

Bench: A Rajan

Vasantha Rao And Leelavathi vs Balan, S/O Lakshmana Iyer on 22/8/2002

JUDGMENT

A.K. Rajan, J.

1. This second appeal is filed against the concurrent finding of facts.

2. The suit had been filed for declaration of title and possession. The suit property originally belonged to one Ameena Bi. She had two children, by name, Kamarunnissa Bi and Sheik Amir; Ameena Bi died on 1.11.1970; Kamarunnissa Bi pre-deceased her mother; she died on 18.10.1968 leaving her husband and son. Sheik Amir also died in the year 1974 leaving his wife and son. The son of Sheik Amir filed a suit in the year O.S.No.750 of 1980 for injunction against the defendant; that suit was admittedly withdrawn with liberty to file a fresh suit. Thereafter, no suit was filed by the wife and son of Sheik Amir, but they sold the property to the plaintiff under Exs.A.4 and A.5 on 17.12.1984. After purchasing the property, the plaintiffs filed the suit for declaration and possession.

3. This suit was opposed by the defendants on two grounds. One is, that the suit property was given by way of oral gift by Ameena Bi to her daughter, Kamarunnissa Bi during the marriage in 1940. He also raised another plea that Sheik Amir was not the son of Ameena Bi. The Court also found that Hiba was proved and further, both the Courts have found that the defendants have prescribed title by adverse possession. Against the dismissal of the suit, the plaintiff has filed the second appeal.

4. The learned senior counsel, Mr. R.Muthukumarasamy submitted that to prove oral gift under Mohameddan Law, three things must be established, viz., the factum of oral gift; the factum of acceptance by the donee and handing over of possession. Unless these three things are proved, "Hiba" cannot be held to be valid. He referred to the decision in Mahboob Sahab v. Syed Ismail, wherein the Supreme Court has held,

" Though gift by a Mohammadan is not required to be in writing and consequently need not be registered under the Registration Act; a gift to be complete, there should be a declaration of the gift by the donor; acceptance of the gift, expressed or implied, by or on behalf of the donee, and delivery of possession of the property, the subject matter of the gift by the donor to the donee. The donee should take delivery of the possession of that property either actually or constructively. On proof of these essential conditions, the gift becomes complete and valid. In case of immovable property in the possession of the donor, he should completely divest himself physically of the subject of the gift. "

The learned senior counsel further submitted that bearing this principle in mind and the evidence on record, there is absolutely no evidence to prove the oral gift. The witnesses examined on the side of defendant are, D.W.1, the purchaser himself and D.W.2, the son of Kamarunnissa Bi. Both of them are handicapped of giving any evidence regarding the gift by Ameena Bi to her daughter, Kamarunnissa Bi at the time of marriage in 1940. These witnesses are incapable to speak the oral gift. This argument is accepted. There is no other person on the side of the defendant to prove the oral gift made by Ameena Bi. The other documents which are relied on by the lower Court are Exs.B.56, 57 and 58, the voters' lists; these are only to be rejected. These voters' list will not have any bearing on the factum of Hiba. Further, Exs.B.5 and B.61 are the lease deeds executed by the Kamarunnissa Bi, in favour of third parties immediately after the death of Kamarunnissa Bi on 2.3.1971. In that, there is a mention of Hiba in favour of Kamarunnissa Bi. Learned counsel further submitted that they are self-styled documents to prove Hiba. This argument is acceptable. These self-styled documents are not sufficient to prove the oral gift by Ameena Bi to Kamarunnissa Bi. There is absolutely no evidence on record to prove the oral gift by Ameena Bi to Kamarunnissa Bi. Therefore, the finding of the lower Court that Hiba is proved is liable to be set aside and accordingly, it is set aside.

5. The lower Courts have decreed the suit also on the basis of adverse possession. Ex.B.53, is the sale deed executed by the husband of Kamarunnissa Bi on 15.6.1979 by which the property was sold to the defendant; in that, there is no mention about the oral gift; the title was said to have been derived by long possession for more than 40 years. From the evidence on record, Exs.B.5, B.53, B.61, it is proved that the husband of Kamarunnissa Bi claimed exclusive possession even as early as 2.3.1971. Therefore, the animus to adverse possession is established from 2.3.1971 . Though a suit was filed in the year 1980 for injunction by the plaintiff's predecessor-in-title, that suit was withdrawn with liberty to file another suit. But, no other suit was filed. Thereafter, the plaintiff has purchased the property under Exs.A.4 and A.5. After purchase, the plaintiff filed the suit on 23.8.1985. From 12.3.1971, 12 years ended on 12.3.1983. But, the suit was filed in the year 1985. Therefore, the suit was not filed within 12 years. Hence, the husband of Kamarunnissa Bi and his son have prescribed title by adverse possession in the year 1983 itself. Therefore, the suit filed in 1985 for declaration of title has to fail.

6. Learned senior counsel referred to the judgment of the Supreme Court in Nagarajan v. Rajamani Iyer, where the Supreme Court held that both physical possession and intention to possess are necessary. Applying this test to the present case, both corpus and animus is proved by documents, Exs.B.5 and B.61 and continuous possession thereof; from the date of filing of the suit, the defendants have title by adverse possession. The lower Courts have correctly held that the defendant has prescribed title. Hence, the second appeal is to be dismissed. The prayer in the second appeal is dismissed. The parties do bear their own costs.