Swamirao Shriniwas Parvati Vs Bhimabai Padappa Desai

Court: Bombay High Court

Date of Decision: Oct. 8, 1920

Citation: AIR 1921 Bom 368(1) : (1921) 23 BOMLR 416

Hon'ble Judges: Norman Macleod, J; Fawcett, J

Bench: Division Bench

Judgement

Norman Macleod, Kt., C.J.
The plaintiff had to file this suit to obtain a declaration that the suit house was of the ownership of the 2nd

defendant, and liable to attachment and sale in execution of the decree which the plaintiff had obtained against him. The 1st defendant contended

that the house did not belong to the 2nd defendant but was hers and was in her Vahivat through tenants. The 1st issue raised in the trial Court

wasÃ¯Â¿Â½Does plaintiff show that the whole house belongs to his judgment-debtor defendant No. 2? On that issue the Court found that half the

house belonged to the judgment-debtor. The next issue wasÃ¯Â¿Â½Was defendant No. 2 in possession of it within twelve years next before suit''(The

Court found that issue in the negative. Accordingly it dismissed the suit with costs with regard to house B. It appears to me that owing.

2. I cannot agree with that view at all. Apparently it was not suggested, so far as I can see, from the record, that defendant 1 claimed to be in

possession of the house through Mallappa as her tenant and therefore, her possession was adverse to the knowledge of the 2nd defendant, and

therefore, the period for instituting a suit against her by the 2nd defendant had commenced to run. That was not proved by the evidence Nor does

it appear that Mallappa came forward to say that he held the house adversely to the 2nd defendant. This passage in the judgment especially shows

how the mind of the trial Judge was affected by the raising of issue 2, which was a wrong issue to be raised in the case. It is quite. true that the

plaintiff must show that the property which is attached is the judgment-debtor''s, and that the judgment-debtor has a subsisting interest in the

property. He did show that the title was in the judgment-debtor, defendant No. 2. The title will remain so until it can be shown that somebody el so

has got a better title. In the appellate Court the Judge said :

In the second suit the lower Court has hold that Mahaningappa and defendant No. 2, Adiveppa, were owners of the house but have been out of

possession far more than twelve year- end that their ownership is lost by adverse possession on the part of Mallappa. It is argued that Mallappa

may be the tenant of Mahaningappa and Adiveppa. There is nothing, however, in support of this contention and Mallappa himself says tint he is the

tenant of the Desai. So the presumption is that Adiveppa has lost his title to the house by adverse possession of Mallappa.

3. It is not a question at all of presumption. Either defendant No. 1 could establish her right to remain in possession of the house by adverse

possession for twelve years against the 2nd defendant, or else it might have been proved that Mallappa had acquired a title. Rut there is certainly

no presumption that Mallappa could have acquired a title, and Mallappa himself has not come forward to claim that he acquired a title.

4. So the result, so far as the hearing of this suit, has been, that it has been proved that defendant No. 2 had a title to the property. It has not been

proved that anybody else has acquired a title to the property against defendant No. 2 yet the plaintiff is not allowed to attach the 2nd defendant''s

property in execution of his decree. If that decision were to stand, although no one is entitled to the property except the 2nd defendant, he will be

entitled to retain it free from attachment. I should like, to refer to the recent decision of the Privy Council in Secretary of State for India v.

Chellikani Rama Rao (1916) 18 Bom. L.R. 1007: ILR 39 Mad. 617, where it was first held by the High Court of Madras that where claimants

were in possession of property which originally belonged to the Crown it rested upon the Crown to prove that it had a subsisting title by showing

that the possession of the claimants commenced or became adverse within the period of limitation, i. e., sixty years before the notification. That

was the view taken by the High Court of Madras, and their Lordships of the Privy Council said (page 631) :

Their Lordships are of opinion that the view thus taken of the law is erroneous. Nothing is better settled than that the onus of establishing title to

property by reason of possession for a certain requisite period lies upon the person asserting such possession. It is too late in the day to suggest the

contrary of this proposition. If it were not correct it would be open to the possessor for a year or a day to say, '' I am here; be your title to the

property ever so good, you cannot turn mo out until you have demonstrated that the possession of myself and my predecessors was not long

enough to fulfil all the legal conditions''. Such a singular doctrine can be well illustrated by the case of India, in which the right of the Crown to vast

tracts of territory including not only islands arising from the sea, but great spaces of jungle lands, necessarily not under the close supervision of

Government Officers, would disappear because there would be no evidence available to establish the state of possession for sixty years past, It

would be contrary to all legal principles thus to permit the squatter to put the owner of the fundamental right to a negative proof upon the point of

possession.

5. It must follow from that decision that a person who happens to be in possession of property without title cannot be allowed to say to the owner:

you cannot turn me out until you have demonstrated that my possession is not long enough to fulfil all the legal conditions."" I think, therefore, that

the decision of both the lower Courts was wrong and that the plaintiff was entitled to the declaration he asked for in the suit with regard to half the

house, and there will be a decree in his favour with costs throughout to the extent of his success.

Fawcett, J.

6. I concur.