(1869) 07 CAL CK 0008

Calcutta High Court

Case No: Special Appeal No. 3132 of 1868

Selam Sheikh		APPELLANT
	Vs	
Baidonath Ghatak		RESPONDENT

Date of Decision: July 26, 1869

Judgement

Markby, J.

The plaintiff in this case sued to recover two small plots of land, which we may, for convenience, call plot No. 1 and plot No. 2. His case was that he obtained a patta for the two plots from the zamindar, on the 16th Baisakh 1275 (1868), and got into possession; but that he was ousted by the defendant on the 2nd Jaisti in the same year. The defendant alleged that he had been continuously in possession, for upwards of 12 years, of plot No. 1, and that he had thereby acquired a right of occupancy therein. He also alleged that he obtained in 1273 (1867), from the zamindar, for a consideration, a verbal grant of the plot No. 2 in perpetuity, at an annual rent, subject however, to enhancement.

2. The zamindar denied that he had granted plot No. 2 to the defendant in perpetuity, but he said that he had granted him the two plots for 5 years and 3 years respectively, which periods expired in 1274 (1867).

3. There was no doubt about the plaintiff''s patta, which was registered. The Munsiff found that the defendant had not been 12 years in possession of plot No. 1, but he found that the defendant''s allegation that the zamindar had settled plot No. 2 with him in perpetuity was true. Accordingly be gave the plaintiff a decree for possession of plot No. 1 only, and dismissed his suit in respect of plot No. 2.

4. Both parties appealed with regard to plot No. 2. The lower appellant Court says, that inasmuch as the defendant was in possession both before and after the grant of the patta to the plaintiff "the party seeking for an ejectment from that possession must first prove that the possession held by the defendant was under a temporary settlement. But the record shows that the plaintiff, appellant, has been very weak on that point."

5. This appears to me to be an extremely unsatisfactory mode of disposing of this issue of fact. A person in possession of property ought to be presumed to be in lawful possession until the contrary be shown; but this is, I believe, the only presumption which a Judge, as matter of law, is absolutely bound to make. For any purpose beyond this, possession is only evidence to be taken conjointly with the other evidence (if any) by which it is sought to establish or impugn the title. The Principal Sudder Ameen seems to me to have entirely overlooked this distinction. He appears to think that he was bound as a matter of law to presume everything in favor of the defendant in possession. In this, I think, he was wrong. It was admitted that the defendant was only a tenant. There was evidence, on the one hand, that his tenancy had expired, and on the other that his tenure was perpetual. In this state of things, the possession of the defendant was only one of the elements to be taken into consideration in determining whether or no the defendant had, as he alleged, obtained a grant in perpetuity. That this was the true mode of considering the question seems to me clear, and I think it is in accordance with the decisions in Shiv Dyal Puri v. Mahabir Prasad 2 B.L.R. Appx. 8 and Ramdhun Chuckerbutty v. S.M. Komultara 3 B.L.R. A.C. 99 Note. It appears to me therefore that at present the question whether the zamindar had granted these lands to the defendant in perpetuity has not been properly tried.

6. It is said however by the plaintiff, respondent, that we ought not to remand the case for the trial of this issue, because even if the defendant established the grant to himself in perpetuity, this verbal grant cannot prevail against the plaintiff''s patta which is registered, and section 48 of Act XX of 1866 is relied on.

7. That section provides, "that all instruments duly registered under this Act, and relating to any moveable or immoveable property, shall take effect against any oral agreement or declaration relating to the same property."

8. It would certainly appear, applying ordinary principles of construction to these words, that as against the holder under a registered title the holder under a title derived from a parol agreement would be in all cases defenceless. If the case falls within sections 17 and 48, the parol agreement cannot be given in evidence. If the case falls within sections 18 and 44, the parol agreement is of no avail. And unless some distinction can be discovered which is not at first sight apparent, the purchaser--no matter whether of an article of food at a shop over the counter or of a piece of land worth rupees 10,000--under a parol agreement, has, against a subsequent registered purchaser, a defective title.

9. The consequences of such a construction need hardly be pointed out. Probably no one who has purchased any of the ordinary articles of daily use or consumption since 1866, would be able to make out a safe title to them, nor would it be possible to acquire a safe title to the most trivial thing imaginable without the expensive and troublesome formality of a registered instrument.

10. I think it quite impossible that the Legislature intended the Act to apply to such cases as these, and it is therefore necessary to search for some distinction which will enable us to escape from this conclusion. The choice seems to me to lie between these three courses; either (1st) to hold that when possession is delivered, the strict rules laid down in the Registration Act do not apply; or (2nd) to pub some limit upon the words "declaration or agreement," in section 48; or (3rd) to make some distinction between moveable and immoveable property.

11. The most obvious, perhaps the most satisfactory, distinction would have been the almost universally recognized one between the modes of acquiring moveable and immoveable property. I may observe that the consideration whether or no this distinction exists does not bear directly upon the question before us, because the distinction, if any, is in favor of moveable property, and this is the case of an interest in immoveable property. But it bears generally upon the interpretation of the Act. For to my mind it does not involve any absurdity to require in all cases a registered written instrument to complete the title to immoveable property, so that if the distinction could be established, there would be much less difficulty in carrying out, in their integrity, the provisions of the Act. But it so happens, that contrary to usual principles, a distinction between the modes of acquiring moveable and immoveable property is not recognized by general Hindu law, which requires the same formalities for the acquisition and transfer of all kinds of property. We must therefore look for the distinction if it exists at all to the Act itself. But though the Act makes a broad distinction between the necessity of registration of moveable and immoveable property in section 17, it distinctly excludes any such distinction in section 48. Though therefore a purchaser may, under a parol agreement, in some cases, at any rate, of immoveable property, and in all cases of moveable property, rely upon his title against the former owner, this title will not avail him in any case against a rival registered purchaser, whether the property be moveable or immoveable.

12. Next, what is the proper sense to be attributed to the words "declaration or agreement" in section 48? With regard to the first of these words, I imagine that by a declaration, as distinguished from an agreement, is meant a declaration of his wishes by the owner with reference to his property not amounting to a contract, and which the maker is at liberty to recall; whereas by an "agreement" is meant something which, if correct in point of form, is binding on the maker. And the question seems to be this; whether under the words "agreement or declaration," in section 48, the Legislature intended to include all the documents which must or may be registered under sections 17 and 18. If I adhere to the ordinary, and (as I should say) correct meaning of the words, I come to the conclusion that they did include all such documents. Every document there specifically mentioned is either a "declaration" or an "agreement," and a division of documents into "declarations" and "agreements" does appear to be a tolerably correct and complete one. It has indeed occurred to me that it is just possible that the word "agreement" may have

been meant only to refer to that kind of agreement which was as yet entirely unperformed; that kind of agreement which English writers sometimes call "executory." Such a construction is not altogether without precedent. Some such restricted meaning has been put upon the word "agreement" in the English Statute of Frauds by the decision of the Court of Queen''s Bench in Donellan v. Reid 3 Bar. & Adol. Rep. 899. But that decision, though long acted on, has I think generally been considered to do violence to the words of the Statute (see Smith''s Leading Cases, 5th Edition. 284): and I am bound to say I do not understand upon what reasoning it is founded. I think therefore the word "agreement" in this section must bear its ordinary meaning.

13. There yet remains the first of the three alternatives which I mentioned above, namely to hold that the strict provisions as to registration do not apply where possession of the thing to be transferred is given by the owner to the transferee. It is true that there is nothing in the words of the Act which expressly authorises such a distinction; but on the whole I cannot help thinking that it must have been intended. It would be very strange, if just when the Law Commissioners were reporting that the provisions of the English Statute of Frauds, which require contracts to be in writing, were "not suited to the habits and present condition of the people in India," that the Legislature here should pass as Registration Act which makes not only a writing but a registered writing necessary for every transaction relating to an interest in land or goods of whatever value, which would be a Statute of Frauds for India going far beyond the Statute of Frauds in England in its requirements, and extending over all the ordinary transactions of daily life. I think the legislature cannot have intended the provisions of sections 17, 18 and 48 to apply to cases of transfer of an interest in moveable property, where the transfer is followed by putting the transferee in possession; and if they do not apply to this case, where the subject of transfer is moveable property, neither do they apply to a similar case where the subject of the transfer is immoveable.

14. It certainly seems that this view is not altogether in accordance with that which baa been taken by another Division Bench, when discussing the Registration Act of 1864, in Boikuntnath Sett v. Rusik Loll Barmono 10 W.R. 231. In that Act there does not appear to be any clause precisely similar to section 48 of the Act of 1866, but section 68 of the Act of 1864 is similar to section 50 of the Act of 1866, giving priority to registered deeds over unregistered ones, even in cases where the registration is not compulsory. And upon that section Phear and Hobhouse, JJ., held that a registered bill of sale must prevail over a prior parol sale, although the purchaser had obtained possession under the latter. They say, "the parol contract cannot rank higher than an instrument, and it seems to us that whether possession was had under the first instrument, namely, the first parol contract of sale, or not, is immaterial so far as regards the operation of the Act. The possession does not affect the title. It only shows that the person had succeeded in obtaining enjoyment of the property under his title."

15. But, on the other hand, this view seems to me hardly in accordance with the view expressed by Steer and Phear, JJ., in Syud Furzund Ally v. Syud Abdool Ruhim 4 W.R. 30, where those Judges are reported to have held that Act XIX of 1843 does not apply to a case where enjoyment has actually taken place under the first deed: and with great respect I must say that I am unable to assent to the proposition that as a general principle of law "possession," that is, as I understand it, the fact of obtaining possession, does not affect the title. I have indeed generally understood that the delivery of possession is not considered absolutely necessary to the acquisition of title under modern Hindu law. The Privy Council have recently expressed a doubt upon this point: Raja Shaheb Prahlad Sen v. Baboo Budhu Sing 2 B.L.R. P.C. 111 (117). But however this may be, there is I think no reason for saying that, under modern Hindu law, possession may not sometimes complete an otherwise defective title. The acquisition of possession has, in all systems of law, European and Oriental, been always treated as a most important element in the acquisition of title. Under the Roman law it was absolutely essential, traditionibus et usucapionibus non nudis pactionibus rerum dominia transferuntur; and this is what a Roman lawyer considered as the natural, by which he meant the universal, mode of acquiring property. The same notion prevailed, and still prevails, to a greater or less extent in every country in Europe. The French law recognizes it emphatically in the phrase "enfait de meubles ia possession vaut litre." The necessity in some cases of delivery of possession in order to complete title is also, as is well known, recognized by the Mahomedan law. And there is no ground for saying, as far as I can see, that its effect is ignored by the Hindu law. On the contrary, I imagine the title of a purchaser from a person who is not the true owner, which under certain circumstances is, or certainly was, recognized by the Hindu law (see Jaganatha''s Digest, Book 2, clause 2, section 2, para. 48) depended entirely on possession. In the Mitakshara, chapter III, section 3, S. 99, of the portion contained in the work of W.H. Macnaghten, there is a very elaborate discussion on possession, and in section 6 there occurs this passage: "It has been shown that possession, when accompanied by a title, is evidence of right; but lest it should be supposed that a title without possession affords equal proof, it is declared where there is not the least possession, there the title is not weighty, such is the intent. With whatsoever title there is not the least occupancy, in that title there is no sufficient weight." These passages seem to me to show that, even in Hindu law, by obtaining possession a man not only obtained enjoyment under his title, but that he went through a ceremony which was to some extent efficacious in completing his title.

16. Moreover, the decisions on the earlier Registration Act of 1843 appear to me to be capable of reconciliation only on the view that the acquisition of possession has the effect of completing an otherwise defective title. Some of the decisions on that Act in which the unregistered transactions have been supported, rest upon the ground that the earlier Act only applies when the rival claimants are both purchasers or donees, or both mortgagees, and not when one is a purchaser, and

the other a mortgagee. That is the ground of the Full Bench decision in Maharaja Moheshur Sing Bahadoor v. Bhika Chowdhry Case No. 645 of 1865; February 5th 1866 (B.L.R., Sup. 403) and in Kartick Chunder Dhabay v. Nobye Sirdar S.D.A. (1852) 987. But in two cases, Bhyroo Chunder Misser v. Ram Chunder Bhuttacharjee 1 Hay. Rep. 261 and Imrit Singh v. Koylash Koer 11 W.R. 559, it has been held that a registered deed of sale will not prevail against an unregistered sale or gift of prior date. In both these cases, however, the first purchaser bad got into possession, and that fact is relied upon in the judgments. Upon this ground and upon this ground alone, as it appears to me, these judgments can be supported. There is also the decision in Syud Furzund Ally v. Syud Abdool Ruhim 4 W.R. 30 to which I have already alluded. On the other hand, in the case of Prahlad Misser Vs. Udit Narayan Sing , it was held that a title derived from a registered mortgage was, under the Act of 1843, a better title than that derived from a previous mortgage which was unregistered. This last I must say, seems the only possible interpretation of that Act, if it applies, and it did apply in the case of Prahlad Misser Vs. Udit Narayan Sing , because the first mortgagee had not obtained possession.

17. The result is, that in my opinion the case ought to be remanded for a decision upon the question, whether the zamindar granted to the defendant plot No. 2 in perpetuity, and that if he did so, effect ought to be given to the grant notwithstanding the subsequent registered patta.

18. With regard to plot No. 1, the finding of the lower appellate Court is also unsatisfactory. The first Court had found that the defendant''s allegation of a right of occupancy by 12 years'' possession had not been proved. The defendant appealed against the decision, and the Principal Sudder Ameen reverses this part of the Munsiff''s decision, but his finding is most indefinite. He merely says that "the evidence produced by the defendant in support of his possession is conclusive enough." But there was no dispute about the defendant''s having been in possession, the dispute was as to how long he had been in possession, and the Principal Sudder Ameen ought, before reversing the decision of the Moonsiff, to find distinctly that the defendant had been 12 years in possession, and had been so under such circumstances as to give him a right of occupancy.

19. I think therefore that the case ought to be remanded for a retrial of the two questions which I have pointed out.

Jackson, J.

I concur.