GURUNATH MANOHAR PAVASKAR & ORS

v.

NAGESH SIDDAPPA NAVALGUND & ORS.

DECEMBER 11, 2007

[S.B. SINHA AND HARJIT SINGH BEDI, JJ.]

Evidence Act, 1882: ss. 83 and 101– Suit for permanent injunction – Courts below relying on revenue record entries produced by defendant, decreed the suit holding that properties were demarcated in revenue records – Held: Revenue record is not document of title – It merely raises presumption in regard to possession – In the interest of justice, impugned judgments set aside and matter remitted to trial judge for fresh consideration – Code of Civil Procedure, 1908 – s.151, o.39 rr. 1 and 2.

Plaintiff-respondents filed a suit for permanent and mandatory injunction on the ground that they were owners of suit land and the appellants, who were the owners of the abutting land, had encroached upon a portion of their land, and prayed for direction to demolish the structure erected thereon. During the pendency of the said suit, an application for interim injunction was filed. Allegedly the appellants raised construction upon the suit land in violation of order of injunction. The Trial Judge decreed the suit. On appeal, the High Court upheld the finding of lower court that it was unnecessary to give any decision on the title of the property as the suit was for permanent injunction and that it was open to appellants to work out their remedy in accordance with law. Hence the present appeal.

Allowing the appeal and remitting the matter to the trial court, the Court

HELD: 1.1. It was for the plaintiffs to prove that the land in suit formed part of their lands. It was not for the defendants to do so. It was, therefore, not necessary for defendants to file

A an application for appointment of a Commissioner nor was it necessary for them to adduce any independent evidence to establish that the report of the Advocate- Commissioner was not correct. The Advocate-Commissioner who filed the report could not be cross-examined. His report therefore could not B have been taken into consideration. The suit could not have been, therefore, decreed on the basis of Ex.P-35 alone, which was allegedly produced by the defendants but was used by the plaintiffs. In a case of this nature, even s.83 of the Evidence Act would not have any application. [Para 10] [82 F-G]

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1.2. Furthermore, the High Court committed an error in also throwing the burden of proof upon the defendants-appellants without taking into consideration the provisions of s.101 of the Evidence Act. [Para 11] [82-H, 83-A]

D *Narain Prasad Aggarwal(D) by LRs. v. State of M.P.* 2007 (8) SCALE 250– Relied on.

1.3. A revenue record is not a document of title. It merely raises a presumption in regard to possession. Presumption of E possession and/or continuity thereof both forward and backward can also be raised under s.110 of the Evidence Act. The courts below, were, therefore, required to appreciate the evidence keeping in view the correct legal principles in mind. [Para 12] [83-C-D]

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1.4. The courts below appeared to have taken note of the entries made in the revenue records wherein the name of the Municipal Corporation, appeared in respect of CTS No. 4823/ A-1. However, the trial judge proceeded on the basis that the said property may be belonging to the defendants appellants. G The courts below not only passed a decree for prohibitory injunction but also passed a decree for mandatory injunction. The High Court opined that the Trial Court could exercise discretion in this behalf. It is again one thing to say that the courts could pass an interlocutory order in the nature of

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mandatory injunction in exercise of its jurisdiction under s.151 CPC on the premise that a party against whom an order of injunction was passed, acted in breach thereof; so as to relegate the parties to the same position as if the order of injunction has not been violated, but it is another thing to say that the courts shall exercise the same power while granting a decree of permanent injunction in mandatory from without deciding the question of title and/or leaving the same open. It has not been spelt out by the High Court as to how, in the event the structures are demolished, it would be possible for the appellants to work out their remedies in accordance with law in regard to the title of the property. [Para 13] [83 E-H, 84-A]

1.5. The interest of justice would be subserved if the impugned judgments are set aside and the matter is remitted to the Trial Judge for consideration of the matter afresh. The plaintiffs may, if they so desire, file an application for amendment of plaint praying for declaration of their title as also for damages as against the respondents for illegal occupation of the land. It would also be open to the parties to adduce additional evidences. The trial judge may also appoint a Commissioner for the purpose of measurement of the suit land whether an Advocate–Commissioner or an officer of the Revenue Department. [Para 14] [84 B-C]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 5794 of 2007.

From the Judgment and Order dated 4.7.2005 of the High Court of Karnataka at Bangalore in R.S.A. No. 135 of 2003.

S.N. Bhat for the Appellants.

Kiran Suri and Rajesh Mahale for the Respondents.

The Judgment of the Court was delivered by

S.B. SINHA, J. 1. Leave granted.

A 2. Defendants before the Trial Court are the appellants herein.

3. Plaintiffs – Respondents filed a suit against the appellants praying inter alia for the following reliefs:

> "(a) That the encroached portion of the suit property by erection
> B of structure measuring 369 1/9 sq. yards be directed to be demolished at the cost and risk of Defendant No. 1 to 5 consequently defendants be further directed to maintain the rules of set-back in respect of his remaining construction enabling plaintiff to use and enjoy the free light and air to his property and
> C similarly defendants No. 6 be directed to remove the sign board and the firm from the encroached area of the suit property. Further defendants be directed to give the respective vacant possession of the suit land to the plaintiffs.
>
> D (aa) A decree of permanent injunction against defendants, their agents, their relative or any body on their behalf to interfere with the plaintiffs peaceful possession and enjoyment of suit property..."

4. Respondents contended that they are owners of a portion of Survey No. 1008/1 bearing CTS Nos. 4823/A-17 and 4823/A-18
E measuring 662 2/9 and 533 3/9 square yards respectively and the appellants who are the owners of the abutting land bearing CTS No. 4823/A-1 had encroached upon a portion of CTS Nos. 4823/A-17 and 4823/A-18 measuring 249 1/9 and 120 square yards respectively. Plaintiffs purchased the said plots by a deed of sale dated 7.11.1984,
F whereas the date of purchase made by the defendants dated 17.8.1992

5. The learned Trial Judge having regard to the pleadings of the parties framed issues; issue No. 3 whereof reads as under:

> "3. Whether the defendant Nos. 1 to 5 proves that the vendor
> G of the plaintiff by way of fabrication of false documents had sold the suit schedule property to these plaintiffs, thus, the plaintiffs are not the owners of the suit schedule property?"

It was answered stating:

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"My answers to the above issues are as follows: A

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Issue No. 3 - Does not arise."

6. During the pendency of the said suit, an application for injunction was filed. Allegedly, the appellants raised constructions upon the suit land in violation of the said order of injunction. The learned Trial Judge in regard to the title of the plaintiffs over the suit land held: B

"...According to the learned counsel for the plaintiff since CTS No. 4823/A1 is completely acquired by the Municipal Corporation Belgaum for Malmaruti Extension scheme then the property of the defendant no. 1 to 6 is not in existence in the name of defendants. But according to me since the defendant no. 1 to 5 also have purchased the property through a registered sale deed and also their vendors have also purchased the said property through a registered sale deed and as such it cannot be said that the property of defendants are not in existence. But at the same time the say of the defendant cannot be taken into believed (sic) that the CTS No. 4823/A17 and 4823/A18 are not in existence. When in the survey map as well as in other documents these properties are clearly demarcated and identified then according to me, these properties have been clearly demarcated in relevant records..." C D E

7. The High Court affirmed the said findings stating:

"It is also clear from the perusal of the judgment and decree passed by the courts below that both the courts below have rightly decided on the basis that it is unnecessary to give any decision on the title of the property as the suit is for permanent and mandatory injunction and the trial court has rightly observed that it is always open to the defendants to work out their remedy in accordance with law, regarding their title to the property CTS No. 4823/A1 and no finding could be given on title in the present case and when there is no finding on the title of the property in the present case, it is clear that it is always open to the defendants F G H

A to work out their remedy, in accordance with law. It is clear from the perusal of the material on record that defendant No. 6 who also suffered decree of injunction and permanent injunction though had filed first appeal before the lower appellate court has not chosen to challenge the judgment and decree passed by first
B appellate court in RA 252/2001..."

8. Indisputably, an Advocate-Commissioner was appointed. He filed a report. An objection thereto was also filed. He, however, could not be cross-examined. His report, therefore, could not have been
C taken into consideration although the same formed part of the record.

9. The High Court although took into consideration the fact that the plaintiffs did not seek for any declaration of title, as noticed hereinbefore, opined that the question of title can be gone into in an appropriate suit. All the courts relied on Ex. P-35 which was allegedly
D produced by the appellants but were made use of by the respondents, wherein it had been shown that the chalta No. 63 was allotted in respect of CTS No. 4823/A-1, chalta No. 62-A was allotted in respect of CTS No. 4823/A-17 and chalta No. 62-B was allotted in respect of CTS No. 4823/A-18.

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10. It is one thing to say that there does not exist any ambiguity as regards description of the suit land in the plaint with reference to the boundaries as mentioned therein, but it is another thing to say that the land in suit belongs to the respondents.

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It was for the plaintiffs to prove that the land in suit formed part of CTS Nos. 4823/A-17 and 4823/A-18. It was not for the defendants to do so. It was, therefore, not necessary for them to file an application for appointment of a Commissioner nor was it necessary for them to adduce any independent evidence to establish that the report of the
G Advocate-Commissioner was not correct. The suit could not have been, therefore, decreed inter alia on the basis of Ex. P-35 alone. In a case of this nature, even Section 83 of the Indian Evidence Act would not have any application.

H 11. Furthermore, the High Court committed an error in also

throwing the burden of proof upon the defendants – appellants without taking into consideration the provisions of Section 101 of the Indian Evidence Act. In *Narain Prasad Aggarwal (D) by LRs.* v. *State of M.P.* [2007 (8) SCALE 250], this Court opined:

> "22. Record of right is not a document of title. Entries made therein in terms of Section 35 of the Indian Evidence Act although are admissible as a relevant piece of evidence and although the same may also carry a presumption of correctness, but it is beyond any doubt or dispute that such a presumption is rebuttable."

12. A revenue record is not a document of title. It merely raises a presumption in regard to possession. Presumption of possession and/ or continuity thereof both forward and backward can also be raised under Section 110 of the Indian Evidence Act. The courts below, were, therefore, required to appreciate the evidence keeping in view the correct legal principles in mind.

13. The courts below appeared to have taken note of the entries made in the revenue records wherein the name of the Municipal Corporation, Belgaum appeared in respect of CTS No. 4823/A-1. We have, however, noticed that the learned Trial Judge proceeded on the basis that the said property may be belonging to the defendants – appellants. The courts below not only passed a decree for prohibitory injunction but also passed a decree for mandatory injunction. The High Court opined that the Trial Court could exercise discretion in this behalf. It is again one thing to say that the courts could pass an interlocutory order in the nature of mandatory injunction in exercise of its jurisdiction under Section 151 of the Code of Civil Procedure on the premise that a party against whom an order of injunction was passed, acted in breach thereof; so as to relegate the parties to the same position as if the order of injunction has not been violated, but, it is another thing to say that the courts shall exercise the same power while granting a decree permanent injunction in mandatory form without deciding the question of title and/or leaving the same open. How, in the event the structures are demolished, it would be possible for the

A appellants to work out their remedies in accordance with law in regard to the title of the property has not been spelt out by the High Court.

14. We, therefore, are of the opinion that the interest of justice would be subserved if the impugned judgments are set aside and the B matter is remitted to the learned Trial Judge for consideration of the matter afresh. The plaintiffs may, if they so desire, file an application for amendment of plaint praying inter alia for declaration of his title as also for damages as against the respondents for illegal occupation of the land. It would also be open to the parties to adduce additional C evidence(s). The learned Trial Judge may also appoint a Commissioner for the purpose of measurement of the suit land whether an Advocate - Commissioner or an officer of the Revenue Department.

15. Before us, additional documents have been filed by the appellants showing some subsequent events. It would be open to the D defendants to file an application for adduction of additional evidence before the Trial Judge which may be considered on its own merits.

16. The appeal is allowed with the aforementioned observations. We would request the Trial Court to consider the desirability of disposing E of the matter as expeditiously as possible and preferably within a period of six months from the date of communication of this order. Costs of this appeal shall be the cost in the suit.

D.G Appeal allowed.