Shikharchand Jain vs Digamber Jain Praband Karini Sabha And ... on 11 January, 1974

Equivalent citations: 1974 AIR 1174, 1974 SCC (2) 215, AIR 1974 SUPREME COURT 1178, 1974 (1) SCC 675, 1974 SCR 101, 1975 MAH LJ 101, 1975 MPLJ 123

Author: P.N. Bhagwati

Bench: P.N. Bhagwati, D.G. Palekar, V.R. Krishnaiyer

PETITIONER:
SHIKHARCHAND JAIN

Vs.

RESPONDENT:
DIGAMBER JAIN PRABAND KARINI SABHA AND OTHERS

DATE OF JUDGMENT11/01/1974

BENCH:
BHAGWATI, P.N.
BENCH:
BHAGWATI, P.N.
PALEKAR, D.G.
KRISHNAIYER, V.R.

CITATION:
1974 AIR 1174 1974 SCC (2) 215
CITATOR INFO :
R 1975 SC 123 (22)

ACT:
Civil Procedure Code--Amendment of the written statement during pendency of the appeal--Whether Appellate Court can order amendment of the written statement in view of change of circumstances not contemplated at the time of institution of the suit.

HEADNOTE:
The respondent no. 1, Digamber Jain Praband Karini Sabha instituted a suit against the appellant for recovery of possession of certain agricultural land Respondent Smt. Rajrani was the malik maqbooza of the land who, in 1954, gifted the land by a registered gift deed in favour of

respondent no. 1. The third and fourth respondents were cultivating the land. Respondent no. 1 sued them for possession but they pleaded that the appellant had sub-let the land to them. The suit was decreed. Their appeals were dismissed. The appellant thereafter had filed a suit against respondent no.1 for a declaration that the gift made by the 5th respondent in favour of the 1st respondent was void; but the suit was dismissed for default.

The suit from which the present appeal arose, was filed and all the defendants except Smt. Rajrani filed their written statement. The trial court decreed the suit in favour of respondent no.1. On appeal,the first appellate court allowed the appeal but on a second appeal, the High Court reversed the decree of the appellate court and restored the decree of the trial court and hence the present appeal before this Court.

Remanding the case to the trial court,

HELD : (1) In his written statement, the appellant had admitted Smt. Rajrani's ownership of the land. But he had pleaded that he became the owner of the land by adverse possession for more than 12 years from 1937. The khasra entries from 1937-38 to 1941-42 and 1943-44 to 1951-52 are all in favour of Smt. Rajrani. Further, assuming that the appellants' adverse possession started in 1937 and continued till 1949, he became the owner of the land in dispute in 1950. Nevertheless, he did not move the appropriate revenue authority to correct the entries in the. record of rights. Again one of his own witnesses, has admitted that the appellant had been paying rent of the disputed land on behalf of Smt. Rajrani till 1958-59. Had he became an owner by adverse possession in 1950, he would never have paid rent on behalf of Smt. Rajrani.

Maharaja Srischandra Nandy v. Baijnath Jugal Kishore 62, Indian Appeals 40; Deity Pattabhiramaswamy v. S. Hanymayya, A.I.R. 1959 S. C. 57 and H. R. Ramachandran Ayyar v. Ramalingam Chettiar, [1963] 3 S.C.R. 604, referred to.

(2) During pendency of the appeal, as Smt. Rajrani died in 1968, the appellant filed an application for substitution of himself as her legal representative in place of Smt. Rajram. No order has yet been made on this application. Now he has made another application in the course of hearing seeking amendment of his written statement in view of the changed circumstances to the effect that as the limited owner Smt. Rajrani died, he is entitled to the disputed property as the sole reversioner and respondent no. 1 and no right in the said lands.

It is, therefore open to the Court, including a court of appeal to take notice of events which have happened after the institution of the suit and afford relief to the parties.

Rai Charon Mandal and another v. Biswanath Mandal and others A.I.R. 1915 Cal.103, referred to.

(3) Under the circumstances, since the death of Smt.

Rajrani creates a fresh [,cause of action to the appellant who claims to be her next reversioner, it will be just ,and proper to allow the amendment. Therefore, the amendment is allowed and
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the case will go back to the trial court and the trial court will give reasonable time to the respondent to file a reply to the amended written statement. The trial Court will then record its findings and the new plea raised by the appellant and shall forward them to this Court through High Court within 4 months of the receipts of the record.

JUDGMENT:

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 1598 of 1967.

Appeal by special leave from the judgment and decree dated October 17, 1966 of the Madhya Pradesh High Court in Second Appeal No. 521 of 1962.

V. M. Tarkunde, S. L. Jain and M. S. Gupta, for the appellant.

M. C. Chagla, S. K. Bagga, S. Bagga, Yash Bagga and Rani Arora, for the respondents.

The Judgment of the Court was delivered by DWIVEDI, J.-It is the defendant's appeal. The plaintiff Digamber Jain Praband Karini Sabha, Panagar, instituted a suit against the defendant Shikharchand Jain for recovery of possession over certain agricultural lands situate in mauza Imlai. Smt. Rajrani, fifth defendant (now dead) was the proprietor of a Patti in mauza Imlai. The land in dispute fell in that Patti. It was her sir. The area of the land is 12 .86 acres. Smt. Rajrani became malik maqbooza of the land on the abolition of the proprietary rights in the State in 1951. On January 18, 1954. she gifted the land by a registered gift deed in favour of the plaintiff (which is registered under the Madhya Pradesh Public Trust Act, 1951). Ram Das and Ballu, the third and fourth defendants, were cultivating the land. The plaintiff instituted a suit against them on July 15, 1954. In the said suit they pleaded that Shikharchand had sub-let the land to them. The suit was decreed. Their appeals were dismissed on May 4, 1957. Shikharchand also instituted a suit on November 3, 1955 against the plaintiff and Smt. Rajrani for a declaration that the gift made by her would be void after her death. We are told that the suit has been dismissed in default. As the aforesaid defendants are disputing the plaintiff's title, the suit was instituted. All the defendants except Smt. Rajrani filed a joint written statement. They denied the plaintiff's title to the land. Smt. Rajrani held a limited estate in the land and the gift deed would be ineffective after her death. She could not gift the entire property. Shikharchand has been in possession over the land since 1937 as an owner thereof and has acquired rights of an owner by adverse possession for more than 12 year,. Smt. Rajrani filed a separate written statement. She has supported the case of the plaintiff. The trial court framed a number of issues. Of them, only two now survive for consideration. They are issues Nos. 1 and 4. Issue No. 1 is :

"1(a) Whether the defendant No. 5 Smt. Rajrani was the owner of the suit fields till 18-1-1954 ?

(b) whether she was also in possession of the suit fields till 18-1-1954 ?

(Shikharchand) has been in exclusive, continuous and uninterrupted possession of the suit fields since 1937 adversely to the defendant No. 5 and the plaintiff ?

has perfected Ms title by adverse possession ? Issue No. 1 was answered in favour of the plaintiff. Issue No. 4 was answered against Shikharchand. The trial court held that he was in possession for and on behalf of Smt. Rajrani and not in his own right. The trial court granted a decree for possession to the plaintiff.

Defendants Nos. 1 to 4 went in appeal. The first appellate court allowed the appeal and set aside the decree of the trial court and dismissed the suit. The plaintiff then filed a second appeal in the High Court of Madhya Pradesh. The High Court has reversed the decree of the first appellate court and restored that of the trial court. Hence this appeal by Shikharchand.

The first appellate court has held that Shikharchand was in possession over the disputed land since 1937 and has become the owner thereof by adverse possession before Smt. Rajrani transferred the land to the plaintiff. Sri Tarkunde, counsel for Shikharchand, says that it is a finding of fact and that accordingly the High Court could not interfere with it in second appeal. It appears that the High Court was aware that it was interfering with a finding of fact in a second appeals. So the High Court has explained.

"(Defendants 1 to 4) clearly failed to establish by positive evidence the adverse possession of (Shikharchand) for more than twelve years at any point of time so as to rebut the statutory presumption of possession arising in favour of the appellant and its predecessor-in-title Smt. Rajrani. Therefore, with due respect to the learned appellate Judge. I might say that the question has been absolutely misconceived him and he has not approached the question in a proper and legal manner with a view to apply the law to the facts found established from the record. In this view, the decree passed by the first appellate court cannot be sustained either on facts or law." So according to the High Court the finding recorded by the first appellate court was arrived at by overlooking the statutory presumption of possession in favour of the plaintiff and Smt. Rajrani and his approach to the issue before him was not proper and legal. In other words, the High Court intervened under cl.

(c) of s. 100(1) of the Code of Civil Procedure. According to the High Court, the finding of the first appellate court suffered from a "substantial error or defect in the procedure provided.... by any other law for the time being in force, which may possibly have produced error or defect in the decision of the case upon the merits."

It is now to be seen whether the first appellate court's finding really falls within the grip of s. 100(1)(c) of the Code of Civil Procedure. In his written statement Shikharchand has admitted Smt. Rajrani's ownership of the land. But he has pleaded that he has become the owner of the land on account of adverse possession for more than 12 years from 1937. The burden of proving the acquisition of ownership by adverse possession lay on him. The Khasra entries from 1937-38 to 1941-42 and 1943-44 to 1951-52 are all in favour of Smt. Rajrani. They show that she was in possession over the land during those years. Khasra is a record of right according to s. 45(2) of the Central Provinces Land Revenue Act, 1917. Section 80(3) of that Act provides that entries in a record of right shall be presumed to be correct unless the contrary is shown. This provision raises a presumption of correctness of the aforesaid Khasra entries. The burden of proving adverse possession accordingly was a heavy one. The judgment of the first appellate court shows that it has not kept in mind this aspect while examining the evidence. In the first step, it has proceeded to assess the evidence adduced by Shikharchand. After discussing that evidence, it has recorded a finding that he was in possession. Thereafter, in the second step, it has proceeded to take the view that no reliance can be placed on Khasra entries. It has summed up the discussion thus "(A) 11 these witnesses (of Shikharchand) have stated that the possession of the fields was with Shikharchand. Their statements are further supported by documentary evidence and, therefore, there is no room for any doubt that the possession was not with Shikharchand. It is true that in Patwari papers Mst.

Rajrani's name appears and that the dues were deposited on behalf of Mst. Rajrani. But in my opinion the entries in Khasra and the fact that the receipts were issued in the name of Mst.

Rajrani would not by themselves establish the fact of possession.It is settled law that entries in Khasra have only presumptive value, and it is difficult to conclude from these entries that the possession was with Mst. Rajrani. The falsity of the entries in Khasra is clear from the fact that from 1937 to 1947 the name of Mst. Rajrani appeared in the khasra Panchsala and yet Mst. Rajrani's admission in D/1 shows that she was not in possession. This fact is enough to show that no reliance could be placed on the Khasra entries."

As already pointed out, this passage shows that the first appellate court proceeded in the reverse order. Moreover, the Khasra entries have been discarded solely for the reason that Smt. Rajrani has admitted in Ex. D/1 that she was not in possession. But Ex. D/1 has been entirely misunderstood by the first appellate court. Exhibit D/1 is a copy of the plaint filed by Smt. Rajrani in a suit for profits against Shikharchand. Shikharchand was Lambardar of the muhal in which the Patti belonging to Smt. Rajrani was situate. In the first paragraph of her plaint she has mentioned this fact. Thereafter she went on to say that she was entitled "to get her share of profits from the defendant." In paragraph 2 she has said : "That the defendant is in possession of all the sir and khudkasht land of her full ..... patti of the village..... that as the defendant did not render an account, nor paid any thing in spite of repeated demands and a notice by the plaintiff, he is liable to pay interest by way of damages at the rate of /8/- per cent per month" and the amount detailed in the schedule of accounts attached to the plaint. In the schedule she has shown.the amount of rent recovered by Shikharchand from the tenants. She has also shown the estimated income from sir and khudkasht land belonging to her. After making certain deductions, a total amount of Rs. 318/7/- was claimed from Shikharchand. The suit was filed in July 1942. The suit for profits related to a period between

1938-39 and 1940-41. We do not think that paragraph 2 of the plaint can be read in the manner it has been read by the first appellate court. It was a suit for profits by a co-sharer against the Lambardar. It was not a suit for mesne profits which an owner of land may claim from a trespasser. It wag really a suit for accounts from the Lambardar. So it is not possible to spell out from paragraph 2 an admission from Smt. Rajrani that Shikharchand was in adverse possession over her sir land. Further Shikharchand did not file a copy of his own written statement, nor a copy of the judgment in the suit. If he had denied his possession over her sir land, the suit for profits from sir land would have been dismissed. If he had pleaded adverse possession, over her sir, then also her suit for profits from sir land would have been dismissed. If, on the other hand, the suit for profits of sir land were decreed, it would follow that Shikharchand was held to be in permissive possession and not in adverse possession. In the result, we are of opinion that the first appellate court was wholly wrong in discarding the Khasra entries on the solitary statement in paragraph 2 of her plaint. The High Court could, therefore, interfere with its finding under s. 100(1)(c).

The High Court has considered afresh the entire evidence on record and has held that Shikharchand has failed to establish by positive evidence his adverse possession for more than 12 years. The appellant could not show to us that the finding is not sustainable on the evidence on record. It is not necessary for us to reappraise that evidence again, but we may point out two circumstances which heavily tell against the appellant. Assuming that his adverse possession started in 1937 and continued till 1949, he became the owner of the land in dispute in 1950. Nevertheless he did not move the appropriate revenue authority for the correction of the entries in the record of rights. He did not get the name of Smt. Rajrani expunged from the record and his name entered therein. Again, Beni Ram, one of his witnesses, has admitted that Shikharchand had been paying rent of the sir land of Smt. Rajrani on behalf of Smt. Rajrani until 1958-59. Had he become an owner by adverse possession in 1950, he would never have paid rent on behalf of Smt. Rajrani.

Counsel for the appellant has referred us to Maharaja Srischandra Nandy v. Baijnath Jugal Kishore,(1) Deity Pattabhiramaswamy v. S. Hanymayya(2) and R. Ramachandran Ayyar v. Ramalingam Chettiar.(3) But none of these cases help the appellant on the facts of this case. In the last case this Court said : "(1)f in dealing with a question of fact the first appellate court has placed the onus on a wrong party and its finding of fact is the result, substantially of this wrong approach, that may be regarded as a defect in procedure under s. 100(1)(c)." The same view has been expressed in Ladli Prasad Jaiswal v. Karnal Distillery Co. Ltd.(4) In this case the High Court has upset a finding (1) 62 Indian Appeals 40.

(2) A. 1. R. 1959 S.C. 57.

(3) [1963] 3 S. C. R. 604.

(4) [1964] 1 S. C. R. 270.

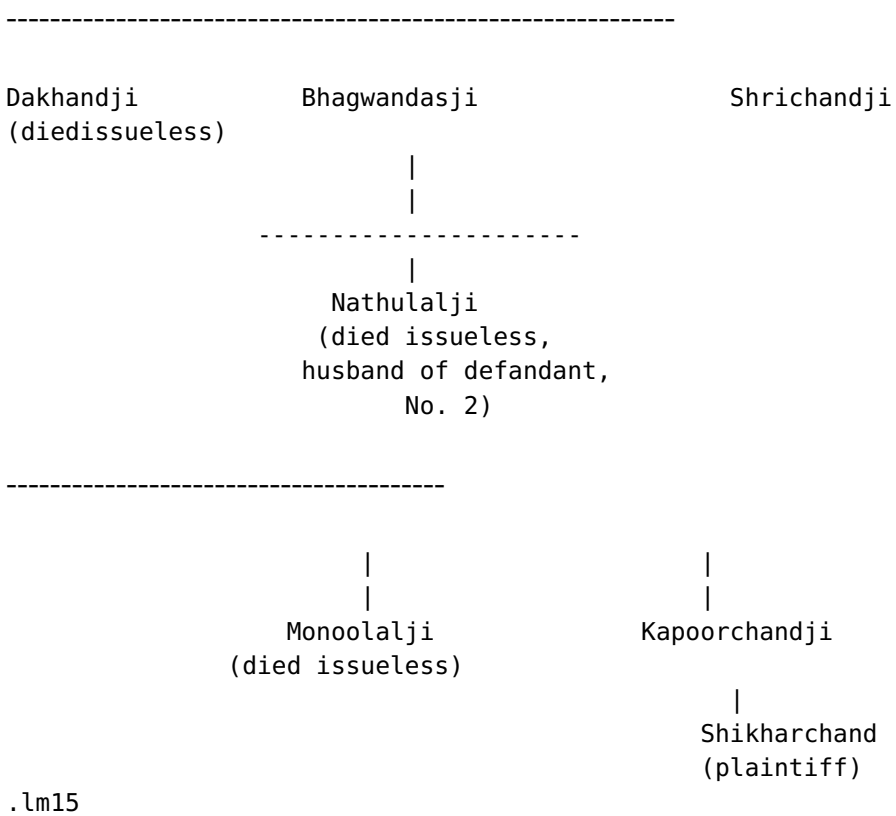
of fact recorded by the lower appellate court inter alia on the ground that the burden of proof was wrongly placed on the plaintiff. Shah J., while affirming the judgment of the High Court, said: "A decision of the first appellate court reached after placing the onus wrongly .... is not conclusive and a

second appeal lies to the High Court against that decision."

In Jai Krishna v. Babu. (1) it was held that possession of a nonowner after partition is adverse. No exception may be taken to this preposition. But we fail to understand how this case will assist the appellant.

We now pass on to another aspect of the case. During pendency of this appeal Smt. Rajrani died on December 5, 1965. The appellant first filed C.M.P. No. 1377 of 1969 for his substitution in place of Smt. Rajrani, the fifth respondent, as her legal representative. No order has yet been made on this application. Now he has made another application in the course of hearing. By this application he seeks to amend his written statement. He wants to make this addition to the written statement :

> "12(a) that the gift deed dated 18-1-1954 was executed by Smt. Rajrani who was a, limited owner having a widow's estate on the date of the execution of the gift deed. Assuming though not admitting the said gift deed was valid it is submitted that the above gift could at most enure for the life of the defendant No. 5. The plaintiff cannot have any rights in the suit lands after the death of Smt. Rajrani and the defendant as the sole surviving reversioner becomes the owner of the lands and resist the claim of the plaintiff.
>
> (b) that the genealogy of the family is as under Bihari Lal



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"12(c) that the deceased Smt. Rajrani could not transfer the suit property even for the religious and charitable pur-

poses as it was the entire property she had and such a transfer is not binding on the defendant after her death." (1) A.I.R. 1933 Nagpur 112.

He also prays for the renumbering of present paragraph 12 as paragraph 13 of the written statement. Sri Tarkunde has submitted that if the assertions made in the new paragraph 12 are accepted by the Court, the respondent's suit will have to be dismissed. It is also, said that the new situation arising on the death of Smt. Rajrani during. pendency of the appeal can be considered by the Court in order to, mould the decree in the suit out of which this appeal has arisen. In our view, Mr. Tarkunde, is right in this submission. Ordinarily, a suit is tried in all its stages on the cause of action as it existed on the date of its institution. But it is open to a Court (including a court of appeal) to take notice of events which have happened after the institution of the suit and afford relief to the parties in the changed circumstances where it is shown that the relief claimed originally has (1) by reason of subsequent change of circumstances become inappropriate, or (2) where it is necessary to take notice of the changed circumstances in order to shorten the litigation, or (3) to do complete justice between the parties (See Rai Charan Mandal and another v.. Biswanath Mandal and others)(1). Sri Chagla, counsel for the respondent, has submitted that the application for amendment of the written statement should not be allowed. It is said that the appellant has alleged in his written statement that Smt. Rajrani could not transfer the disputed land as she was a limited owner having a widow's estate. The trial court had framed specific issue on this aspect and recorded a finding against the appellant. The trial court said : "(Smt. Rajrani) is a jain widow, and therefore she is competent to transfer the suit lands for religious and charitable purposes." The trial court decreed the suit. The appellant filed an appeal. The appeal was allowed and the decree of the trial court was set aside. The respondent then filed a second appeal in the High Court. As already stated, the High Court set aside the decree of the, first appellate court and restored the decree of the trial court. It is said by Sri Chagla that as the appellant did not challenge the validity of the gift either in the first appellate court or in the High Court, he should not be allowed to challenge it now by an amendment of his written statement. We find it difficult to accept this submission of Sri Chagla. Even if the assertions made in the application for amendment of the written statement are found to be true, the appellant could not have non-suited the respondent during. the life time of Smt. Rajrani. The gift was valid during her life time. Her death gives a fresh cause of action to the appellant who claims to be her next reversioner. It appears to us that it will be just and proper to allow the amendment sought for. it will shorten litigation.

Sri Chagla has also pointed out that the respondent has acquired new rights under the Land reform measures passed by the Madhya Pradesh Legislature. It will be open to the respondent to file a reply to the amendment when the case goes back to the trial court and raise any plea which according to it is likely to defeat the appellant's new, claim.

(1) A.I.R. 1915 Cal. 103 So we allow the application for amendment of the written statement on payment of Rs. 200 as -costs to the respondent. The case will now go back to the trial court. The trial court will allow reasonable time to the respondent to file a reply to the amended written statement.

Thereafter the trial court will record evidence on the new plea raised by the appellant by his amendment and by the respondent in its reply. The trial court will then record its findings and forward them to this Court through the High Court. The trial court should send the findings within four months of the receipt of the record from this Court. C.M.P. No. 1377 of 1969 is dismissed as infructuous on receipt of findings, the appeal will be listed for hearing before the Court. S.C. Case Remanded.