

[Supreme Court of Pakistan]

Present: Qazi Faez Isa, Syed Mansoor Ali Shah and Yahya Afridi, JJ

TAJ WALI SHAH---Appellant

Versus

BAKHTI ZAMAN---Respondent

Civil Appeal No. 71-P of 2015, decided on 22nd October, 2018.

(On Appeal from the judgment of the Peshawar High Court, Peshawar dated 19.02.2015 passed in Civil Revision No. 524-P of 2014)

(a) Specific Relief Act (I of 1877)---

----S. 8---Recovery of specific immovable property---Person entitled to seek remedy under S. 8 of Specific Relief Act, 1877---Scope---Such person would include an owner, lessor, lessee, mortgagee or mortgagee of immovable property, trustee or beneficiary of a trust.

Nair Service Society Ltd. v. K.C. Alexander and others AIR 1968 SC 1165 ref.

(b) Constitution of Pakistan---

----Arts. 4 & 10-A---Access to justice, right of---Scope---Vested right---Any right vested in a person to seek his remedy under the law should be liberally construed, as this would bolster his recognised fundamental right of access to justice.

(c) Specific Relief Act (I of 1877)---

----Ss. 8 & 42---Suit for recovery of specific immovable property---Relief---Scope---In a suit under S. 8 of the Specific Relief Act, 1877, the declaration of the entitlement was an inbuilt relief claimed by the plaintiff of such a case---In such circumstances, a prior declaration for the said entitlement under S. 42 of the Specific Relief, 1877 could not be made a condition precedent for filing a suit for possession under S. 8 of the Act.

Hazratullah and others v. Rahim Gul and others PLD 2014 SC 380 ref.

(d) Specific Relief Act (I of 1877)---

----Ss. 8 & 9---Recovery of specific immovable property---Undivided property--- Co-owners--- Co-owner of disputed property seeking possession from another co-owner, who was in peaceful possession of the disputed undivided property---Remedy in such circumstances was to seek possession through partition, and not by a suit under S. 8 of the Specific Relief Act, 1877.

(e) Specific Relief Act (I of 1877)---

----S. 8---Recovery of specific immovable property---Vested right---Scope---Person in possession of an immovable property acquired a vested right to possession, which could not be taken away unless the challenge was made thereto by a person who showed prior or better title through transfer or inheritance.

(f) Khyber Pakhtunkhwa Land Revenue Act (XVII of 1967)---

----Ss. 3 & 42---Abadi deh---Proprietary rights, transfer of---Transfer of proprietary rights in abadi deh were not recorded under S. 42 of the Khyber Pakhtunkhwa Land Revenue Act, 1967, as the said area had been, under S. 3 of the said Act, expressly excluded from the applicability thereof.

(g) Specific Relief Act (I of 1877)---

----S. 8--- Recovery of specific immovable property--- Undivided immovable property---Suit filed by one of the co-sharers for ejectment of a trespasser or person exercising possession over disputed property---Effect---Firstly, filing of such a suit could not be considered as evidence of the co-sharer's denial of the title of the other co-sharers; secondly, the suit brought by the co-sharer would be deemed to be for the benefit of the other co-sharers; and thirdly, when the co-sharer acquired possession in consequence of the proceedings, he would be in possession of the entire property, on behalf of all co-sharers and his said possession could not be deemed as adverse to the other co-sharers.

Bashir Ahmad and others v. Parshotam and others AIR 1929 Outh 337 and Kanchi Kamamma and others v. Yerramsetti Appanna AIR 1973 Andhra Pradesh 201 ref.

M. Faheem Wali, Advocate Supreme Court and M. Zahoor Qureshi, Advocate-on-Record for Appellant.

Muhammad Asif, Advocate Supreme Court and M. Ajmal Khan, Advocate-on-Record for Respondent.

Date of hearing: 27th September, 2018.

JUDGMENT

YAHYA AFRIDI, J.---Through the instant Civil Appeal, Taj Wali Shah, (appellant-plaintiff) has challenged the judgment dated 19.02.2015 passed by the Peshawar High Court, Peshawar vide which Civil Revision (C.R. No.524-P of 2014) was accepted and the suit of present appellant was declared as not being maintainable.

2. Taj Wali Shah instituted a suit seeking possession by ejectment of Bakhti Zaman (defendant-respondent) from a house measuring 18 marlas situated in Khasra No.1493 Mousia Sher Garh (disputed house) on the basis of being owner vide sale deed No.207 dated 31.03.2010 (sale deed), default in payment of rent vide Karaya-Nama dated 23.06.1982 (rent deed), illegal alteration thereon, and for his personal use; recovery of outstanding rent; and permanent injunction.

3. Bakhti Zaman, in response to the averments made in the plaint, contested the same in his written statement, claiming that the disputed house was the legacy of his predecessor, which has been in their possession as owners for the last 80/90 years. In support of his claim, it was averred that the gas meter installed in the disputed house was under his uncle's name. He also contested the sale deed and further denied ever residing in the disputed house as a tenant.

4. The Trial Court reduced the contested pleadings of the parties into 11 issues, and allowed the parties to adduce their respective evidence. Finally, the Trial Court vide its judgment and decree dated 12.03.2013 decided the suit in favour of Taj Wali Shah in terms that:

"The upshot of above discussion is that the plaintiff is the owner of the suit house. The defendant is a tenant under the plaintiff. The defendant is a defaulter in the payment of rent so he is liable to eviction and plaintiff is awarded decree as prayed for."

5. Being aggrieved, Bakhti Zaman impugned the decision of the Trial Court in appeal before the Appellate Court, which also met the same fate vide judgment and decree dated 17.05.2014 in the following terms:

"Plaintiff/respondent has proved his case and the defendant/appellant has failed to prove his stance.

Thus, findings of the trial court on all the issues except issues Nos.09 and 10 are based on proper appreciation of evidence. Findings on issues Nos.09 and 10 need trial modification in light of discussion made above. Therefore, judgment and decree of the trial court is upheld with modification to the extent of determination of the amount of rent. Appeal in hand is dismissed to extent of ejection and permanent injunction, being devoid of merit while it is partially allowed to extent of modification of findings regarding the amount of rent."

6. This led Bakhti Zaman to challenge the above decision in Civil Revision before the High Court, which was finally decided in his favour, essentially on the following premise:

"Any suit under section 8 of the Specific Relief Act, 1877, could be filed by any person entitled to the possession of specific immovable property on the basis of his title and where the title is disputed one a suit under section 42, for declaration, under Specific Relief Act, 1877, is to be filed. Where a suit for possession, on the basis of a title which is disputed one, creating a cloud over his title, he must seek a declaration to his right, first."

And finally, after reviewing the evidence on the record, the High Court came to the conclusion that:

"In view of the above, it can safely be held that both the courts below have ignored the fact by misreading and non-reading of evidence, that respondent/plaintiff is not the absolute owner of

the property in dispute and his titled is defected one, therefore, suit under section 8 of the Specific Relief Act, 1877, was not maintainable and in such like situation a suit for declaration under section 42 of the Act, *ibid* was competent, thus, both the impugned judgments of the lower courts are set aside and the suit of the respondent/plaintiff is dismissed being not maintainable in the given circumstances."

7. We have heard the learned counsel for the parties and with their valuable assistance have gone through the available record.

8. The entire controversy in the present case revolves around the scope and the true purport of section 8 of Specific Relief Act, 1877 (Act of 1877), which reads as follows:

"8. Recovery of specific immovable property.

A person entitled to the possession of the specific immovable property may recover it in the manner prescribed by the Code of Civil Procedure."

9. On careful reading of the aforementioned section, it is noted that the same provides for two essential elements in a suit for recovery of a specific, immovable property; firstly, it identifies the person, who may seek the remedy under this, section; and secondly, it specifies that said remedy is to be invoked and tried in accordance with the forum and procedure provided under the Civil Procedure Code, 1908.

10. The present case deals with the first part of section 8 *supra*, which relates to the right of a person entitled to possession under the law. This right to seek possession is anchored on the word entitled, and to understand the meaning thereof, we will have to examine the true intent of the legislature in inserting the said word in section, 8 *supra*. For this purpose, guidance may be sought from Narotam Singh Bindra's Interpretation of Statutes (Tenth Edition), wherein it is explained that:

"The primary and foremost task of a court in interpreting a statute is to ascertain the intention of the legislature, actual or imputed. The words of the statute are to be construed so as to ascertain the mind of the legislature from the natural and grammatical meaning of the words which it has used."

11. Now, the Oxford dictionary meaning of the word entitle is, "often be entitled to give (someone) a legal right or a just claim to receive or do something", while Black's Law Dictionary (Tenth Edition) defines the term to be ".... grant a legal right to or qualify for". It appears that the true intent of the legislature, as gathered from the ordinary meaning of the word entitled coupled with the natural spirit and the very reason of the provision, was to extend the scope of the right to seek possession to those persons who are eligible or qualified under the law to seek possession of an immovable property. This would thus include; an owner, lessor, lessee, mortgagee or mortgagee of immovable property, trustee or beneficiary of a trust.

12. Had the intention been to restrict the scope of the right to seek the possession to only owners, then the legislature would have expressly provided so, which it did not. In fact, any right vested in a person to seek his remedy under the law should be liberally construed, as this would bolster his recognised fundamental right of access to justice. In consonance with the same line of thought, the Indian Supreme Court in *Nair Service Society Ltd. v. K.C. Alexander and others* (AIR 1968 SC 1165) went on to extend the scope of section 8 *supra* to a possessor, by enunciating that:

"Section 8 of the Specific Relief Act does not limit the kinds of suit but only lays down that the, procedure laid down by the Code of Civil Procedure must be followed. This is very different from saying that a suit based on possession alone is incompetent after the expiry of 6 months. Under section 9 of the Code of Civil Procedure itself all suits of a civil nature are triable excepting suits of which their cognizance is either expressly or impliedly barred."

13. Let us now address the preliminary objection of the learned counsel for the respondent; that Taj Wali Shah could not seek possession under section 8 *supra* without praying for a declaration of his title over the disputed house. This issue has been aptly commented upon in a recent judgment of this Court

passed in the case of Hazratullah and others v. Rahim Gul and others (PLD 2014 SC 380), in terms that:

"... it may be held that in a suit under section 8 of the Specific Relief Act, 1877, the declaration of the entitlement is an inbuilt relief claimed by the plaintiff of such a case. Once the plaintiff is found to be entitled to the possession, it means that he/she has been declared to be entitled, which includes the declaration of title of the plaintiff qua the property."

14. Interestingly, in the present case, the trial Court, in fact, framed two issues relating to the contesting claim of title over the disputed house to the effect:

".....

7 Whether the defendant is the owner of the disputed house?

8. Whether the plaintiff is the owner of the disputed house vide Iqrar-Nama dated 31.03.2010? "

15. In furtherance to the aforementioned two issues framed by the trial Court, and the evidence adduced by the parties in support of their respective claims to title over the disputed house, the trial Court passed a definite finding in favour of Taj Wali Shah. This finding transcended into an express declaration of title in the decree, when no specific prayer for title of the disputed house was sought by Taj Wali Shah in his plaint. This being so, it reaffirms the ratio of Hazratullah's case supra, that in a suit under section 8 of the Act of 1877, there is ordinarily an inbuilt prayer for the declaration of entitlement to possession, which is sought by the plaintiff. In view of the express declaration of title in the decree passed by the trial Court, the preliminary objection of the respondent and direction of the High Court, for Taj Wali Shah to first seek a declaration of title under section 42 of the Act of 1877 before filing a suit for possession under section 8 supra was not justified, and in the circumstances of the present case it would in fact be an exercise in legal futility.

16. A very crucial admitted position in the present case having serious legal consequences was that the disputed house was situated within the 'Abadi Deh' (village site), and this fact warranted the evidence relating to the transactions of proprietary rights therein to be viewed in the light of the special principles governing the said area. Firstly, the transfer of proprietary rights in favour of Taj Wali Shah vide the sale deed could not be recorded under section 42 of the West Pakistan Land Revenue Act, 1967, as the village site has been, under section 3 supra, expressly excluded from the applicability thereof. Secondly, Bakhti Zaman, despite being in possession of the disputed house, was unable to prove that he was a member of the proprietary body of the village site of Sher Gargh. In fact, his own uncle, Ali Mohammad (DW2) clearly admitted that Bakhti Zaman was from another village in Mauza Qasmi. This being so, Bakhti Zaman could only be put in peaceful possession of any piece of the land in the village site of Sher Gargh through a valid transfer or legacy, which he failed to prove. Thirdly, Salah-ud-Din and Siraj-ud-Din were proved to be members of the proprietary body of the village site of Sher Gargh, being sons of Amir-ud-Din, as reflected in the Pedigree Table (Exp PW4/1). It was also brought on record that Amir-ud-Din had expired and was survived by a widow, four sons including Siraj-ud- Din and Salah-ud-Din, and four daughters. Finally, had Bakht Zaman, even without proving his claimed legacy, established himself to be member of the proprietary body of the village site, he could then have claimed the status of a co-owner of the disputed property, and in such circumstances, the challenge made to his possession by Taj Wali Shah under section 8 of the Act of 1877 would not have been maintainable. The remedy then available to Taj Wali Shah would have been to seek possession of the disputed house through partition only and, not by a suit under section 8 of the Act of 1877.

17. The impugned decision of the High Court reveals that the above crucial principles relating to transfer of immovable property in Abadi Deh; particularly, the legal position of the transfer of proprietary interests of immovable property in Abadi Deh, the legal standing of a member of proprietary body of Abadi Deh vis-a-vis that of an outsider, and finally, the locus standi of a co-owner

seeking possession of the property under section 8 of the Act of 1877 were not taken into proper consideration, resulting in an error warranting legal correction.

18. Now to the contested claims of title over the disputed house. To appreciate the evidence produced by the parties, it would be essential to keep in view that Taj Wali Shah had instituted the suit for possession, as owner of the disputed house, which was in the possession of Bakhti Zaman. In such circumstances, the onus to prove the title of the disputed house rested upon Taj Wali Shah's shoulders under the mandate of Articles 117, 118, 119 and most importantly 126 of the Qanun-e-Shahadat Order, 1984 (Order of 1984).

19. This brings us to examine, whether Taj Wali Shah had discharged his onus in proving his said claim or otherwise. In civil cases, facts are to be proved on preponderance of evidence adduced by the parties. The enabling provisions of the Order of 1984 casting the onus of proof upon a party would only become relevant when ago evidence worth its while is produced by the plaintiff or when the Court is unable to decide the issue, as the evidence on the record is so evenly balanced.

20. On combing through the evidence on the record, it is noted that Taj Wali Shah was able to establish the link between Salah-ud-Din and his family and the disputed house through the testimony of two PESCO representatives, who were independent witnesses. It was proved that the electric supply meter in the disputed house was installed in the name of Siraj-ud-Din and that there was also a disconnection order thereof (Exp PW3/1). In addition, the rent deed (Ex PW6/1) was also produced in evidence without protest of Bakhti Zaman. In contrast, apart from peaceful possession, Bakhti Zaman was unable to produce any reliable evidence that linked him to the disputed house; the claimed legacy and the gas, and electric meters of the disputed house under his uncle's name were not proved through any reliable evidence.

21. In view of the above, the preponderance of evidence surely tilted in favour of Taj Wali Shah, as he was able to discharge the onus to the extent that he had stepped into the shoes of the original owners. However, to what extent, it is noted that his status as a sole owner of the disputed house was not proved. It is noted that the sale deed, despite its admission in evidence without protest of Bakhti Zaman, was not executed by all the co-owners of the disputed house and, there was no valid power of attorney produced in evidence, vesting in Salah-ud-Din or Siraj-ud-Din the executants thereof, to transfer the same. Thus, the sale deed could not be considered a valid instrument, transferring to Taj Wali Shah, the proprietary rights of all the owners of the disputed house; the siblings and mother of Salah-ud-Din. However, the very fact that Salah-ud-Din appeared in the witness box (PW6), and testified to have sold the entire disputed house to Taj Wali Shah cannot be taken lightly. His testimony would legally suffice to transfer his share in the disputed house to Taj Wali Shah, thereby making Taj Wali Shah a co-sharer of the disputed house.

22. As far as the contention of the worthy counsel of the respondent regarding Bakhti Zaman's peaceful entry into the disputed house and his continuous possession thereof, it is noted that the same cannot be ignored. However, when the peaceful possession of Bakhti Zaman is placed in juxtaposition to rights of a co-owner, Taj Wali Shah, the latter would surely prevail. We have the well recognized legal maxims: *possessio contra omnes valet praeter eum cui ius sit possessionis* (he that hath possession hath right against all but him that hath the very right); *adversus extraneos vitiose possessio prodesse solet* (prior possession is a good title of ownership against all who cannot show a better), which has been very precisely described in Pollock and Wright on Possession, in terms that:

"possession in law is a substantive right or interest which exists and has legal instance and advantages apart from the true owner's title".

23. The above legal position has been well recognized not only in the Common Law, but also in the law as it has developed in the sub continent. In fact, the Privy Council more than a century ago in *Perry v. Clissold* ([1907] AC 73) maintained the said stance, which has since then been reaffirmed by our courts. The view then expressed by the Privy Council was in terms that:

"It cannot be disputed that a person in possession of land in the assumed character of owner and exercising peaceably by ordinary rights of ownership has a perfectly good title against all the world but the rightful owner."

24. The above principle has now crystallised and, it is legally settled that the person in possession of an immovable property acquires a vested right to possession, which cannot be taken away unless the challenge is made thereto by a person who shows prior or better title through transfer or inheritance. One has to be mindful that this right is subject to legislation, as is witnessed in Abadi Deh in the Province of Punjab under Punjab Conferment of Proprietary Rights on Non-Proprietors in Abadi Deh Act, 1995. We have been informed that no such legislation has been introduced in Khyber Pakhtunkhwa rendering protection to possessory rights in Abadi Deh. Accordingly, the rights of Taj Wali Shah, as a co-owner would prevail over that of Bakhti Zaman, as a possessor.

25. Now that we have settled that the rights of a co-owner of an undivided property in Abadi Deh would prevail over the rights of a mere possessor thereof, let us now address the next crucial issue: whether a co-owner could seek possession of the entire property against a possessor under section 8 of the Act of 1877. This issue has been dealt in *Bashir Ahmad and others v. Parshotam and others* (AIR 1929 Oudh 337) wherein it has been held as follow:

"I must again point out a well settled rule of law, which has been laid down in numerous cases both by their Lordships of the Privy Council as well as by this court and the other High Court in India. The rule is that if a property belongs to several co-sharers and one co-sharer is in possession of the entire property, his possession cannot be deemed to be adverse to other co-sharers. He must be deemed to be in possession on behalf of other co-sharers and adverse possession cannot be founded on the basis of such exclusive possession, unless there has been an ouster of the other co-sharers. The ouster takes place when the title of the other co-sharers is denied...

...It is a settled rule of law that one co-sharer can maintain a suit for ejectment in respect of the entire property against a trespasser. The mere act that a co-sharer brings such a suit can, therefore, be no evidence that he denied the title of the other co-sharer. It is a question arising out his exclusive possession, but cannot be no evidence of a denial of the title of the other co-sharers. The suit brought by one co-sharer would in the eyes of law be considered for the benefit of the other co-sharers and the latter would be entitled to take advantage of such proceedings."

26. A similar matter later came up before Andhra Pradesh High Court in the case reported as *Kanchi Kamamma and others v. Yerramsetti Appanna* (AIR 1973 Andhra Pradesh 201), wherein it has been held as under:

"The mere fact that the alienation is not valid to the extent of half share does not take away this right of the purchaser. He can very well maintain the suit for recovery of possession of the entire property as against every person other than the true owner."

27. The views rendered in the above cases appear to be the correct pronouncement of the law on rights of a co-owner to seek possession of the undivided property: the right of a co-owner to seek possession of the entire undivided property; the possession of the co-owner would be considered to be on behalf of all the co-owners; the said suit of the co-sharer cannot be considered as evidence of his denial of the title of the other co-sharers; the suit brought by said co-sharer would be deemed to be for the benefit of the other co-sharers; and that the co-sharer's possession in consequence of the proceedings under section 8 of the Act of 1877 cannot be deemed as adverse to the other co-sharers.

28. In conclusion, it would be appropriate to recapitulate the important issues discussed and decided herein above. The same are that:

- i. Section 8 of the Act of 1877 provides for any person who is 'entitled' to possession of immovable property to seek the same before the Civil Court of competent jurisdiction under section 9 of

- the Code of Civil Procedure, 1908, (C.P.C.), unless the jurisdiction thereof is impliedly or expressly barred by law.
- ii. By employing the word 'entitled' in section 8 of the Act of 1877, the legislature has expanded the scope for those who may seek possession of immovable property under the said section. This right is not only restricted to owners, but to all who are entitled to possession under the law.
 - iii. In a suit under section 8 of the Act of 1877, there is an inbuilt prayer for the declaration for entitlement to possession being sought by the plaintiff. In such circumstances, a prior declaration for the said entitlement under section 42 supra cannot be made a condition precedent for filing a suit for possession under section 8 of the Act of 1877.
 - iv. In a suit for possession, as owner of the disputed house, which was in the possession of defendant, the onus to prove the title of the disputed house rests upon the plaintiff under the mandate of Articles 117, 118, 119 and most importantly 126 of the Order of 1984.
 - v. When a co-owner of the disputed property seeks possession from another co-owner, who is in peaceful possession of the disputed undivided property, the remedy is to seek possession through partition, and not by a suit under section 8 of the Act of 1877.
 - vi. the person in possession of an immovable property acquires a vested right to possession, which cannot be taken away unless the challenge is made thereto by a person who shows prior or better title through transfer or inheritance.
 - vii. the transfer of proprietary rights in abadi deh are not recorded under section 42 of the West Pakistan Land Revenue Act, 1967, as the said area has been, under section 3 supra, expressly excluded from the applicability thereof.
 - viii. In an undivided immovable property one of the co-sharers can maintain a suit for ejectment of a possessor in respect of the entire property and in such a case the following may ensue:
 firstly, the said suit of the co-sharer cannot be considered as evidence of his-denial of the title of the other co-sharers;
 secondly, that the suit brought by said co-sharer would be deemed to be for the benefit of the other co-sharers; and
 thirdly, when the said co-sharer acquires possession in consequence of the said proceedings, he would be in possession of the entire property, on behalf of all co-sharers and his said possession cannot be deemed as adverse to the other co-sharers.

29. Accordingly, for the reasons stated above, the impugned judgment of the High Court dated 19.02.2015 is set aside, and the decree passed in favour of Taj Wali Shah passed by the Appellate Court is affirmed with the modification to the extent that the word "owner" be substituted with "entitled to possession as a co-owner of the disputed house".

30. The present appeal is allowed, in the above terms, with no orders as to costs.

MWA/T-4/SC Appeal allowed.