(2006) 11 GUJ CK 0105

In the Gujarat High Court

Case No : Second Appeal No. 82 of 1989

Raysing Hurji Bhil and Others — APPELLANT

Vs

Vaniben Manjibhai and Others — RESPONDENT

Date of Decision : 06-11-2006

Acts Referred:
Limitation Act, 1963 — Article 64 , 65
Registration Act, 1908 — Section 17, 49
Transfer of Property Act, 1882 — Section 53A, 54, 60

Citation : AIR 2007 Guj 69 : (2007) 27 GLH 607 : (2007) 1 GLR 562

Hon'ble Judges : R.S. Garg, J

Bench : Single Bench

Advocate : D.F. Amin, for the Appellant; K.M. Patel, for the Respondent

Judgement

R.S. Garg, J.—The parties are heard.

2. The appeal has been admitted for hearing the parties on the following substantial questions of law:

1. In view of the fact that there is no mortgage deed, whether the learned Judge has erred in holding that the suit land was orally mortgaged to the defendants?

2) In view of the fact that the defendants have not produced sale deed alleged to have been executed on 24-1-1963 and 7-10-66, whether the learned Judge has erred in holding that the defendants had purchased the suit land from the plaintiff and Bhavsingh Hurji?

3) In view of the fact that the defendants have not produced sale deed in order to prove their ownership over the suit land and that the defendants have not given any explanation for producing the sale deed, whether the learned Judge has erred in holding that the defendants are the owners of the suit land and the suit is time barred?

3. The appellants-plaintiffs had filed the suit for declaration and possession of

certain land on the basis of their title, submitting, inter alia, that the defendants were in possession of the property and as the defendants do not have any right to continue in possession, the possession be restored back to them.

3.1 The defendants appeared before the Court and submitted that on 25th July, 1954, the land in dispute was mortgaged with the defendants under an oral mortgage, thereafter, by a sale deed dated 24th January, 1963, the property has been sold in favour of the respondents-defendants, and yet by another document dated 7th October, 1966, the rest of the property was sold by the plaintiffs in favour of the defendants.

3.2 Consequent upon the defendants'' written statement, the plaintiffs amended the suit and submitted that a decree for redemption be granted in favour of the plaintiffs.

3.3 The learned trial Court framed as many as eleven issues; Issue No. 4 related to the oral mortgage while Issue Nos. 5 and 6 were relating to execution of the sale deed dated 24th January, 1963 and 7th October, 1966, Issue No. 8 related to the question of limitation and it reads as: Whether the suit is time barred".

3.4 The parties did not lead any evidence and the Court proceeded to decide the matter on the strength of the pleadings and the documents produced by the parties.

3.5 The learned trial Court held that the defendants were successful in proving that the plaintiff No. 1 and Bhavsingh had handed over the possession of the suit property to the defendants under an oral mortgage on 25th July, 1954. The Court also held qua Issue Nos. 5 and 6 that certain writings were executed by the plaintiffs in favour of the defendants. It also held that the suit is barred by limitation.

3.6 As the appeal suffered the very same fate, the plaintiffs are before this Court.

4. Shri Amin, learned Counsel for the appellants, submits that the Courts below were absolutely unjustified in dismissing the suit, less appreciating that for the purpose of Section 60 of the Transfer of Property Act, the mortgage must be by a registered document and unless the document is registered, the document would not be admissible, though the Court would be entitled to look into the fact of possession, that too, for collateral purpose. His further submission is that assuming in the year 1954, the oral mortgage was created between the parties and the oral mortgage was contrary to law, then, on completion of twelve years from the date of the oral mortgage, the person in possession would become legal and valid mortgagee. His submission is that if on completion of twelve years from 25th July, 1954, that is, date of oral mortgage, the defendants have acquired the right of a valid mortgagee, then, the limitation for redemption would be thirty years and, therefore, the Court was absolutely unjustified in holding that the suit was barred by limitation.

5. Shri Patel, learned Counsel for the respondents, on the other hand, submitted

that present is not a case of a simple oral mortgage and perfection of mortgagee''s valid title because by intervening events dated 24th January, 1963 and 7th October, 1966, the plaintiffs have sold the property in favour of the defendants and as the defendants were in possession of the property in their own rights and were in adverse possession of the property from the date of the writings and as the suit was filed beyond twelve years from the date of the unregistered sale deed, the right to sue for possession was lost. His further submission is that to the present case, provisions of Article 65 of the Limitation Act would apply and the suit of the plaintiffs would be barred by limitation.

6. It is also submitted by Shri Patel that as the plaintiffs have not entered in the witness box, an adverse inference must be drawn against them. His submission is that their non-stepping in the witness box persuaded the defendants not to lead any evidence.

7. Contrary to the said submissions, Shri Amin, learned Counsel for the appellants, submitted that in a case where Article-65 of the Limitation Act applies, the burden to prove that the adverse possession commences from a particular date, would always be upon the defendants. His submission is that once the plaintiffs'' title and possession of the defendants is admitted by the defendants, then, unless they prove that on a particular date, they asserted their hostile title and that their possession was adverse to the right, title and interest of the plaintiffs, the limitation would not commence. He submits that in the present case, the entire burden was upon the defendants to prove that they had perfected their title by adverse possession and if the defendants have failed to prove the fact and the unregistered sale deeds, then, the suit ought to have been decreed.

8. The decision on Issue No. 4 clearly says that the defendants have proved that the land was mortgaged with them on 25th July, 1954 under an oral mortgage.

9. Section 60 of the Transfer of Property Act deals with the mortgage, while Section 17 of the Registration Act deals with registration of documents, which are relating to tangible immovable properties worth more than Rs. 100/-, Section 49 of the Indian Registration Act provides that if a document is unregistered, then, the same would not be admissible in evidence. In the present case, the two documents dated 24th January, 1963 and 7th October, 1966 would be inadmissible in evidence except for the collateral purpose, that is, to the extent to prove the nature of possession of the defendants.

10. What was the nature of the possession and whether the defendants perfected their title by adverse possession, would always be a burden upon the defendants to discharge. Once the defendants admit the title of the plaintiffs and the fact that the defendants are in possession, then, the burden would be extra heavy upon the defendants to prove that on what particular date, they asserted their hostile title, a title contrary to the interest of the plaintiffs and that the assertion was public and open.

11. According to Article 65 of the Limitation Act, the suit for possession of immovable property based on title can be filed within twelve years. The starting point of limitation would be the date when the possession of the defendants becomes adverse to the plaintiffs. In the present case, barring pleadings that the defendants were in possession of the property in their own rights, the defendants did not assert anything, they did not step in the witness box, they did not say that on which particular date, they asserted adverse possession or in what manner, they informed the plaintiffs that the possession of the defendants has become adverse to the rights of the plaintiffs.

12. Otherwise also, it is to be seen that the alleged oral mortgage was created on 25th July, 1954, and if the mortgage was oral, though it was required to be registered, the defendants, who were put in possession of the property, would acquire the rights of a valid mortgagee on completion of twelve years, that is, from 25th July, 1966. If on one hand, the defendants have failed to prove their adverse possession or failed in asserting their rights as owner by prescription, then, on completion of twelve years from the date of the oral mortgage, the limitation would not start running against the plaintiffs. The present suit has been filed in the year 1980. By no stretch of imagination, the suit could be said to be barred by limitation. The suit even otherwise is not barred either under Article-65 of the Limitation Act or for the purpose of redemption. The two Courts below were absolutely unjustified in dismissing the suit on this ground.

13. At this stage, Shri Patel, learned Counsel for the defendants-respondents, submitted that the benefit of Section 53A of the Transfer of Property Act be extended in favour of the defendants because the defendants would be deemed to be in possession in part performance of the transaction.

14. The argument in the opinion of this Court is misconceived. Except taking the plea that Section 53A of the Transfer of Property Act is applicable, the defendants have not pleaded anything further. They have not stated that they are in possession of the property under a valid agreement of sale, they have not pleaded that they were always ready and willing to perform their part of the contract. In the present case, the plea of adverse possession and part performance would be mutually destructive; one cannot be allowed to say that on one side, he admits the title of the plaintiff for the purposes of Section 53A and at the same time, asserts title in his own self.

15. Even otherwise, in absence of proper pleadings and evidence from the side of the defendants, the benefit of Section 53A of the Transfer of Property Act cannot be extended.

16. It was also submitted by Shri Patel that the present matter needs to be remanded to the trial Court for decision in accordance with law. I am unable to concede to this request. When the parties knew that what is the case of each other and the issues were plain and simple, then, it was for the defendants to prove that there was some starting point of limitation for adverse possession and

that the plaintiffs'' suit was barred by limitation. Issue No. 8 framed by the learned trial Court reads that: `whether the suit is time barred''. If this is the issue, then, from the very frame of the issue, it would appear that the burden is upon the defendants. One could hold that the burden would be on the plaintiffs if the issue was `whether the suit is within limitation''. In the present case, the plaintiffs were not required to discharge the burden of proof that their suit was within limitation; when the defendants were saying that the suit is barred by limitation, then, they were required to prove that either under Article-64, from the date of dispossession in a suit based on earlier possession or under Article 65 in a suit based on title, because of the defendants'' adverse possession, the suit has become barred by limitation.

17. Taking up the issue from any angle, I must hold that the learned Courts below were unjustified in holding that the suit was barred by limitation. Question No. 1 framed by this Court is answered by holding that in view of admission made by the parties, the oral mortgage is proved, but, the legal mortgage would come into existence only on completion of twelve years from the date of oral mortgage. Question No. 2 cannot be answered in favour of the defendants because in absence of a legal sale deed, as required u/s 54 of the Transfer of Property Act, read with Section 17 of the Registration Act, the defendants cannot be said to be legal and valid purchasers of the property. Question No. 3 has to be decided against the interest of the defendants because they have failed to produce the valid sale deed conveying the title in their favour and have also failed to prove perfection of title by adverse possession.

18. As the suit of the plaintiffs is not barred by limitation and the defendants have not acquired any rights either under the alleged sale deed or by way of prescription, the suit of the plaintiffs must be decreed. It is, accordingly, decreed. The plaintiffs are held entitled to the property in dispute. The appeal is allowed, the judgment and decree passed/made by the two Courts are set aside.

19. As the suit is for redemption and the plaintiffs are held entitled to possession, I hereby direct the defendants to hand over the possession of the property within a period of three months from the date of deposit of the mortgage money by the plaintiffs. For rest of the determinations, the parties may take up the final decree proceedings. The suit to the extent indicated above is decreed. No costs.

