



AIR 1995 GUJARAT 148
GUJARAT HIGH COURT
R. K. ABICHANDANI, J.

Cases Referred

ILR 5 Bom 208

Chronological
Paras

7

Civil Revn. Appln. No. 1324 of 1988, D/- 20 -
1 - 1995

Mr. S. K. Zaveri, Advocate, for Petitioner; Mr.
K. S. Nanavati, Advocate, for Respondents.

Dabgar Arvindkumar Keshavlal Petitioner v.
Shri Modh Ghancl Gnyati Samaj Respondents

Specific Relief Act (47 of 1963), S.6 - Suit for restoration of possession - Dispossessed property passed on to other person - Suit filed against person in actual possession and not against party dispossessing - Relief can be granted.

The cause of action for suit for restoration of possession of suit property arises when any person is dispossessed without his consent of immovable property otherwise than in due course of law. The relief that can be claimed in such a suit is of recovery of possession. This would mean that person who is in possession of such immovable property of which the plaintiff was dispossessed without his consent and otherwise than in due course of law would be a necessary party to the suit for claiming the relief effectively. If persons who have dispossessed are in possession of the property in question, they would obviously be necessary parties for recovery of possession in a suit under S. 6 of the Act. However, if dispossession is done through the agency of some persons who have passed on the possession to other persons, the latter being in actual possession from whom recovery can be sought, would be necessary parties for claiming an effective relief under S. 6 of the Act. The suit filed against those who are in actual possession for recovery of the immovable property under S.6 of the Act can be effectively decided even in absence of the agents who have dispossessed plaintiff and transmitted the possession of the defendants.

(Para7)

Judgement

1. ORDER :-The petitioners have preferred this revision application in view of the fact that no appeal lies against a decree passed under S. 6 (1) as provided in S.6(3) of the Specific Relief Act, 1963.
2. The petitioners' have challenged the judgment and decree passed by the Civil Judge (J.D.), Patan in Regular Civil Suit No. 127 of 1976 on 30-4-1988 dismissing the suit of the petitioners.
3. The petitioners filed the suit under S. 6 of the Specific Relief Act, 1963 for restoration of the possession of the suit shop with mesne profits from 4th April, 1976 till the restoration of the shop. According to the petitioners they were in possession of the suit property bearing City Tika No. 11/ 3.166 till 4th April, 1976. During the night of 4th April, 1976, the first wife of the uncle of the petitioner No. 2, Surajben and three others had removed the locks, entered the suit shop and taken away the goods and on 5th April, 1976 the possession of the suit shop was handed over to the respondents Nos. 2 to 4. The suit was therefore filed for recovery of the possession from these respondents who were original defendants.
4. The trial Court took note of the fact that under the partnership deed, Ex. 54, the petitioner No. 1 (who was original plaintiff No. 1) had started business with his uncle Devchand and observed that even assuming that he was in possession of the suit shop, it appeared from the complaint filed in the police Ex. 55, that he had claimed to be the owner of the business which was run

in the shop after death of his uncle Devchand on 21-6-1975. The trial Court held that such assertion by the petitioner No. 1 that he had become sole owner of the business of the firm was contrary to the will Ex. 108 executed by Devchand in which it was provided that the second wife of Devchand namely Leelaben was to be the beneficiary of the suit shop. By this process of reasoning the trial Court came to the conclusion in paragraph 55 of its judgment that the case of the petitioners-plaintiffs that they were in possession was doubtful. The trial Court further found that Devchand was the tenant of the suit shop and

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by becoming a partner the petitioner No. 1 could not be said to have come in possession as a tenant from 21-6-1975 on death of Devchand. The trial Court also found that the suit for recovery of possession was filed only against these defendants and the four persons namely - Surajben, Vithaldas, Govindlal and Kala who were said to have dispossessed the petitioners, were not impleaded as parties to the suit and without giving an opportunity of hearing to those persons, the Court could not come to a finding that the petitioners were dispossessed by them. The trial Court held that it was not established that the defendants Nos. 2 to 4 had taken forcible possession of the suit premises. The suit was therefore, dismissed.

5. The case of the respondents-defendants was that possession of the suit shop was handed over by the respondents Nos. 2 to 4 on 5-4-1976 to the respondent No. 5 Dr. Lalitchandra as a tenant of these premises. The respondents Nos. 6 to 9 (original defendants Nos. 6 to 9) were added as the new trustees who were appointed in place of defendants Nos. 2 to 4. According to the defendants, a licence was obtained in the name of Surajben first wife of Devchand for doing business in tobacco and that business was being

carried on in the name of Surajben. It was denied that the petitioner No. 1 was in possession of the suit shop. It was also denied that Devchand had executed any will or that he had a second wife Leela. It was contended that Surajben had willingly handed over the possession of the suit shop to the respondent No. 1 trust on 3rd April, 1976.

6. The suit was filed by the petitioners for recovery of possession under S.6(1) of the Specific Relief Act, 1963 which reads as under :-

"If any person is dispossessed without his consent of immovable property otherwise than in due course of law, he or any person claiming through him may, by suit, recover possession thereof, notwithstanding any other title that may be set up in such suit. "

7. On plain reading of the said provision it becomes clear that cause of action for suit arises when any person is dispossessed without his consent of immovable property otherwise than in due course of law. The relief that can be claimed in such a suit is of recovery of possession. This would mean that person who is in possession of such immovable property of which the plaintiff was dispossessed without his consent and otherwise than in due course of law would be a necessary party to the suit for claiming the relief effectively. If persons who have dispossessed are in possession of the property in question, they would obviously be necessary parties for recovery of possession in a suit under S. 6 of the Act. However, if dispossession is done through the agency of some persons who have passed on the possession to other persons, the latter being in actual possession from whom recovery can be sought, would be necessary parties for claiming an effective relief under S. 6 of the Act. The suit filed against those who are in actual possession for recovery of the immovable property under S.6 of the Act can be effectively decided even in absence of the agents

who have dispossessed plaintiff and transmitted the possession to the defendants. Therefore, the approach of the trial Court that in absence of the persons, who had dispossessed the plaintiffs having been made parties to the suit, the relief under S. 6 could not be granted against those who are actually in possession of that property is wholly misconceived and not warranted by the provisions of S. 6 of the said Act. In *Virjivandas Madhavdas v. Mohammed Ali Khan*, reported in ILR 5 Bom 208, the Bombay High Court in context of S. 9 of the Specific Relief Act, 1877 held that a person who has been ejected from his property in suing to recover it under S. 9 of the Specific Relief Act, 1877, may sue the actual ejector or the person under whose order or by whose authority the actual ejector had acted, or he may sue both; but the wrong doer who has taken possession is the one from whom primarily, it is to be reclaimed. Therefore a suit filed against persons from whom possession is to be primarily reclaimed under S. 6 of the said Act can be decided notwithstanding that those who had actually dispossessed the plaintiffs were not made parties to the suit.

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8. Devchand was admittedly running business in the suit shop since a very long period. The petitioner No. 2 is a nephew of Devchand and petitioner No. 1 is the son of petitioner No. 2. Devchand made a Will Ex.108 on 24th June, 1966 which discloses that he had two wives - one Suraj and the other Leela who have been described as old wife and new wife respectively in the Will. In the said registered Will, there is mention of the suit shop at Item No. 7 in the enumeration of the properties. It is stated therein that there was a grocery shop of the ownership of Devchand in Patan. This property along with other properties at Items 1, 2 and 3 was bequeathed to his new wife Leela. It appears from the Will that he has also given some properties to his first wife Suraj. It is

however, made clear in the Will that both his wives would have life interest in the properties. In paragraph 4 of the Will it was stated that if the testator had no issue at his death, all his properties should devolve on Keshavlal who was his nephew and who is the petitioner No. 2 - plaintiff No. 2. In the context of the suit shop, a significant arrangement which was made in the said Will was that having regard to the fact that Leela was a straightforward and simple lady, the possession and management of the suit shop was required to be done by Keshavlal on his own on the death of the testator. By virtue of this provision in the Will, it becomes clear that on the death of the testator in 21-6-1975 the petitioner No. 2 Keshavlal came to be in possession and management of the suit shop pursuant to the Will. It appears from the Will that when it was executed on 24-6-1966, Devchand was the sole owner of the business which was run in the suit shop. The partnership deed Ex. 54 which is duly proved shows that the partnership firm was established between Devchand and petitioner No. 1 Arvindlal on 14-11-1974 for running grocery business at Patan in the same name "Dubgar Devchand Mancharam" in which the business was being carried out earlier as a sole proprietor by Devchand. Though the partnership was started from 14-11-1974, the partnership deed was executed on 4-1-1975. Under the said partnership deed, Devchand and Arvinddas both have a moiety of share in the said business. From the documentary evidence on record therefore, it appears that the petitioners were in possession of the suit shop, the petitioner No. 1 by virtue of the Will Ex. 108 and the petitioner No. 2 in view of his having become the partner in the business which was run in the suit shop as evidenced by the partnership deed Ex. 54. The oral evidence of the petitioners at Ex. 48 and Ex. 105 and of Advocate Rameshchandra at Ex. 108A clearly establishes that the petitioners were in possession of the suit shop and that petitioner No. 1 was doing business in the said shop till 3rd April, 1976 and that during the night of 4th April, 1976

four persons named by the petitioner No. 1 had broken open the locks of the suit shop and taken away the goods therefrom. This fact is borne out from the complaint Ex. 55 also. The oral evidence is clearly supported by documentary evidence. It is therefore amply borne out from the evidence on record that the petitioners were dispossessed of the suit shop during the night of 4th April, 1976, as stated in the complaint Ex. 55. The evidence of Babugar Ex.133 who collected rent and Dr. Lalit Modi Ex. 135 and other witnesses of the defendants does not shake the credibility of the positive evidence on record, which points to the fact that the petitioners were in possession of the suit shop before they were dispossessed by the four persons named in the complaint and in the evidence and who handed over the possession to the defendants Nos. 1 to 4. The fact that the defendant No. 5 Dr. Lalit Modi promptly got into possession on 5-4-1976 cannot disentitle petitioners from a relief under S.6 of the said Act. These defendants have come to be in possession of the suit shop on the basis of the unlawful dispossession effected through the said four persons and therefore, the petitioners would be entitled for the restoration of the possession. The question as to title and other rights in respect of the suit premises cannot be determined in a suit under S. 6 of the Act and those rights can be decided in appropriate proceedings.

9. It was contended on behalf of the respondents that the licence at Ex. 125 issued by the Central Excise Department on

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21-1-1976 would show that Surajben was doing business. The licence Ex. 125 does not show that Surajben was doing any business in the suit shop. It only authorises Surajben to carry on business in House No. 9/17/52 mentioned therein. This document cannot have the effect of nullifying the positive evidence on record indicating that possession of the suit shop was with the

petitioners before they were dispossessed on 4-4-1976.

10. The petitioners have made out sufficient ground for exercise of revisional powers of this Court. Under the above circumstances, the petitioners are entitled to a decree of possession under S. 6 of the Specific Relief Act, 1963. The impugned judgment and order dated 30th April, 1988 dismissing the suit is therefore, set aside and the suit is decreed in favour of the petitioners-plaintiffs with costs all through out. The respondents are accordingly directed to hand over the possession of the suit premises to the petitioners.

11. As regards prayer for mesne profit, it is directed that an enquiry as to mesne profit be made by the trial Court under O. 20, R. 12 of the C.P.C. for the -period from the date of dispossession till recovery of possession. Rule made absolute accordingly with costs.

12. At this stage the learned counsel for the respondent prays for staying the operation of this order. Having regard to the facts and circumstances of the case, the prayer is rejected.

Order Accordingly .