
(1948) 04 AHC CK 0008
In the Allahabad High Court

Dan Singh Bisht

APPELLANT

Vs

Firm Janki Saran Kailash Chander Dhampur

RESPONDENT

Date of Decision : 30-04-1948

Acts Referred:

Encumbered Estates Act, 1934 — Section 19

Citation : AIR 1948 All 396

Hon'ble Judges : Malik, C.J

Bench : Division Bench

Judgement

Malik, C.J.—This is a defendant's appeal. The defendant appellant filed an application for injunction to restrain the plaintiffs from cutting and removing the trees in dispute. When the application came up before us, we found that the granting or refusing of the temporary injunction might result in serious loss to one party or the other which it would not be possible to compensate when finally deciding the appeal. Both parties were anxious for the speedy disposal of the appeal and prayed that instead of passing any final orders on the application for injunction we might hear the appeal and decide it without the preparation of the paper book, the parties undertaking to have it prepared if the matter was taken further to the Federal Court.

2. The dispute between the parties relates to their rights to certain standing timber in the district of Bijnor and Naini Tal. Raja Gajendra Shah was the owner of considerable property in the districts of Moradabad, Shahjahanpur, Bijnor and Naini Tal. On 22nd December 1941, he entered into an unregistered agreement with Lala Romesh Chand Goel, proprietor of the firm Lala Janki Sarau Kailash Chandra, who were the plaintiffs to this action. We shall have occasion to quote the relevant portions of this agreement. Briefly it may be mentioned that it gave the plaintiffs a right to cut and remove certain timber trees of certain girth by, 21st December 1948, that is during a period of seven years, for a sum of Rs. 25,000 which was to be paid in certain instalments, the last instalment being payable on 30th June 1943. After the agreement was entered into, the plaintiffs

started cutting and removing the trees.

3. Raja Gajendra Shah had applied in the district of Moradabad under the Encumbered Estates Act in the year 1936 and the Special Judge had u/s 19 of the Act transmitted the decree to the Collector of Moradabad for liquidation of the debts. When the Collector came to know that the trees were being cut by the plaintiffs he intervened. On that an enquiry was made and the Collector agreed to recognise the plaintiffs' rights under the agreement provided Raja Gajendra Shah deposited the money that he had realised under the agreement and the plaintiffs paid the balance to the Collector for payment to the creditors of the Raja. This order is dated 10th March 1942. The deposits were made by the plaintiffs in accordance with the Collector's order, the last deposit of Rs. 5000 having been made on 6th April 1943. Raja Gajendra Shah died sometime in October 1943, and the estates was taken over by the Court of Wards.

4. The Special Manager of the Court of Wards, Shahjahanpur, negotiated the sale of certain villages with the defendant Thakur Dan Singh Bisht. The property could not be sold without the permission of the Collector, Moradabad, who was liquidating the debts under the Encumbered Estates Act and an application was, therefore, made by the Special Manager, Court of Wards, Shahjahanpur, to the Collector of Moradabad for permission to sell certain villages to the defendant, Dan Singh Bisht. On 22nd November 1944, the Collector of Moradabad passed an order that the property could be sold provided the price fetched was sufficient to pay off all the debts due from the estates of the deceased Raja. Ultimately, the Special Manager, Court of Wards, Sbabjabanpur, settled the transaction with the defendant for Rs. 2,35,000 which was in excess of the amount due to the creditors from the estates and the sale was sanctioned by the Collector, Moradabad, on 26th April 1945, and was executed on 30th October 1945. It may be mentioned that in the proceedings under the Encumbered Estates Act the property which was sold for Rs. 2,35,000 was valued at Rs. 1,80 000 only.

5. In the sale deed there was no reservation made in favour of the plaintiffs and all the rights in every bit of property in the villages sold to the defendant were transferred to him, with the result that the defendant became the owner of the entire property in those villages, unless any part thereof had been previously sold. It is thus that competition has arisen between the agreement dated 22nd December 1941, executed in favour of the plaintiffs by the deceased Raja and the sale deed dated 30th October 1945, executed by the Special Manager, Court of Wards, Shahjahanpur, in favour of the defendant, Dan Singh Bisht. The defendant after the sale to him prevented the plaintiffs from cutting and removing the trees inside the villages sold to him.

6. The plaintiffs thereupon filed a suit out of which this appeal has arisen for injunction and damages, their claim being based on ownership. It was alleged in the plaint that under the agreement dated 22nd December 1941, the plaintiffs had become the owners of the timber trees which they had the right to cut and remove and the defendant could not get any title to the same by his subsequent

purchase. It was further alleged that the defendant had made the purchase with notice of the agreement and the plaintiffs' rights under the agreement could, therefore, be enforced against the defendant.

7. The first point for decision, therefore, is whether the title to the trees passed to the plaintiffs under the agreement dated 22nd December 1941. For that purpose it would be necessary to consider the terms of the agreement itself. We may mention that the agreement has been most inartistically drafted. It is written in the Hindi language and probably by one of the Raja's employees who himself made the draft. Only three paragraphs are relevant for our purposes:

(1) That with the exception of 80 Samal marked trees in villages Baipuri, Makhonia, Garhi, Malikanth pur Baheri and Inampur Fatehabad and with the exception of all the mango trees in all the villages, I have sold to the said vendees all the rest of the trees of all kinds for a consideration of Rs. 25,000.

(4) That the period for cutting, carrying and taking out of the material of 7 years namely from 22-12-1941 to 21-12-1948, has been allowed by the seller to me the purchaser. After the termination of the period whatever material cut or uncut remains in the aforesaid villages will belong to me the seller. The Thekedar will have nothing to do with it.

(5) That the Thekedar aforesaid can also not cut Pipal, Bargad, Harr, Bahera, Amla trees Over and above this, in the aforesaid villages, Thekedar will be entitled to cut trees, which are at the time of cutting, over two feet of girth if it is Shisham, over 1 foot in girth if Kher, over 4 feet in girth if Senmal and over 1 foot in girth if Kagat trees of any kind. The Thekedar aforesaid cannot cut trees below this girth. Such trees will remain exempt from being cut.

From the above it would appear that if para. 1 is read by itself, it gives the impression that all the trees of all kinds except mango trees and the 80 Samal marked trees were sold to the vendees, but from para. 5, it is clear that Pipal, Bargad, Harr, Bahera and Amla trees were not being transferred to the Thekedar and he was being given the right of cutting Shisham trees of only over 2 feet in girth, Kher trees of only of one foot in girth, Senmal trees of over 4 feet in girth and Kakat trees of over 1 foot in girth and that also, according to para. 7 of the agreement, six inches above the surface of the earth. According to para. 4, any tree which the plaintiffs had the right to sever and to remove if it remained standing or if the wood had not been removed by 21-12-1948, would belong to the seller.

8. The first question for consideration is whether the title in the trees had passed to the plaintiffs, and this question has to be decided in accordance with the provisions of the Sale of Goods Act (H. of 1930). Section 4, Sub-section (3) provides:

Where under a contract of sale the property in the goods is transferred from the seller to the buyer, the contract is called a sale, but where the transfer of the

property in the goods is to take place at a future time or subject to some condition thereafter to be fulfilled, the contract is called an agreement to sell.

Section 18 says:

Where there is a contract for the sale of unascertained goods, no property in the goods is transferred to the buyer unless and until the goods are ascertained." Section 19, however, provides:

(1) Where there is a contract for the sale of specific or ascertained goods the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred.

9. Reading Sections 18 and 19, together it would appear that the property in unascertained goods cannot pass to the buyer until the goods are ascertained, while the title in the ascertained goods may pass at such time as the parties intend it to pass. In the absence of a contract to the contrary, the rules when the title in ascertained goods would be deemed to have been intended to be transferred arrest out in Sections 20 to 24. Section 20 deals with the transfer of title in specific goods in a deliverable state. Section 21 relates to a transfer of specific goods which have to be put into a deliverable state by the seller. u/s 22, the specific goods contracted to be sold are in a deliverable state, but the seller has to do something in order to ascertain the price. Section 24 deals with the question of goods sent on approval or "on sale or return." Coming back to Section 23, it relates to a contract for the sale of unascertained or future goods by description, and in such a case the title would pass when goods of that description and in a deliverable state are unconditionally appropriated to the contract, either by the seller or the buyer with the consent of the other.

10. The words "ascertained goods" have not been defined under the Sale of Goods Act, though "specific goods" have been defined as meaning; goods identified and agreed upon at the time a contract of sale is made. u/s 19, the Legislature has used the words "specific or ascertained goods." Reading Sections 18 and 19, together it appears that the word "unascertained" has been used as opposed to "specific or ascertained." There does not appear to be any material difference between "specific" and "ascertained" goods. The meaning seems to be, more or less, the same. It has, however, been suggested that there is probably this difference that "specific goods" are goods identified at the time of the sale, while; "ascertained goods" are goods identified in accordance with the agreement after the time a contract of sale is made; see the judgment of Atkin L.J. in *Emperor v. Mt. Zalikhani* ('13) 21 I.C. 476 at p. 630.

11. From the agreement it is clear that it will have to be determined from time to time as and when it is proposed to fell the trees whether a particular tree has attained the minimum girth required under the agreement entitling the plaintiffs to fell the same. What trees would fulfil the requirements of the agreement and attain the minimum girth required by 21-12-1948, was a matter which could not be known to the parties either at the time of the agreement or even later. The

sale, therefore, was of unascertained goods which were ascertainable from time to time during the period that the agreement remained in existence, and u/s 18, Sale of Goods Act, the property in the trees could not pass so long as the ascertainment had not been made. It cannot, therefore, be said that any specific trees were sold to the plaintiffs, the title in which had passed to them before the date when the trees along with the zamindari were sold to the defendant in the year 1945.

12. On behalf of the plaintiffs two arguments have been advanced. Firstly, it has been said that some trees may have attained the minimum girth required for their felling at the time when the defendant purchased the villages and as these had fulfilled the description mentioned in the agreement, the title to those trees had certainly passed to the plaintiffs. The answer to his argument is that though it may have been possible to ascertain which trees fulfilled the requirements of the agreement and were therefore ascertainable, the ascertainment had not been made and therefore, it could not be said that it was a transfer of ascertained goods. Another answer may be that no attempt was made to prove that there were any trees of the required girth-and if there were any, no attempt had been made to identify the same and it is, therefore, not possible to issue any injunction with respect to such trees.

13. The other argument is that all the trees except the 80 Samal marked trees and the mango trees were sold to the plaintiffs and the plaintiffs had, therefore, become the owners thereof, the property having vested in the plaintiffs. The plaintiffs under subsequent paras, 4, 5 and 7 of the agreement could only cut the trees after certain maturity, their right to fell them being restricted, and they were to be cut from above six inches from the ground, the property in the trees was to revert in the vendors at the expiry of the period of seven years. The agreement, read as a whole, does not lead to this conclusion. Paragraphs 1, 4 and 5, to our mind, must be read together, and read as a whole it seems to be clear that the plaintiffs were given the rights only to cut certain trees after maturity. There is no provision in the agreement giving the plaintiffs rights in the fruits or the other produce. It is only the timber which belonged to them and which they had a right to cut and remove after it had reached certain stage of maturity.

14. Moreover, the argument would place the plaintiffs in further difficulty as it would then not be the sale of moveable property and the document would have to be compulsorily registered and it being not a registered document would not be admissible in evidence. The jungle consists of trees of all kinds, of timber trees and other trees. Timber trees are moveable property, only if they are transferred with the object of being cut and removed. A Bench of this Court has held in First Appeal No. 184 of Mt. Bachal v. Emperor 1 AIR 1914 Sind 51, that if trees are sold with the object of being cut and removed within a reasonable time, it is a sale of moveable property; if, on the other hand, there is a transfer for a period during which the transferee is entitled to appropriate the produce it is not

a transfer of timber but a lease of immovable property. Having, therefore, carefully considered this matter we have come to the conclusion that the agreement dated 22 12 1941, relates to "unascertained goods" and therefore the plaintiffs had not become owners of any specific trees and it cannot be held that the title in any such trees had passed to the plaintiffs and could not pass to the defendant under the sale deed dated 30-10-1945.

15. Then remains the question of notice. The lower Court has held that from the above facts and circumstances it is likely that the defendant had knowledge of the agreement and even if he had not, it was because of his wilful negligence inasmuch as he should have inspected the proceedings before the Special Judge in the case under the Encumbered Estates Act and would have then come to know all about the agreement.

16. The Special Manager, Court of Wards, Mr. Madan Mohan, gave evidence on behalf of the defendant and he has stated that he had no knowledge of the agreement with the plaintiffs and that he sold the entire property to the defendant without any exception whatsoever. Thakur Dan Singh Bisht, the defendant, has come into the witness-box and he has specifically denied having had any knowledge of the plaintiffs' agreement. Neither of these two witnesses were asked any question in cross-examination to show that they had knowledge of the agreement. The defendant was not even asked whether when his man went to inspect the property that he was purchasing he saw any trees being cut and whether he made any such report. There is complete lack of suggestion in the cross-examination that the evidence on this point that was being given by Madan Mohan or by Dan Singh was not reliable.

17. A letter Ex. 8 dated 7-1-1944, has been filed by the plaintiffs which is addressed to the Manager of the Court of Wards, Shahjahanpur, in which it is said that a copy of the agreement was being supplied. Curiously enough when Madan Mohan, the Special Manager, said that he had no knowledge of the agreement his attention was not drawn to this letter, nor was he asked a single question whether he had seen the copy mentioned in this letter in the office of the Court of Wards, Shahjahanpur. Ramesh Chandra, plaintiff, was the solitary witness on behalf of the plaintiff. From his evidence and the letters that he has filed it is clear that the Collector of Moradabad liquidating the debts under, the Encumbered Estates Act knew of the agreement. It may also be taken that the Special Manager, Court of Wards, Bijnor, who had made enquiries, had been informed and knew of the terms of the agreement, but there is no suggestion in the evidence of the witnesses that either Madan Mohan, the Special Manager, who sold the property on behalf of the Court of Wards, Shahjahanpur, or the defendant Thakur Dan Singh had knowledge of the agreement.

18. Learned Counsel conceded the point, but urged that the defendant must be deemed to have had constructive notice as but for his gross negligence he would have come to know of the agreement. He has also urged that a person buying property worth Rs. 2,35,000 would make enquiries about the extent of the

property and the defendant must, therefore, have carefully examined not only the revenue papers relating to the villages but also the number of trees and their value etc. in the forest. He has further urged that the defendant would have to ascertain the amount of the debt due from the estate to find out what he would be required to pay for the property. Lastly, he has urged that his clients must be deemed to have been in possession and therefore u/s 3, T.P. Act the defendant must be deemed to have had constructive notice.

19. On the first point we have already said that the defendant came, into the witness-box and stated what enquiry he had made and no suggestion was made in cross-examination that the man sent by him had seen any trees either being felled or removed. A person purchasing property makes enquiries for his own benefit. It cannot be said that he owed a duty to the plaintiff to make an enquiry about the extent of his rights in the trees in the forest.

20. As regards the ascertainment of price the property was being sold by the Collector under the provisions of the Encumbered Estates Act and therefore free from all encumbrances. Madan Mohan, Special Manager, Court of Wards, has stated that he fixed the price at Rs. 2,85,000 so that all the debts might be paid. We fail to see why it was necessary for the defendant to ascertain the amount of the debts. The reply of the Collector of Moradabad to the application of the Special Manager for permission to sell to the effect that he would have no objection to the sale provided the price fetched was enough to pay off all the debts would make it necessary for the Special Manager to find out the amount of the liability. He may have done that by making enquiries as regards the total amount of the debts due, but it was not necessary that any enquiry should be made as to how the amount happened to be due from the estate of "the deceased Raja. Madan Mohan has stated that the debts were less than Rs. 2,35,000. He fixed the price at that figure as he wanted not only that the debts should be paid off but also that the expenses of the Court of Wards should be met out of the sale price.

21. The last point about possession has also no force. There is no evidence that the plaintiffs were, at the time when the purchase was made, cutting any trees; nor would it amount to possession of the forest. We are not satisfied that the burden of proving actual or constructive notice which lay on the plaintiffs was satisfactorily discharged and on the materials placed before the Court it cannot be said that they have satisfied that burden.

22. Mr. Banerji has argued that no question of constructive notice would arise in a case of this kind, nor would the plaintiffs be entitled to enforce the agreement against the defendant on the basis of constructive notice. It is not necessary to go into that question as we are of the opinion that no notice, actual or constructive, has been proved.

23. The result, therefore, is that the appeal is allowed, the decree of the lower Court is set aside and the plaintiffs' suit is dismissed with costs in both the

Courts.