Darshan Lal And Ors. vs Harkesh Singh And Ors. on 7 September, 1950

Equivalent citations: AIR1951ALL338, AIR 1951 ALLAHABAD 338

JUDGMENT

Agarwala, J.

1. This is a defendants' appeal arising out of a suit for joint possession after demolition of certain constructions.

2. The property in dispute is a portion of plot No. 1027. It is a part of Khewat No. 38 in village Dara Rajpura, now included in the city of Saharanpur. Khewat No. 38 was owned by one Kunwar Singh who had two sons, Nehal Singh and Shib Sahai. Nehal Singh died in the lifetime of Kunwar Singh leaving his son Harkesh Singh, plaintiff-respondent. Shib Sahai executed a will in favour of his three daughters-in-law and a daughter's son, Joti Prasad in respect of the entire property left by Kunwar Singh. In 1923 Harkesh Singh plaintiff-respondent filed a suit for possession of a half share in the properties against Joti Prasad and the daughters-in-law of Shib Sahai. Toe suit was ultimately decreed by this Court on 23-3-1927. Harkesh Singh obtained joint possession over the property in dispute. While the appeal was pending in this Court Khewat No. 38 was divided into six portions, namely, Khewat NOS. 38/1, 38/2, 38/3, 38/4, 38/5 and 38/6. Plot No. 1027 was sub-divided into four parts, Nos. 1027/1, 1027/2,1027/3 and 1027/4. We are concerned only with plots NOS. 1027/2 and 1027/4 in this appeal. On 23-10-1929 a portion of plot No. 1027/2 was sold by Joti Prasad to Darshan Lal, who was a benamidar for Puran Chand, defendant 3. On 6.2-1932 a portion of plot no. 1027/4 was sold by Joti Prasad to Bishambhar Das defendant 2.

3. Then the plaintiff Harkesh Singh filed a suit for partition of shares in the revenue Court in 1933. It appears that during the pendency of this suit, defendants 2 and 3 started making constructions over the plots purchased by them. The plaintiff thereupon got an order of injunction issued restraining defendants 2 and 3 from, making any constructions over the plots in dispute. Ultimately, however, the partition proceedings became infructuous.

4. Defendants 2 and 3 applied to the Municipal Board for permission to make constructions upon the plots purchased by them. In the Municipal Board the plaintiffs filed objections to the permission being granted to the defendants. His objections were overrated and defendants 2 and 3 were allowed to make constractions prayed for. They completed their constructions in 1934. The plaintiff filed the suit which has given rise to this appeal in 1939 for demolition of the constructions made by defendants 2 and 3 and also by Dr. Kanhaiya Lal, with whose constructions we are not concerned in the present appeal.

5. The defence to the suit inter alia was that Joti Prasad was in possession of the plots in suit with the consent of Harkesh Singh plaintiff and that, as such, he was entitled to sell them to defendants 2 and 3 and further that the suit for demolition was barred by the doctrine of acquiescence. The trial Court held that the plaintiff and Joti Prasad were in possession of separate plots by mutual agreement and that Joti Prasad was entitled to sell the portion of which he was in exclusive possession to the defendants. It also held that the plaintiff having delayed in filing the suit for about 5 years after the constructions had been completed, his suit was barred by the doctrine of acquiescence.

6. There was an appeal to the lower appellate Court. It was held by that Court that the doctrine of acquiescence did not apply inasmuch as the plaintiff had been objecting to the constructions from the very beginning. It allowed the appeal and decreed the plaintiff's suit for joint possession by demolition of the constructions as against defendants 2 and 3. It dismissed the suit as against Dr. Kanhaiya Lal because it found that the suit against him was barred by acquiescence.

7. Defendants 2 and 3 have now come up in second appeal to this Court and it has been urged on their behalf that the relief for a mandatory injunction should not have been granted to the plaintiff. It has been pointed out that the plaintiff failed to take any steps for getting the constructions demolished for about 5 years and that there was a vacant space in plot No. 1027 and in other areas of Khewat No. 38, which would suffice for the share of the plaintiff. It has also been pointed out that the lower appellate Court did not set aside the finding of the trial Court that Joti Prasad and the plaintiff were in exclusive possession of the specific areas in Khewat No, 38 by mutual agreement and that the view of the lower appellate Court that a co-sharer in exclusive possession could not sell a portion of the property of which be was in exclusive possession, without the consent of the other co-sharers, is no longer tenable in view of a Pull Bench decision of this Court in Ram Raj Singh v. Rajendra Singh, 1943 A. L. J. 213: (A. I. R. (30) 1943 ALL. 247 F. B.).

8. It is true that the plaintiff did not file the suit for 5 years after the constructions were completed and as would appear from the judgment of the trial Court, it may also be that there is enough land in Khewat No. 38 which can satisfy the claim of Harkesh Singh if a suit for partition were filed. It is also true that a co-sharer in exclusive possession can transfer his rights in the joint land and can let the transferee have exclusive possession of the land in his possession, and unless the mutual agreement by which the co-sharers were in separate possession is put an end to, the other co-sharers have no right to eject the transferee from possession over the land purchased by him.

9. The question, however, is whether the plaintiff can be granted a mandatory injunction for demolition of constructions in dispute. It is well-settled that one co-sharer cannot build upon joint land without the consent of the other co-sharers, This consent may be express or implied. Where constructions made by one co-sharer over the joint land have been allowed to remain without challenge for a long time, the consent of the other co-sharers may be implied But there can be no implication where the other co-sharers have expressly objected to the making of the constructions.

10. In the present case, as found by the Court below, the plaintiff objected to the constructions in the partition suit filed by him in the revenue Court and got an injunction restraining the defendants

from making the constructions issued. He again objected to the constructions being made when the defendants applied in the Municipal Board for permission to build. In spite of the objection, the defendants continued to make their constructions. It cannot, therefore, be said that the plaintiff impliedly consented to the action of the defendants.

11. The mere fact that the suit was brought after 5 years of the completion of the constructions does not affect the right of the plaintiff to have the constructions demolished and the land restored to its original position. As observed by Sir Barnes Peacock in Lindsay Petroleum Co. V. Hurd, (1873) L. R. 5 P. C. 221 at p. 239: (22 W. R. 492).

> "The doctrine of laches in Courts of Equity is not an arbitrary or a technical doctrine where it would be practically unjust to give a remedy, either because the party has, by his conduct, done that which might fairly be regarded as equivalent to a waiver of it, or where by his conduct and neglect, he has, though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted, in either of those cases lapse of time and delay are most material. But in every case, if an argument against relief, which otherwise would be just, is founded upon mere delay, that delay of course not amounting to a bar by any statute of limitations, the validity of that defence must be tried upon principles substantially equitable. Two circumstances, always important in such cases, are the length of the delay and the nature of the acts done during the interval, which might affect either, party and cause a balance of justice or injustice in taking the one course or the other, so far as relates to the remedy."

12. In the present case, no circumstances have been brought to our notice showing either that the plaintiff waived his remedy, or that it would be inequitable now to give relief to the plaintiff.

13. Where one co-sharer is in exclusive possession of a certain piece of land by virtue of a mutual arrangement between the co-sharers, he is not necessarily entitled to build upon the land over which he is in exclusive possession, unless the mutual arrangement permitted him to build upon the land, or the land was intended to be used by the parties fox Building purposes. It was not alleged by the defendants that the mutual arrangement allowed them to make the constructions. Nor has it been shown that the land was intended to be used as a building site. In these circumstances, the mere fact that the defendants were in exclusive possession of the joint land under a mutual arrangement does not en title them to make the constructions.

14. The fact that there is a vacant space still available in the joint Khewat out of which the plaintiff can be given an area equivalent to his share in the suit for partition is wholly irrelevant for the purpose of determining whether the plaintiff is entitled to enforce his right of having the land restored to its original condition. No co-sharer is entitled simply by choosing a piece of land and building upon it to appropriate it to himself. This can only be done either by an agreement between the parties or by an order of the Court. The plaintiff was, therefore, entitled to have the mandatory injunction issued for the demolition of the constructions unlawfully raised by the defendants.

15. If, however, the defendants were in exclusive possession under a mutual agreement, the plaintiff will not be entitled to gat joint possession over the land. No issue was specifically raised upon the question whether the defendants were in exclusive possession of the land under a mutual agreement, though this point was taken in the written statement filed by them. The trial Court, no doubt, discussed this question and recorded a finding in favour of the defendants, but the lower appellate Court does not seem to have considered the matter at all. It is not necessary to send down an issue upon the point to the lower appellate Court. Mr. Kazmi on behalf of the plaintiff respondent does not insist upon a decree for joint possession being passed in favour of the plaintiff. He is content to have a declaration of his title to the plot.

16. We, therefore, allow this appeal in part, modify the decree of the Court below and dismiss the suit of the plaintiff for joint possession. We grant the plaintiff a declaration of his proprietary title to the plots in dispute to the extent of a half share. We confirm the decree of the lower appellate Court so far as it relates to the issue of an injunction ordering demolition of the constructions We set aside the decree of the Court below as regards mesne profits.

17. The question whether the defendants are in possession under a mutual arrangement will not be deemed to have been decided in the present litigation and will be an open question between the parties.

18. The defendants are given six months' time to remove the constructions. In case they fail to do so, the plaintiff will have the constructions removed through Court.

19. The plaintiff has substantially succeeded, he shall have his costs as against the defendants-appellants in all the Courts.