

Niramathi Naicker and anr. Vs. Kambalam Naicker Residents of Gothai Nachiarpuram, Through their Representatives and ors.

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Court : Chennai

Decided On : Jan-24-1997

Reported in : (1997)1MLJ505

Appellant : Niramathi Naicker and anr.

Respondent : Kambalam Naicker Residents of Gothai Nachiarpuram, Through their Representatives and ors.

Judgement :

S.S. Subramani, J.

1. Plaintiffs in O.S. No. 69 of 1981, on the J file of District Munsif's Court, Srivilliputtur, are the appellants.

2. Plaint schedule property is two cents of land with a well in Survey No. 405/C6, Rajapalayam Taluk. The suit property is a portion of 21 cents of land which, according to plaintiffs, belonged to their joint family. Plaintiffs and their elder brother, third defendant in the suit, are admittedly members of a Hindu joint family. Their father died about 22 years back prior to the institution of the suit. On the death of their father, mother Sakkammal was managing the property, and when third defendant attained majority, he became the manager. It is said that the joint family possessed only 6 acres of dry land, and some of them are rain-fed. Plaintiffs

are depending only on the properties for their livelihood. It is said that on 25.3.1980, the Kambala Naicker residents of the village (2nd defendant) prevailed upon the third defendant with a false promise, and asked him to execute a registered gift deed in respect of the well situated in the suit property. Accordingly, a gift deed was executed in favour of; first defendant, i.e., B.D.O., Rajapalayam. As per the, gift deed, the 3rd respondent also promised to put up water storage tank for the benefit of the villagers. The Schedule property, according to plaintiffs, is an ancestral property. A coparcener is not entitled to execute a gift deed in respect of an ancestral property, and the same is void under law. It is said that the joint family manager can execute a gift deed in respect of the joint family property only in favour of daughter or wife. Any gift in favour of a stranger is invalid and not binding on the family. Third defendant has made the gift without the consent of the plaintiffs, who were then majors. In the gift deed, they were shown as minors, and they are represented by their guardian third defendant. It is further said that by executing the gift deed in respect of the well, the remaining, 19 cents of land has become unfit for cultivation and, therefore, plaintiffs are put to great loss and hardship. The remaining 19 cents cannot be made use of for any purpose, and the same has to lie fallow due to water scarcity. It is said that as soon as the plaintiffs came to know about the gift, they requested the second defendant to give back the property. But their demand was not complied with. Second defendant, with more than 150 persons trespassed into the property and began to give trouble to the plaintiffs. It is further said that the Kambala Naicker community has begun to claim title to the property, and they have also removed few coconut saplings, causing loss to the plaintiffs. They are threatening the plaintiffs that they will not allow them to cultivate even the remaining extent of land, nor will they permit the plaintiffs to take water from the well in question. The suit was, therefore, necessitated. In the suit, plaintiffs have prayed for a declaration that the gift deed dated 25.3.1980 in favour of the first defendant is void, for a further declaration that the suit property absolutely belongs to the joint family consisting of plaintiffs and third defendants, and for a consequential injunction to restrain the defendants 1 and 2 from interfering with their possession, and for consequential reliefs.

3. Defendants 1 and 2 have filed separate written statements.

4. In the written statement, first defendant has stated that the suit well is a drinking water well and the same is used by the people of Gothai Nachiarpuram Village for their domestic purpose. According to 1st defendant, this is only well supplying drinking water, and that the same is owned and maintained by the villagers. First defendant has further stated that the Government under its Welfare Scheme, decided to provide the village with protected drinking water. It was proposed to construct a ground level reservoir near the well at a cost of Rs. 15,000. It is said that the third defendant represented that the suit property belonged to him and his two brothers. He further represented that the plaintiffs are minors. He agreed to give the suit property to the first defendant by way of gift, and accordingly a gift deed was executed on 25.3.1980. The first defendant is in possession of the suit property on behalf of the villagers. Excavation work was started with a view to construct reservoir. At that time, plaintiffs filed the suit with a view to cause loss to the Government. It is said 'that the suit property is not agricultural land. According to first defendant, plaintiffs have no possession, and the suit is liable to be dismissed.

5. In the written statement filed the 2nd defendant, i.e., the Community, it is contended that the description of property is incorrect, and the plaintiffs have suppressed material particulars. It is said that the suit property includes a drinking water well and also a Vinayagar Temple, and also three trees adjoining the same. It is said that the drinking water well is there for several centuries, and the same is called 'Mangammal Kinaru'. It is contended that during the reign of Rani Mangammal, the well was dug and was dedicated to the villagers and water therefrom is used for drinking purposes. The said well was deepened by their forefathers during drought period. It is said that this is the only source of water for the villagers. A small parapet wall was also constructed on the southern side of the well and it was periodically repaired and maintained. A platform was also constructed. It is said that during festival times, water is taken only from the suit well. The idol of Vinayagar is the village deity, and it is also in existence for several centuries. A pucca masonry platform was also constructed around the deity and an asbestos roof was also provided. Daily worship is also offered in that Vinayagar Temple. It is said that the defendants are in continuous and uninterrupted possession of the suit property openly and peacefully, to the knowledge of the

plaintiffs, and their possession is for centuries and they have acquired title by adverse possession. The plaint property was never cultivated. The allegation of the plaintiffs that the suit property is their ancestral property* is denied. The execution of gift deed is a creation of false record of title in favour of plaintiffs, and it will not affect the title and interest of the villagers over the suit property. They have also said that at least as against the third defendant, the gift has come into effect and, therefore, the suit for injunction by a co-owner against other co-owner is not maintainable.

6. A reply statement was also filed by plaintiffs reiterating their case in the plaint. They also said that the second defendant, who are members of public, cannot prescribe title by adverse possession. According to them, the plaint property is a portion of their patta land, and it never remained uncultivated. They prayed for the passing of a decree as claimed in the plaint.

7. On the above allegations, trial court took oral and documentary evidence. On the side of plaintiffs, Exs. A-1 to A-26 were marked. P.Ws. 1 and 2 were examined. On the side of the defendants, Exs. B-1 and B-31 were marked, and as oral evidence, D.Ws. 1 to 7 were examined. As court Exs. C-1 to C-4 (photographs) were marked. Exs. C-5 and C-6 are the Commissioner's report and plan.

8. On the above materials, trial court came to the conclusion that the plaint property absolutely belonged to the plaintiff's family. It also found that the third defendant has no right to execute a gift deed in favour of a stranger, and the same offends fundamental principles of Hindu Law. Regarding the contention that the members of the public had right over the well, on the basis of Ex. B-31, the trial court also found that the said contention cannot be accepted. It took note of the fact that the very same public have executed Ex. B-29 whereby they have recognised the title of the plaintiffs over the plaint item and also the remaining portion of the survey number. It also found that the plaint property was a registered holding in the name of the plaintiff's family. They have patta in their name and, therefore, they are absolute owners. It further found that the community of the second defendant has not prescribed title by adverse possession. It held that mere

drawing of water from a well will not confer the community with any right over the property or well. At the most, it can be construed that consent was given by plaintiffs' family to take water from the well. It further found that Ex. B-31 is not valid document. Even the identity of the well as stated in Ex. B-31 is not substantiated. For the above reasons, a decree was granted in favour of the plaintiffs as prayed for.

9. Aggrieved by the judgment, an appeal was filed by the members of the public (described as second defendant in the suit), as A.S. No. 18 of 1983. The lower appellate court held that the plaintiffs are not entitled to any right over the plaintiff item. The gift deed can be treated as a document executed by the manager for pious purpose, and under that deed, members of the public have obtained valid title. It further found that under Ex. B-31, the members of public have absolute right over the property. The well in question was periodically inspected by the officials of the Government and maintained by it. It was further found that the second defendant has title by adverse possession. Accordingly, the suit was dismissed. The oral evidence adduced on side of the defendants was believed. Finding of the lower appellate court reads thus:

In the result, I hold that the suit property is owned by the appellant Villagers and the respondents plaintiffs' family have lost their title by long possession of the suit well by the villagers.

In view of the above finding, the suit was dismissed.

10. It is against the said judgment of the lower appellate court, this second appeal is filed.

11. At the time of admission of the second appeal, the following substantial questions of law were raised for consideration:

(1) Whether a gift of the ancestral property by the manager of the Hindu joint family would be valid?

(2) Whether the gift of the irrigation well by the manager of the joint Hindu family thereby depriving the lands of the joint family of the source of irrigation would be

reasonable and justified in law? and

(3) Whether a fluctuating or indeterminate body of persons like 2nd defendant-community could prescribe title to the suit property by adverse possession.

12. Of the three questions raised, questions 1 and 2 could be considered together.

13. Exs. A-4 and A-7 prove ownership of the property by the plaintiffs and the members of their family. Other exhibits also show that at least from 1952 onwards, plaintiffs and their predecessors were paying kist to the Government. Patta Number is 124. It stands in the name of third defendant elder member of the family. The total extent is 21 cents, and in this suit, we are concerned only with 2 cents, i.e., the well. As rightly found by lower appellate court, the dispute is only in respect of the well, and not the remaining portion of the property. Exs. A-4 and A-7 will prima facie show title in the family of plaintiffs. Various kist receipts also prove that they were exercising right of ownership, and dues to the Government were being paid by them.

14. Ex. A-1 is the gift deed executed by 3rd defendant in favour of first defendant in this case. The gift was accepted by first defendant, recognising the title over the well. The fact that the well is included in the entire 21 cents of land, i.e., patta land in the name of the plaintiffs, is not disputed. On the same date of Ex. A-1, representatives of second defendant executed an agreement, agreeing that thereafter they will not question the right of plaintiffs over the 19 cents, which is included in their patta. The fact that gift was executed under Ex. A-1 by third defendant is also made mention of therein. A reading of Ex. A-1 along with Ex. A-26 will show that the plaintiffs and their brother (3rd defendant) were exercising their right over the suit property and even defendants 1 and 2 have accepted the absolute title of plaintiffs.

15. As against the said documentary evidence, defendants rely on Ex. B-31, a register maintained by the Local Authority regarding public wells in the village of Gothai Nachiarpuram. Ex. B-31 was produced by D.W. 2, the then Village Administrative Officer. It is said that Ex. B-31 was prepared on the basis of a circular issued by Collector by way of instructions to Village Officials to maintain

register regarding public wells used in village. It enjoins upon the village officer to register in the book, public wells owned by the Government or dug with the assistance of funds supplied by local body or Government of India and wells dug for charitable purposes. The suit well is shown as Serial Number 16 situate in Survey No. 406/C6. In the column regarding ownership of the well, it is shown as 'built by Naickers Pothu Sthabanam'. In Ex. B-31, various endorsements are made by various Officers after inspecting the well. They have certified that the well is maintained regularly, and it is in good condition.

16. On the basis of Ex. B-31, an argument is advanced by learned Counsel for respondents that Government records show that the well is a public one, and the same never belonged to plaintiffs or their family.

17. The lower appellate court accepted Ex. B-31 as a piece of evidence to come to the conclusion that the well belongs to the villagers. It also found fault with the trial court for not giving importance to Ex. B-31. The observation of the lower appellate court that the trial court has not taken into consideration Ex. B-31 properly is a misreading of the judgment of the trial court. In paragraph 10 of the judgment of the trial court, various reasons have been given for eschewing Ex. B-31. One important circumstance to discard Ex. B-31 is that, even according to defendants, there is another well in the very same locality, adjoining the suit well. The same is, admittedly, a public well. That is not made mention of in Ex. B-31. Trial court has further observed that the identify of the well is not proved by mere production of Ex. B-31. The trial court had discarded the evidence under Ex. B-31. It also took note of the fact that patta has been granted in the name of plaintiffs, and they are paying revenue to the Government. Except for the production of Ex. B-31, no other evidence has been let in by defendants to show as to how the general public have right over the well. In this connection, it may also be noted that in the written statement the well is known by name 'Rani Mangammal Well'. In Ex. B-31, the well is described as 'Naickers Pothu Sthabanam'. The change of name was not taken into account seriously by lower appellate court. Second defendant has no case that the well was dug by the villagers or community. The specific contention in the written statement is that during the reign of Rani Mangammal, the well was dug for the defendants-villagers, and turn, J.I the well is called 'Rani Mangammal Well.'

18. The lower appellate court simply brushed aside the difference in the name on the ground that when the well itself is dedicated to the members of the public, the naming of the same as 'Naickers' Pudhu Sthabanam' has to be accepted, as correct, and 'Mangammal Kinaru' mentioned in the written statement can be referable to the digging of the well during her period. The said explanation cannot be accepted. Even the defendants have no such case that the well which is now identified as 'Naickers Podhu Sthabanam' was ever known as 'Mangammal Kinaru.'

19. The judgment of the lower appellate court is also inconsistent. In the last portion of the judgment, the lower appellate court has said that the plaintiffs' family has lost title to the well by long possession of the defendants. That means, even the lower appellate court has recognised the antecedent title of the plaintiffs and their family over the well, and the defendants are given the benefit of prescriptive title.

20. The fact that the entire property is having an extent of 21 cents, is not disputed. The well also comes within that area. For the entire 21 cents, plaintiffs have obtained title. In a private property, there cannot be a public well unless the*same is dedicated by the owner of the well to the general public. In fact, none of the defendants has such a case. For proving title over the 21 cents, except for the production of Ex. B-31, the villagers have not filed even a scrap of paper. The oral evidence of various witnesses will not prove ownership to the land. Title to an immovable property cannot be proved by oral evidence by an utter stranger. I hold that the plaintiff's family has title over the entire 21 cents of land which includes the plaint property also.

21. Once I hold that the plaintiffs have title to the property, the next question that arises for consideration is, what is the effect of Ex. A-1 gift deed.

22. Once it is held that including the plaint schedule, the entire property belongs to the joint family of plaintiffs, there cannot be any question of gift by one of the co-parceners to any stranger.

23. In Mulla's 'Hindu Law' - 15th Edition, at page 294, the learned Author says that a Hindu father or other managing member has power to make gift of ancestral immovable property within reasonable limits, for pious purpose. At page 346 of the same book, learned Author has further said that 'According to the Mitakshara law as applied in all the States, no coparcener can dispose of his undivided interest in coparcenary property by gift. Such transaction being void altogether there is no estoppel or other kind of personal bar which precludes the donor from asserting his right to recover the transferred property. He may, however, make a gift of his interest with the consent of the other coparceners'.

24. In this case, first defendant, who is the donee, has withdrawn from the contest and the same is clear from paragraph 12 of the lower appellate court judgment. The trial court has also taken note of the same. In paragraph 7 of the judgment the trial court has said thus:

We find that even a memo was filed by 1st defendant that they do not claim any right on the basis of Ex.A-1. If the donee himself is not claiming under gift deed, and has no objection for declaring the same as void, I do not think, the second defendant representing the members of the community can at any time challenge the document.

25. On the basis of the written statement filed in this case, I do not think the second defendant can claim any right on the basis of the gift deed. In their written statement, the contention that is raised is that the gift deed is an act of collusion between plaintiffs, third defendant and first defendant, in order to create evidence of title over the plaint item. Their case is, that the document is invalid, and third defendant has no right to execute such a deed. It is their further case that even before the gift, the property belonged to the general public. A reading of the entire written statement makes it clear that they are not claiming any right under the gift.

26. Once the donee has discarded the gift, and second defendant disputes the rights of the plaintiffs to execute a gift deed, and claims independent title, the question whether the gift was executed for pious purpose or otherwise loses its importance. So long as the first defendant is not claiming any right under the gift, plaintiffs can recover the property if it is proved that it belongs to them. Trial court

has taken into consideration this fact and has held that the second defendant has no antecedent title. The gift is invalid and, therefore, plaintiffs are entitled to recovery. At the same time, the lower appellate court, by a curious reasoning, has held that Ex. A-1 was executed for pious purpose, and under Ex. A-1, second defendant has obtained title to the property (See last portion of para 12 of the judgment). It is against their own pleadings.

27. It is true that Hindu Law permits the father or managing member to execute a gift for pious purpose if, it is within reasonable limits. That 'reasonable limit' will have to be taken into consideration not only by the extent of the property gifted but also from the importance of the property gifted. By executing a gift of the well, the plaintiffs are unable to cultivate the remaining portion of the property. Their income is based on cultivation. If the property could be cultivated only by drawing water from this well alienation of the same can never be treated as within 'reasonable limits.'

28. In a decision of our High Court reported in *The Madras State Boodan yagna Board, Madurai v. Subramania Athithan and Ors.* : AIR1973 Mad277 , their Lordships said that a gift to Bhoodan yagna was invalid. In that case, their Lordships followed an earlier decision of the Supreme Court reported in *Guramma Bhratar v. Mallappa Chanbassappa* : [1964]4SCR497 . The decision in : AIR1973 Mad277 was followed by a Bench of this Court in the decision reported in *Salem Kannika Parameswari Devasthanam v. T.K. Sadasivam Chettiar* 94 L.W. 15.

29. If 6 1/2 acres of land which belongs to the family has to remain fallow due to lack of water in view of the gift, it cannot be said that the manager was exercising the power within 'reasonable limits'. Such a gift will be disadvantageous to the family. In fact, this question of pious purpose is unnecessary when we take into account the contention of second defendant. They do not want to uphold the gift in any way.

30. I have already held that the plaintiffs have title to the property, and the gift executed by 3rd defendant is discarded by the donee. Legally also, such a gift cannot be sustained. If so, plaintiffs will be entitled to recover the property. Question Nos. 1 and 2 are found in favour of the appellants.

31. The further question that arises for consideration is, whether second defendant has prescribed title by adverse possession as found by lower appellate court.

32. The finding is, for decades together, 2nd defendant and their predecessors were exercising possession over the same and, therefore, plaintiffs have lost their title.

33. The lower appellate court forgot for a moment the fact that the second defendant is, members of the public, and not an individual. It did not consider whether members of public can prescribe title by adverse possession.

34. In an early decision of our High Court reported in *Ussam Kasim Sait v. Secretary of State* 44 M.L.J. 688 : A.I.R. 1923 Mad. 624 : 74 L.C. 25 it was held that 'there can be no adverse possession by public and the use of land by them cannot affect plaintiff's title or possession'. No rule can be laid down that acquisition of a right by the public will be equivalent to its acquisition by the Secretary of State, as the public or a portion of it sometimes prescribes or attempts to prescribe against Government.' At page 625 of the Reports, it was held thus:

As regards prescription of the latter kind authority is clear: *Smith v. Andrew and Attorney General v. Esher Linoleum and Company Limited*, and this position is assumed in the Indian case last mentioned. As was said in the second English case 'it is necessary to remember that the thing to be established is dedication, not user.' What can be proved is that the public has acquired an easement or a profit a prendre by a grant or dedication, actual, if direct evidence of one is available, or to be presumed in case such evidence is not, and in the latter alternative evidence of enjoyment will be relevant and may go far towards supporting the inference that a grant or a dedication which is lost at some time was made....

So, it is clear therefrom that a public cannot prescribe title, and they can get the same only by dedication.

35. In another Bench decision of the Allahabad High Court reported in *Kunwar Orendra Chandra Singh v. Bulaqi Ram* A.I.R. 1942 All. 1 it was held thus:

Apart from ancient possession where legal origin may¹ be presumed and apart from incorporation and trust and like cases, the law in India does not allow a fluctuating and indefinite body to own and hold real property nor to acquire title to property of a secular nature by mere prescription or adverse possession. But where possession goes back to time immemorial and the property on the face of it is not of a secular nature and is a subject of religious use, long possession of the fluctuating and indefinite body such as the members of a particular caste cannot be lightly disregarded.

In such a case the possession which goes to time immemorial should be presumed to have a legal origin and must be respected though it may not be possible having regard to the pleadings in the case to find the nature and the extent of the possession.

36. In *Nagar Palika Bina v. Shrinandlal* : AIR 1961 MP212 , it was held thus:

Adverse possession implies that the person claiming it is in actual possession, at the time, with a notorious hostile claim of exclusive title to repel which the true owner would then be in a position to maintain an action. There can be no adverse possession by public and the use of land by them cannot affect plaintiff's title or possession.

37. In U.N. Mitra's 'Law of Limitation and prescription' - 10th Edition (1992), at page r2pO, the learned Author says thus:

Members of the public are indefinite and unascertained. To acquire title by adverse possession it is essential that the possession must be in persons who could be regarded as deriving title from one another. The public however is a fluctuating body. Further the public as such cannot have the necessary animus possidendi to constitute adverse possession. So it cannot acquire by adverse possession any land as against the person entitled to it. The public may, however, have rights of user over the soil as in regard to highways and waterways. But that would not make the public the owner of such property.

38. Rustomji on 'Limitation' - 7th Edition (1992), at page 1007, has followed the same principle.

39. Mantha Ram Murty in 'Law of Adverse Possession' 1985 Edition, at page 80-2, has accepted the same legal principle. The relevant portion (at page 80-2) reads thus:

Adverse possession implies that the person claiming it is in actual possession, at the time, with a notorious hostile claim of exclusive title to repel which the true owner would then be in a position to maintain an action. In *Ussam Kasim Sait v. Secretary of State*, supra it was held that there can be no adverse possession by public and the use of land by them cannot affect plaintiff's title or possession and that no rule can be laid down that acquisition of a right by the public will be equivalent to its acquisition by the Secretary of State, as the public or a portion of it sometimes prescribes or attempts to prescribe against Government. Moreover, it is settled law that with regard to a vacant plot of land, possession must be deemed to be of the title-holder unless somebody can prove his possession.

40. The lower appellate court, without considering the above legal aspect, believing the oral evidence of few witnesses, has come to the conclusion that the plaintiffs were not making use of the land, and the villagers were using it and, therefore, lost title. Apart from legal impossibility of prescription, a case of adverse possession cannot be found on the basis of oral evidence. Rustomji on 'Limitation' at page 1021 (in the same book), has said thus:

No court should take the plea of acquisition of title by adverse possession casually and no importance should be attached to the evidence of witnesses who simply depose that the land is in possession on somebody or other. The burden of proving adverse possession is a heavy one. It must not be lost sight of that acts sufficient to constitute possession on the owner may not be sufficient to constitute possession in the trespasser. In determining the question of acquisition of title by adverse possession, the court must depend on clear, full and definite evidence relating to different points of time.

41. In this case, there is no act of possession, nor could there be by any assertion. I have already said about the legal impossibility of acquiring property by adverse possession, by public. The custom of the country should also be taken into consideration when the question of adverse possession is pleaded. In places where there is scarcity of water, if a person allows his well to be used by members of the public also, that mere using of the well by the members of the public is not against the interest of the owner. It is only permissive in character. In this case, there cannot be any use of the water as of right when we take into consideration Ex. A-26, and the taking of a gift deed recognising the plaintiff's title. In either way, the finding of the lower appellate court that the plaintiffs have lost title to the suit property is legally unsustainable. Question No. 3 is also found in favour of the appellants.

42. In the result, I set aside the judgment of the lower appellate court and restore the judgment and decree of the trial court, and a decree is granted in favour of the plaintiffs as prayed for. True appellants are entitled to their costs in all the three courts.