Mahadeo Tatu Naik Vs Ramakant Atmaram and Another

Court: Bombay High Court (Goa Bench)

Date of Decision: Jan. 10, 1985

Acts Referred: Easements Act, 1882 â€" Section 1, 60
Portuguese Civil Procedure Code, 1867 â€" Article 476, 576

Citation: AIR 1985 Bom 347

Hon'ble Judges: G.F. Couto, J

Bench: Single Bench

Advocate: S.K. Kakodkar and A.F. Diniz, for the Appellant; U.S. Kowalkar, for the Respondent

Judgement

1. This Second Civil Appeal directed against the judgment dt. 31st Aug. 1983 passed by the learned District Judge, Panaji was admitted on the

following substantial questions of law :-

(a) Whether the provisions of Art. 2307 of the Portuguese Civil Code are attracted to the case :

(b) Whether the lower Courts ought not to have held that on the facts and circumstances of the cases the purported licence granted to the

appellant"s ancestors was irrecovable; and

(c) Whether the prayer of mandatory injunction was not bared by limitation.

2. At the hearing, however, the learned counsel appearing for the appellant restricted his submissions to the first two questions and did not press

the third. Therefore, while disposing of this appeal, I will address myself only to the said first two questions.

3. A suit for possession has been filed by the respondent I against the appellant herein and the respondent 2 on the grounds that there exists a

house bearing Gram Panchayat No. 74 situated at Vithalpur, Sanquelim. The land where the house is standing belonged to one Dattaram Vithoba

Fatarpenkar and was purchased on 13th September, 1966 by the plaintiff/respondent 1 herein. According to the said respondent, the father of the

present appellant was in possession of the said house as a license and after his death, respondent 1 continued in possession of the same house, also

as a license, and although he was not entitled to let the house, he allowed the respondent 2 to carry on works as a Machine in the said house.

Therefore, the plaintiff/respondent 1 requested the appellant to deliver vacant possession of the house, but he failed to do so.

4. The appellant resisted the suit on the main ground that the house has been constructed by his ancestors and further denied that the occupation

thereof was a license. He alleged that he was a mundkar and that the Court has no jurisdiction to try the suit.

5. The suit was finally disposed of by a judgment and decree dated 11th Sept. 1970. However, the said judgment was set aside in appeal by the

District Court and a direction was given to the trial Court to decide the question of mundkarship as a preliminary issue. As a result, the trial Court

directed the appellant to approach the Court of Mamlatdar and at a later stage, the respondent 1 product an Order of the Mamlatdar holding that

the appellant was not a mundkar in respect of the said house. Thereafter, the suit proceeded and was ultimately decreed by judgment dt. 24th

August, 1976 passed by the learned Civil Judge S.D., Bicholim. The appellant herein, being aggrieved, preferred as appeal to the District Court,

Panaji which was dismissed by the impugned judgment, for according to the learned District Judge, inter alia the principles of the Indian Easements

Act were not applicable to the case since the provisions of Art. 2307 of the Civil Code were attracted and that in terms thereof, the appellant was

not entitled to continue in the house against the wishes of the land"s owner.

6. Mr. S.K. Kakodkar, the learned counsel appearing for the appellant, contended that the above observations are erroneous and being the basis

of the impugned judgment, substantially vitiate and render it liable to be set aside. In fact, he argued, it is common ground that the house was built

by the father of the appellant, at his own cost, about 30 years back and has been ever since in occupation of the appellant and his father. Further, it

is also common ground that as amount of Rs. 24/- per annum is being paid by the appellant, and was earlier being paid by his father, to the

respondent 1 for the occupation of the land where the house was built. In the circumstances, therefore , according to the learned counsel, it is clear

from the records that the appellant, and prior to him hos father, had been occupying the land and the house with permission of the owners of the

land on payment of a rent, fee or compensation. Thus, the occupation of the land and the house is not and cannot be held to be in bad faith. Art.

2307 of the Civil Code, he further urged, requires bad faith for being attracted, and hence, since the occupation by the appellant is not in bad faith,

it is obvious that the provisions of the said Article are not applicable. In any event, in the context of the admitted facts, although at the relevant time

the Indian Easements Act was not in force in this territory, the learned District Judge ought to have applied its principles in view of the judgment of

the learned Addl. Judicial Commissioner of Goa, Daman and Diu delivered on 2nd Jan. 1975 in Second Civil Appeal No. 41 of 1973, M/s. The

Matches Goa Pvt. Ltd., Curti, Ponda v. Shaik Kashim, Bonbo Curti, Ponda which was binding on him.

7. As against this, Mr. U. Kolwalkar, the learned counsel appearing for respondent 1, argued that Art. 2307 is applicable to the case before me

since the concepts of good and bad faith as defined in Art. 476 are to be read in the said provision of the Civil Code. Now, Art. 476 provides that

only a possession preceded by title is in good faith. In the present case, admittedly, the appellant has no title to the land and hence, when

respondent 1 requested him vacate the land and terminated the licence or cancelled the permission, he ceased to occupy the said land in good

faith. Reliance was placed in support of this submission in the judgment of the Supreme Court of Purtugal dt. 24th June, 1949 reported in Bulletin

do Ministerio Justica, year 1949, No. 13, P. 291. The learned counsel further contended that irrespective of this aspect of the case, it may also be

pointed out that the plea that the license was irrevocable in view of the provisions of S. 60 of the Indian Easements Act has not been raised before

the trial Court, nor it has been raised in the Memo of Appeal to the District Court. Therefore, as held by the Supreme Court in the case of

Chavalier I.I. Iyyappan and Another Vs. The Dharmodayam Company, , it is not open to the appellant to raise it at this stage, even though the

point was argued before the District Judge and disposed of on merits. Such circumstance in no manner affects the legal position, since the appellant

was not at all entitled to raise the point even before the District Judge. In addition, there are concurrent findings of the Courts below to the effect

that the respondent 1 has requested the appellant to give vacant possession of the land occupied by him and, therefore, it is clear from the records

that the license to occupy the land has been revoked. This being the case, according to the learned counsel, the appellant has no right to continue in

the said land against the wishes of the respondent 1 and hence, there are no grounds made for interference by this Court with the impugned

judgment.

8. Article 2307 of the Civil Code provides that if works are done, crops raised or cultivations made in a land belonging to others, the owner of the

land may demand that such cultivations, crops and works be removed and the land restored to its initial condition at the cost of the one who has

raised the crop and done the works or the plantations, if such works, crops or cultivations are done in bad faith. It further provides that, however,

the owner of the land can keep for himself the works, crops or cultivations on payment of the value thereof to the owner of the works, crops and

cultivations. A plain reading of the aforesaid provision of law makes it clear that it is only in case one occupies other''s land and executes works,

raises crops or makes cultivations thereon in bad faith that the owner of the land can demand the removal of the same. Therefore, it will be useful

to advert to the relevant provisions of the Civil Code in order to see when possession of land by a person can be said to be in good or bad faith.

Art. 476 of the Civil Code deals with the matter and provides that possession in good faith is the one which is preceded by title vices of which are

not known to the possessor, possession in bad faith being the one which occurs in the opposite hypothesis. Hence, in the scheme of the Civil

Code, possession to be in good faith should necessarily be preceded by title. I am supported in this view by the judgment of the Portuguese

Supreme Court dt. 24th June, 1949 (above). The facts of the case before the said Court were that machinery belonging to the plaintiffs had been

permitted to be utilised by a partnership firm constituted by the owners of the said machinery and others. Later on a a dispute arose and the

partnership firm laid a claim to the ownership of the said machinery on the ground that it has been allowed to use the same by the owners and

therefore, was in good faith possession thereof. The Portuguese Supreme Court observed that, as laid down in Art. 476 of the Civil Code,

possession is deemed to be in good faith only when preceded by title, vices of which are not known to the possessor and that since the possession

in bad faith occurs in the opposite hypothesis, such possession is that of one who knows, or should know, that his possession is vitiated as it is not

based on a title of acquisition. The Portuguese Supreme Court further observed that in the particular case before it the evidence on record had

clearly established that the partnership firm did not ignore, nor could ignore, that its possession of the machinery was precarious since the same

machinery was in its possession by mere tolerance of the owners thereof and was being utilised in their name, adding that the partnership firm has

not rebutted the presumption that it was a possessor in bad faith and, on the contrary, has even surreptitiously stated to be the legitimate owner and

possessor of such machinery, a fact that was entirely incorrect. It, therefore, flows from the said decision of the Portuguese Supreme Court, and it

is well settled, that in a case where a person possesses a thing and his possession is not preceded by title, a presumption that such possession is in

bad faith arises by virtue of the provisions of Art. 476 of the Civil Code. This presumption is rebuttable and hence, unless it is rebutted, possession

on such circumstances is undoubtedly in bad faith.

9. Admittedly, in the case before me, the occupation or possession of the land where appellant''s house stands was not preceded by acquisition or

transfer thereof, nor was the said land transferred at any later stage. Hence, it necessarily follows that the possession of the suit land by the

appellant and his father was not preceded by a title of acquisition or transfer and thus, it would appear that such possession is in bad faith.

However, it may be pointed out that it is not disputed that the land was occupied with permission of its owners on payment of an amount of Rs.

24/- per annum. The question that therefore arises is whether such permission given by the owners of the land amounts to a title of acquisition as

required by Art. 476 to make the possession a bona fide possession. The records do not clarify as to whether the said amount was being paid as a

rent, a fee, or a compensation. In the circumstances, though it cannot be said by any stretch of imagination that the occupation of the land by the

appellant or by his father was unlawful and in bad faith, the fact remains that the appellant has failed to establish that the said occupation of the suit

land was preceded by a title of acquisition thereof. Hence, his possession of the suit land is precarious and subject, as such, to the sweet will of its

owners. His occupation of the land, being by permission of the owners, was not obviously an occupation and possession with animus domini and

could not be adverse to the owners. Consequently, the request made by respondent 1 to the appellant to vacate the land has to be construed as a

termination or cancellation of the permission earlier given to occupy the land and thus, the continuation of the land''s occupation become unlawful

therefrom. It may also be pointed out here that even if the amount of Rs. 24/- was paid as a rent on account of a lease, such lease would have

been constituted when the law in force in the territory of Goa, Daman and Diu was the Portuguese law and consequently, no interest in the suit land

would have been created in favour of the appellant, for, unlike under Indian law, a lease under the Portuguese law does not create an interest in the

land in favour of the lessee. In this context of circumstances and of law, the permission given to the appellant and his father by the owners to

occupy the suit land does not constitute the title of acquisition or transfer required by Art. 476, Civil Code, to make the possession by the

appellant a possession in good faith. Therefore, in view of the same provision of law and in the light of the observations of the Portuguese Supreme

Court above referred to. I have no doubt in holding that the possession of the suit land by the appellant is in bad faith.

10. I have already said that the learned District Judge held that the provision of Art. 2307, Civil Code, were attracted to the case and that,

therefore, the principles of the Indian Easements Act were not applicable And correctly, in my view, although according to Mr. Kakodkar, it is not

so, because Art. 2307 speaks of works that had been executed crops that were raised or cultivations that were made in bad faith and such a

contingency that does occur in the case under scrutiny where it is not disputed that the occupation of the suit land and the construction thereon

were done with permission of the owners. He submitted that since the construction was done with permission of the land''s owners, the good faith

is established. This, the learned counsel argued, takes away the case from the ambit of Art. 2307 and takes it squarely under the purview of Art.

2306 which provides that if works are done in other''s property in good faith and the value thereof is more than the value of the land, then the

owner of such land is entitled only to get the value of the land. I am afraid that these submissions are not well founded. Undoubtedly, Art,. 2307

speaks of works executed, crops raised or cultivations done in bad faith and it may appear, therefore, that bad faith is in respect of the works,

crops or cultivations. But in a deeper and careful consideration of the question, it becomes obvious that it is not so. Art. 2307 is in Part III of the

Civil Code which deals with the Right of Property, i.e., ownership rights over moveable and immovable property. The said Article provides for a

safeguard of the ownership rights, for it entitles the owner of the land to protect it against encroachments, etc. It speaks of works executed, crops

raised or cultivations done. In other words, it speaks of thing that by implication require the land to come in possession of the person who executes

the works, raises the crops or makes the cultivations. Hence, the provision has to be read along with those which deal with possession and so, Art.

476 which defines good and bad faith has to be read in Art. 2307. Otherwise, the provision of Art. 2307 would become nugatory.

11. The above view is in no manner affected by Art. 2306. This provision of law does not, at all, apply to the case before me. Good faith only is

not sufficient to attract it, for it requires also that the land on which the works, crops and cultivations were made is possessed with animus domini,

and further, with just title. In fact, Art 2306 provides that if one had executed works, raised crops or made cultivations in an land not belonging to

him but being enjoyed by him as his own, i.e., with animus domini, in good faith and "just title", and the value of such works, crops or cultivations is

higher than the value of the land, then the owner of the land will be entitled to the value of the land only. Art, 518, of the Civil Code, lays down that

just title"" is any legitimate means of acquisition, irrespective of the transferor''s right. None of the above requirements, namely (I) enjoyment of the

land as his own; (ii) good faith; and (iii) ""just title"" are satisfied by the appellant, for his stand has been that he is a ""mundkar"" in the Mundkars Act,

by implication, he admits that the land is not enjoyed by him as his own and further, he admits that the land was not acquired by him. In the

circumstances, therefore, Art. 2306 is not attracted.

12. I will now turn to the other contention of Mr. Kakodkar, according to which, in view of the decision of the learned Addl. J.C. in the Second

Civil Appeal No. 41 of 1973, the learned District Judge could not have held that the provisions of the Indian Easements Act were not applicable.

In the said case, the learned Addl. J.C. placing reliance in Mathuri Vs. Bhola Nath and Others observed than even though the Easements Act does

not expressly apply to cases of licenses before the coming into force of the Act, the principle underlying Chapter VI of the Act being in consonance

with justice, equity and good conscience may well be applied. It would, thus appear in the light of the aforesaid observations of the learned Addl.

J.C. that the law on the point having been laid down by a Court to which the learned District Judge was subordinate, he was bound to follow it.

But it was contended by Mr. Kolwalkar that the said decision was passed per incuriam and as such, the correct law was not laid down in the said

case. In fact, according to the learned counsel, at the relevant time, the Indian Easements Act was not in force in Goa, Daman and Diu having been

extended to this Union Territory only in the year 1978. The Extension Act has expressly provided that on and from the date on which the

provisions of the Indian Easements Act come into force in this Union Territory, the provisions of Arts. 2309, 2311, 2312, 2313,and 2314 of the

Portuguese Civil Code and any other law in force in the same Territory corresponding to any of the provisions of the Easements Act shall stand

repealed. Therefore, the learned counsel further contended, it is clear that the footing on which the decision was passed by the learned Addl. J.C.

is erroneous, for, in fact, he proceeded on the wrong assumption that there was no provision corresponding to the Indian Easements Act in force in

Goa, Daman and Diu and being thus misled, wrongly applied the ratio of Mathuri"s case. However, Mr. Kolwalkar further urged, the Extension

Act itself clearly shows that the assumption was erroneous and that there were provision in the law in force in this Union Territory corresponding to

the Easements Act which, being express, were to be applied, instead of the principles of the said Act. Hence, he contended, the law laid down in

the said decision per incuriam is bad and not binding. There is great force in this submission of Mr. Kolwalkar. In fact, the learned Addl. J.C. while

making the observations above referred to has relied on the decision of the Allahabad High Court in Mathuri"s case. It will be, therefore, useful to

advert to the said authority. Undisputably, the said decision of the Allahabad High Court is based on the circumstance that there was no provision

corresponding to the Easements Act applicable to the case of licensees before the coming of the said Act and, therefore, since the principles

underlying Chapter VI of the Act are in consonance with justice, equity and good conscience, the same were to be applied. It is, therefore,

apparent that there was no law in force under which a relief that equity was demanding to be given to the licensees could be granted. It was in this

context of circumstances that the learned Judges of the Allahabad High Court held the view that the principles are in consonance with justice,

equity and good conscience. Manifestly, the situation was quite different in this Union Territory where there existed provisions in the Civil Code

regulating the matter. As such, there was no lacuna in the law and hence, the question of applying the principles laid down in the Easements Act

was not at all arising. With respect, these material circumstances escaped the scrutiny of the learned Addl. Judicial Commissioner and were,

consequently, overlooked by him. Hence, with respect, I am of the firm view that the law laid down by him in the Second Civil Appeal No. 41 of

1973 is not good law. In the circumstances, therefore, I do not find any reason to interfere with the finding of the learned District Judge that the

principles of the Easements Act are not applicable to the present case.

13. Though it is not essential for the disposal of this appeal, I may also deal with the contention of Mr. Kolwalkar, according to which, in my event,

the appellant was not entitled to raise the question of the irrevocability of the license since the point has not been raised before the trial Court.

Joining issue, Mr. Kakodkar urged that, though the point has not been raised in the trail Court, the fact remains that, during the course of the

arguments before the District Judge actually dealt with it in the impugned judgment. In addition, he submitted, it happens that it is the case of the

respondent 1 in the plaint itself that the appellant was a licensee, and as such there was no need for the appellant to raise the question that the

license was irrevocable for such irrevocability is merely a consequence of law.

14. It is thus common ground that the question as to whether the license was irrevocable was not at all raised by the appellant in the trial Court.

Also, it is not disputed that the point was not taken up in the memo of appeal to the District Court. Nevertheless, it is clear from para 8 of the

impugned judgment that such point was raised in the course of the arguments and the learned District Judge has dealt with it. Thus, the question

that arises is whether it was at all open to the appellant to raise the point in the First Appellate Court and again in this Second Appeal, after having

failed to do so in the trial Court. A similar situation fell for consideration of the Supreme Court in Chavalier I.I. Iyyappan and Another Vs. The

Dharmodayam Company, That was a case where the appellant his mainly relied on the plea that the had been granted a license and that acting

upon the license, he had executed a work of a permanent character and incurred expenses in the execution thereof, and therefore, under S. 60(b)

of the Indian Easements Act, 1882, which was applicable to the area where the property was situated, the license was irrevocable. No plea of

license or its irrevocability had been raised but what had been pleaded was the validity of a trust and the said question has not been discussed in

the judgment of the trial Court. It was only in the grounds of appeal to the High Court that the appellant has taken, for the first time, the said

ground. Dealing in the case, their Lordships of the Supreme Court observed that it is not open to a party to change his case at the appellate stage

and that in that particular case since there was no case of license in the trial Court, the appellants were precluded from raising it at the appellate

stage. As I already said, it is common ground that the plea of irrevocability of the license was not raised by the appellant in the trial Court. The fact

that the respondent No. 1 stated in the plaint that the appellant was a license in no manner implies that the question of irrevocability of the license

was before the Court. The point was not at all discussed in the trail Court''s judgment and it is clear from the judgment of the learned District Judge

that it was for the first time raised only at the time of the arguments in the District Court. This being the factual position, undoubtedly, the

observations of the Supreme Court in Iyyappan''s case apply on all fours to the case before me, and as such, I am bound to hold that it was not

open to the appellant to raise the question of irrevocability of the license before the District Judge.

15. In the result, therefore, this appeal fails and is consequently dismissed with costs.

16. The learned counsel for the appellant prays that the operation of the judgment which was just delivered be stayed for four weeks as the

appellant intends to move the Supreme Court. Since there is no objection on the part of the learned counsel for respondent 1, stay is granted as

prayed for.

17. Appeal dismissed.