

Saroop Singh vs Banto & Ors on 7 October, 2005

Author: S.B. Sinha

Bench: S.B. Sinha, R.V. Raveendran

CASE NO. :

Appeal (civil) 4426 of 1999

PETITIONER:

Saroop Singh

RESPONDENT:

Banto & Ors.

DATE OF JUDGMENT: 07/10/2005

BENCH:

S.B. Sinha & R.V. Raveendran

JUDGMENT:

J U D G M E N T S.B. SINHA, J :

The first defendant in the suit is in appeal before us. The plaintiff- respondents filed a suit for possession and permanent injunction, being Suit No.218 of 1994.

One Shadi admittedly was the owner of the suit property. He left behind his widow, Indira Devi, who inherited the same. On or about 7.1.1955, by a deed of gift Indira Devi donated the suit property in favour of the Appellant herein. One Harnama son of Jatti and Nathu son of Chetu (as reversioners of said Shadi) filed a suit being Suit No.204 of 1957 challenging the legality of the said deed of gift, contending that said Indira Devi had a limited life interest therein.

In terms of a judgment and decree dated 31.1.1958, the said suit was decreed. The said Indira Devi is stated to have died subsequently. Her date of death is not known. The Appellant First Respondent contended that she died at Haridwar in the year 1961. While filing the aforementioned suit on 7.7.1994, the Respondents raised a plea that as she was not heard for a period of seven years prior thereto, by them and by others who would have heard from her had she been alive, she was presumed to have been died .

The plaintiffs-Respondents, as regard the earlier suit, averred :

"One Harnama son of Jatti and one Nathu son of Chetu challenged the gift deed mentioned above in the year 1957 through a suit No.204 and sought declaration to the effect that the gift deed in dispute shall not effect their reversionary rights after

the death of Inder Devi and their suit was decreed on 31.1.58 by Sub-Judge, Ist Class, Ambala. However, at the same time it was observed by the Ld. Sub-Judge, that declaratory decree will ensue for the benefit of daughters of Shadi deceased. Apart from it under the customary law of Punjab Smt. Inder Devi was not absolute owner on 7.1.1955 i.e. the day of gift of the suit properties, rather on the other hand she was only having life interest in the suit properties and could not gift away the same to defendant No.1 as Smt. Inder Devi had already parted with the suit properties in favour of defendant No.1 and could not become absolute owner with the passing of Hindu Succession Act, 1956, rather her life interest continued through in the hand of defendant No.1."

In the said suit, the plaintiff-respondents prayed :

"It is, therefore, prayed that the suit of the plaintiffs for possession as owner of the land comprised in Kh/kh. No.285/356, Khasra Nos. 194(8-4), 195(5-7), 2124(6-18), 1854(1-2), 1859(4-7), 1856(4-7), 851(4-3), 850/2(0-8), 1621(0-15), and for symbolical possession as owner of the land comprised in kh/kh No.285/337, Khasra Nos.849(1-10), 850(3-7), situated within the revenue limits of village Mullanpur Garib Dass and of 1/6 share of kh. No.2078(3-7) and of 1/6 share out of Bara bounded as .and for permanent injunction restraining the defendant No.1 from alienating the suit properties to anybody may kindly be decreed in favour of the plaintiff against the defendants with costs.

Any other relief this Ld. Court deems fit may kindly be granted to the plaintiff in the interest of justice."

The statements made in paragraph 1 was traversed by the Appellant herein in paragraph 3 of the written statement, contending :

"It is incorrect and denied. Smt. Inder Devi who had been absolute owner of the suit properties and she made a valid gift in favour of the answering defendant."

A plea that the suit is time-barred was also raised as an additional plea.

The learned Trial Judge in view of the pleadings of the parties, inter alia, framed the following issues :

"3. What is the effect of the judgment and decree dated 31.1.1958 ? OPP. Parties.

4. Whether Smt. Inder Devi has not been heard for the last 7/7 = years back by plaintiff and other family members and is presumed to be dead ?

OPP.

5. Whether plaintiffs are entitled to possession of the suit land. OPP.

6. Whether suit is time barred ? OPP."

While dealing with Issue No.3, the Trial Court noticed that in the judgment and decree passed in Suit No.204 of 1957, which was marked as Ex.P3 and Ex.P4, it was observed that the declaratory decree would ensue the benefit of the daughters of Shadi, who were the plaintiffs therein, and on that basis decided the said issue in favour of the plaintiff-respondents.

As regard Issue No.4, it while holding that there was no cogent evidence proving the death of Indira Devi in the year 1961 recorded a finding that she was presumed to have died on account of her untraceability for more than 7 years in terms of Section 108 of the Indian Evidence Act. As regard Issue Nos.5 and 6, the Trial Court held :

" The defendant has nowhere pleaded that he became the owner of the suit land by way of adverse possession. No amount of evidence can be taken into account by travelling beyond the pleadings of the parties. The defendant has neither pleaded nor set up any adverse possession over the suit property. No period of limitation is prescribed for bringing a suit for possession on the basis of inheritance. The suit for possession on the basis of inheritance can fail if defendant proves that he has perfected his title by way of adverse possession. In the instant case, the defendants have not set up any adverse possession and consequently the suit is within time under Article 65 of the Limitation Act, 1963 "

The appeal preferred thereagainst by the Appellant was dismissed. In the Second Appeal filed before the High Court, the Appellant, inter alia, raised the question of limitation. The High Court relying on or on the basis of Entry 2(b) of the schedule appended to the Punjab Limitation (Customs) Act, 1920, affirming the findings of the courts below that the Appellant could not prove the date of death of Indira Devi, held that the suit is not barred by limitation stating :

" Since the defendant-appellant failed to prove the death of Indira Devi, it cannot be said that the suit filed by the plaintiffs is barred by time. In fact the suit filed is basing on the acquisition of title on the death of Indira Devi. Thus the suit is based on title as it cannot be disputed that the plaintiffs became entitled to the suit property on the death of their mother. It is for the defendant-appellant to prove that he has perfected in his title being in adverse possession for over 12 years from the date of death of Indira Devi and that the plaintiffs lost their right to sue by efflux of time. Under Article 65 of the Limitation Act, the burden of proof that he perfected his title by adverse possession is on the defendant- appellant."

Mr. P.L. Jain, the learned Senior Counsel appearing on behalf of the Appellant herein, would contend that the courts below committed a manifest error of law insofar as they failed to properly interpret the provisions of Sections 107 and 108 of the Indian Evidence Act; as by reason thereof a date of death cannot be fixed. It was urged that Indira Devi did not become an absolute owner in

terms of the provisions of the Hindu Succession Act, 1956 as she was not possessed of the property on the date of coming into force thereof and in that view of the matter the courts below had committed a serious error in passing the impugned judgments relying on or on the basis of Article 65 of the Limitation Act, 1963. Reliance, in this connection, has been placed on *Giasi Ram and Others vs. Ramjilal and Others* [(1969) 1 SCC 813] It was submitted that it was for the plaintiff-Respondents to prove the date of death of Indira Devi as they have not filed a suit based on title.

Mr. P.N. Mishra, the learned Senior Counsel appearing on behalf of the plaintiff-respondents, on the other hand, would contend that on the death of Indira Devi, the succession reopened in view of the declaratory decree passed by the Civil Court. It was argued that having regard to the fact that the Appellant having not set up any plea of adverse possession, the suit cannot be held to be barred by limitation and in that view of the matter Article 65 of the Limitation Act, 1963 will have no application.

It has not been disputed before us that the judgment and decree passed in Suit No.204 of 1957 had attained finality. In the said suit, it was held :

" In the present case the declaratory decree will ensue for the benefit of the daughters of Shadi deceased and the daughters' sons who are minors. In the circumstances, I would in exercise of my discretion, grant the plaintiffs a decree for a declaration to the effect that the gift in dispute shall not affect their reversionary rights after the death of defendant no.1. The parties are, however, left to bear their own costs "

It is furthermore not in dispute that Indira Devi had only a life interest. The deed of gift dated 7.1.1955 was, therefore, held to be valid only so long as she was alive. On her death the succession reopened having regard to the provisions of the Hindu Succession Act, 1956. The Respondents being daughters inherited the interest of Shadi. They were also reversioners in terms of their personal law as was opined by the Civil Court in the earlier suit. The plaintiff-respondents, therefore, rightly claimed their title by inheritance.

Entry 2(b) of the Punjab Limitation (Customs) Act, 1920 provides for a limitation of three years, when a suit is filed for possession of ancestral immovable property which has been alienated on the ground that the alienation is not binding on the plaintiff according to custom. The said provision has no application herein as the title of the suit property in favour of the Respondents herein had already been declared by the Civil Court in the earlier suit, subject to the condition that they remain owners thereof. The Civil Court took into consideration the customary law as also the provisions of the Hindu Succession Act while arriving at the said finding. Moreover, a declaratory decree obtained by a reversioner is not binding upon actual owner, in view of the decision of this Court in *Shankuntla Devi vs. Kamla and Others* [(2005) 5 SCC 390].

In the suit, it was not necessary for the Respondents herein to claim their reversionary right, as the same had already been declared in the earlier suit.

This Court in Giasi Ram (supra) held :

"The Punjab Custom (Power to Contest) Act 1 of 1920, was enacted to restrict the rights exercisable by members of the family to contest alienations made by a holder of ancestral property. By virtue of Section 6 of the Act no person is entitled to contest an alienation of ancestral immovable property unless he is descended in the male line from the great-great-grandfather of the alienor. Under the customary law in force in the Punjab a declaratory decree obtained by the reversionary heir in an action to set aside the alienation of ancestral property enured in favour of all persons who ultimately took the estate on the death of the alienor for the object of a declaratory suit filed by a reversionary heir impeaching an alienation of ancestral estate was to remove a common apprehended injury, in the interest of the reversioners. The decree did not make the alienation a nullity it removed the obstacle to the right of the reversioner entitled to succeed when the succession opened. By the decree passed in Suit No. 75 of 1920, filed by Giani Ram it was declared that the alienations by Jwala were not binding after his life time, and the property will revert to his estate. It is true that under the customary law the wife and the daughters of a holder of ancestral property could not sue to obtain a declaration that the alienation of ancestral property will not bind the reversioners after the death of the alienor. But a declaratory decree obtained in a suit instituted by a reversioner competent to sue has the effect of restoring the property alienated to the estate of the alienor."

In this case, the Respondents herein have a better title. They were not parties in the earlier suit. They, therefore, claimed their title independent of the declaratory decree, although such right has been noticed therein. We would consider the question of applicability of Limitation Act little later but before doing that we may consider the question of date of death of Indira Devi.

Sections 107 and 108 of the Indian Evidence Act read :

"107. Burden of proving death of person known to have been alive within thirty years.- When the question is whether a man is alive or dead, and it is shown that he was alive within thirty years, the burden of proving that he is dead is on the person who affirms it.

108. Burden of proving that person is alive who has not been heard of for seven years.-Provided that when the question is whether a man is alive or dead, and it is proved that he has not been heard of for seven years by those who would naturally have heard of him if he had been alive, the burden of proving that he is alive is shifted to the person who affirms it."

Section 108 is a proviso to Section 107. There is neither any doubt or dispute that the date of death of Indira Devi is not certain. By reason of the aforementioned provision, a presumption of death can be raised. In this case, however, death of Indira Devi is not in question, the date of death is. In the instant case, both the parties have failed to prove the date of death of Indira Devi. However, having

regard to the presumption contained in Section 108 of the Indian Evidence Act, the Court shall presume that she was dead having not heard of for a period of seven years by those who would naturally have heard of him, if he had been alive, but that by itself would not be a ground to presume that she had died seven years prior to the date of institution of the suit In *Lal Chand Marwari vs. Mahant Ramrups Gir and Another* AIR 1926 PC 9], it was observed :

"Now upon this question there is, their Lordships are satisfied, no difference between the law of India as declared in the Evidence Act and the Law of England (*Rango Balaji vs. Mudiyeppa* (1899) 23 Bom. 296) and searching for an explanation of this very persistent heresy, their Lordships find it in the words in which the rule both in India and in England is usually expressed. These words taken originally from *In re Phene's Trusts* (L.R. 5 Ch.139) run as follows :-

"If a person has not been heard of for seven years, there is a presumption of law that he is dead; but at what time within that period he died is not a matter of presumption but of evidence, and the onus of proving that the death took place at any particular time within the seven years lies upon the person who claims a right to the establishment of which that fact is essential."

Following these words, it is constantly assumed not perhaps unnaturally that where the period of disappearance exceeds seven years, death, which may not so. The presumption is the same if the period exceeds seven years. The period is one and continuous, though it may be divisible into three or even four periods of seven years. Probably the true rule would be less liable to be missed, and would itself be stated more accurately, if, instead of speaking of a person who had not been heard of for seven years, it described the period of disappearance as one of not less than seven years."

In *LIC of India vs. Anuradha* [(2004) 10 SCC 131], this Court held :

"12. Neither Section 108 of the Evidence Act nor logic, reason or sense permit a presumption or assumption being drawn or made that the person not heard of for seven years was dead on the date of his disappearance or soon after the date and time on which he was last seen. The only inference permissible to be drawn and based on the presumption is that the man was dead at the time when the question arose subject to a period of seven years' absence and being unheard of having elapsed before that time. The presumption stands unrebutted for failure of the contesting party to prove that such man was alive either on the date on which the dispute arose or at any time before that so as to break the period of seven years counted backwards from the date on which the question arose for determination. At what point of time the person was dead is not a matter of presumption but of evidence, factual or circumstantial, and the onus of proving that the death had taken place at any given point of time or date since the disappearance or within the period of seven years lies on the person who stakes the claim, the establishment of which will depend on proof of the date or time of death."

However, the date of death of Indira Devi would not assume any significance, as would appear from the discussions made hereinafter.

In the instant case, the question of applicability of the Limitation Act does not arise. The Appellant-first defendant could have legitimately raised a plea that Indira Devi having died in the year 1961, his possession thereafter has become adverse to the true owner and, thus, on the expiry of the statutory period of limitation he had perfected his title by adverse possession. But, he did not raise such a plea. Even before us, Mr. Jain categorically stated that the Appellant does not intend to raise such a plea.

Articles 64 and 65 of the Limitation Act read thus :

"

Description of suit Period of Limitation Time from which period begins to run

64. For possession of immovable property based on previous possession and not on title, when the plaintiff while in possession of the property has been dispossessed Twelve years The date of dispossession.

65. For possession of immovable property or any interest therein based on title.

Explanation.-For the purposes of this article

(a) where the suit is by a remainderman, a reversioner (other than a landlord) or a devisee the possession of the defendant shall be deemed to become adverse only when the estate of the remainderman, reversioner or devisee, as the case may be, falls into possession;

(b) where the suit is by a Hindu or Muslim entitled to the possession of immovable property on the death of a Hindu or Muslim female, the possession of the defendant shall be deemed to become adverse only when the female dies;

(c) where the suit is by a purchaser at a sale in execution of a decree when the judgment-

debtor was out of possession at the date of the sale, the purchaser shall be deemed to be a representative of the judgment-debtor who was out of possession.

Twelve years When the possession of the defendant becomes adverse to the plaintiff "

The statutory provisions of the Limitation Act have undergone a change when compared to the terms of Articles 142 and 144 of the schedule appended to the Limitation Act, 1908, in terms whereof it was imperative upon the plaintiff not only to prove his title but also to prove his possession within twelve years, preceding the date of institution of the suit. However, a change in legal position has been effected in

view of Articles 64 and 65 of the Limitation Act, 1963. In the instant case, plaintiff-respondents have proved their title and, thus, it was for the first defendant to prove acquisition of title by adverse possession. As noticed hereinbefore, the first defendant- Appellant did not raise any plea of adverse possession. In that view of the matter the suit was not barred.

In terms of Article 65 the starting point of limitation does not commence from the date when the right of ownership arises to the plaintiff but commences from the date defendant's possession becomes adverse. [See Vasantiben Prahladi Nayak and Others vs. Somnath Muljibhai Nayak and Others (2004) 3 SCC 376] 'Animus possidendi' is one of the ingredients of adverse possession. Unless the person possessing the land has a requisite animus the period for prescription does not commence. As in the instant case, the Appellant categorically states that his possession is not adverse as that of true owner, the logical corollary is that he did not have the requisite animus. [See Md. Mohammad Ali (Dead) By LRs. Vs. Jagdish Kalita and Others, (2004) 1 SCC 271, para 21] Yet again in Karnataka Board of Wakf vs. Government of India and Others [(2004) 10 SCC 779], it was observed :

" Physical fact of exclusive possession and the animus possidendi to hold as owner in exclusion to the actual owner are the most important factors that are to be accounted in cases of this nature. Plea of adverse possession is not a pure question of law but a blended one of fact and law. Therefore, a person who claims adverse possession should show: (a) on what date he came into possession, (b) what was the nature of his possession, (c) whether the factum of possession was known to the other party, (d) how long his possession has continued, and (e) his possession was open and undisturbed. A person pleading adverse possession has no equities in his favour. Since he is trying to defeat the rights of the true owner, it is for him to clearly plead and establish all facts necessary to establish his adverse possession."

In view of our findings aforementioned, we are of the opinion that there is no merit in this appeal, which is accordingly dismissed. No costs.