Singh (Dead) by LRs. and Ors. 2002 (1) Sup Today 36. The apex Court has held as under:

In our view the correct legal position is that possession of a property belonging to several co-sharers by one co-sharer shall be deemed that he possesses the property on behalf of the other co-sharers unless there has been a clear ouster by denying the title of other co-sharers and mutation in the revenue record in the name of one co-sharer would not amount to ouster unless there is a clear declaration that title of the other co-sharers was denied. After the death of Heera Singh, one collateral Smt. Har Kaur got her name mutated and took possession, which was questioned by Rulia Singh. Both the parties were litigating and ultimately the Court decided in favour of Rulia Singh, who got possession of the land and his name was mutated in the revenue records. After the death of Rulia Singh, his grand sons - the present Appellants, also got their names mutated which was challenged unsuccessfully by the Plaintiff. Thus, it is proved that present Appellants got their names mutated after denying the title of co-laterals of Jagjit Singh, including the present Appellant. On these facts, we hope that as names of present Appellants were mutated in the revenue record after rejecting the claims of Plaintiff and other co-laterals, there was a clear ouster of other co-sharers of Jagjit Singh. From the judgment of the trial court, we find that Rulia Singh mortgaged a part of the land and sold some part treating himself as the owner. On the facts proved in the case in hand, we are of the view that the Appellants have proved that their possession of the land in question is in continuity for more than the statutory period, in publicity and adverse to Jagjit Singh and his other collaterals and they have perfected their title over the land by adverse possession. We therefore, find merit in the present appeal and accordingly it is allowed by setting aside the judgment impugned and the judgment of the trial court is restored. Consequently, suit filed by the Plaintiff is dismissed. We direct the parties to bear their own costs.

9. Learned Counsel for the Defendants Appellants submitted that this Court vide Order dated 05-06-2003 while granting an interim stay in their favour directed that the Respondent No. 1 in the garb of injunction order shall not enter that part of the residential premises which is in exclusive possession of the Appellants. He further submitted that the interest of the Defendants Appellants be protected. He also submitted that the Respondents No. 6 and 7 are not the Plaintiff in the case and they should not be allowed to use the common passage. On the other hand, learned Counsel for the Plaintiff Respondent No. 1 and Respondents No. 6 and 7, who are sons of Plaintiff, submit that as they are in possession of the first floor of the suit house, so they shall be allowed to use the common passage between 9.00 A.M. to 9.00 P.M., so that it does not cause any inconvenience to the family members and children of the Defendants Appellants.

10. It is borne out from the record that the Defendants with their family are living in the suit house. The Plaintiff is not residing in the suit house. The Plaintiff

and his sons are not using it for residence purposes for the time being. Under the circumstances ends of justice would be served if the Plaintiff Respondent No. 1 and Respondents No. 6 and 7, who are sons of the Plaintiff, shall be allowed to use the common passage between 9.00 A.M. to 9.00 P.M. so that it does not cause any inconvenience to the family members and children of the Defendants Appellants.

11. It is a settled principle of law that in a partition suit both the parties attain the status akin to that of Plaintiff. Therefore, there should be no objection

for the use of common passage by Respondents No. 6 and 7.

12. Having considered the facts and circumstances of the case and material on record, in the opinion of this Court, ends of justice would be served if the interests of both the parties are protected. It is therefore directed that the Plaintiff Respondent No. 1 and his sons/Respondents No. 6 and 7 be allowed to use the common passage between 9.00 A.M. to 9.00 P.M. so that it does not cause any inconvenience to the family members and children of the Defendants Appellants, till the suit is decided finally.

13. At this stage, counsel for the parties pray for a direction that the suit itself be decided as early as possible. The prayer appears to be just and proper. Having thus considered, it is directed that the trial court shall decide the suit itself on its own merits in accordance with law without being influenced by any of the observations made, while deciding the application filed under 1 Order 39 Rule 2 Code of Civil Procedure, as early as possible preferably within 9 months from the date of production of the certified copy of this Order. All the parties to cooperate.