
(1972) 04 MP CK 0010
In the Madhya Pradesh High Court
Case No : L.P.A. No. 16 of 1968

Sultan Jehan Begum and others

APPELLANT

Vs

Gul Mohammed and others

RESPONDENT

Date of Decision : 28-04-1972

Acts Referred:

Citation : (1972) JLJ 734

Hon'ble Judges : Bishambhar Dayal, C.J; Shiv Dayal Shrivastava, J

Bench : Division Bench

Advocate : C.P. Sen and P.C. Naik, for the Appellant; A.S. Usmani, for the Respondent

Final Decision : Allowed

Judgement

Shivdayal, J.—This is an appeal under the Letters Patent of this Court from the judgment and decree of a learned Single Judge in a second appeal arising out of a suit for a declaration that the plaintiff, Yasin Mohammad, has perfected his title by adverse possession.

2. The facts, in short, are that the lands in dispute comprising 39.31 acres in village Sivanja, Tahsil Sehore, originally belonged to Nannu and Atmaram. These lands were sold in auction for recovery of arrears of land revenue. On May 11, 1944, Ahsan Beg purchased those lands in the auction sale. The plaintiff resisted delivery of possession on the ground that on April 25, 1943, he had purchased the suit lands from Nannu and Atmaram, through their guardian.

3. There were proceedings u/s 145, Code of Criminal Procedure, which ended in favour of Ahsan Beg. Even then he could not get possession as a matter of fact.

4. On March 5, 1946, a suit was instituted by Yasin Mohammad for cancellation of the revenue sale. That was Civil suit No. 17 of 1949. That suit was, however dismissed on March 31, 1949, on the ground that the sale in his favour was after attachment of the lands. On May 17, 1952 the plaintiff's appeal was dismissed. On May 21, 1953 his second appeal was also dismissed by the Judicial

Commissioner, Bhopal.

5. In the meanwhile, Ahsan Beg, the auction-purchaser had brought a suit for possession against Yasin Mohammad. That suit was Civil suit No. 28 of 1954. On August 30, 1954 a decree for possession was passed in favour of Ahsan Beg. An appeal was preferred against the decree, but it was dismissed on February 1, 1956. The decree for possession in favour of Ahsan Beg thus became final. Execution of this decree was taken out by Ahsan Beg on July 31, 1958. Objections filed by Yasin Mohammad were dismissed. Aggrieved by that order Yasin Mohammad preferred an appeal on December 1, 1958. That appeal was dismissed on October 29, 1959. A second appeal preferred by him was also dismissed. Eventually, on September 17, 1960 the appellants were put in possession in execution of the decree which had been passed in Civil suit No. 28 of 1954.

6. It must now be mentioned that in the meanwhile Yasin Mohammad had brought a suit (No. 70 of 1956) claiming protection of his possession as a sub-tenant. That suit was dismissed. An appeal preferred against the decree of dismissal was also dismissed on February 24, 1959.

7. Thereafter on November, 3, 1959, the present suit from which this appeal arises was instituted by Yasin Mohammad against the appellants. He claimed a declaration of his title as to have been perfected by adverse possession. On January 22, 1962, the trial Court dismissed the suit. An appeal was preferred by him which was allowed on September 7, 1963 and a decree was passed in the suit in favour of the plaintiff. Against the appellate decree a second appeal was preferred by the defendants but the learned Single Judge of this Court dismissed that appeal on April 23, 1968. He, however, declared that this was a fit case for Letters Patent Appeal. Hence this appeal.

8. The appellants (defendants) are heirs of Ahsan Beg auction purchaser. The respondents are legal representatives of the plaintiff Yasin Mohammad, who died during the pendency of the present appeal.

9. It has been held by the first appeal Court and the learned Single Judge that the plaintiff was in adverse possession from 1944; and that in spite of the fact that on June 9, 1952, Ahsan Beg brought the suit (No. 28 of 1954) for possession, the adverse possession of the plaintiff was not arrested. In the result it has been held that in spite of suit No, 28 of 1954 (supra) having been brought by Ahsan Beg and a decree having been passed in his favour, Yasin Mohammad's adverse possession continued and he perfected his title during the pendency of that (auction-purchaser's) suit.

10. It is contended for the appellants that the decree of the first appeal Court and of the learned Single Judge are erroneous in law inasmuch as the suit No. 28 of 1954, (which ultimately resulted in a decree in their favour, and in execution of which they obtained possession) arrested the adverse possession of the plaintiff Yasin Mohammad with effect from the date of his suit. In our opinion this

contention must be accepted.

11. Section 28 of the Limitation Act, 1908 (which applies to this case) enacts that on the expiry of the period of limitation prescribed for a suit for possession of property the title of the plaintiff extinguishes. It implies that the plaintiff's title would extinguish if no suit is instituted by the person who is entitled to possession. The best that a person against whom there is adverse possession of another person can do is to bring a suit for possession within the limitation prescribed by law. How long that suit will take is not within his control. It must necessarily follow that if the result of the suit is declaration of title in his favour of the decree, so far as title is concerned, must relate back to the date of the suit. This can well be demonstrated by two illustrations. Suppose when the plaintiff brings a suit for possession the defendant had already been in adverse possession for 11 years, and in his suit a decree for possession is passed in favour of the plaintiff against the defendant after one year and one day of the institution of the suit, that is, after one day of the defendant having remained in adverse possession for 12 years. It cannot be said that the plaintiff's title extinguished just because the defendant was in possession for 12 years before the decree was passed against him. To say so will mean that the plaintiff must also see that the decree for possession is passed and possession is delivered to him within 12 years from the date when the defendant's adverse possession commenced. This can never be the law,. Let us now take another instance. Suppose the plaintiff brings a suit for possession on the very next day when the defendant takes unlawful possession, but a decree for possession is passed in favour of the plaintiff after 12 years from the date of institution of the suit. It can not be said that the defendant has acquired title by adverse possession of 12 years. It is patent enough that Sec. 28 does not positively confer any title on the defendant but it merely extinguishes the right of the plaintiff, if he allowed the period prescribed for a suit for possession to run out.

12. In our view the law is clearly this :-

(1) When a person entitled to possession does not bring a suit against the person in adverse possession within the time prescribed by law his right to possession is extinguished. From this it only follows that if the former brings a suit against the latter within the prescribed period of limitation his right will not be extinguished.

(2) If a decree for possession is passed in that suit in his favour he will be entitled to possession irrespective of the time spent in the suit and the execution and other proceedings.

(3) The very institution of the suit arrests the period of adverse possession of the defendant and when a decree for possession is passed against the defendant the plaintiff's right to be put in possession relates back to the date of the suit

(4) Sec. 28 of the Limitation Act merely declares when the right of of the person out of possession is extinguished. It is not correct to say that, that section " confers title on the person who has been in adverse possession for a certain

period. There is no law which provides for conferral of title" as such on a person who has been in adverse possession for whatever length of time.

(5) When it is said that the person in adverse possession "has perfected his title", it only means this. Since the person who had the right of possession but allowed his right to be extinguished by his inaction he cannot obtain the possession from the person in adverse possession, and, as its necessary corollary the person who is in adverse possession will be entitled to hold his possession against the other not in possession, on the well settled rule of law that possession of one person cannot be disturbed by any person except one who has a better title.

13. Perhaps it will be a matter for consideration whether the plaintiffs right will be extinguished in a case when the plaintiff institutes a suit within the prescribed time and although a decree for possession is eventually passed in his favour, he does not execute it and allows the decree to become inexecutable. But that is not the case here. In the present case the appellants had taken out execution. The respondent filed objections which were dismissed. First and second appeals were preferred by Yasin Khan but were dismissed, and eventually the appellants were put in possession.

14. In this context it may be pointed out that there is a distinction between a suit for a declaration simpliciter and a suit for declaration coupled with possession. Where a suit is instituted by one person against another person who is in adverse possession a mere decree in his favour declaring his title will not have the effect of arresting the adverse possessions of the defendant. We have our own doubts whether in such a suit a decree could at all be passed because the suit would be barred by the Proviso to Sec 42 of the Specific Relief Act, then in force. However, the position is entirely different when the suit is not only for declaration but also for possession. This distinction was succinctly brought out in a decision of the Calcutta High Court in Achhiman Bibi Vs. Abdur Rahim Naskar and Others, . The Division Bench which decided that case pointed out that there is a considerable difference between a suit for mere declaration and a suit for declaration coupled with a prayer for possession. It was held that if a suit of the latter kind is decreed in the presence of the person in wrongful occupation, then the decree arrests the running of time against the true owner. If the person in wrongful possession continues in possession even after the decree, the wrongful possession does not ripen into prescriptive title by efflux of time. The same view was taken in Fatima Bibi and Another Vs. A. Hajee Muhammad Usman Sahib (died),

15. The learned Single Judge has relied on three decisions in support of the respondent's contention. In our opinion all the three cases are clearly distinguishable. The first is Mohammad Tahir and Others Vs. Bechey Lal and Others, where it was held that a decree not accompanied by actual effective assertion of rights and taking possession of these rights does not help to stop adverse possession running. It can not be said that that proposition will apply to the present case because here there was actual assertion of rights and

possession was also taken in execution of the decree. The second case is Mohammad Tahir v. Bechey Lal AIR 1948 Bom 149. That was a suit for mere declaration of title and the learned Single Judge who decided that case, relying on the observations of the privy Council in Subbaiya Pandaram v. Muhammad Mustapha AIR 1933 Lah 472, said that the decree for declaration merely emphasised the fact that the defendant's possession was adverse. In the present case the suit instituted by Ahsan Beg was not merely for declaration but also coupled with possession. The third case relied on is the above mentioned decision of the Privy Council.

16. Learned Counsel for the respondent has further relied before us on a decision of the Bombay High Court in Dagadabai v. Sakharani 50 IA 295, The facts of that case were entirely different. There a decree against a mortgagor was passed in favour of the mortgagee, to have possession of the lands for two years and the possession thereafter should go to the mortgagor. The mortgagee attempted to execute the decree but could not get possession from the defendants who were in possession as heirs of the husband of the plaintiff. The possession was never in fact obtained by anybody. The mortgagor then brought a suit against the defendants claiming as an heir of her husband to eject the defendants. It was in those circumstances that the defendants' plea of adverse possession was upheld and it was held that the mortgage decree in favour of the mortgagor which had been passed did not arrest the defendants' adverse possession and that the defendants' possession must be deemed to have been adverse throughout. That case is poles apart from the present one.

17. The other case relied on by the Learned Counsel for the respondent is Krishna Prasad Singh Vs. Adyanath Ghatak and Another, In that case although the decree for possession was passed, it was never executed and after the expiry of the period prescribed for its execution the decree did not survive. It was held that a mere decree, even a decree for possession, which is not executed, cannot possibly in itself interrupt adverse possession. The observations of the Privy Council were recalled where it was said that the decree merely emphasised its adverse character. The ratio of that case may be reproduced here :

"There is no distinction in principle between a declaratory decree and a decree for possession which the decree-holder fails to execute within the statutory period." In the present case the decree-holder did execute his decree and got its fruit.

18. For these reasons this appeal is allowed. The judgment and decree of the learned Single Judge and of the first appeal Court are set aside and those of the trial Court are restored. The respondent's suit is dismissed with costs throughout.