

Rajender Singh and Others

Vs

Santa Singh and Others

Civil appeal No. 1027 of 1967 with C.M.P. No. 2487 of 1967

(K.K. Mathew, M. H. Beg JJ)

16.08.1973

JUDGMENT

BEG, J. -

1. The plaintiffs-appellants, before us by grant of special leave, had filed a suit on April 20, 1959 for possession against the defendants-respondents, of 331 Kanals and 11 Marlas of land, the Khasra numbers of which are given in the plaint. The plaintiffs were the sons of Smt. Premi, a daughter of Sham Singh (deceased), the original owner of the plots, and of Smt. Malan, who, as the widow of Sham Singh, had gifted the plots in dispute in 1935, half and half, to the plaintiffs and Smt. Khemi, the younger sister of their deceased mother, Smt. Premi. It appears that Smt. Khemi, who was issueless, had also made a gift in favour of the plaintiff before her death in 1944. The plaintiffs are said to have obtained possession of the whole land in dispute thus gifted to them. But, as there was considerable uncertainty at that time about the rights of the daughters and the powers of a widow to donate during her life-time under the customary law in Punjab, which was applicable to the parties, the defendants-respondents, the 8th degree collaterals of Sham Singh, had filed a suit on July 3, 1940, for possession of the land in dispute. This suit had been stayed from 1941 to May 29, 1946, under the Indian Soldiers (Litigation) Act, 1925, to the benefits of which the plaintiffs were entitled. It appears that there was also a dispute over mutation of names between the plaintiffs and defendants-respondents in revenue Courts which ended finally by an order in favour of the appellants donees passed by the Financial Commissioner of Punjab on December 13, 1946. Defendants-respondents' suit of 1940, for declaration of rights and possession, renumbered in 1949, ended with the judgment and decree of a Division Bench of the Punjab High Court passed in favour of the appellants on November 21, 1958.

2. The plaintiffs asserted, in their suit No. 179 of 1959, filed on April 16, 1959, now before us in appeal, that the defendants-respondents had taken illegal and forcible possession of the land in dispute after the decision of the High Court on November 21, 1958, and that, as the defendants-respondents refused to deliver possession of the land to the plaintiffs, they were compelled to file their suit for possession. The defendants-respondents, however, claimed that they had taken possession over the whole of the land in dispute after the death of Smt. Khemi, issueless, in 1944 and that, since then, they had been in open, continuous, exclusive possession as owners, adversely to the rest of the world. Hence, according to the defendants-respondents, the plaintiff's suit was barred by limitation.

3. There cannot be the least doubt, after looking at the plaint, that the plaintiffs-appellants, having alleged possession and dispossession, for which they claimed relief by delivery back of possession of the land in dispute to them, the case fell squarely within the ambit of Article 142 of the

Limitation Act of 1908. The defendants-respondents had, however, pleaded the bar of limitation as well as acquisition of title by their adverse possession for over 12 years.

4. The trial Court had framed the first three issues which had a direct bearing on the question whether Article 142 or 144 of the Limitation Act of 1908 would be applicable. These issues were :

"1. Whether the plaintiffs obtained the possession of the land in dispute through the Tehsildar near about the date December 13, 1946 as alleged by them in para 3 of the plaint ? O.P.

2. Whether the defendants took possession of the land in dispute after November 21, 1958, as alleged in para 5 of the plaint ? O.P.

3. Whether the defendants have become owners of the land in dispute through adverse possession ? O.D".

5. The trial Court rightly placed the burden of proof of the first two issues on the plaintiffs and of the third issue upon the defendants. It took up and decided the three issues together holding that the plaintiffs' suit is barred by Article 142 of the Limitation Act. The first appellate Court also rejected the plaintiffs' case of acquisition of possession on December 13, 1946 and then of dispossession after November 21, 1958. It accepted the defendants' version. It observed that the "oral evidence coupled with the entries in the revenue records conclusively established that the possession over the suit land right from 1946 up to the present time was not that of the plaintiffs, but, that of the defendants", who had been asserting their own proprietary rights as collaterals of Sham Singh, the husband of Smt. Malan. Although, no issue was framed on the applicability of Section 52 of the Transfer of Property Act, 1882, to such a case, yet, the question appears to have been argued for the first time before the first appellate Court which, relying upon a decision of the Nagpur High Court in Sukhubai v. Eknath Bellappa (AIR 1948 Nag 97 : ILR 1947 Nag 719 : 1947 Nag LJ 447.), held that, despite the established possession of the defendants-respondents for over twelve years, the doctrine of lis pendens prevented the rights to the defendants-respondents from maturing by adverse possession. It held that the possession of the defendants-respondents became adverse when their appeal in their suit for possession was dismissed by the Punjab High Court on November 21, 1958. Thus, the first appellate Court had really used Section 52 of the Transfer of Property Act as though it was a provision for excluding the period of time spent in litigation in computing the prescribed period of limitation. The question whether the doctrine of lis pendens, contained in Section 52 of the Transfer of Property Act, would govern such a case was referred by a Division Bench to a Full Bench of the Punjab High Court.

6. A. N. Grover, J., giving the majority opinion of the Full Bench of three judges of the Punjab High Court held that, on the concurrent findings of fact recorded by the Courts below, the adverse possession of the defendants, who were appellants before the High Court, commenced during the pendency of the earlier suit, and, once having begun to run, could not stop running merely because of the pendency of the defendants' suit for possession which was finally dismissed by the High Court on November 21, 1958. On the other hand, I. D. Dua, J., expressing his minority opinion of the Full Bench of the High Court, held that the doctrine of lis pendens, contained in Section 52 of the Transfer of Property Act, would enable the plaintiffs appellants to overcome the consequences of defendants' adverse possession until November 21, 1958, so that the doctrine of lis pendens could operate as a provision enabling exclusion of time during the pendency of the defendants' suit of 1940.

7. One of the questions attempted to be raised here, involving investigation of fresh facts, was that a portion of the land, entered in the revenue records as "Banjar", cannot be adversely possessed at all because it is vacant so that it must be deemed to be in the possession of the plaintiffs on the principle that possession follows title. The plaintiff had not taken such a case even in their replication in answer to the written statement of the defendants. Apart from the fact that the question does not appear to have been missed in the Courts below, we think that the plaintiffs' admission of dispossession by the defendants, implying that the defendants-respondents were in actual adverse possession of all the land in dispute debars plaintiffs' learned Counsel from raising such a question now. Furthermore, the patent fallacy underlying such a contention is that Banjar land is incapable of adverse possession. It may be that Banjar land cannot be cultivated, but, we do not think that it could possibly be urged that it is per se incapable of being actually physically possessed by use for other purposes, such as building or storing of wood or crops, apart from cultivation. We will say no more about this unsustainable contention.

8. It was then urged that Article 142 was not applicable to this case and that no question as to its applicability should have been decided. We fail to see how such a contention could be advanced in view of the assertions in the plaint which clearly compelled the application of Article 142. As was held by a Full Bench of the Allahabad High Court., in *Bindhyachal Chand and Others v. Ram Gharib Chand and Others* (AIR 1934 All 993 and 999 : 1934 ALJ 973.), the question whether the suit is within time, when the plaintiffs make assertions attracting the application of Article 142, becomes a question of proof of title itself. Without proof of subsisting title the plaintiffs' suit must obviously fail. It was said there by Sulaiman, C.J. (at page 999) :

"In cases falling strictly under Article 142, in which the only question is one of discontinuance of possession of the plaintiff and not of adverse possession of the defendant, the question of limitation in one sense becomes the question of title, because by virtue of Section 28, Limitation Act, if the claim is barred by time, the title must be deemed to be extinguished."

9. It is true that the extinction of title took place in the case before us during the pendency of the suit. But, it has to be borne in mind that an extinction of title will not be hit by the doctrine of *lis pendens* simply because it is an extinction during the pendency of a suit. If so wide was the sweep of Section 52 of Transfer of Property Act this provision would have been differently worded. We are of opinion that a case in which the extinction of title takes place by an application of the specific and mandatory provisions of the Limitation Act falls outside the scope of Section 52 of the Transfer of Property Act. It would not be governed by provisions of an Act relating to "transfer", defined by Section 3 of the Transfer of Property Act, but by the Limitation Act, exclusively.

10. It is immaterial in the case before us, from the point of view of extinction of title by an application of Section 28 of the Limitation Act of 1908, whether Article 142 or Article 144 of the Limitation Act is applicable. The findings of the Courts below, accepted as correct and binding by A. N. Grover, J., in the majority judgment of the Punjab High Court, would make Article 144 also of the Act clearly applicable to the case. All the elements of an open, adverse, hostile, continuous, and exclusive possession of the defendants for over 12 years were present here.

11. It would be idle to contend in the case before us, in view of the pleadings of the parties and the issues framed and decided, that the applicability of Article 142 of the Limitation Act was either not put in issue by pleadings of the parties or an issue on its applicability was not framed. The first two issues framed have a direct bearing on the applicability of Article 142. It is not necessary that the

issue framed must mention the provision of law to be applied. Indeed, it is the duty of the Court, in view of Section 3 of the Limitation Act, to apply the bar of limitation where, on patent facts, it is applicable even though not specifically pleaded. Therefore, we find no force in the submissions based on the supposed inapplicability of Article 142 of the Limitation Act of 1908 or assumed defects in procedure adopted in applying it.

12. The only question of some importance which could be said to arise in this case is : Does the doctrine of lis pendens, contained in Section 52 of the Transfer of Property Act, arrest the running of the period of limitation during the pendency of the suit of the defendants-respondents filed on July 3, 1940, and, finally decided in second appeal by the High Court on November 21, 1958 ?

13. We may here set out Section 52 of the Transfer of Property Act which runs as follows :

"52. During the pendency in any Court having authority within the limits of India excluding the State of Jammu and Kashmir or established beyond such limits by the Central Government of any suit or proceeding which is not collusive and in which any right to immovable property is directly and specifically in question, the property cannot be transferred or otherwise dealt with by any party to the suit or proceeding so as to affect the rights of any other party thereto under any decree or order which may be made therein, except under the authority of the Court and on such terms as it may impose.

Explanation. - For the purpose of this section, the pendency of a suit or proceeding shall be deemed to commence from the date of the presentation of the plaint or the institution of the proceeding in a Court of competent jurisdiction, and to continue until the suit or proceeding has been disposed of by a final decree or order and complete satisfaction or discharge of such decree or order has been obtained, or has become unobtainable by reason of the expiration of any period of limitation prescribed for the execution thereof by any law for the time being in force."

14. The background of the provision set out above was indicated by one of us (Beg, J.) in *Jayaram Mudaliar v. Ayyaswami and Others* ((1972) 2 SCC 200, 217 : AIR 1973 SC 569.). There, the following definition of the lis pendens from *Corpus Juris Secundum* (Vol. LIV, p. 570) was cited :

"Lis pendens literally means a pending suit, and the doctrine of lis pendens has been defined as the jurisdiction, power, or control which a court acquires over property involved in a suit pending the continuance of the action, and until final judgment therein."

It was observed there :

"Expositions of the doctrine indicate that the need for it arises from the very nature of the jurisdiction of Courts and their control over the subject-matter of litigation so that parties litigating before it may not remove any part of the subject-matter outside the power of the Court to deal with it and thus make the proceedings infructuous."

15. The doctrine of lis pendens was intended to strike at attempts by parties to a litigation to circumvent the jurisdiction of a court, in which a dispute on rights or interests in immovable property is pending, by private dealings which may remove the subject-matter of litigations from the ambit of the Court's power to decide a pending dispute or frustrate its decree. Alienees acquiring

any immovable property during a litigation over it are held to be bound, by an application of the doctrine, by the decree passed in the suit even though they may not have been impleaded in it. The whole object of the doctrine of lis pendens is to subject parties to the litigation as well as others, who seek to acquire rights in immovable property, which are the subject-matter of a litigation, to the power and jurisdiction of the Court so as to prevent the object of a pending action from being defeated.

16. It is very difficult to view the act of taking illegal possession of immovable property or continuance of wrongful possession, even if the wrongdoer be a party to the pending suit, as a "dealing with" the property otherwise than by its transfer so as to be covered by Section 52 of the Transfer of Property Act. The prohibition which prevents the immovable property being "transferred or otherwise dealt with" by a party is apparently directed against some action which would have an immediate effect, similar to or comparable with that of transfer, but for the principle of lis pendens. Taking of illegal possession or its continuance neither resemble nor are comparable to a transfer. They are one sided wrongful acts and not bilateral transactions of a kind which ordinarily constitute "deals" or dealings with property (e.g. contracts to sell). They cannot confer immediate rights on the possessor. Continued illegal possession ripens into a legally enforceable right only after the prescribed period of time has elapsed. It matures into a right due to inaction and not due to the action of the injured party which can approach a court of appropriate jurisdiction for redress by a suit to regain possession. The relief against the wrong done must be sought within the time prescribed. This is the only mode of redress provided by law for such cases. Section 52 of the Transfer of Property Act was not meant to serve, indirectly, as a provision or a substitute for a provision of the Limitation Act to exclude time. Such a provision could and would have been there in the Limitation Act, where it would appropriately belong, if the policy behind the law was to have such a provision.

17. The policy underlying statutes of limitation spoken of as statutes of "repose", or of "peace" has been thus stated in Halsbury's Laws of England Vol. 24, p. 181 (para 330) :

"330. Policy of Limitation Acts. - The Courts have expressed at least three differing reasons supporting the existence of statutes of limitation, namely : (1) that long dormant claims have more of cruelty than justice in them, (2) that a defendant might have lost the evidence to disprove a stale claim, and (3) that persons with good causes of actions should pursue them with reasonable diligence."

18. The object of the law of limitation is to prevent disturbance or deprivation of what may have been acquired in equity and justice by long enjoyment or what may have been lost by a party's own inaction, negligence, or laches.

19. If Section 52 of the Transfer of Property Act was really intended to strike at the running of the period of limitation, based on the considerations mentioned above, it would have made it clear that the law excludes the period spent in any litigation from computation. Exclusion of time in computing periods of limitation is a different subject altogether to which the whole of Part III of the Limitation Act is devoted. There, we find Section 14, which deals with "exclusion of time of proceeding bona fide in Court without jurisdiction". There are certain conditions for the applicability of Section 14 of the Limitation Act. One of these is that the plaintiff should have prosecuted, with due diligence, civil proceedings "founded upon the same cause of action". In the case before us, the cause of action arose, according to the plaintiffs, after the decision of the previous suit. The cause of action in the previous suit was entirely different. Indeed, it was the

defendants-respondents who had sought relief, there and set up a cause of action. Section 14 of the Limitation Act of 1908 which is the only provision of the statute specifically dealing with exclusion of time spent in another litigation, could not obviously apply to the case now before us. The only mode of relief open to the plaintiffs was to have instituted a suit of their own within the prescribed period of limitation. They did institute the suit now before us but did so long after the period of limitation had expired. In such a case Section 52 of the Transfer of Property Act could not, in our opinion, apply at all. The matter could only be covered, if at all, by some provision of the statute of limitation which, as already observed, makes no provision for such a case. The effect of Section 3 Limitation Act is that it expressly precludes exclusion of time on a ground outside this Act even if it parades under the guise of a doctrine which has no application whatsoever here.

20. The majority judgment of the Punjab High Court cites several cases to support the view that limitation would start running against the plaintiffs-appellants when the defendants-respondents took possession. We need mention only two of these cases : Subbaiya Pandaram v. Mahammad Mustapha Marcayar (ILR 46 Mad 751 : AIR 1923 PC 175.), and Narayan Jivangouda Patil and Another v. Puttabai and Others (AIR 1945 PC 5 : 47 Bom (1944) 2 Mad LJ 358.). We are in complete agreement with the majority view.

21. It is not possible, in the absence of any provision which would entitle the plaintiffs to exclude time and thus bring their suit within 12 years period of limitation, to accept a contention which would enable the plaintiffs to escape the mandatory provisions of Section 3 of the Act read with Section 28 and Articles 142 and 144 of the Limitation Act of 1908. Courts of Justice cannot legislate or reconstruct law contained in a statute or introduce exceptions when statutory law debars them from doing so. Even hard circumstances of a case do not justify the adoption of such a course. Moreover, we fail to see how the plaintiffs could complain of hardship when their own negligence or failure to act in time enabled defendants to acquire rights by reason of the operation of a law of limitation with the wisdom or justice of which we are not concerned here.

22. A claim was sought to be advanced on behalf of the Custodian of Evacuee Property, who is also a defendant-respondent, based on the provisions of Section 8, sub-section (4) of the Administration of Evacuee Property Act 1950. This question was not gone into by the Punjab High Court. As we are affirming the Full Bench decision of the Punjab High Court, dismissing the plaintiffs' suit on the ground that it is barred by limitation, it is not necessary for us to give any decision on any dispute between co-defendants-respondents regarding the right to possess any property which may have vested in the Custodian, Evacuee Property. A decision on such a dispute is not necessary for deciding the case before us. There is, therefore, no question of res judicata between co-defendants on the points raised. And, we cannot allow the plaintiffs-appellants to raise any such question on behalf of the Custodian, Evacuee Property, as their learned Counsel seemed to be attempting to do, in a desperate attempt to clutch at a straw.

23. The result is that we affirm the judgment and decree of the Punjab High Court and dismiss this appeal. An application on behalf of the plaintiffs-appellants (C.M.P. No. 2487 of 1967), seeking permission to introduce additional questions in respect of Banjar land, is also dismissed for the reasons already given. In the circumstances of this case, we order that the parties will bear their own costs throughout.

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