M. S. Jagadambal

Vs

Southern Indian Education Trust and Others

Civil Appeal No. 235 of 1974

(B. C. Ray, K. Jagannatha shetty JJ)

02.11.1987

JUDGMENT

JAGANNATHA SHETTY, J. –

1. This appeal by special leave has been preferred against the judgment dated August 2, 1971 passed by the High Court of Madras in O.S.A. 37 of 1963.

2. The facts briefly stated are : Under Ex. P-2 dated May 24, 1929 Nagappa Naicker purchased from Manicka Naickar and his sons nanja lands in old Survey Nos. 187 and 188 (R.S. No. 3859) an extent of about 3/8 cawnie, roughly about 9 grounds for Rs. 275. It was recited in the document that the property was not fetching any income, that irrigation from the tank had failed and that as the property was a pit which required Rs. 2000 to fill, it was sold for meeting certain family expenses. The boundary of the property was given as north of Government Maclean's Garden, west of the fields of Thanappa Naicker and Srinivasa Naicker, south of the field of Srinivasa Naicker, and last of the road, Ramanatha Mudaliar's vacant land and Masilamani Gramani's house. It may be noted that the re-survey number was given as 3859.

3. On May 14, 1941 Nagappa died. Jagdambal appellant is the widow of Nagappa. She instituted the suit C.S. No. 52/1960 which was tried on the original side of the Madras High Court. The suit was for recovery of the land purchased under Ex. P-2 by her husband and for mesne profits with other concerned reliefs. She alleged that the property was in possession and enjoyment of Nagappa during his lifetime and subsequently in her possession and enjoyment. It was her case the neighbouring land owner South India Education Trust ('SIET') trespassed and encroached upon the suit property taking advantage of her helpless condition as a widow. The SIET is defendant 5 in the suit.

4. We may now trace the title of the adjoining plot of land owned by the SIET. One Kuppuswami Naicker was the owner in possession of land measuring 35 grounds 1989 sq. ft. This entire land was sold to Rani of Vuyyur for Rs. 10,000 under Ex. P-6 dated July 30, 1940. In the schedule, the property sold was described as R.S. No. 3859/1, 3859/2 and part of 3859/3. The property was also described as bounded on the west partly by Nagappa Naicker's land and partly by Mount Road and Duraiswami Gramani's house. According to the sale deed the property sold was only 35 grounds 1989 sq. ft. and it was marked yellow in the plan attached thereto. Under Ex. P-7 dated December 24, 1953 Rani of Vuyyur sold the property she purchased under Ex. P-6 to SIET. The property was described as bearing R.S. No. 3859/1, 3859/2 and 3859/3 part and 3872 in Teynampet measuring about 38 grounds. In the schedule to Ex. P-7 the property was described as laying east of Nagappa Naicker's land and Mount Road. It will be seen that though the Rani Vuyyur purchased 35 grounds 1989 sq. ft. the extent mentioned in Ex. P-7 was about 38 grounds. On February 11, 1954 the SIET

exchanged its land under Ex. P-8 with the property belonging to the defendants 1 to 4 in the suit. Ex. P-8 recited that the SIET was conveying an extent of 43 grounds 1324 sq. ft. comprised in R.S. Nos. 3859/1, 3859/2 and 3859/3 and 3872 Mount Road Madras. Here again the land has been described as bounded on the west by Nagappa Naicker's land and Mount Road. The curious thing to be noted is about the extent of land exchanged. 38 grounds purchased by the SIET under Ex. P-7 has become 43 grounds 1324 sq. ft. in the Exchange Deed Ex. P-8.

5. The suit was resisted by all the respondents. They contended that the plaintiff has no title to the suit property and the suit was barred by time. They denied the trespass or encroachment alleged by the plaintiff. They set up title in themselves. They particularly contended that the plaintiff was not in possession at any time within 12 years next before the suit.

6. The plaintiff examined in all seven witnesses as against six witnesses by the defendants.

7. The learned Single Judge after considering the material on record held that Nagappa during lifetime and the plaintiff after Nagappa's death had been in possession and enjoyment of the suit property. The title was also held in her favour. On the question of trespass by the defendants, learned judge with reference to documents and pleadings observed that the defendants trespassed the suit property after the measurement and demarcation of the land by the Tehsildar in January 1954. That means, learned Judge held that the respondent was in possession within 12 years prior to the date of filing the suit. Accordingly the suit was decreed with a direction to the defendants to vacate the suit land marked as R.S. No. 3859/4 and deliver vacant possession to the plaintiff.

8. Being aggrieved by the judgment of learned judge, the SIET preferred an appeal before the Division Bench of the High Court. The Division Bench affirmed the finding as to the plaintiff's title to the property. It was held that the plaintiff has satisfactorily established the title to the suit property. On the question of possession, however, it was observed that the evidence adduced by the plaintiff was vague and unacceptable. The plaintiff has not proved her possession of the suit property at any time within 12 years prior to the suit. At the same time, it was also observed that the defendants have not perfected title by adverse possession. So stating the Division Bench allowed the appeal and dismissed the suit.

9. Hence this appeal by the plaintiff.

10. Mr. Padmanabhan learned counsel for the appellant urged two contentions before us. The first contention related to the jurisdiction of the appellate court to reverse the finding of the fact properly recorded by the trial judge. The second contention rested on the undisputed nature of the suit property and the legal presumption of possession in favour of the title holder.

11. Mr. Abdul Khader and S. Balakrishnan, learned counsels for respondents, urged in support of the judgment of the Division Bench. In the alternate they contended that it is a fit case for remand to consider the question of adverse possession raised by the SIET in the pleading.

12. We are not persuaded by the alternate contention urged by learned counsel for the respondents. The trial court did not frame an issue as to the defendants perfecting title to the suit property by adverse possession. The defendants did not produce any evidence in support of the plea of adverse possession. It is not the case of the defendants that they were misled in their approach to the case. It is also not their case that they were denied opportunity to put forward their evidence. It is, therefore, not proper for us at this stage to remand the case to enable the defendants to make good their lapse.

13. We find considerable justification for the criticism of Mr. Padmanabhan about the manner in which the Division Bench considered the oral evidence in the case. So far as the appreciation of oral testimony by the appellate court is concerned there are two view points. One view is that the court of appeal has undoubted duty to review the recorded evidence and to draw its own inference and conclusion. The other view is that the court of appeal must attach due weight to the opinion of the trial judge who had the advantage of seeing the witnesses and noticing their look and manner. The rule of practice which has almost the force of law is that the appellate court does not reverse a finding of fact rested on proper appreciation of the oral evidence. That was the view taken in Sarju Pershad v. Raja Jwaleshwari Pratap Narain Singh (1950 SCR 781, 783-84 : AIR 1951 SC 120) where this Court observed :

> The question for our consideration is undoubtedly one of fact, the decision of which depends upon the appreciation of the oral evidence adduced in the case. In such cases, the appellate court has got to bear in mind that it has not the advantage which the trial judge had in having the witnesses before him and of observing the manner in which they deposed in court. This certainly does not mean that when an appeal lies on facts, the appellate court is not competent to reverse a finding of fact arrived at by the trial judge. The rule is - and it is nothing more than a rule of practice - that when there is conflict of oral evidence of the parties on any matter in issue and the decision hinges upon the credibility of the witnesses, then unless there is some special feature about the evidence of a particular witness which has escaped the trial judge's notice or there is a sufficient balance of improbability to displace his opinion as to where the credibility lies, the appellate court should not interfere with the finding of the trial judge on a question of fact.

14. In that instant case, it may be noted that the trial judge on a consideration of every material on record reached the conclusion that the plaintiff was in possession of the property and it was only in 1954 she was dispossessed. This conclusion was also based on the credibility of the witnesses examined by the parties. The Division Bench reversed that finding without due regard to the probability of the case and the considerations which weighed with the trial judge. The Division Bench appears to have missed the important features which have not been properly explained by the defendants.

15. First, about the western boundary of the property purchased by the defendants. In all the sale deeds forming links in the defendant's title Ex. P-6 of 1940, Ex. P-7 of 1953 and Ex. P-8 of 1954, the western boundary has been shown as the property belonging to Nagappa. What was that property belonging to Nagappa which formed the western boundary ? It was certainly not the land bearing R.S. No. 3862 and 3863 although counsel for the respondents made an attempt before us to show that the said land formed the western boundary. But there is nothing on record to lend credence to this belated submission. It was never the case of the parties that the plaintiff had no other property apart from R.S. Nos. 3862 and 3863.

16. Second, the SIET purchased under Ex. P-7 the land measuring 38 grounds. Within a couple of months thereafter the SIET conveyed under the deed of exchange Ex. P-8, 43 grounds 1324 sq. ft. If one prefers to go yet further back, the Rani of Vuyyur purchased only 35 grounds 1989 sq. ft. It was the same property which was the subject matter of sale under Ex. P-7 and later the subject matter of exchange under Ex. P-8. One fails to understand how that waxing could be possible without an attempt to grab the adjacent property.

17. Thirdly, the plaintiff has come forward with specific case that her land was encroached by the defendants in the early part of January-February 1954. That has been denied in the written statement filed by the Secretary of the SIET. The Secretary was examined as DW 3. He was a star witness in support of defendant's case. The sale deed Ex. P-7 was in his name. The exchange deed Ex. P-8 was executed by him along with treasurer of the SILT. DW 3 in the evidence has given a go-by to his pleading. He stated that he did not examine the title deeds of his property. He did not know anything about the contents of the title deeds except in a general way. He did not take any responsibility for any portion of the sale deed in favour of the SIET. He said that the exchange deed was given to him by the Chairman of the SIET and he did not actually draft it. He also stated that he could not explain how the property which was 38 grounds at the time of purchase under Ex. P-7 came to be described as 43 grounds in Ex. P-8, although he later said that Ex. P-8 was written after measurement and demarcation of the property. We do not know whether he feigned his ignorance, or, whether he was trying to be ingenious. We could only conclude that he was fair enough and ingenuous. He stated before the court that he did not investigate the title and could not take personal responsibility for the statement he made in the written statement to the effect that the plaintiff was not in possession of the property. This was the final blow to the defendant's case which the Division Bench has failed to appreciate.

18. The force of the second contention, urged for the appellant cannot also be gainsaid. We have already stated that the suit property was admitted located in a low-lying area with a deep pit where water stagnated making it incapable of use and enjoyment. The sale deed Ex. P-2 by which the property was purchased by Nagappa described the property as a pit. It has come from the evidence that the land was 8 feet below the road level. It was also called "pallam". There would be water in the "pallam" during the rainy season making it a pond (see the evidence of PW 1). It was admitted before the trial judge that the suit property was low-lying where water did stagnate. The learned judge, however, found it unnecessary to draw legal presumption of possession because on other material he found the de facto possession with the plaintiff till 1954. The law with regard to possession of such land is clear. The possession continuous with the title holder unless and until the defendant acquires title by adverse possession. There would be no continuance of adverse possession when the land remains submerged and when it is put out of use and enjoyment. In such a case the party having title could claim constructive possession provided the title had not been extinguished by adverse possession before the last submergence. There is no difference in principle between seasonal submersion and one which continues for a length of time. This view has been applied by the Privy Council in Basanta Kumar Roy v. Secretary of State for India (1917 ILR 44 Cal 858, 871-2) where Lord Summer observed :

> The Limitation Act of 1877 does not define the term "dispossession", but its meaning is well settled. A man may cease to use his land because he cannot use it, since it is under water. He does not thereby discontinue his possession; constructively it continues, until he is dispossessed; and, upon the cessation of the dispossession before the lapse of the statutory period, constructively it revives. "There can be no discontinuance by absence of use and enjoyment, when the land is not capable of use and enjoyment" (per Cotton, L.J. in Leigh v. Jack (1879 LR 5 Exch D 264, 274)). It seems to follow that there can be no continuance of adverse possession, when the land is not capable of use and enjoyment, so long as such adverse possession must rest on de facto use and occupation. When sufficient time has elapsed to extinguish the old title and start a new one, the new owner's possession of course continues until there is fresh dispossession, and revives as it ceases.

In the case of Secretary of State for India v. Krishnamoni Gupta (1902 ILR 29 Cal 518 : LR 29 IA 104), their Lordships' Board applied this view to a case, where a river shifting its course first in one direction and then in the opposite direction, first exposed certain submerged lands, of which the Government took possession, and then after a few years flooded them again. No rational distinction can be drawn between that case and the present one, where the re-flooding was seasonal and occurred for several months in each year. It was held that when the land was re-submerged the possession of the Government determined, and that, while it remained submerged, no possession could be deemed to continue so as to available towards the ultimate acquisition of title against the true owner.

19. These principles, in our opinion, are equally applicable to the present case. The plaintiff has proved title to the property. The defendants have not acquired title by adverse possession. The property as described in the sale deed Ex. P-2 was a vacant land fetching no income. It was called "pallam" or pond that was seasonally submerged. The entire land might not be seasonally submerged, but it makes little difference in the position of law. "As a general rule possession of part is in law possession of the whole, if the whole is otherwise vacant" (Sarkar on Evidence, Vol. 2, 13th edn., p. 110).

20. In view of the foregoing discussion, we allow the appeal with cost, set aside the judgment of the Division Bench and restore that of the learned Single Judge.

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