

(1955) 12 BOM CK 0004

In the Bombay High Court

Case No : A.F.O.D. No. 711 of 1951 with Civil Application No. 2014 of 1955

Apaya Dundyappa and Others

APPELLANT

Vs

Govind Dattatraya and Others

RESPONDENT

Date of Decision : 05-12-1955

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 1 Rule 10
Evidence Act, 1872 — Section 101, 102, 103, 114, 13
Limitation Act, 1908 — Article 142, 143, 144
Registration Act, 1908 — Section 32, 60
Transfer of Property Act, 1882 — Section 105, 44, 58, 8

Citation : AIR 1956 Bom 625

Hon'ble Judges : Bavdekar, J

Bench : Single Bench

Advocate : G.A. Kamte, for the Appellant; M.M. Virkar, D.P. Dhupkar and B.M. Kalagate, for the Respondent

Judgement

1. This is an appeal arising from a suit which has been filed by the plaintiffs who had purchased the property for defendant No. 1 on 6-9-1945. It appears that prior to the plaintiff's purchase there was litigation between defendant No. 1 and defendant No. 2 with regard to the property in suit, and defendant No. 1 obtained a decree for possession of the lands in suit as against defendant No. 2 in the year 1932.

In the year 1940 defendant No. 1 made an application for execution of this decree joining as parties to the execution application defendant No. 3 and his sons defendants Nos. 4 and 5 also upon an allegation that in the year 1928 defendant No. 3 appeared to have taken a Thev Patra from defendant No. 2. Notices of the application for execution were served upon defendants Nos. 3 to 5; but they took no notice whatsoever of the application for execution. It was then held that the Thev Patra which had been taken by defendant No. 3 had to take subject to the result of the suit which had been filed by defendant No. 1 against defendants No. 2, because the doctrine of lis pendens applied. Possession

was consequently given to defendant No. 1 on 2-6-1942. The plaintiffs' purchase was subsequent to that.

2. The plaintiffs filed the suit from which the present appeal arises not against defendants Nos. 1 to 5 but also against the other descendants of defendant No. 3 so as to leave no defect of parties to the suit. Defendant No. 1 remained ex parte. Defendant No. 2 claimed that the lands belonged to him; that the decree in the suit filed by defendant No. 1 was obtained by fraud; that the sale deed taken by the plaintiffs was bogus; that defendant No. 2's sons should be brought on the record, and that defendant No. 1 had not come into possession on 2-6-1942.

Defendant No. 3 died pending the suit, and the principal contention of his descendants, that is, defendants Nos. 4 to 8 was that the decision in the darkhast of 1940 was not binding upon them, especially as defendants Nos. 6 to 8 were not parties to the darkhast. They also denied that there was any Thev patra and claimed that they had become owners of the land in suit by adverse possession. Pending the suit the plaintiffs gave notice to defendant No. 3 to produce the Thev patra, but defendant No. 3 did not produce it. Thereupon the plaintiffs tendered a certified copy of the Thev Patra in evidence.

In order to prove it, he examined one of the attesting witnesses, but he failed to prove that the document was attested. Thereupon the learned trial Judge held that the document was in the first instance not proved to have been executed. He therefore declined to admit the document into evidence. In the second instance, he came to the conclusion that the document was a bogus document obtained by defendant No. 3.

Then finding that defendant No. 3 was in possession since at any rate from 1920, he said that defendant No. 3 had become owner of the land in suit by adverse possession for more than 12 years. This adverse possession had ripened into title by 1932. Consequently any possession which defendant No. 1 obtained in execution of his decree in the year 1942 was of no use to defendant No. 1 or to the plaintiffs.

3. The plaintiffs have come in appeal, and It appears to me in the first instance that the learned trial Judge was in error in holding that the plaintiffs had failed to prove that the document was attested as required by law. It has been contended on behalf of the plaintiffs that in the first instance the document is not a mortgage and consequently it was not necessary that the document should have been attested. But this contention does not seem to be correct. The document obviously is not a lease, for the reason that the executant, namely, defendant No. 2 says, that he had obtained the amount of the document, namely, Rs. 1000 "upon his land".

In the second instance, even though there is a period of 10 years mentioned in the document for which defendant No. 3 was to pay what is called Khand or rent to defendant No. 2, defendant No. 3 was not to hand over possession of the land

to defendant No 2, at the end of that period. On the contrary, defendant No. 3 was to remain in possession till at some Padva (Hindu New Year day) succeeding to the Padva which came at the end of the tenth year. Defendant No. 2 paid back to defendant No. 3 the amount of the consideration of the Thev Patra, namely, Rs. 1000.

It is obvious consequently that the document created usufructuary mortgage. It may be that there was no right in defendant No. 3 to bring the property to sale; he had got a right to remain in possession of the property until the amount of Rs. 1000 was paid off. The property, therefore, was made security for the repayment of the money, and the transaction was obviously consequently a mortgage.

4. In that case, it was required to be attested; but in this case the plaintiffs had given notice to defendant No. 3 to produce the document, and defendant No. 3 failed to produce it. Thereupon the plaintiffs tendered a certified copy of the document into evidence. It is said that the plaintiffs never tendered a certified copy into evidence; but that does not seem to be correct, for the reason that the learned trial Judge has gone into the question of proof of the mortgage and holding that it was not proved that the document was properly attested he has refused to admit it into evidence the certified copy.

It is obvious that the learned trial Judge would not have gone into this question, unless a certified copy of the document had as a matter of fact been tendered into evidence. Immediately defendant No. 3 or his heirs refused to produce the document, the plaintiffs became entitled to give secondary evidence of the document into evidence.

Secondly, u/s 89, Evidence Act the Court had to presume that the document was not only executed but was attested as required by law. Defendant No. 3 could indeed rebut the presumption, but then he made no attempt whatsoever to do so. There was consequently nothing against the presumption and it had to be taken that the document was attested as the certified copy showed that it purported to be attested.

5. It is contended, however, that the presumption u/s 89 could not be drawn, unless it was shown that the original was in the possession of defendants Nos. 4 to 8. That is undoubtedly so. But in this case the certified copy shows that the document purported to have been presented for registration by defendant No. 3 himself.

Now, u/s 60, Registration Act there was a presumption with regard to the correctness of this endorsement. In the second instance, when in the execution application of 1940 notice was given to defendants Nos. 3 to 5 about the claim of defendant No. 1, that they had taken the land in suit upon a Thev patra from defendant No. 2 pendente lite and claiming that possession should be given to them from Nos. 3 to 5, they took no notice whatsoever of the matter and remained ex parte.

Now, inasmuch as defendant No. 1 was seeking for possession of the land not only from defendant No. 2 but also from defendants Nos. 3 to 5 if defendants Nos. 3 to 5 were in possession not under the Thev Patra but as persons who had, held adversely to defendant No. 2 and their adverse possession had ripened into a title, there could be no doubt whatsoever that defendants Nos. 3 to 5 would have appeared in the darkhast which has been filed by defendant No. 1 and would have contested the application saying that it was not true that they had obtained possession of the land under a Thev patra executed by defendant No. 2 in favour of defendant No. 3 but that they were in possession independently of the Thev patra and as a matter of fact adversely to defendant No. 2. But the matter does not even rest there.

It appears that at some time before 1939 when the record of rights was introduced in the village in which the property in suit was situated defendant No. 4 made a statement claiming that he was enjoying this property in the amount of a Thev. It is obvious therefore, that the conclusion to which the learned trial Judge came that defendant No. 2 had in this case got a bogus Thev Patra executed by himself and obtained registration of it is not correct.

As a matter of law there is a presumption, as their Lordships of the Privy Council pointed out about the regularity of the proceeding before the Sub-Registrar, and even apart from anything else once the Registrar's papers had shown that the document had been presented for registration by defendant No. 3, it was necessary for defendant, No. 3 to rebut that presumption by adducing evidence to show that as a matter of fact the document was not presented for registration by him.

Once the document is registered, it has got to be returned to the party who had presented it for registration. The document may be returned to the party who presents it either personally or by registered post. If it was returned personally the thumb impression of the party who tendered it for registration would be taken and as long as defendant No. 3 was alive which he was at any rate for some time after the filing of the present suit, it was always possible for defendant No. 3 to show by examining an expert to compare the thumb impression which must be on the registration record with his own thumb impression that the document was not really presented for registration by him.

We do not know when in this case defendant No. 3 died. He may have died before the certified copy of the document was produced in this case on 12-4-1948. But the plaintiffs alleged even in the plaint that there was a Thev Patra. In the year 1929 defendant No. 2 claimed that he was in possession of the property in suit as a mortgagee, and in the execution application of 1940 specific notice has been given to defendants Nos. 3 to 5 that they were in possession of the property under a Thev Patra executed by defendant No. a in their favour pending the litigation between defendant No. 1 and defendant No. 2.

They must have known therefore that the claim was that there was a registered

Thev Patra and in that case even if defendant No. 3 died before the certified copy was produced, they had an opportunity to take a search of registration records and to show that the Thev Patra which purported to be presented for registration by defendant No. 3 was not really presented by him and they took no steps to show that there can be no doubt that in all the circumstances of the case, the Thev Patra must have been presented for registration by defendant No. 3.

6. Upon the failure of defendants Nos. 4 to 8 therefore to produce the original, the certified copy could not only be tendered into evidence, but the presumption u/s 89 arose, and inasmuch as the defendants had led no evidence to rebut this presumption, it must be taken that defendant No. 3 was a mortgagee under a mortgage executed by defendant No. 2 in his favour in the year 1928.

7. It is contended on behalf of defendants Nos. 4 to 8, however, that even so the plaintiffs had to prove their title to the property; but the land admittedly belonged to the Kulkarni family from which defendants Nos. 1 and 2 come. It was the plaintiffs' case that the land belonged to defendant No. 1; defendant No. 1 proved his title by filing a suit against defendant No. 2, and the plaintiffs have purchased the property from defendant No. 1.

On the other hand, it was the case of defendants Nos. 4 to 8 that the land belonged to defendant No. 2. But in that case the plaintiffs were entitled to rely upon the judgment in the suit which defendant No. 1 had filed against defendant No. 2 and in which defendant No. 1 proved his title as against defendant No. 2. This decree may not be res judicata even as against defendant No. 2 for the reason that the decree appears to have been a decree of the second class Sub-Judge's Court. But that does not make any difference.

The judgment was evidence u/s 13, Evidence Act of the title of defendant No. 1. This title was proved by defendant No. 1 filing a suit against defendant No. 2(sic) Defendant No. 3 is merely a mortgagee under a mortgage executed pendente lite. It is obvious therefore that the plaintiffs have proved that the land belonged to defendant No. 1.

8. Coming next to the question of defendant No. 3's adverse possession, giving him a title, it is obvious that whatever possession defendant No. 3 may have had before the year 1928 his possession after 1928 had to be referred to the mortgage deed. Defendant No. 3's possession has been held to be proved only from 1920 onwards. In the year 1928 the adverse possession had not ripened into a title. Besides defendant No. 3 took a mortgage of the property in suit from defendant No. 2 in 1928. Any possession by defendant No. 3 after 1928 being derivative could not rank as adverse possession.

On the contrary inasmuch as defendant No. 3 took a mortgage from defendant No. 2 in the year 1923 he admitted the title of defendant No. 2 in the year 1928. There was consequently an interruption in the adverse possession of defendant No. 3 in 1928, when the mortgage was taken by defendant No. 3 from defendant No. 2. In the result, therefore, defendant No. 3 had not obtained, title to the

property by adverse possession for more than 12 years.

9. The plaintiffs were consequently entitled to a decree; but inasmuch as the plaintiffs do not claim the whole of the property in suit but claim only half a share in it, they cannot get a decree for exclusive possession. They cannot get also a decree for partition and separate possession of their half a share in the property, because according to the plaintiffs' own case the remaining half does not belong to defendants Nos. 3 to 8 or defendant No. 1; it belongs to some other person.

In order that a decree for partition and separate possession should be passed the other sharers must be before the Court. The plaintiffs will be entitled consequently to be put into joint possession of the property with defendants Nos. 3 to 8. Defendants 4 to 8 will pay the plaintiffs' costs throughout.

10. There will be no order on Civil Application No. 2014 of 1955 which is not pressed.

11. Order accordingly.