

A BAKHTIYAR HUSSAIN (DEAD) THR. LRS.

v.

HAFIZ KHAN AND ORS.

SEPTEMBER 24, 2007

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[DR. ARIJIT PASAYAT AND D.K. JAIN, JJ.]

Code of Civil Procedure, 1908—s.100—Title suit—Defendants claiming to have perfected their title by adverse possession—Suit decreed on the finding that possession was permissible—Affirmed by First Appellate Court—Second appeal—Substantial question of law was formulated as to whether by virtue of the permission, defendants acquired Bhumiswami Right under Land Revenue Code—High Court setting aside the decree answering the substantial question of law in affirmative—On appeal, held : Substantial question of law was wrongly formulated, as the same did not arise out of the issue involved i.e. adverse possession—Second appeal is maintainable only when substantial question of law is involved—Matter remitted to High Court to consider whether any substantial question of law arose—Madhya Pradesh Land Revenue Code—ss. 168 and 169.

The suit of the appellant-plaintiff was decreed and affirmed by First Appellate Court on the ground that defendants-respondents were in the permissible possession of the land in question and hence cannot be said to have perfected their title by adverse possession.

F **In Second Appeal, substantial question of law was interalia formulated as to whether the defendants had acquired Bhumiswami rights u/s 168 of Madhya Pradesh Land Revenue Code. High Court held that the defendants had acquired the right of occupancy tenant and, therefore, no decree for eviction could be passed.**

G **In appeal to this Court appellant contended that High Court could not have decided the case relying on rights u/s 168 of the Code as no issue had been formulated in that regard.**

Partly allowing the appeal and remitting the matter to High

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Court, the Court

HELD: 1. It was nobody's case that the position related to possession of the defendants by way of lease or otherwise. The basic issue related to adverse possession. There was no issue even relating to any lease having being executed. The High Court held that once it is concluded that the suit lands were cultivated with the permission of the Bhumiswami then considering the language of Section 168 of the Madhya Pradesh Land Revenue Code, that lease means transfer of right to enjoy any land made for a certain time, the question has to be considered accordingly. Section 169 of the Code has different parameters as compared to Section 168. There was no material evidence led in that regard. However, the substantial question of law formulated did not arise out of the orders of the courts below. In the circumstances, the impugned judgment cannot be maintained. [Paras 6, 7 and 8] [269-B, E, F; 271-E-F]

2. An appeal under Section 100 CPC is maintainable only if substantial question of law is involved. High Court to re-hear the matter and consider whether any substantial question of law arises which needs adjudication and thereafter to decide the appeal in accordance with law. [Para 8] [271-F-G]

CIVIL APPELLATE JURISDICTION : Civil Appeal Nos. 497-498 of 2001.

From the Judgment and Order dated 1.7.1999 of the High Court of Madhya Pradesh, Bench at Gwalior in Second Appeal No. 180 of 1993.

B.S. Banthia for the Appellant.

S.S. Khanduja for the Respondents.

The Judgment of the Court was delivered by

DR. ARIJIT PASAYAT, J. 1. Challenge in these appeals is to the judgment of a learned Single Judge of the Madhya Pradesh High Court in Second Appeal No.180 of 1993. The appellant-plaintiff filed a suit for declaration of his title and permanent injunction in respect of the lands.

A The plaintiff claimed to be bhumiswami of the land. According to him, deceased Nannu Khan and his son Hafiz Khan-respondent No.1 forcibly secured the possession of the land on 1.7.1970 and deprived him of his rights over the lands. According to him, the defendants had no right or interest to continue their possession over the suit lands. Therefore, the
B suit was filed. The defendants filed a joint statement and denied title of the plaintiff and pleaded that the plaintiff's right over the suit land had extinguished as they had perfected their title by adverse possession. Plaintiff used to reside in Bhopal for more than 20 years and the defendants are in possession of the suit lands openly to the knowledge of the plaintiff
C from 1962. Since their possession over the land was for more than 12 years, the suit is barred by limitation. The trial Court held that the possession of the defendants is not adverse but they are in permissible possession of the suit lands. Therefore, it was held that the plaintiff is entitled for a decree of possession. The first Appellate Court found that
D the defendants are in possession of the suit lands with the permission of the plaintiff. It was also held that the defendants have failed to prove their adverse possession. Accordingly, the judgment and decree of the trial Court were affirmed.

E 2. Respondents filed Second Appeal in terms of Section 100 of the Code of Civil Procedure, 1908 (in short the 'CPC'). The following question stated to be a substantial question of law was formulated for adjudication:

F "Whether the finding that the defendants were cultivating the lands with the permission of the plaintiffs for more than six years from the date of filing of the suit, the defendants have acquired any Bhumiswami rights under Section 168 of the M.P. Land Revenue Code?"

G 3. According to the High Court the only question which remained in the case was whether the possession of the defendants was by way of lease or otherwise. Analyzing the evidence on record it was held that the defendants had acquired the right of occupancy tenant and, therefore, no decree for eviction can be passed.

H 4. According to learned counsel for the appellant no issue relating

BAKHTIYAR HUSSAIN (DEAD) THR. LRS. v. HAFIZ 269
KHAN [PASAYAT, J.]

to any use of rights or any rights under Section 168 of the M.P. Land Revenue Code (in short the 'Code') was formulated. A

5. An entirely new case has been made out in the Court. Learned counsel for the respondent submitted that in view of the findings recorded, the conclusions of the High Court cannot be faulted.

6. It is to be noted that the High Court has come to a conclusion that respondent No.1 was son of the deceased and, therefore, was Bhumiswami under Section 169 of the Code. But, it is to be noted that it was nobody's case that the position related to possession of the defendants by way of lease or otherwise. The issues framed were as follows: B

1. Whether the plaintiff has title on the suit lands.
2. Whether the defendants have dis-possessed the plaintiff on 1.7.1970 and have taken illegal possession.
3. Whether the plaintiff is entitled to claim compensation and if so, what rate. D
4. Whether the defendants on the basis of the principle of adverse possession have acquired title of the suit lands.
5. Relief and costs. E

7. As would be seen from the above the basic issue was Issue No.4 which relates to adverse possession. There was no issue even relating to any lease having been executed. The High Court held that once it is concluded that the suit lands were cultivated with the permission of the Bhumiswami then considering the language of Section 168 of the Code, that lease means transfer of right to enjoy any land made for a certain time, the question has to be considered accordingly. Sections 168 and 169 of the Code are read as follows: F

“Lease- Except in cases provided for in sub-section (2), no Bhumiswami shall lease any land comprised in his holding for more than one year during any consecutive period of three years: G

Provided that nothing in this sub-section shall apply to the lease of any land-

(i) made by Bhumiswami who is a member of a registered Co- H

- A operative Farming Society to such Society;
 (ii) held by a Bhumiswami for non-agricultural purposes.
- Explanation.*—“For the purposes of this section-
- B (a) “lease” means a transfer of a right to enjoy any land, made for a certain time, expressed or implied in consideration of price paid or promised or of money or any other thing of value to be given periodically to the transferer by the transferee who accepts the transfer on such terms;
- C (b) any arrangement whereby a person cultivates any land of a Bhumiswami with bullocks belonging to or procured by such giving a specified share of the produce of the land to the Bhumiswami shall be deemed to be a lease;
- D (c) the grant of a right merely to cut grass or to graze cattle or to grow ‘Singhara’ or to propagate or collect lac, pluck or collect tendu leaves shall not be deemed to be a lease of the land.
- (2) A Bhumiswami who is-
- E (i) a widow ; or
- (ii) an unmarried woman ; or
- (iii) a married woman who has been deserted by her husband ; or
- (iv) a minor ; or
- F (v) a person subject to physical or mental disability due to old age or otherwise ; or
- (vi) a person detained or imprisoned under any process of law ; or
- (vii) a person in the service of Armed Forces of the Union ; or
- G (viii) a public, charitable or religious institution;
- (ix) a local authority or a Co-operative Society; may lease the whole or any part of his holding;

H Provided that where a holding is held jointly by more than one person the provisions of this sub-section shall not be applicable

unless all such persons belong to any one or more of the classes A
aforesaid:

Provided further that any lease made in pursuance of this sub-
section shall cease to be in force after one year of the determination
of the disability by death or otherwise.

(3) xx xx xx

(4) Where a lease is granted in pursuance of sub-section (2) the
lessee shall hold the land on such terms and conditions as may be
agreed upon between him and the Bhumiswami and may be ejected
by an order of a Sub-Divisional Officer on the application of the
Bhumiswami on the ground of contravention of any material term
or condition of the lease or on the lease ceasing to be in force.

(5) Where on the coming into force of his Code any land is held
on lease from a Bhumiswami who belongs to any one or more of
the classes mentioned in sub-section (2), such lease shall, on the
coming into force of this Code be deemed to be a lease granted in
pursuance of sub-section (2).

169. Unauthorised Lessees.-If a Bhumiswami leases out for any
period whatsoever any land comprised in his holding in
contravention of section 168, the rights of an occupancy tenant shall
thereupon accrue to the lessee in such land."

8. Section 169 has different parameters as compared to Section 168.
There was no material evidence led in that regard. However, the substantial
question of law formulated did not arise out of the orders of the courts
below. In the circumstances, the impugned judgment cannot be maintained
and is set aside. We request the High Court to re-hear the matter and
consider whether any substantial question of law arises which needs
adjudication and thereafter to decide the appeal in accordance with law.
Needless to say an appeal under Section 100 of CPC is maintainable only
if substantial question of law is involved.

9. The appeals are allowed to the aforesaid extent with no order as
to costs.

K.K.T.

Appeals partly allowed. H