

CASE NO.:
Appeal (civil) 7579 of 1999

PETITIONER:
Bondar Singh & Ors.

RESPONDENT:
Nihal Singh & Ors.

DATE OF JUDGMENT: 04/03/2003

BENCH:
R.C. Lahoti & Arun Kumar.

JUDGMENT:

J U D G M E N T

ARUN KUMAR, J.

This appeal is directed against the judgment and decree dated 16th November, 1998 passed by the Indore Bench of the High Court of Madhya Pradesh. As a result of the decision of the High Court the suit filed by the plaintiffs/respondent was decreed. The plaintiffs had filed a suit for declaration that they had become owners of the lands in suit by adverse possession and for injunction to restrain the defendants from interfering with the plaintiffs' possession of the suit lands. The trial Court had decreed the suit, however, the appeal filed by the defendants against the trial court judgment was allowed by the Additional District Judge, Dhar, M.P. and the suit was ordered to be dismissed. Further an appeal filed by the plaintiffs against the said judgment of the Additional District Judge was allowed by the High Court and the suit was finally decreed.

Briefly the facts are that the plaintiffs (respondents herein) claim title to the land in suit on the basis of the plea that they had become its owners by adverse possession. The land was owned by one Fakir Chand predecessor in interest of the appellants herein (defendants in the suit). Fakir Chand sold the land to Tola Singh, predecessor in interest of the plaintiffs by an unstamped and unregistered sale deed dated 9.5.1931. The plaintiffs claim to have entered into possession of the land on the basis of the said sale deed and they claim to be continuously in possession since then. The defendants tried to dispossess the plaintiffs which led to the present suit being filed by them on 15.4.1972. In the written statement filed by the defendants they denied the sale of land by their father Fakir Chand to Tola Singh. They denied possession of the plaintiffs of the suit land. They also took the plea that the alleged sale deed was false, fictitious and without consideration. According to the defendants, their father was in possession of the lands till his death. After the death of their father, their mother had given possession of the land to Tola Singh for purpose of cultivation in order to earn some money for supporting her family. According to the defendants they had taken back possession of the land from Tola Singh in the year 1957-58. They also pleaded that after the death of Fakir Chand, the land had been mutated in their names in the revenue records to the knowledge of the plaintiffs. The plea of adverse possession was denied by stating that actually the defendants were in possession of the land and there was no question of adverse possession of the land by the plaintiffs qua the suit land.

The main question for consideration in the present suit is as to whether the plaintiffs were in hostile continuous possession of the suit lands by virtue of which they had perfected their title to the land by adverse possession. Both parties claim to be in possession of the suit land. While considering the above question, the Court will also have to look into the plea raised by the learned counsel for the appellants/defendants that the plaintiffs had come in possession of the suit land for a brief period after the death of Fakir Chand, father of the defendant as "Shikmi" that is sub-tenants. The plea of sub-tenancy was as such not raised in the written statement nor any issue was framed by the trial Court in this connection. No particulars of alleged sub-lease were given. Not even date of creation of alleged sub-lease was stated. The defendants have tried to build an argument based on plea of sub tenancy (shikmi) at appellate stage. In support of this plea they rely on certain entries in the revenue records. Since this plea pre-supposes possession of the plaintiffs, the defendants took the stand that they had taken back the possession of the land from the defendants.

Before we proceed further it is necessary to notice a preliminary argument raised by the learned counsel for the appellants. It was contended that the question of possession is a question of fact and the High Court while exercising power under Section 100 of the Code of Civil Procedure, had no jurisdiction to upset the findings on this question recorded by the lower appellate Court. An appeal under Section 100 C.P.C. can be entertained by the High Court only on a substantial question of law. There can be no quarrel with this legal proposition. The scope of powers of High Court under Section 100 C.P.C is a matter of settled law. The learned counsel for the appellant cited several judgments in support of his contention. We do not consider it necessary to discuss these decisions because so far as the question of powers of High Courts under Section 100 C.P.C. is concerned, it needs no discussion. If the findings of the subordinate courts on facts are contrary to evidence on record and are perverse, such finding can be set aside by the High Court in appeal under Section 100 C.P.C. A High Court cannot shut its eyes to perverse findings of the courts below. In the present case the findings of fact arrived at by the lower appellate court were contrary to evidence on record and, therefore, perverse and the High Court was fully justified in setting aside the same resulting in the appeal being allowed and suit being decreed.

The main question as we have already noted is the question of continuous possession of the plaintiffs over the suit lands. The sale deed dated 9.5.1931 by Fakir Chand, father of the defendants in favour of Tola Singh, the predecessor interest of the plaintiff, is an admitted document in the sense its execution is not in dispute. The only defence set up against said document is that it is unstamped and unregistered and therefore it cannot convey title to the land in favour of plaintiffs. Under the law a sale deed is required to be properly stamped and registered before it can convey title to the vendee. However, legal position is clear law that a document like the sale deed in the present case, even though not admissible in evidence, can be looked into for collateral purposes. In the present case the collateral purpose to be seen is the nature of possession of the plaintiffs over the suit land. The sale deed in question at least shows that initial possession of the plaintiffs over the suit land was not illegal or unauthorized. It is significant to note that the sale deed is dated 9.5.1931 and Fakir Chand died somewhere in the year 1949-50. During his lifetime Fakir Chand never disputed plaintiffs' title or possession of the suit land. There is other reliable evidence on record which establishes that the plaintiffs have been in continuous possession of the land in question. There is a notice dated 16.4.1956 Exhibit P.6. The notice was issued on behalf of the defendants and is addressed to the predecessor interest of the plaintiffs. By the notice

the defendants called upon the plaintiffs to hand over possession of the suit land to them. According to the notice, the plaintiffs were trespassers on the suit land and were liable to hand over its possession to the defendants. This notice is an admission on the part of the defendants that the plaintiffs were in possession of the suit land at least on the date of the notice i.e. 16th April, 1956. The notice was followed by an application dated 8th May, 1956 (Exhibit P.3). filed by the defendants under Section 58 of the Madhya Bharat Land Revenue and Tenancy Act, 1950 before the revenue authorities. In the said application the defendants admit that the land in question was in possession of the plaintiffs since the lifetime of their father. It is further admitted that the land was being cultivated by the plaintiffs. It was prayed in the said application that the plaintiffs be declared trespassers over the suit land and possession of the land be given to the defendants. In their reply to the application, the present plaintiffs denied the allegation that they were trespassers on the suit land, they refer to the sale deed of 9.5.1931 by Fakir Chand in favour of their predecessor. Thus the plaintiffs were all along asserting that they were in possession of the land in their own right. The Tehsildar vide his order dated 3rd October, 1959 dismissed the said application of the defendants. He relied on an admission on the part of Poonam Chand, eldest son of Fakir Chand that the present plaintiffs were in possession for the last 26-27 years. Relying on the said statement the revenue authorities held that since possession of the present plaintiffs was continuing for last 26-27 years they could not be dispossessed from the suit land. The application of the defendants was dismissed. The defendant filed an appeal against the said order which was also dismissed on 6.8.1962. A copy of the order of the Tehsildar is Exhibit P.8 while a copy of the order of the appellate authority i.e. S.D.O. is Exhibit P.9. These judgments of the revenue authorities establish that at least till 1962 the plaintiffs were in possession of the suit land. They also totally nullify the assertion of the defendants in their written statement in the present suit that they had taken possession of the suit land in 1957-58. If they had taken possession of the suit land in 1957-58 why were they pursuing the matter before the revenue authority till 1962 when the appeal was contested before the S.D.O. and the decision of the S.D.O. was given on 6.8.1962?

It appears that having failed to obtain possession of the suit land through lawful means, the defendants tried to dispossess the plaintiffs forcibly which led to the present suit being filed on 15.4.1972. The claim of the defendants regarding taking possession of suit land from plaintiffs in 1957-58 having been found to be false, it follows that the defendants never came into possession of the suit land. Another significant conclusion which follows from these facts is that the defendants started asserting their title to the suit land since at least 1956 when they issued the notice Exhibit P.6 while the plaintiffs have been denying their title to the suit land and were setting up their own title to the same. This lends support to the plea of adverse possession set up by the plaintiffs. It will be seen from this clear and clinching evidence on record that the plaintiffs were in continuous and uninterrupted possession of the suit land since 1931 and they had been setting up a hostile title thereto as against the defendants. The defendants were asserting their title to the land since 1956. They had however failed to get possession of the suit land. The plea of adverse possession raised by the plaintiff is thus clearly established.

As regards the plea of sub tenancy (shikmi) argued on behalf of the defendants by their learned counsel, first we may note that this plea was never taken in the written statement the way it has been put forth now. The written statement is totally vague and lacking in material particulars on this aspect. There is nothing to support this plea except some alleged revenue entries. It is settled law that in the absence of a plea no amount of evidence led in relation thereto can

be looked into. Therefore, in the absence of a clear plea regarding sub tenancy (shikmi) the defendants cannot be allowed to build up a case of sub tenancy (shikmi). Had the defendants taken such a plea it would have found place as an issue in the suit. We have perused the issues framed in the suit. There is no issue on the point.

The alleged revenue entries relied upon by defendants do not support the plea of the defendants that the plaintiffs' possession of the land was as shikmi tenants. A significant point which militates against the argument that the plaintiffs were shikmi tenants on the suit land is that the mother of the defendants is said to have inducted the plaintiffs as sub-tenants. The mother of the defendants was alive at the relevant time and her evidence on this point would have been the best evidence. She could have been produced in evidence in support of this plea. The defendants, rather than producing her in evidence, created a drama by moving an application for examining their mother as a witness on commission. The trial Court passed an order appointing a Commissioner to record her evidence on commission. However, when the Commissioner went to record the evidence of the mother, it was represented to him that she was totally deaf and dumb and therefore, the Commissioner returned without recording her statement. The plaintiffs thereafter moved an application that the mother of the defendants was completely hale and hearty and in order to avoid her being cross-examined by the counsel for the plaintiffs she was purposely not produced as a witness. Apart from this, even Puran Chand, the eldest brother of the defendants was not examined as a witness. The defendants were said to be very young at the time of death of their father. Punam Chand is the eldest son of Fakir Chand. He was also kept away from the court in these proceedings even though he was arrayed as a defendant in the suit. The written statement filed by the defendants was a joint written statement by all the defendants except Punam Chand. Punam Chand did not file a written statement. The best evidence in relation to the plea of shikmi, though available, was kept away from the court. It follows from the above that the argument that the plaintiffs were shikmi tenants in the suit land is wholly devoid of any merit. The same has therefore to be rejected.

Regarding the plea of the defendants that they had taken possession of the land in suit from the plaintiffs somewhere in the year 1957, the High Court has aptly remarked that the defendants were required "to open their mouth before the revenue authorities if not in 1957 at least in the year 1962 to show to the revenue authorities that they had obtained possession." The High Court has further found after scrutinizing the record that the defendants did not care to file even a single revenue entry for the period between 1956 and 1962 that they had been recorded in possession of the suit lands. Therefore, the High Court concluded that the finding recorded by the lower appellate Court was based on surmises and conjecture and was contrary to the evidence on record and the law. The High Court came to a definite finding that Tola Singh predecessor in interest of the plaintiffs came in possession of the suit land in the year 1931 and continued to be in possession thereof till the date the present suit was filed in 1972.

The defendants have tried to take advantage of the fact that a receiver had been appointed with respect to the suit land in proceedings under Section 145 of the Code of Criminal Procedure. According to the defendants the possession of the receiver was on their behalf. This is not correct. The plaintiffs had become bhoomiswami with respect to the suit land prior to the appointment of the receiver. Therefore, receiver's possession could not be said to be on behalf of the defendants.

The result of the above discussion is that there is no merit in this appeal. The stand taken by the defendants/appellants is totally

untenable. The appeal is dismissed leaving the parties to bear their respective costs.

JUDIS