

Kishanlal Biharilal Maheshwari and Others

Vs

Ramrao Hanumant Rao Patil and Another

Civil Appeal No. 1131 of 1970

(Syed M. Fazal Ali, A. Varadarajan, V.B. Eradi JJ)

18.03.1981

JUDGMENT

1. This appeal by special leave by the plaintiffs is directed against a judgment dated October 14, 1968 of the Bombay High Court by which the High Court set aside the decrees of the courts below and dismissed the plaintiffs' suit.
2. The plaintiffs had filed the present suit praying for a permanent and mandatory injunction direction the defendant to remove the encroachment in the nature of erection of fencing and thorny bushes in the land in possession of the plaintiffs and restraining them from interfering with the possession of the plaintiffs. A prayer for recovery of Rs. 500 as damages was also made by the plaintiffs.
3. The facts and circumstances of the case have been detailed in the judgments of the courts below and it is not necessary for us to repeat the same.
4. It appears that in the original plaint filed by the plaintiffs there was some inter dispute between the three plaintiffs who claimed to be rival heirs of Radhabai who was in possession of the property after the death of her husband. In view of the pleadings a large number of issues were framed by the trial Court in the present suit. As the plaintiffs realised that for the purpose of getting a simple mandatory injunction it was not necessary to raise a controversy about the title inter se between the plaintiffs, they sought an amendment to the plaint which may be extracted thus :

The plaintiffs further state that in order to restrict the controversy to the material issues between the parties in this case, plaintiffs 1 and 2 do not press their title to the Gadhi and further to the reliefs claimed in the suit on the foot of the respective adoptions set out above and they further agree that if the claim made in the suit is well-founded, a decree be passed in favour of plaintiff 3 only as the next reversioner of Radhabai. This withdrawal on the part of plaintiffs 1 and 2 is done without prejudice to their rights and only for the purposes of this suit with a view to avoid trail of unnecessary issues.
5. In view of this amendment a very large number of issues framed by the trial Court became unnecessary and the only question to be determined was whether there was an encroachment on the land of the plaintiffs as alleged in the plaint and, if so, a permanent and mandatory injunction could be granted against the defendant.
6. The suit was contested by the defendants on various grounds in which the title and possession of

the plaintiffs was also challenged. Both the trial Court and the appellate Court concurrently found that the defendants had neither title nor possession. The courts below also found as a fact that plaintiff I was in possession of the lands in dispute and the defendant had undoubtedly encroached on the land by putting up fencing and accordingly granted decree for injunction and damages. When the matter came up to the High Court in second appeal, the only point which survived for consideration was whether on the finding of fact arrived at by the courts below, a permanent and mandatory injunction against the defendants could be granted. The High Court did not and, in fact, could not have disturbed the findings of fact arrived at by the courts below against the defendant but dismissed the suit mainly on the ground that as the courts below had found plaintiff 1 alone in possession of the lands in dispute, no injunction could be granted in favour of plaintiff 1 in view of the amendment sought by the plaintiffs by which all the three plaintiffs agreed that plaintiff 3 may be taken to be in possession of the land in dispute.

7. In our opinion, the view taken by the High Court is extremely technical and against the very spirit of the pleadings of the plaintiffs. So far as the defendants were concerned, the question of the title of plaintiffs 1, 2 and 3 inter se was not at all relevant. In order to succeed in the suit, it was sufficient for the plaintiff to show that the land was in possession of the plaintiffs or any of them and as the defendants had erected fencing of thorny bushes in the portions on the eastern side, as indicated by letters E F M N O E in the map attached to the plaint, they had made an encroachment on the land. The question whether plaintiff 1 or plaintiff 3 was in possession of the land in dispute was not at all germane so far as the relief against the defendant was concerned, in view of the findings of fact arrived at by the courts below that the defendant was not in possession of the land and had no justification to make the encroachment complained of. It is true that the courts below found as a fact that plaintiff 1 was in possession of the land but in view of the amendment sought for the High Court could have treated the statement of the plaintiffs to mean that the land in dispute could be treated as being in possession of any of the plaintiffs - whether it was plaintiff 1, 2 or 3 - because in the present suit the inter se title of plaintiffs 1, 2 and 3 was not involved at all. In our opinion, therefore, broadly construing the amendment, there does not appear to be any defect in the frame of the suit so as to negative the relief of injunction prayed for by the plaintiffs.

8. Mr. Mehta submitted that in view of the finding of the courts below that plaintiff 1 alone was in possession of the land whereas plaintiff 3 arrived in the amendment that plaintiff 3 may be treated to be in possession, no injunction could be granted against the defendant. This is exactly the error into which the High Court appears to have fallen. It was not the case of the plaintiff that none of them was in possession of the land but for the purpose of driving out the defendant from the land in dispute and removing the encroachment, all the three plaintiffs joined hands to extricate the trespasser, defendant 2, who had made encroachment on the land and whichever of the plaintiffs was found to be in possession of the land, the defendant could not resist the suit for injunction once it was shown that any of the plaintiffs was in possession. Mr. Lalit, appearing for the appellant, frankly submitted that his statement may be taken to include that plaintiff 1 be treated as in possession of the land if it was on for these technicalities that the suit had to be dismissed.

9. We feel that it may not be necessary to go to that extent because the amendment, if liberally construed, as indicated above includes the possession by plaintiff 1 and therefore there was no error of law in the finding of the courts below so as to invoke the second appellate jurisdiction of the High Court. We might mention here that the trial Court had given a categorical finding that defendant 2 had no title to the land in question not was he in possession of it and that plaintiff 1 was in possession of the property at the date of the suit. In this connection, the trial Court observed as follows :

Thus on the whole it is difficult to hold that defendant 2 was in possession and that too as owner or adverse to the plaintiffs and Radhabai. Hence for this, and for reasons already noted, it is more probable that plaintiff 1 was in possession of the property at the date of the suit.

10. This finding of fact was affirmed by the appellate Court where the court observed as follows :

I stated above that the plaintiffs made it clear in the plaint that the title of plaintiffs 1 and 2 is not being pressed in this suit and they agree that plaintiff 3 alone is entitled to a decree as being Radhabai's next reversioner. The learned Advocate for the plaintiffs urged and in my opinion rightly that although after Radhabai's death plaintiff 1 was in possession, still it was on behalf of plaintiff 3 as his agent, because plaintiffs 1 and 2 do not dispute that it is plaintiff 3 who alone is entitled to possession.

11. The appellate Court, in our opinion, rightly affirmed the view taken by the trial Court by holding that even though plaintiff 1 was found to be in possession of the land in question, in view of the amendment sought by the three plaintiffs he would be deemed to be an agent of plaintiff 3 for the purposes of the present suit and his possession would be on behalf of other plaintiffs.

12. For these reasons, therefore, we are unable to uphold the judgment of the High Court. The appeal is accordingly allowed and the judgment of the High Court is set aside. The plaintiffs' suit is decreed and the judgment of the trial Court is hereby restored. In the peculiar circumstances of the case, parties are left to bear their own costs throughout.

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