Misri Lal and ors. Vs. CaptaIn Raja Durga NaraIn Singh and ors.

LegalCrystal Citation : legalcrystal.com/456282

Court : Allahabad

Decided On : Jan-03-1940

Reported in : AIR1940All317

Appellant : Misri Lal and ors.

Respondent : CaptaIn Raja Durga NaraIn Singh and ors.

Judgement :

Allsop, J.

1. This second appeal arises out of a suit in which the plaintiffs-appellants sought to recover a sum of Rs. 10 as damages for the price of a nim tree alleged to have been cut down by the defendants and also sought an injunction that the defendants should not interfere with the plaintiffs' possession over the plot of land upon which the tree was growing. The question of the tree is apparently of subsidiary interest. The main question is whether the plaintiffs have a title to the plot of land. It has been established that the plaintiffs bought a house with the site upon which it stood from Ram Dayal and Debi Dayal on 8th July 1891. The house has fallen into a state of ruin and the main question is whether the plaintiffs had any title to possession over the plot upon which the house stood and upon which, as it happened, the nim tree was growing. The Courts below have found that the plaintiffs have not been in possession of this site or plot of land for a very long period and that they acquired no right to possession by the deed of sale because their vendors were not entitled to transfer the site of the house or, to put it in other words, to transfer the house with the right to occupy it and the land upon which it had been built.

2. The Courts below seem to have misdirected themselves upon this question of possession. The plaintiffs did not assert that they had been living in the house although they said that they had used the land for the purpose of tethering some of their animals upon it. That allegation has been disbelieved. The Courts seem to have assumed that the plaintiffs were out of possession in the legal sense because they had not established any definite acts of user within a certain period. They seem to me to have overlooked the point that the plaintiffs would be considered in law to be constructively in possession if they had a right to possession unless it could be shown that they had definitely been ousted by others or had definitely by their conduct evinced an intention of abandoning the site for ever. It was not the plaintiffs' case that they had acquired any title by adverse possession and the real point, therefore, which has to be considered is whether the plaintiffs had acquired a legal right to remain in possession of this plot of land under the deed of sale of 8th July 1891. The question resolves itself into the very common one whether the tenant of a house is entitled to transfer it in a particular area with the right of occupation. The general rule in these provinces is that tenants in rural areas or agricultural villages are not entitled to

transfer houses and the sites of houses but are entitled only to transfer the materials of which the houses are built whereas tenants in urban areas are entitled to transfer the houses as they stand upon their sites and the right of occupation therein. Thus tenants in urban areas have to all intents and purposes a proprietary right over the sites of their houses and the zamindar or the owner of the land is left only with a right of escheat in the case of abandonment or in the case of the decease of a tenant who leaves no heirs to succeed him.

3. It follows, therefore, in this particular case the real question is whether the town or village of Manderwa in which the land in suit lies is an urban area or an agricultural area or perhaps I should say was an urban or an agricultural area at the time when the transferors of the plaintiffs or their predecessors-in-interest were granted the land upon which they built the house which they transferred to the plaintiffs. Before I proceed to consider this question, I should like to make a few general observations which are perhaps not strictly relevant to the decision of the case before me. It seems from the reported cases that it has generally been assumed on both sides at the bar that the question whether a site is or is not transferable by a tenant is one which is to be determined upon a consideration whether there is or is not a custom having the force of law bearing upon the issue. It has been said that there is a custom in these provinces that sites of this nature in rural areas cannot be transferred and that sites in urban areas can be transferred. Because the word 'custom' has been used, it has been assumed very generally that the question is one of custom having the force of law, and this being so, no Court has ever had occasion, as far as I can discover, to examine this aspect of the matter. It seems to me, however, that there is some danger in making the assumption which has been so generally made because it may at some time lead to unfortunate results. When we speak of a custom having the force of law we mean that there is some rule of law which has been established as a result of a custom which has crystallized so that it has come to have a legal force. It is advisable when we refer to a rule to state it in some precise terms.

4. The general assumption that tenants in urban areas have a right to transfer the sites of their houses and tenants in rural areas have no such right is based upon a very loose expression of what may possibly be a conclusion which can be reached from an examination of prevailing practice. Nobody, I suppose, would assert that a person who owns a plot of land in an urban area is not entitled to deal with it as he chooses and to transfer it to some other person by lease or grant of some kind on any conditions which he chooses provided that he does not transgress any specific rule set forth in any statute. I do not suppose, if the matter were fairly considered, that anybody would assert that such a person, if he transferred a site to another for the purpose of building a house, would necessarily be bound to transfer it on the condition that other would be entitled to transfer the site. Whether he did so or not would depend entirely upon the contract between the parties. Persons who are not the owners of land and who own houses on sites in urban and rural areas have rights which arise out of some grant or contract made to them and made between them and the owner of the land. Whether such a person has a right to transfer or not to transfer the land would depend upon the nature of the grant made to him. The only rule, I think, which prevails is that the nature of a grant which is lost in antiquity should be deduced from the prevailing practice in the area in which the land lies or, in other words, that we can assume that a lost grant is of a particular kind because we know that it is the practice to make grants of that type in that particular area. When we say therefore that it is a custom that tenants of houses in urban areas can and in rural areas cannot transfer the sites of their houses, all that we may properly mean is that

we know that it has been the practice in those particular areas to make grants of that nature and we shall therefore assume in the absence of any evidence of any contract to the contrary that any particular grant is of that type.

5. It follows therefore that the question whether a particular site is transferable or not does not strictly depend upon the existence of a custom in the sense of a custom having the force of law but upon our knowledge of a custom in the sense of a prevailing practice. What I mean is that no custom is crystallized into a rule of law which compels the owner of a site to make a grant of a particular nature but that the custom in the sense of a prevailing practice has been such that we can assume from our knowledge that lost grants were made in a particular form. It is useful to consider this aspect of the matter because it seems to me to follow that we have to examine the conditions as far as possible existing at the probable time of the grant in order to determine what the nature of the grant is and that no practice which has grown up after the grant has been made and no extraneous circumstances, such as the conversion of a rural area into a town area at later period, can affect the terms of a grant already made.

6. In the particular case before me we have to consider whether it can be assumed in all the circumstances of the case that Ram Dayal and Debi Dayal or their predecessors-in-interest received a grant of the site in the nature of that which is prevalent in urban areas or in the nature of that which is prevalent in rural areas. In order to determine this matter, it is necessary to consider what kind of place Manderwa is. It has been conceded that this place was originally known as Ganj Tirwa. It has been established that the Town Areas Act of 1914 was applied to this town and it was at one time the headquarters of a tehsil and had a police station and several schools in it. The assumption prima facie is that this was an urban rather than a rural area. I have examined the Gazetteer of the Farrukhabad District in which this place lies and I find that it was described as a town as long ago as the year 1884. At that time it had clearly been established for some period as the headquarters of a tehsil and Act 20 of 1856 had been applied to it. This was an Act which was enacted to make provision for the appointment and maintenance of police chaukidars and by Section 2 of the Act it was not to be applied to any agricultural village. It may not be conclusive of the fact that this town could not be described as an agricultural village in the ordinary sense that the Act was applied to it but it is a reasonable assumption that the Local Government would not have applied the Act if the town had not been capable of being properly so described. Reference has been made to a wajib-ul-arz of the year 1832 in which this place is described as a 'ganj,' that is a bazar.

7. There seems to me to be good ground for holding that within a reasonable time this place has not been properly an agricultural village but has been of the nature of an urban area. We do not know when Ram Dayal and Debi Dayal who were mahajans acquired their title in their house or whether they acquired it directly from the owner of the land by means of a grant or by a transfer from some other person, but it is, I think, a reasonable assumption that Manderwa or Ganj Tirwa, as it then was, was an urban area in all probability when the grant was made and, therefore, in the absence of evidence to the contrary it may be assumed that the grant was in the form in which grants usually are made in urban areas in these provinces or in other words that it was of the nature of the grant that the site of the house could be transferred. The plaintiffs-appellants have produced seventy-seven documents dating from the year 1869 and thereafter which show that houses have been transferred partly by sales in execution of decrees and partly by private treaty. There is nothing to show that the

zamindar ever questioned the right of any transferors to transfer their property. The learned Judge of the lower Appellate Court has relied in some measure upon the statements of witnesses produced not only by the defendants but by the plaintiffs that the transferors of such houses paid nazrana to the zamindar and obtained his permission when the transfers were made. If the learned Judge had said definitely that he believed the witnesses and that he held in consequence that all transfers were made with permission and consequently that there was no practice to transfer as of right, I might have considered myself bound by his decision, but he has said after referring in one part of his judgment to the statements of these witnesses that he has to presume that many of the transfers were made without payment of nazrana to the zamindars and that they had been fully acted upon and never objected to by the defendants. As the plaintiffs' witnesses, who were very probably won over, had stated that nazrana was always paid, I can only conclude that the learned Judge disbelieved them and that his real finding is that nazrana may have been paid in some cases but that it was not paid in all.

8. It seems therefore that there have been a large number of transfers as of right and that these have never been objected to. There is no question, in my judgment, of these transfers establishing any custom having the force of law, but on the other hand, the conduct of the persons concerned over a long period of years tends to strengthen the presumption which can be drawn from the nature of the town and the general practice in these provinces that the grants of sites for building houses in this town were made in such a form that the grantees were entitled to transfer their houses with the sites upon which they stood. The learned Judge has been affected in some measure by the fact that the Town Areas Act was applied to Manderwa only in the year 1914 and he goes on to say that he believes that the zamindar enjoyed an absolute sway over all his zamindari including the abadi in the year 1891 when the disputed sale deed was executed. From these remarks I can conclude that he was in some way assuming that the question in issue was whether the plaintiffs or the zamindar were the absolute owners of the site in question. I do not think that is really the question in issue between the parties. If Ram Dayal and Debi Dayal were entitled to retain possession of the site of the house which they transferred and if they had a right to transfer the site, then the plaintiffs had a right to possession and as long as they had that right they were able to prevent any other person from entering upon the site and cutting down any tree or doing any other damage.

9. It has been suggested by learned Counsel for the respondents that the plaintiffs-appellants must be assumed to have abandoned the site of the house because they did not rebuild the house after it fell into a state of dilapidation. I do not think that it has ever been held that the tenant of a house is bound to give up the site in an urban area if the house falls into disrepair and is not rebuilt. It is no doubt true that a tenant who abandons a site leaves that site to revert to the zamindar, but there must be proof of an intention to abandon. The mere fact that a house is not rebuilt does not, I think, necessarily prove that the tenant means to abandon the site or lead to the result that the zamindar is entitled to enter upon the land. In the present case, the plaintiffs live in the same town, although it appears that the house in which they live is at some distance from the disputed site, and there is nothing to show that they ever meant to abandon the site so that it has escheated to the zamindar. As I Have already said possession follows title and if the plaintiffs were entitled to remain in possession of the land, it is to be concluded that their possession continued until such time as they were ousted. It has not been shown that any person ousted them and has held the land for a period of twelve years or more.

10. In these circumstances I have come to the conclusion that the plaintiffs-appellants are entitled to a decree for damages for the value of the nim tree that was cut down, these damages to be paid by defendant 1 who claims to be entitled to the site as zamindar and by defendant 2 who asserts that he cut down the tree as a licensee of defendant 1. I also find that the plaintiffs are entitled to an injunction that the defendants shall not interfere with their possession until such time as the plaintiffs abandon the site or until such time as it escheats to the zamindar on the failure of the plaintiffs or their legal successors-in-interest. The plaintiffs will get their costs throughout. Leave to appeal under the Letters Patent is allowed.