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LAWS(GJH) 2017 4 5

HIGH COURT OF GUJARAT

Coram :- RAJESH H. SHUKLA, J.

Decided on 2017 April 06

FIRST APPEAL NO. 709 of 1991

Baloch Ilamkhan Umarkhan

VERSUS

Heirs And L. R. Of Deceased Dilavarsinh Naransinh Zala

Advocates:

NIRAD D. BUCH, N. D. NANAVATI, NAVIN K. PAHWA, PRATIK P. THAKKAR

Citations:

LAWS(GJH) 2017 4 5,

Expert View:

- A. **The background of the facts as narrated and briefly summarized are that the Plaintiffs had purchased the land in question from the original owner Shri Shaukat Ali and the land was in his possession and occupation as owner as it was purchased by registered sale deed dated 22__ . Reference is also made to some revenue record to show that the name of the Defendant is mutated and therefore it is claimed that the judgment and order is erroneous and the court below has failed to appreciate the fact that the Defendant has been in possession for a long period, and in fact, the amount was paid by the Defendant for purchase of the land__ .**
- B. **Further, the much emphasis on the entry in the revenue record has been clearly discussed by the court below while appreciating the evidence that the possession was also with the Plaintiff, and therefore, the title and possession of the land in question was with the Plaintiff, and even the entry in the revenue record clearly suggest about the title, possession and occupation of the Plaintiff, when he has already paid the dues and the necessary charges for the revenue__ .**
- C. **The Plaintiff- deceased Dilavarsinh Zala was an employee in the office of the Forest Department and was required to go outside for the purpose of his duty and therefore he has asked Ilamkhan Umarkhan Baloch, who was working under him, to look after the land and was making payment of Rs__ 2 who is the son of Ilamkhan Umarkhan Baloch used to take the law in his hand and got the**

entries in the revenue record in his name and therefore when the Plaintiff came to know about such a change in the revenue record, he filed a Regular Civil Suit No___ Reference is also made to some revenue record to show that the name of the Defendant is mutated and therefore it is claimed that the judgment and order is erroneous and the court below has failed to appreciate the fact that the Defendant has been in possession for a long period, and in fact, the amount was paid by the Defendant for purchase of the land___ He referred to the discussion in the judgment and submitted that the document itself would speak and when there is a documentary evidence in the form of sale deed, such ipsi dixit cannot be believed and therefore the court below has not accepted such submissions which are made without any basis___ Further, the much emphasis on the entry in the revenue record has been clearly discussed by the court below while appreciating the evidence that the possession was also with the Plaintiff, and therefore, the title and possession of the land in question was with the Plaintiff, and even the entry in the revenue record clearly suggest about the title, possession and occupation of the Plaintiff, when he has already paid the dues and the necessary charges for the revenue___

- D. Buch for the Appellant has requested for stay of the operation of the order to enable his client to approach the higher forum. -- The operation of the judgment and order is ordered to be stayed for a period of six weeks.**

JUDGMENT / ORDER

1. The present First Appeal has been preferred by the Appellants / Original Defendants being aggrieved with the impugned judgment and decree in Special Civil Suit No. 115 of 1983 by which the Suit of the Plaintiff is allowed and decreed with the declaration that the suit land is of the ownership and possession of the Plaintiff and the Defendant should hand over the vacant and peaceful possession to the Plaintiff.

2. The background of the facts as narrated and briefly summarized are that the Plaintiffs had purchased the land in question from the original owner Shri Shaukat Ali and the land was in his possession and occupation as owner as it was purchased by registered sale deed dated 22.3.1972. The Plaintiffs who are the heirs of the original Plaintiff Dilavarsinh Zala has filed the suit. The Plaintiff- deceased Dilavarsinh Zala was an employee in the office of the Forest Department and was required to go outside for the purpose of his duty and therefore he has asked Ilamkhan Umarmkhan Baloch, who was working under him, to look after the land and was making payment of Rs.100/- per month as a watchman. However, it appears that the Defendant No.2 who is the son of Ilamkhan Umarmkhan Baloch used to take the law in his hand and got the entries in the revenue record in his name and therefore when the Plaintiff came to know about such a change in the revenue record, he filed a Regular Civil Suit No. 83 of 1981 in the court of learned Civil Judge (JD), Palitana. The trial court on appreciation of material and evidence and the documents including the sale deed executed by the original owner Shaukat Ali decreed the suit declaring that the Plaintiff is the absolute owner. The Plaintiff had also paid the revenue charges and the notices which were received for the revenue charges were produced suggesting the ownership and possession of the Plaintiff. In fact in the document Exh.43, up to the year 1978, the name of the Plaintiff was shown in the revenue record. However, thereafter the name of the Defendant was mutated in village form 7/12 which came to his notice. The say of the Defendant as claimed is that the Plaintiff had purchased on behalf

of the Defendant the said land and therefore the Defendant was in possession and occupation of the suit land. Reference is also made to some revenue record to show that the name of the Defendant is mutated and therefore it is claimed that the judgment and order is erroneous and the court below has failed to appreciate the fact that the Defendant has been in possession for a long period, and in fact, the amount was paid by the Defendant for purchase of the land. Further, the document was executed under the influence of the superior in the name of the Plaintiff. The reliance is placed by the Defendant on the letters at Exh.46, Exh.51 and Exh.52 to suggest that it would convey that there was an understanding that the suit land was purchased by the Plaintiff on behalf of Defendant and in fact it belonged to the Defendant though the document is executed in the name of the Plaintiff.

3. Heard learned Advocate Shri Nirad D. Buch for the Appellant.

4. Learned Advocate Shri Buch referred to the papers and also the registered sale deed dated 22.3.1972 at Exh.33 and agreement to sell at Exh.32. He submitted that the court below has failed to consider the same and has totally misdirected in appreciating that as the Defendant was the owner, the money was paid by him and it was purchased by the Plaintiff for and on behalf of the Defendant. He emphasized the discussion in the judgment and submitted that the trial court on the one hand has accepted about the possession but has given the finding that the payment made to the land owner is not proved. He also referred to the observations in the judgment in paragraphs 23, 24 and 27 referring to the aspect of undue influence and tried to submit that it has not been considered that he is in the possession for many years. He submitted that the letters Exh.48 and Exh. 52 would clinch the issue that there was an understanding regarding purchase of the land by the Defendant and it was purchased by the Plaintiff for and on behalf of Defendant No.1. Learned Advocate Shri Buch submitted that if the Appellant / Original Defendant had no right, title, interest, then there was no need for addressing the letters. Learned Advocate Shri Buch therefore submitted that as it has come on record that Defendant No.1 was the rightful owner, the court below has failed to appreciate about the possession that otherwise he would not have been in possession for long period. He submitted that the observations made that the Defendant was only a caretaker and was engaged as a watchman, there is no evidence on this aspect. He also referred to the deposition of original owner Shaukat Ali at Exh.109 and submitted that he is not specifically stating as he has only stated:

"Negotiation was with Ilamkhan for Rs.12000/-. He had paid Rs.5000/- earlier. At the time of satakhat or at the time of giving money, no talks had taken place with Dilavarsinh."

5. Learned Counsel Shri Navin K. Pahwa appearing with learned Advocate Shri Pratik P. Thakkar for the Respondent has referred to the papers at length and submitted that the agreement to sell at Exh.32 and thereafter registered sale deed at Exh.33 would itself be sufficient to establish the title and possession of the Plaintiff. Both these documents have been admitted. Learned Counsel Shri Pahwa submitted that the possession would go with the title and therefore once these documents are established which have not been challenged, the claim made by the Appellant / Original Defendant has not been rightly believed by the court below. Learned Counsel Shri Pahwa referred to the discussion in the judgment about the theory or the understanding about the aspect of payment to contend that the land was purchased by the Plaintiff for and on behalf of Defendant No.1. He referred to the discussion in the judgment and submitted that the document itself would speak and when there is a documentary evidence in the form of sale deed, such ipsi dixit cannot be believed and therefore the court below has not accepted such submissions which are made without any basis. Learned Counsel Shri Pahwa also submitted that the court

below has discussed threadbare the issue with regard to the entries in the revenue record on the basis of which the possession is claimed. He submitted that up to a particular time i.e. up to 1978 or 1980 even the name of Respondent / Original Plaintiff was shown as the owner and occupier of the land. This itself would suggest that, all throughout, the ownership and possession of the land was with the Plaintiff. However, Defendant No.1 was a caretaker as the Plaintiff had to attend for his duties outside the village and therefore the care was taken for an on behalf of the Plaintiff. However, the son of the Defendant got the entry mutated in his name subsequently in the year 1980 or 1981 which came to the notice of the Plaintiff and therefore he took the steps including filing of the suit. He therefore submitted that the submissions which have been made to make a claim about the possession or a long possession are misconceived. Learned Counsel Shri Pahwa pointedly referred to the aspect of the possession relying upon the judgment of the Hon'ble Apex Court in case of Maria Margarida Sequeira Fernandes and ors. v. Erasmo Jack De Sequeria (Dead) Through Lrs. Reported in (2012) 5 SCC 370. He pointedly emphasized the observations made in paragraph 96 and 97 and submitted that the principles have been summarized in paragraph 97. Learned Counsel Shri Pahwa emphasized that no one acquires a title to the property or even any interest in the property irrespective of his long possession. He emphasized that the caretaker or the servant has to give the possession on demand. Therefore, learned Counsel Shri Pahwa submitted that the claim made is without any basis. He also referred to and relied upon the judgment of the Hon'ble Apex Court in case of Behram Tejani and ors. v. Azeem Jagani, reported in 2017 (1) J.T. 180. Learned Counsel Shri Pahwa therefore submitted that the judgment and order passed by the court below may not be disturbed.

6. In view of these rival submissions, it is required to be considered whether the present Appeal deserve consideration.

7. As could be seen from the rival submissions and appreciation of material and evidence as discussed in the impugned judgment, the title of the plaintiff pursuant to the agreement to sell at Exh.32 and the registered sale deed at Exh.33 have been accepted and believed on appreciation of evidence. Therefore, the title and possession of the Plaintiff are established. The original owner Shaukat Ali executed a registered sale deed in favour of the Plaintiff at Exh.33. The deposition of the original owner Shaukat Ali at Exh.33 also makes it clear that the possession is also given to the Plaintiff. Therefore, as rightly submitted, possession would follow the title, and in view of this clear deposition of the original owner Shaukat Ali, the possession was also handed over to the Plaintiff. The submissions which have been made referring to the deposition of Shaukat Ali at Exh.33 that it should be believed that the land was purchased by the Plaintiff for and on behalf of Defendant No.1 though the document is executed in the name of the Plaintiff, is misconceived. The submissions which have been made with much emphasis that though the sale deed is in favour of the Plaintiff, in fact it was purchased by Defendant No.1 and the reliance sought to be placed on the deposition of Shaukat Ali at Exh.33 that it is not clear and therefore it should be construed that it was purchased by the Defendant, is misconceived. It is well accepted that the evidence of the witness has to be read as a whole and reading the deposition of Shaukat Ali, it does not spell out or reveal that there was any such intention or understanding that the land is purchased by the Plaintiff for and on behalf of Defendant No.1. Similarly, the reliance placed on the documents i.e. letters Exh.48 and Exh.52 to corroborate the theory of purchase by the Plaintiff for and on behalf of Defendant No.1 again suggest that the court may presume without any basis. Merely because the letter is written, it does not necessarily give an indication about the understanding or the intention of the parties which is sought to be canvassed disregarding the registered sale deed in favour of the Plaintiff. Further, the much emphasis on the entry in the revenue record has been clearly discussed by the court below while appreciating the evidence that the possession was also with the Plaintiff, and therefore, the title and possession of the land in question was with the Plaintiff, and even the entry in the revenue record clearly suggest about the title, possession and occupation of the Plaintiff, when he has already paid the dues and the necessary

charges for the revenue. This itself suggest that the possession was with the Plaintiff and the Defendant was appointed only as a caretaker. This aspect has been further corroborated by the deposition of other witnesses that after the transaction of sale in the year 1972, the title and possession has remained with the Plaintiff as it is evident that entry in the revenue record showing the possession of the Plaintiff is borne out from the record till 1978 and 1979. Thus, as stated by the Plaintiff that due to his job, when he was out, he had given as a caretaker to Defendant No.1. Thereafter, the son of the Defendant is said to have got the entries mutated in his name, which came to the notice of the Plaintiff, and thereafter, he took steps, including filing of the suit. Thus, a few entries in the revenue record got entered, would not establish any right, title, interest including even possessory title of the Defendant.

8. The Hon'ble Apex Court in a judgment in case of Maria Margarida Sequeira Fernandes and ors. v. Erasmo Jack De Sequeria (Dead) Through Lrs. (supra) has, while considering this very aspect of possession and the claim made on the basis of possession, clearly observed that the possession is a flexible term and is not necessarily restricted to actual possession of the property. The two elements of possession i.e. corpus and the animus have been considered and it has been clearly observed that merely because a servant who is employed as a caretaker or chowkidar or a watchman to look after the property cannot be said to have entered into the possession of the property. Summarizing the principle of law in paragraph 97, again the Hon'ble Apex Court has observed:

- (1) No one acquires title to the property if he or she was allowed to stay in the premises gratuitously. Even by long possession of years or decades such person would not acquire any right or interest in the said property.
- (2) Caretaker, watchman or servant can never acquire interest in the property irrespective of his long possession. The caretaker or servant has to give possession forthwith on demand.
- (3) The courts are not justified in protecting the possession of a caretaker, servant or any person who was allowed to live in the premises for some time either as a friend, relative, caretaker or as a servant.
- (4) The protection of the court can only be granted or extended to the person who has valid, subsisting rent agreement, lease agreement or licence agreement in his favour.
- (5) The caretaker or agent holds property of the principal only on behalf of the principal. He acquires no right or interest whatsoever for himself in such property irrespective of his long stay or possession."

9. Thus, what is required to be established even to claim the possession, there has to be a legal possession. Meaning thereby, the owner had parted with the possession or part interest in the property. However, if the possession is retained by the owner and the person who is employed is in possession as a caretaker or look after the same, it would not justify to make any claim, and it cannot be said to be a possessory title. The possession, in such an eventuality remains with the owner and he is allowed to look after by entering the possession for which he is engaged and therefore the owner has never parted with the possession. This issue was again considered by the Hon'ble Apex Court in case of Maria Margarida Sequeira Fernandes and ors. v. Erasmo Jack De Sequeria (Dead) Through Lrs. (supra). Therefore, this court is in complete agreement with the findings and the conclusion arrived at by the court below which cannot be said to be erroneous. The present First Appeal therefore deserves to be dismissed and accordingly stands dismissed.

Further Order

10. After the order was pronounced, learned Advocate Shri Nirad D. Buch for the Appellant has requested for stay of the operation of the order to enable his client to approach the higher forum.

11. Request as prayed for is granted. The operation of the judgment and order is ordered to be stayed for a period of six weeks.

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