

(2008) 12 UK CK 0001

In the Uttarakhand High Court

Case No : First Appeal No. 1039 of 2001

U.P. State Electricity Board and Others

APPELLANT

Vs

Maharaja Manvendra Shah (since deceased) through L.Rs.
and Another

RESPONDENT

Date of Decision : 08-12-2008

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 7 Rule 3, 96
Limitation Act, 1963 — Section 10, 11, 12, 13, 14
Specific Relief Act, 1963 — Section 39

Citation : (2009) 1 UC 660

Hon'ble Judges : Prafulla C. Pant, J

Bench : Single Bench

Advocate : Alok Singh, assisted by, N.S. Negi and Tarun Takuli, for the Appellant; U.K. Uniyal assisted by, Sandeep Kothari, for the Respondent

Final Decision : Dismissed

Judgement

Prafulla C. Pant, J.—This appeal, preferred u/s 96 of the Code of Civil Procedure, 1908, is directed against the judgment and decree dated 27-02-1990, passed by the then District Judge, Tehri Garhwal, in Original Suit No. 37 of 1983, whereby the said trial court decreed the Plaintiffs' suit for mandatory as well as the prohibitory injunction.

2. Heard Learned Counsel for the parties and perused the entire lower court record.

3. Brief facts giving rise to this appeal are that the Plaintiff/Respondent instituted Suit No. 37 of 1983, before the District Judge, Tehri Garhwal with the pleadings that he is owner of the building known as "OLD POWER HOUSE" and land appurtenant thereto situated in Narendra Nagar, shown in the plaint map. The said building and land in suit were declared to be owned by the Plaintiff by State of Uttar Pradesh vide its Government Order No. 308-B/III-37 F/58 dated 13-05-1960, as has been shown at SI. No. 20 of the "Properties of His

Highness". It is alleged in the plaint that the Defendant No. 1 through its contractor (Defendant No. 5) encroached upon the land in suit on 05-02-1983 and started constructions over it for the residence of Defendants No. 2 and 3. The constructions are shown by letter "B" in the plaint map. It is pleaded that the Plaintiff served a notice on the Defendants to stop the constructions, as the Defendants started not only constructing the building at the place shown by letter "B" but also demolishing the existing building, owned by the Plaintiff in which the tenants of the Plaintiff were residing. It is prayed in the suit that the Defendants be restrained from demolishing the property in suit and raising constructions over it. A further relief has been sought against the Defendants that they be directed to remove the constructions raised over the land in suit, restoring the land in suit to its original condition.

4. Defendants No. 1 to 4 (Appellants) contested the suit and filed their written statement. It is pleaded in the written statement that the Plaintiff is not the owner of the property in suit. It is further pleaded that the answering Defendants were given possession of the land on 02-05-1950, after the property of Raja Tehri merged with the State of Uttar Pradesh as per the agreement between the Government of India and the interim Government on 18-05-1949. Otherwise also, Defendant No. 1 has acquired the title by way of adverse possession, as the Defendant No. 1 continued in possession over the property in suit since 1950 to 1983. Alleged tenants Nand Bahadur, Pushpa and one Joshi were inducted by the Plaintiff to show his ownership in the property in suit. It is further pleaded in the written statement that the suit is under valued and the court fee paid is insufficient. Lastly, it is pleaded that the Plaintiff has not come with the clean hands. The Defendant No. 5 filed his separate written statement and pleaded that he started constructions as per the contract with Defendant No. 1.

5. On the basis of the pleadings of the parties, the trial court framed following issues:

1. Whether, the Plaintiff is owner of the disputed building, or not, if so, its effect?
2. Whether, the court has jurisdiction to hear the suit ?
3. Whether, the Defendants have started new constructions after demolishing the disputed property w.e.f. 05-02-1983 ?
4. Whether, the Defendants are in adverse possession of the disputed property, if so, its effect ?
5. Whether, the suit is under valued?
6. To what relief, is the Plaintiff entitled?

The trial court decided issue No. 2 as preliminary issue on 18-07-1987, holding that the trial court has jurisdiction to try the suit. As to the issue Mo. 5, the said issue was also decided as preliminary issue on 24-07-1987. Other issues were decided after recording full evidence and hearing the parties. The trial court has

decided issues No. 1, 3, 4 and 6 in favour of the Plaintiff and decreed the suit for prohibitory as well as mandatory injunction, as prayed in the plaint. By directing that the Defendants are restrained from encroaching upon, damaging the building or raising the constructions in the disputed property situated in Khasra No. 518 shown by letters A, B, C, F in plaint map. Defendants are further directed to remove the constructions already raised and restore the condition of the land as it existed on 5th February 1983. Hence, this appeal by the Defendants.

6. Following are the points of determination on the basis of the arguments advanced on behalf of the parties, in this appeal:

1. Whether, the court below has erred in law in ignoring the plea of limitation raised by the Defendants?
2. Whether, the suit for injunction was not maintainable without seeking relief for possession?
3. Whether, the property in suit was not identifiable, and as such, the injunction could not have been granted?
4. Whether, the trial court has erred in appreciating the evidence on record and holding that the Appellant is owner of the property in suit?

Re: Point of determination No. 1:

7. Learned Counsel for the Appellants drew attention of this Court to Section 3 and Section 27 of the Limitation Act, 1963. Section 3 of Limitation Act provides that subject to the provisions contained in Section 4 to 24 of the Act, every suit instituted, appeal preferred, and application made after the prescribed period shall be dismissed although limitation has not been set up as a defence. Section 27 of the Act provides that at the determination of the period prescribed under the Act for instituting a suit for possession of any property, right to such property shall be extinguished. In Para 21 of the written statement it has been pleaded that the answering Defendants No. 1 to 4 have matured their title by virtue of adverse possession as they were in possession over the property in suit from 1950 to the year 1983 when the suit was instituted. Article 64 of the Schedule of the Limitation Act, 1963, provides 12 years period for instituting suit from the date of dispossession. Article 65 of the Schedule of the Act also provides 12 years period of limitation for instituting suit for possession of an immovable property from the date, possession of the Defendant becomes adverse to the Plaintiff. No doubt, it is pleaded in the written statement that the Defendant No. 1 got possession of the property in suit in the year 1950, and on that ground it has further been pleaded that the contesting Defendants have matured their title by virtue of adverse possession. The trial court framed the issue on the point of adverse possession and after discussing the evidence adduced by the parties found that the Defendants were not in possession since 1950, but encroached upon only in the year 1983, as pleaded by the Plaintiff. As such, the

trial court recorded the finding that Defendants could not prove their case of adverse possession against the Plaintiff. After going through the evidence on record this Court also agrees with said finding that it is only in February 1983 the Defendant No. 1 encroached upon the land in suit. Since, the question of limitation as pleaded in Para 21 of the written statement hinges on the factum of acquiring title by the Defendants on the basis of the adverse possession, in the opinion of this Court, after appreciating the evidence when the trial court found that the Defendants were not in possession before 1983 over the land in suit, there is no question of dismissing the suit on the point of limitation.

Re : Point of determination No. 2 :

8. Learned Counsel for the Appellants pointed out that in Para 3 and 4 of the plaint it has been clearly pleaded by the Plaintiff that Defendants No. 1 to 4 are raising the constructions through Defendant No. 5 after encroaching upon the land, as such, the Plaintiff should have sought relief of possession and they cannot get possession under the garb of mandatory injunction which can only be granted to prevent the breach of an obligation that too when it is necessary to compel the performance of certain acts as provided u/s 39 of the Specific Relief Act, 1963. I do agree with the Learned Counsel for the Appellants that it is unhealthy practice to seek the relief of possession under the garb of relief of injunction and thereby causing loss to the public exchequer by not paying the court fee for the relief of possession which is higher to the one payable for the relief of injunction. Having considered the facts and circumstances of the case, after going through the evidence on record, this Court is of the view that in the interest of justice the Plaintiff can be directed to pay the court fee for the relief of possession before the decree is sought to be executed.

Re : Point of determination No. 3 :

9. Learned Counsel for the Appellants drew attention of this Court to Rule 3 of Order VII of the Code of Civil Procedure, 1908, which reads as under:

3. Where the subject matter of the suit is immovable property. - Where the subject-matter of the suit is immovable property, the plaint shall contain a description of the property sufficient to identify it, and, in case such property can be identified by boundaries or numbers in a record of settlement or survey, the plaint shall specify such boundaries or numbers.

Perusal of the plaint shows that in its Para 1 it is stated that the land in suit is situated behind the office of the Public Works Department and below the Palace Road in Narendra Nagar. Further description has been given of the property in suit in the plaint map by showing points A, B, F and C, Apart from this, it is also mentioned in Para 1 of the plaint that the property is known as "OLD POWER HOUSE". Having gone through the pleading and the plaint map it cannot be said that the property is not sufficiently described in the plaint or that it is not identifiable. In the written statement it has nowhere been pleaded by the Defendants that the property in suit is not identifiable. In the circumstances, this

Court does not find any substance in the argument advanced on behalf of the Appellants that the property in suit is not identifiable and relief sought could not have been granted.

Re : Point of determination No. 4:

10. Copy of order dated 13-05-1960 issued by the Government of Uttar Pradesh under signatures of one A.S. Misra, Deputy Secretary to State Government (a copy of which is on the record) clearly shows that certain personal properties of the Plaintiff were restored to him after merger of the Estate of Raja Tehri in 1949. Certain "properties of His Highness" are restored to the Plaintiff vide aforesaid order of the Government of Uttar Pradesh. At SI. No. 20 -"OLD POWER HOUSE - where Malis live" is clearly mentioned specifying that with palace, staff quarters and out houses, said property was also given back to the Plaintiff by the State Government. As far as the oral evidence relating to ownership and possession of the land in dispute is concerned, not only P.W. 1 Raghunath Prasad Raturi, power of attorney holder of the Plaintiff; P.W.2 Inder Singh, a tenant, and P.W.3. Bhairav Dutt Sharma, Patwari, Narendra Nagar (a public servant) have supported the Plaintiff's case that the building and land in question belongs to the Plaintiff, the Defendants' witnesses D.W.3 Chander Singh, an employee of the electricity department in his cross examination has stated that in the disputed building Pushpa Devi and Ganga Ram reside. This witness has further stated that a person named Inder Singh also lives in it. It is pertinent to mention here that Inder Singh (P.W.2) has stated that he is tenant of the Plaintiff. Apart from this, D.W.4 Virendra Prakash Gaur, another employee of the Defendant No. 1, states in his cross examination that one Jagdish Prasad Gaur (another officer of the Defendant No. 1) in the year 1982-83, made attempts to purchase the land and building in suit for Rs. 13.50 thousand. This also indicates that, in fact, the property in question never belonged or possessed by the Defendants No. 1 to 4 before February 1983. From the statement of D.W.1 Raghunandan Prasad Gairola, a retired employee of the Defendant No. 1, as stated in his cross examination, it is clear that the Power House which was in possession of the Defendant No. 1 is situated near the Bus Stand in Narendra Nagar and said Power House is different and away from the "OLD POWER HOUSE" owned by the Plaintiff. This fact further gets clarified from the cross examination of D.W.5 Pitamber Dutt Semwal, who has also admitted that there is one more Power House which is near Bus Stand in Narendra Nagar and which is also in possession of the Defendant No. 1.

11. Having gone through the entire evidence on record and after re-appreciating the same, this Court concurs with the findings recorded by the trial court that land and property in suit is owned by the Plaintiff, who was in possession over it through his tenants and the encroachment made by the Defendant No. 1 in February 1983, was illegal and the constructions which were got raised through Defendant No. 5 are also illegal.

12. For the reasons as discussed above, this appeal is liable to be dismissed. The

same is dismissed with costs. However, it is directed that before executing the decree passed by the trial court, the Plaintiff shall pay court fee on the relief of possession also before said court.