

Devish Vs. M.K. Subbiah and ors.

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Court : Karnataka

Decided On : Jul-30-1969

Reported in : AIR1970Kant249; AIR1970Mys249

Judge : A.R. Somnath Iyer, J.

Acts : Limitation Act, 1908 - Articles 132 and 142

Appeal No. : Second Appeal No. 580 of 1964

Appellant : Devish

Respondent : M.K. Subbiah and ors.

Advocate for Def. : S. Nanjundaswamy, Adv.

Advocate for Pet/Ap. : G.R. Doreswany, Adv.

Judgement :

A.R. Somnath Iyer, J.

1. The source of this second appeal is a suit brought by a certain Subbiah for a declaration that he is the owner of a lane and open space to the west of this house and for an injunction restraining the defendant from disturbing his possession. Subbiah died during the pendency of the appeal in the lower appellate Court and his wife and children were brought on the record as his legal representatives.

2. The defendant resisted the suit on the ground that the open space and the lane belonged to him and not to Subbiah. But both the Courts found that the plaintiff's case was true, but that the defendant had a right of way over the lane for the limited purpose of repairing his eastern wall. So they gave the plaintiff the decree which he wanted subject to the declaration as to the defendant's right of way.

3. So this appeal by the defendant in which the restricted challenge is to the decrees of the Courts below in so far as they relate to the open space EFGH.

4. Mr. Doreswamy appearing for the defendant maintained with great exertion that the decrees of the Courts below are vitiated by obvious errors both in the appreciation of evidence and with respect to the plea of limitation urged by the defendant. He asked me to say that the finding of the Courts below that the plaintiff was the owner of the lane and the open space is contrary to law, and that likewise their finding that the plaintiff had proved his possession within the twelve years before the date of the institution of the suit is also unsupportable.

5. The plaintiff's house bears municipal door No. 1093/3 & 4 whereas the defendant's house bears No. 1902/2. The plaintiff's house is on the eastern side and the defendant's house is to its west. It is between these two constructions that the suit lane and the open space exist. To the north of the lane there is a road, and the open space marked EGFH in the plaintiff's sketch produced by the plaintiff is at the southern end of the land. And although the plaintiff gave the dimensions with respect to it, the concurrent finding of the Courts below is that that open space measures 9 feet east to west by 10 1/2 feet north to south. Similarly the finding recorded by the Courts below is that about a year after the plaintiff purchased this property from his predecessors in title in the year 1937, the lavatory which was on the open space EFGH came down and that since then it has been an open space over which no acts of effective possession could be exercised or were exercised either by the plaintiff or by the defendant. They came to the conclusion ' on the basis of the documentary evidence available in the case that that open space was part of the property of the plaintiff, and that there was a presumption that possession follows title. At any rate, that is, what the Munsiff said about it, although both the Munsiff and the Civil Judge at the same time pointed out that the

plaintiff had proved that he was in actual physical possession of the open space in the year 1962 as admitted by the defendant. Since the suit was brought on August 10, 1959 the Courts below repelled the plea of limitation holding that possession such as was necessary for the plaintiff to prove under Article 142 of the Limitation Act had thus been proved.

6. The view taken by the Courts below in that way was subjected to severe criticism by Mr. Doreswamy who maintained that the documents of title which constituted the foundation for the finding of the Courts below that the plaintiff's ownership was proved, has been misread or misunderstood.

7. I do not think that the findings of the Courts below merit any such criticism for reasons I shall presently state.

8. The documents on which both the Courts relied are Exhibits P-31, P-30, F-29, P-28, P-27, P-25 and P-10 in support of their conclusion that the lane and the open space belong to the plaintiff. Exhibit P-31 is a sale deed executed in the year 1887 by a certain Lingiah who was the owner of the property which now belongs to the plaintiff ' in Favour of a certain Venkatappa, and the description of the property sold to Venkatappa shows that while there was a well in that property on the eastern side there was to the west of the house, open space which is described as hittable measuring 3 yards east to west and 3 1/2 yards north to south.

9. I do not accept the argument advanced by Mr. Doreswamy that this open space measuring 3 yards by 3 1/2 yards was included in the area of the building which was sold and measured 15 1/2 yards east to west and 11 1/2 yards north to south. The description of the property sold makes it clear that the property sold consisted of two parts; one was the building and the other was the open space. While the building measured 15 1/2 yards by 11 1/2 yards the open space measured 3 yards by 3 1/2 yards and that open space was to the west of the building sold. I do not accept the argument of Mr. Doreswamy that the courts below were in error in thinking that the open space measuring 3 yards by 3 1/2 yards was outside the building and to its west, and that the proper way of understanding the description was to say that the open space was part of the area measuring 15 1/2 yards by 11 1/2 yards.

10. What is of importance in the description of the property sold under Exhibit P-31 is that the open space sold to Venkatappa was to the west of the house, and that it measured 9 feet by 10 1/2 feet, whereas the suit open space EFGH is also of identical dimensions and to the west of the building. So, a strong inference was properly drawn by the courts below that whoever owned the property sold under Exhibit P-31 was also the owner of the suit open space.

11. The next document is a mortgage deed exhibit P-30 which was executed by Venkatappa who purchased the property under Exhibit P-31 in favour of a certain Peddalkshamma. The description of the property mortgaged under this document is completely destructive of the argument advanced by Mr. Doreswamy that the open space to which Exhibit P-31 referred is to the east of the house purchased by Venkatappa under Exhibit P-31 and not to the west.

12. This argument does not fit into the description of the property contained in Exhibit P-31 which says that the open space is to the west. Exhibit P-30 also says that there was a well in the front portion of the house, while there was an open space in the rear portion. The well, it is admitted, is to the east, and so, it is clear that the open space was to the west.

13. Venkatappa who purchased the property under Exhibit P-31 had a brother Chinniah, and it appears that the property purchased under Exhibit P-31 was owned by both these brothers, and, on May 24, 1928 there was a release deed executed between Chinniah and Ramiah, his brother's son, under which Ramiah released all his rights in the property which forms the subject matter of the present suit in favour of his uncle Chinniah. Probably Ramiah's father Venkatappa was by then dead, That release deed which describes the property which was in the occupation of the two brothers says that, to the west of the house to which the release deed related, there was a backyard and a lane. The lane, it is undisputed, is the lane which is the subject matter of the present suit, and so, it was reasonable for the courts below to say that the backyard to which the release Exhibit P-29 referred was in continuation of the lane towards the south, since it could not be towards the north where there was a road.

14. The next two documents to which the Courts below referred are Exhibits P-25 and P-2S which are gift deeds executed by Chinniah in favour of his two daughters to each of whom he gave half of the property which came to him under the release deed Exhibit P-29. In both these documents there is a recital that to the west of the property so gifted to the daughters, there was a lane and a lavatory.

15. The last document which was referred to in this context was the sale deed Exhibit P-10 executed in favour of the plaintiff by the two daughters on May 27, 1937. There is again in that document a recital that, to the west of the house which was sold under it, there was a lane and a lavatory which were also included in the sale, deed and, the courts below attached great significance to the fact that this sale deed was attested by the defendant's father.

16. The defendant, very strangely did not produce his documents of title. He did not even produce the sale deed under which he purchased the house in which he was living and which is to the west of the suit lane. So the plaintiff produced a certified copy of that sale deed which was executed in the year 1930 in favour of the defendant's father in order to demonstrate that the dimensions of the open space which according to the defendant was purchased by his father under that sale deed are at variance with the dimensions of the suit open space EFGH.

17. The Munsiff pointed out that the open space purchased by the defendant's father under that document is 2 yards east to west and 7 1/2 yards north to south, and that that could not be the open space which is the subject matter of the present suit. The Munsiff pointed out that Exhibit D-1 which was the mortgage deed executed by the defendant in favour of one Papayya D. W. 2 contains nothing which can be of any use to the defendant, and, I find that it is so.

18. The criticism made by Mr. Doreswamy was that the Civil Judge was in error in thinking that Exhibit P-61 was not the copy of the original sale deed executed in favour of the defendant's father, and he is right in pointing out that the Civil Judge committed a mistake in thinking so. The plaintiff very clearly stated in his evidence that Exhibit P-61 was the copy of the sale-deed, which the defendant did not produce and, it is easy to see that the purpose, of the production of that copy by the plaintiff was to demonstrate the variation with respect to the dimensions of the

suit open space as compared with those of the open space purchased by the defendant's father. But, whatever may be the mistake committed by the Civil Judge, the Munsiff committed none With respect to Exhibit P-61. And what is of greater -importance is that both the Munsiff and the Civil Judge had no doubt in their minds that, as disclosed by the documents of title produced by the plaintiff in support of his title, the suit land and the open space EFGH belong to the plaintiff, and not to the defendant.

19. Any other view would be to overlook the importance of the reference to the suit land and the open space in one form or the other in all the six documents Exhibits P-10 and P-27 to P-31. The description of the property contained in the six documents is incapable of any other interpretation or conclusion than that the suit lane and the open space belonged to the plaintiff's predecessors-in-title and became the property of the plaintiff by the devolutions to which I have referred.

20. The conclusions reached by the courts below, in my opinion, do not invite the criticism to which they are subjected. The view that I take makes unavailable to Mr. Doreswamy the argument that he advanced at one stage that, although the oral evidence given by the plaintiffs witnesses 6, 7, 8 and 11 was believed by the Munsiff with respect, to effective acts of possession, that evidence was not acted upon by the Civil Judge.

21. All these four witnesses gave evidence that that open space was in the possession of the plaintiff during the long period preceding the institution of the suit, and that the defendant was not in possession of it. The Munsiff did not believe the evidence of D. W. 1 that, with the permission of the defendant, he was tethering his horse at some point of time on that open space. The Civil Judge said that, on the evidence of the plaintiff's witnesses it was not possible to say that the plaintiff was in actual possession of the suit property, and, it is difficult to understand what he means when he said so. These witnesses gave evidence that the plaintiff was in possession, and that the defendant was not. It was surely possible for the Civil Judge to say whether he believed that evidence or he would not believe it, and if he believed if it would have been possible for him to say that the possession of the plaintiff was proved, and if he did not believe it, it was equally possible for him to

say that such possession was not proved. Instead the Civil Judge, without discussing what those witnesses stated and without setting out the reasons why he came to the conclusion that he did not find it possible to uphold plaintiff's possession on the basis of their evidence, recorded a finding that it was not possible to say that the plaintiff was in actual possession.

22. But it is clear that this infirmity in the discussion by the Civil Judge has no impact upon the conclusions he reached. I say so for two reasons. The first is that the finding of the Munsiff in which the Civil Judge in effect concurred, was that there was a latrine on the open space EFGH until the year 1938, and that it fell down during that year, and that after it fell down in that year it was not again reconstructed. The Munsiff's finding was that, after the year 1938, it was not possible for the plaintiff to exercise any effective act of possession on that property which had become an open space, and his clear finding was that the defendant was also not in possession of that open space and could not have exercised any acts of possession 'with respect to it. So he depended upon the presumption that possession-follows title and reached the conclusion that during all the period of twelve years immediately preceding the suit the person who must be presumed to be in possession was the plaintiff, and that that is how the plaintiff proved his possession during that period. That view was shared by the Civil Judge.

23. But Mr. Doreswamy contended that the presumption to which there was an appeal by the two courts below was not available since the plaintiff in his pleading and in his evidence attempted to prove that he was in actual physical possession during the entire period preceding the institution of the suit, and that, if the courts below did not believe that evidence, the presumption on which they depended could not be invoked.

24. In support of this postulate Mr. Doreswamy asked attention to the decision of the High Court of Madras in *Sevugan v. Kannappa*, AIR : 1931 Mad 282 in which it was explained that, in the case of a waste land, if the plaintiff proves his title to it he can prove possession on the basis of the presumption that possession follows title, but that that presumption becomes unavailable if he puts forward a case of effective possession which he could not prove. This enunciation depended upon a

decision of the High Court of Calcutta in *Rekhal Chandra Ghose v. Purgadas*, AIR 1922 Cal 557. The ratio of this decision was that the special case set up by the plaintiff that he was in effective possession did not fit into the presumption on the basis of title.

25. It does not appear to me, if I may say so with great respect, that this enunciation can be accepted as correct. If the plaintiff who proves his title to the property asserts that he is in possession of the property and makes an allegation that he was in effective possession exercising acts of ownership and possession with respect to the property and there is a plea of limitation advanced by the defendant who resists the suit on the ground that the plaintiff was not in possession of the suit property within twelve years before the date of the institution of the suit, the burden is on the plaintiff to prove that he was in possession during that period else his suit is liable to be dismissed.

But such possession which the plaintiff has to prove could be established both by the production of evidence that he was in effective possession and also by the production of proof that he is the owner of the property, which in its turn generates the presumption that, in the absence of evidence to the contrary, possession follows title. In such a case where no one else has proved possession and the property is such that it is incapable of physical possession such as a waste land or a jungle, one of the methods by which possession could be proved during the period of twelve years preceding the institution of the suit, is to prove title and to prove that the property is such that physical possession is not possible. In such a case the presumption on the basis of title is not excluded merely for the reason that the plaintiff also attempted to prove effective possession.

26. The decision in *Sevugan's case*, AIR 1931 Mad 282 was by a single judge of the High Court of Madras and a bench of that court in *Ramanathan v. Lakshmanan*. ILR 54 Mad 622 = (AIR 1931 Mad 644) expressed a view to the contrary. The view taken in that case was that, when each party who claims possession is unable to prove any act of effective possession and therefore the normal method of proof is not referable to any such act, the plaintiff must follow title, since the defendant is no more able than the plaintiff to claim effective

possession for twelve years before suit²⁷, Satyanarayana Rao, J. made an elucidation in *K. Ayissa v. V. Kumhaikalanthan*, AIR 1948 Mad 420 that the Full Bench decision of the High Court of Madras which merely explained that in a case where the plaintiff asserts his title and alleges dispossession, the burden of proving that he was in possession within twelve years before the institution of the suit, and that the suit was governed by Article 132 of the limitation Act did not weaken the pronouncement in *Ramanathan's case*, ILR 54 Mad 622 . = (AIR 1931 Mad 644). In that context he said this:--

'In the decision in ILR 54 Mad 622 at p. 624 = (AIR 1931 Mad 644 at p. 646) it is stated:

But the possession to be proved is such possession, as the property is capable of or such as has been the normal method of user. When each party who claims possession is unable to prove any acts of effective possession and therefore the normal method of possession is not referable to any such act, possession must follow title, since the defendants are no more able than the plaintiff to claim effective possession for 12 years before suit. Possession in such circumstances is with the party holding title.

This view of the law is based on the decision of the Privy Council in (1873) 20 WR 25, *Ram jeet Ram Pandey v. Govardhun Ram Pandey*. If the law were otherwise and the owner of land which is either vacant or is of no immediate use to him refrains from exercising acts of ownership he would lose the property even though the dispossession was within 12 years from the date, of the institution of the suit.'

28. If I may say so with great respect, this is an accurate statement of the law. Any other view would lead to the consequence (that, if the land is a waste land and it belongs to the plaintiff who asserts effective possession which he is unable to prove, and it is also proved that the defendant is not the owner and that he was also not in possession before the period of twelve years to which Article 142 refers, the plaintiff would not be able to get a decree for possession and the defendant would not be entitled to the property. A view that produces such anomalous consequences, cannot be sound.

29. Moreover what I have said so far covers the first ground on which the plea of limitation was repelled by the courts below. The second reason why they reached the conclusion that the defendant should fail was that the defendant made an admission in the year 1952 in the notice Exhibit P-] which he caused to be issued to the plaintiff that the plaintiff was in actual physical possession of the open space when the notice was issued. The complaint made in that notice is that the plaintiff encroached upon the open space, included it within the area of his property, and that he was attempting to build a wall so as to segregate it from the defendant's building.

30. The clear meaning of this complaint is that the plaintiff had entered upon the property and had taken possession of it. If he did so, it becomes irrefutable that in the year 1952, seven years before the suit was instituted, the plaintiff was in possession of the property although he was subsequently dispossessed by the defendant, and so, he is constrained to seek a decree for possession. It is impossible to understand Exhibit P-I in any other sense, and Mr. Doreswamy found himself in great difficulty when he asked me to say that Exhibit P-I does not contain any admission that when that notice was issued the plaintiff was in possession.

31. So the argument advanced by Mr. Doreswamy that the Civil Judge over-looked the evidence of D. W. 2 who is a mortgagee of the defendant that he took delivery of possession of the open space in the year 1955 cannot be of any assistance to him. That act of D. W. 2 even if true, only proves that the plaintiff who was in possession in the year 1952 was dispossessed in the year 1955, but that dispossession was within twelve years before the institution of the suit.

32. So, I dismiss this appeal.

33. But in the circumstances I make a direction that each party will bear his own costs in all the three courts.

34. Mr. Doreswamy asks for time for the demolition directed by the decrees of the courts , below. I grant the defendant one month's time.

35. There is a cross-objection by the plaintiff with respect to that part of the decrees of the courts below by which the damages claimed by him were disallowed. There is no substance in this cross-objection.

So I dismiss it. No costs.

36. Appeal dismissed.

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