

CASE NO.:
Appeal (civil) 6219-6220 of 2004

PETITIONER:
Kishori Lal & Anr.

RESPONDENT:
Madan Gopal (Dead) by L.Rs. & Ors.

DATE OF JUDGMENT: 22/09/2004

BENCH:
P. VENKATARAMA REDDI & P.P. NAOLEKAR

JUDGMENT:
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SPECIAL LEAVE PETITION (C) NO.14675-14676 OF 2002

P. Venkatarama Reddi, J.

Leave granted.

The appellants were the defendants in the two suits filed by Madan Gopal, who is no more and is now represented by his legal representatives who are respondents herein. The first suit was filed to restrain the first defendant (appellant herein) from making any construction on the spot marked 'CB' in the sketch annexed to the plaint or in any other part of the land and also to restore the original position of the land at point 'CB' and to restore the entry gate to the suit property. The second suit was filed seeking permanent injunction restraining the defendants from changing the nature of the suit land or raising any construction or transferring the same to the detriment of the plaintiff. The plaintiff also prayed for a permanent injunction restraining defendants No.1 and 5 from installing and working the sawing machine at point 'A' as shown in the sketch plan.

The original plaintiff's father and defendants' fathers were brothers being the sons of one Kanshi Ram. The plaintiffs claimed that Khasra Nos. 119 & 120 were Abadideh inam land belonging to the said common ancestor and the defendants have no exclusive rights over the said land. In other words, the plaintiff claimed to be co-owner along with the defendants 1 to 4. The plaintiff further claimed that there was an entrance and passage at point 'CB' (shown in the plan attached to plaint) leading to K.No.119 and it has been annexed by the defendant No.1 who was proposing to raise shops thereon. The 5th defendant is a tenant of defendant No.1 and he had installed a saw machine on the portion of the land let out to him by 1st defendant.

Both the suits were tried together and they were dismissed. On appeal filed by the plaintiffs, the first appellate Court held that the suit property is the joint and undivided property of the plaintiff and defendants 1 to 4 and in the absence of proof of ouster, the defendants cannot claim to be in exclusive possession and raise constructions thereon. It was further held that a passage existed at point 'CB' and the first defendant had no legal right to block or raise any construction over the passage (leading to the land in K.No. 119). It was also held that the Saw Machine was installed by the 5th defendant without the consent of the co-

sharers. The first appellate Court therefore restrained construction at point marked 'CB' or any other part of the suit land and further directed defendant No.1 to restore the entrance gate and passage to the suit land at point 'CB'. A mandatory injunction was also granted directing defendant No.5 to remove the structure raised and the Saw Machine installed therein.

On second appeal, the High Court confirmed the permanent injunction granted by the appellate Court restraining from raising constructions over suit property. The mandatory injunction directing the first defendant to restore the entrance gate and passage at point 'CB' was upheld. However, the injunction directing the removal of structure and the saw machine installed by the 5th defendant was set aside. The second appeal was thus allowed partly.

We notice that the High Court did not frame substantial question of law arising in the second appeal. However, the High Court did consider the matter elaborately. We also notice that the High Court did not consider the question whether the suit property, not to speak of the passage at 'CB', is the joint undivided property of the plaintiff and defendants 1 to 4, as held by the first appellate Court or it is the exclusive property of the appellants herein. Both before the trial Court and the first appellate Court, there was a debate and finding on the question whether the appellants-defendants could get the exclusive right of ownership by virtue of Section 11 of J&K Common Lands (Regulation) Act, 1956.

It is the contention of the appellants that the land in question being abadi land, held by them at the commencement of the Act, had vested in them. This contention, though upheld by the trial Court, was negatived by the appellate Court on the ground that the appellants could not establish that the suit land was 'under the house' owned by them (defendants 1 to 4) or that they fell within the category of non-proprietors/non-tenants. In the memorandum of second appeal, the following question has been raised.

"As to whether the provisions of Section 11 (wrongly mentioned as Section 17) of the Common Land (Regulation) Act could be claimed by a person who had let out the land in question in abadi deh for purposes of commercial use and construction in particular and what is the meaning of the word 'house' as appearing in the said Section?"

It is the contention of the learned senior counsel appearing for the appellants that the finding of the first appellate Court in regard to the applicability of Section 11 is unsustainable. It is submitted that even according to the document (copy of field book) filed along with the counter affidavit of the first respondent in the SLP, there was a house in Khasra No. 119. Both the learned counsel are not clear whether this document was adduced in evidence by any of the parties at any stage. The High Court did not address itself to the question of law whether on the facts proved or admitted, the appellants-defendants are entitled to the benefit of Section 11 of the Act. If they are so entitled, the finding of appellate Court that the suit land is joint property, cannot prima facie stand. The High Court only focused its attention to the question of existence of the passage at point 'CB' and whether the first defendant or his tenant could raise any constructions thereon. At the same

time, the High Court upheld the permanent injunction granted by the appellate Court restraining the first defendant from making any construction on the point marked 'CB' or any other part of the suit land (emphasis supplied). The suit land undisputably includes K.No.119. Perhaps, if substantial question of law had been framed, this omission on a crucial point would not have occurred. We must, however, clarify that we have not gone into the merits of this contention. We should not be understood to have expressed any view with reference to the finding of the appellate Court in regard to the applicability of Section 11 of the Common Laws (Regulation) Act relied upon by the appellants' counsel.

Coming to the next point as regards the passage at point 'CB', the first appellate Court recorded the finding that the passage and the entrance gate at point 'CB' did exist and that the same should not have been meddled or interfered with by the appellants. This finding based on the appreciation of evidence was affirmed by the High Court. However, it is the contention of the learned counsel for the appellants that the alleged passage was undisputedly located in Khasra No. 118 which is not the suit property and therefore no injunction should have been granted in respect of the alleged passage outside the suit land, i.e. the land situate in K.Nos. 119 & 120. It is also submitted by the learned counsel for the appellants that no easementary right of way to the disputed suit lands through the point 'CB' is pleaded nor any evidence adduced on this aspect. According to the learned counsel, the finding was given by the appellate Court on the footing that it was also part of the joint property which is legally incorrect. Ground No.vi in the memorandum of second appeal covers this point. Without going into the merits of this controversy, we take note of the fact that the High Court did not consider the issue in regard to passage from this perspective whether or not such contention could be allowed to be raised by the appellants and whether it merits acceptance are matters for determination by the High Court. While expressing no view on this aspect either, we would only like to observe that the High Court should have dealt with the contention adverted to above while dealing with this aspect.

In the light of the above discussion, we remit the second appeal to the High Court for fresh consideration after framing appropriate substantial questions of law in regard to the two points referred to above and render its decision afresh as expeditiously as possible. The judgment of the High Court is set aside and the appeals are allowed to the extent indicated above. No costs.