

A KAUSALYABAI & AKKABAI (DEAD) BY LRS.

v.

HARISHCHANDRA MUNNALAL GUPTA

(Civil Appeal No. 1367 of 2009)

MARCH 3, 2009

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[S.B. SINHA AND DR. MUKUNDAKAM SHARMA, JJ.]

Code of Civil Procedure, 1908:

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s. 100 – Second appeal – High Court dismissing second appeal in limine – HELD: Suit for recovery of possession based on grant of permanent lease which grant by subsequent events could not attain finality, High Court ought to have considered the consequential effect – High Court would decide the second appeal afresh after formulating substantial question of law.

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The plaintiff-respondent filed a suit against her widowed sister, the defendant-appellant for recovery of possession of the suit property. The plaintiff's case was that he had been granted a permanent lease by the Naib Tehsildar on 30.11.1979; that the defendant was a licensee and the licence was revoked by a notice dated 3.5.1982. When the defendant came to know of the proceedings before the Naib Tehsildar, she filed a review application and ultimately the order dated 30.11.1979 was set aside. On appeal by the plaintiff, the Commissioner directed the Collector to await decision of a competent court. In the civil suit the defendant amended the plaint to the effect that she acquired title by adverse possession. The suit was dismissed by the trial court, but was decreed by the first appellate court. The plea of adverse possession was also held not available to the defendant. The second appeal of the defendant having been dismissed *in limine*, she filed the appeal.

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Allowing the appeal and remitting the matter to the High Court, the Court

HELD: The plaintiff-respondent in the suit proceeded on the basis that he had title over the suit property by reason of the grant of permanent lease in terms of the order dated 30.11.1979 passed by the Nayab Tehsildar. However, the said order having regard to the subsequent event must be held to have not attained finality and the consequential effect requires consideration. If the contention of the defendant-appellant that the property belonged to her father, and the same devolved on plaintiff and his brother in equal shares, is correct, the subsequent events which have taken place should have been taken into consideration by the High Court. If the other brother of the plaintiff had equal share in the property, who is now dead, and whose heirs and legal representatives are said to be residing in the same premises, the High Court may have to consider the effect of their non-impleadment in the suit. The High Court would consider the matter afresh upon formulating substantial questions of law. [Para 9 and 10] [1101-A, B, C; 1101-E]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 1367 of 2009.

From the Judgment & Order dated 29.6.2004 of the High Court of Judicature at Bombay, Nagpur Bench, Nagpur in Second Appeal No. 13/2001.

Manish Pitale and Chander Shekhar Ashri for the Appellants.

Aniruddha P. Mayee for the Respondent.

The Judgment of the Court was delivered by

A **S.B. SINHA, J.** 1. Leave granted.

B 2. Defendant in a suit for recovery of possession filed by her brother (Respondent) is before us challenging the legality and/or validity of the judgment and order dated 29.6.2004 passed by a learned Single Judge of the High Court of Judicature at Bombay, Nagpur Bench, Nagpur in Second Appeal No.13 of 2001 dismissing an appeal preferred by the appellant herein against a judgment and order dated 7.12.2000 whereby and whereunder the judgment and order dated 25.01.1995 passed by the learned Trial Judge was reversed.

C 3. Original parties to the suit were brothers and sisters. They had another brother, Dr. D.C. Gupta. The property in suit is said to be an ancestral property. Appellant became a widow in 1945. She, therefore, came to stay with her parents. Father D of the original parties died in 1947. Respondent and his brother, therefore, became owner of the properties. Plaintiff-respondent was a Constable. He had been occupying a Government accommodation. Allegedly, he allowed his sister to stay in his house, inter alia, on the condition that she would vacate the same on his retirement.

E 4. Plaintiff in his plaint alleged that the defendant was a licensee, which was revoked by a notice dated 3.5.1982. As despite the same, the defendant did not vacate the licenced premises, the suit was filed.

F Plaintiff, inter alia, contended that he had been granted a permanent lease by an order passed by Nayab Tehsildar on 30.11.1979. Plaintiff, however, did not implead his brother or his heirs or legal representatives in the said suit. Defendant-appellant, however, contended that she had been in possession of the premises in suit even before her husband's death and has allegedly been exercising all rights of ownership in the property in suit including payment of all rates and taxes. The suit was filed on 9.6.1982. Allegedly, in the proceedings before G H the Nayab Tehsildar, the defendant was not a party. She came

to know about the proceedings before the said authority in respect of grant of permanent lease on 4.5.1982. She filed a review application on 20.8.1982. The said review petition was dismissed. An appeal was preferred thereagainst and the learned Additional Collector being the appellate authority by an order dated 20.6.1986 allowed the said appeal and remitted the matter back to the original authority in terms whereof, the review application revived. By reason of an order dated 19.1.1991, Collector, Buldhana revoked the said grant in favour of the plaintiff upon setting aside the order dated 30.11.1979. Plaintiff preferred an appeal thereagainst. By reason of an order dated 25.1.1995, the Additional Commissioner, Amravati Division, Amravati allowed the said appeal in part directing the Collector to await final decision of a competent court whose decision is final and take action accordingly.

5. The defendant sought leave for amendment of her written statement inserting paragraphs 8(A) and 9(A) which are in the following terms :

"8(A) Without prejudice to any above contentions it is submitted that this defendant is in possession of the suit plot openly, continuously, peacefully and without any interruption as owner of the suit plot and showing hostile attitude towards all since last more than 30 years and therefore this defendant has acquired title by adverse possession. That the plaintiff has no title to the suit property and he failed to establish the same. Therefore, instant suit not at all maintainable and cannot lie. That the electric meter in the suit house is in the name of this defendant since beginning and this defendant has paid the charges for the same. That the taxes of the suit plot were also borne by this defendant. It is submitted that, this defendant has acquired the title of the suit plot by way of adverse possession and therefore, the plaintiff has no *locus standi* to file the present suit against him. The suit is also bad for non-joinder of necessary party and hence the suit of the

A plaintiff deserves to be dismissed with costs.

9(A) Without prejudice to the contents made above, alternatively, it is submitted that the plaintiff has no locus to grant alleged licence and further even if the story put forth by the plaintiff is taken as it is in relations with property in question five on licence then the Civil Court has no jurisdiction to entertain and try present suit as the property in question comes within the amended provision of Central Provinces and Barer letting of Houses and Rent Control Order 1949 and hence unless and until permission to that effect is not obtained from the competent authority for issuing quit notice and legally the alleged lease is not terminated, no suit for possession can be against the defendant.”

D 6. The suit was dismissed by the learned trial Court by a judgment dated 16.7.1985. Plaintiff preferred an appeal thereagainst. The First Appellate Court, however, was of the view that the learned Trial Judge was not correct in dismissing the suit as the plaintiff had derived title over the suit land and the defendant had no title therefor.

F It was furthermore opined that the plea of adverse possession was also not available to the defendant. A Second Appeal preferred thereagainst, as noticed hereinbefore, has been dismissed *in limine*.

G 7. Mr. Manish Pitale, learned counsel appearing on behalf of the appellant, would contend that despite the fact that several substantial questions of law arose for consideration before the High Court, it erroneously dismissed the appeal *in limine*, inasmuch as the subsequent events, namely, that the order passed by the Nayab Tehsildar dated 20.12.1979 ceased to have any force, was not taken into consideration.

H 8. The learned counsel appearing on behalf of the respondent, however, would support the impugned judgment.

9. Plaintiff-Respondent in the suit proceeded on the basis that he had title over the property in suit by reason of the grant of permanent lease in terms of the order dated 30.11.1979 passed by the Nayab Tehsildar. However, the said order having regard to the subsequent event must be held to have not attained finality. If the contention of the appellant that the property belonged to her father, and the same devolved on plaintiff and his brother in equal shares, is correct, the subsequent events which have taken place, in our opinion, should have been taken into consideration by the High Court. If the other brother of the plaintiff had equal share in the property, who is now dead, and whose heirs and legal representatives are said to be residing in the same premises, the High Court may have to consider the effect of their non-impleadment in the suit. Plaintiff, as noticed hereinbefore, filed the suit only in terms of the order of grant of permanent lease on or about 30.11.1979. If that has not attained finality by reason of the subsequent events and awaiting the decision of the Civil Court, the effect thereof must be taken into consideration by the High Court.

10. For the reasons aforementioned, the impugned judgment is set aside and the matter is remitted to the High Court for consideration of the matter afresh upon formulating substantial questions of law.

11. The appeal is allowed with the aforementioned observations. No costs.

R.P.

Appeal allowed.