(1982) 02 GAU CK 0004

Gauhati High Court

Case No: Second Appeal No. 121 of 1976

Sri Niranjan Choudhury		APPELLANT
	Vs	
Smt Lakhe Singh Devi and Sri Rabati Mohan Talukdar		RESPONDENT

Date of Decision: Feb. 12, 1982

Acts Referred:

- General Clauses Act, 1897 - Section 3(26)

Citation: (1983) 1 GLR 166

Hon'ble Judges: B.L. Hansaria, J

Bench: Single Bench

Advocate: J.N. Sarma and N. Goswami, for the Appellant; A.C. Bora, for the Respondent

Final Decision: Dismissed

Judgement

B.L. Hansaria, J.

An interesting and some what important question needs determination in this appeal. The same is whether a "Gumtee" of a small structure normally having four wooden posts as its support meant for selling articles like betelnut and petty stationary and cosmetic articles) is an immoveable property, or moveable? This question has arisen on these facts. A suit was filed for eviction from such a Gumtee by Respondent No. 1 on the averment that the same belonged to her husband late Jagannath Singh and was let out to the Defendants on a monthly rental of Rs. 48/-. Though rent was paid for sometime, but the Defendants became defaulter thereafter and the Gumtee was also needed by the Plaintiff for her own use and occupation. Among other points urged by the Defendants a plea was taken that the Gumtee had been sold by Jagannath Singh to Defendant No. 1 on 4.11.69, who in turn sold the same to Defendant No. 1 on 20.11.69. The sale was, however, not by registered deed it was evidenced by execution of receipt. As the consideration (sic) a sum of Rs. 800/-, it has been held by the learned District Judge, Nowgong that the two deeds in question being Exts. Ka and Kha, are not admissible. Having taken this

view the plea (sic) the suit was not maintainable has not been accepted. Though (sic) learned trial Court had accepted the documents as genuine, (sic) learned Court below doubted the same.

2. If late Jagannath Singh had ceased to be the owner of (sic) premises there can be no denial that his wife, the Plaintiff (sic) not have filed the suit for eviction of the Defendants as tenants. So the question whether Jagannath Singh had in fact done so or not is relatable to the jurisdiction of the court and as such is examinable even in a proceeding of the present nature which has been treated as a revision in view of the decision of this Court in LPA No. 11 of 197(sic), which has held that no second appeal lies in such cases. Had it been that the learned District Judge disbelieved execution of Exts. Ka and Kha, that would have definitely been entirely a different matter, but the main point on which the case of the Defendants has been rejected is the inadmissibility of Exts. Ka and Kha. As to the genuineness what has been stated is only that the same was doubtful because sale to Defendant No. 1 was on 4.11.69 whereas sale by him to Defendant No. 2 was on 20.11.69. This cannot raise any doubt. Let it therefore be seen whether any error of law was committed in holding that Exts. Ka and Kha were not admissible.

3. Before this is done, a preliminary point raised by Shri Bora that as this Court is seized with the matter in its revisional jurisdiction, the finding of the learned District Judge in this regard cannot be gone into, be disposed of. The learned Counsel has referred in this connection to Bholaram Vs. Ameerchand, which has dealt with the power of interference in second appeal by a High Court and has pointed out that a finding of fact event if wrong would not entitle the High Court to interfere in the absence of a clear error of law. This case has no application. The decision of the Privy Council in AIR 1949 156 (Privy Council) does not also assist the contesting Respondent because if the error be of a question relating to jurisdiction of the court, High Court''s power of revision can definitely be invoked as stated in this decision itself, which has made abundantly clear in AIR 1949 239 (Privy Council) The Supreme Court decision in Works The Works Manager, Central Railway Workshop, Jhansi Vs. Vishwanath and Others, has held that a finding of fact cannot be interfered in revision. What is being agitated herein is not a question of fact but a point of law as to whether a Gumtee is a moveable or immoveable property.

4. To decide this controversy, let the definition of "immoveable property" be first noted. As is known it has been defined in the Transfer of Property Act only by stating that it "does not include standing timber, growing crops, or grass". We may therefore turn to the definition of this expression in the General Clauses Act, whose Section 3(26) states:

"immovable property" shall include land, benefit to arise out of land, and things attached to the earth or permanently fastened to anything attached to the earth.

The expression "attached to the earth" has been defined in the Transfer of Property Act to mean:

(a) rooted in the earth; as in the case of trees and shrubs;

(b) imbedded in the earth, as in the case of walls or buildings; or

(c) attached to what is so imbedded for the permanent beneficial enjoyment of that to which it is attached.

5. By reffering to the fact as found in this case that the the (sic) hind legs of the Gumtee were imbedded in the ground, it uraged by Shri Bora that the Gumtee in question has to be (sic)rded as immoveable property. It is contended that it being structure, the same has to be taken to be an immoveable property as long as it stands on land. This is what was observed at para 15 of Ajit K. Saha Vs. Nagendra N. Saha and Another, By referring Kanhiya Lal and Another Vs. Satya Narain Panday, Shri Bora submits that the Gumtee is an immoveable property as it is attached to the earth. What was stated in para 5 of this decision is that a building is a thing attached to the earth and is by itself an immoveable property.

6. These are some stray observations only. A reference to the decisions cited by Shri Sarma would however show that the mere fact that a certain thing is attached or annexed to the land or imbedded in the land would not make it an immoveable property. The two tests to be applied in this regard are- (1) the degree or mode of annexation, and (2) the object of annexation.

7. This question had come up before the courts while deciding whether machineries imbedded in the earth or attached to earth are immoveable properties or not. A Division Bench of Nagpur High Court went into this question in J.H. Subhiah v. Govindrao AIR 1953 Gau. 224, and had to determine whether a timber saw mill was immoveable property or not. While doing so, the leading case of Holland v. Hodgson 1872 LR 7 CP 328, was referred to which mentioned about the two tests specified above. The Bench stated in para 9 that of the two tests, the object of annexation is more important. How does the same make a difference would be amply borne out by what was stated by Blackburn. J., in the above case To quote:

...An article may be very firmly fixed to the land and yet the circumstances may be such as to show that it was never intended to be part of the land, and then it does not become part of the land. The anchor of a large ship must be very firmly fixed. In the ground in order to bear the strain of the cable, yet no one could suppose that it became part of the land, even though it should chance that the ship-owner was also the owner of the fee of the spot where the anchor was dropped. An anchor similarly fixed in the soil for the purpose of bearing the strain of the of a suspension bridge would be part of the land.

Applying this test to the facts, the Bench held that as the land on which the machinery was erected by A but belonged to B, it must be assumed that the owner

of the machinery did not intend the same to form part and parcel of the immoveable property to which it was attached A Full Bench of the Madras High Court held in Board of Revenue, Chepauk, Madras Vs. K. Venkataswami Naidu, that the equipments of touring cinema were in the very nature of things not immoveable property as they were described as "collapsible and capable of being removed". So, though the machineries were imbedded in the earth, it was held that it was so done only temporarily and not permanently and so they were held to be moveable property. It may be stated at this stage that according to the Defendants, the Gumtee could be removed from place to place.

8. Similar views were expressed in Jnan Chand Chugh Vs. Jugal Kishore Agarwal and Others, and Perumal v. Ramaswami AIR 1969 Mad 346. In the Calcutta decision it was stated that if the mode of attachment is imbedding in the earth as in the case of walls or buildings, or if the object of attachment for the permanent beneficial enjoyment of the land to which it is attached, then the property will be immoveable property but not otherwise. In the Madras case it was observed the degree, manner, extent and strength of attachment of the (sic) to the earth or building are the main features to be taken into consideration in this regard. It was further observed (sic) if a moveable property has to be fixed or attached to the earth for its beneficial use or enjoyment it could not be regarded as immoveable property for that reason.

9. Applying these tests to a Gumtee of the type with which we are concerned, it cannot be regarded as immoveable because (1) the extent of attachment to the earth is not of of the type as is in the case of walls. As put by the learned District Judge, the two hind legs were fixed to the ground so that the Gumtee could withstand the ravages of wind and rain. The front legs were found (resting on bricks) (2) This would (sic) that the object of attachment was the more beneficial enjoyment of the Gumtee and not of the land. (3) The Gumtee (sic) be removed from place to place. As such, I would hold that the Gumtee could not be regarded as immoveable property. The fact that it was described as "Gumtee house" by both the (sic) is not decisive. Neither is the definition of building, or house (sic) but, in some other statutes, to wit, the Assam Urban Areas Rent Control Act, The Assam Urban Areas Non-agricultural Tenancy Act, or the Assam Municipal Act, to which my attention invited by Shri Bora. It is well-known that every statute has its own definition to serve the purpose for which the statute is enacted.

10. This being the position and the genuineness of Exts. Ka and Kha being not in serious dispute, it has to be held that the Plaintiff had ceased to be the owner of the Gumtee because of which she could not have filed the suit in question for eviction of the Defendants from the Gumtee. The suit as filed was therefore not maintainable and the learned District Judge had no jurisdiction to decree the suit for eviction.

11. The result is that the petition succeeds and the impugned judgment and decree of the learned District Judge are set aside. The suit stands dismissed.