

(1919) 03 CAL CK 0039
In the Calcutta High Court

Abdul Sovan

APPELLANT

Vs

Lakshmi Prasad Agarwala and Others

RESPONDENT

Date of Decision : 03-03-1919

Acts Referred:

Citation : AIR 1919 Cal 55(2) : 50 Ind. Cas. 870

Hon'ble Judges : Ernest Fletcher, J;Cumming, J

Bench : Division Bench

Judgement

Ernest Fletcher, J.—This appeal is preferred by the plaintiff against the decision of the learned Subordinate Judge of Howrah, dated the 30th November 1916. The plaintiff prays for a declaration of his title to two plots of land as the suit now stands, namely, the 17 cottas of item Ka and 6 cottas out of item Kha of the schedule to the plaint. He claims half share of these properties. The title that the plaintiff sets up is this. He says that his father was one Fateh Ali. His mother was one of the wives of Fateh Ali and she predeceased her-husband. When Fateh Ali died, the plaintiff was of the tender age of four years. His step-brother, the defendant No. 4, was then aged 5 years. Upon the death of the father, the orphan plaintiff was left absolutely destitute according to his story and he was removed from the place where he was living at the date of his father's death to Chittagong. For a period of about 35 years nothing was heard of the plaintiff, In the meantime, the Marwari defendants purchased the interest of the plaintiff's step-brother, the defendant No. 4, and now the plaintiff emerges from Chittagong and arrives at Howrah to find that his father's property has been wholly disposed of by his step-brother and he brings this suit to recover his share of the property, notwithstanding that his step brother, the defendant No. 4, has disposed of not only his own share of the property but also the plaintiff's share and has, therefore, apparently defrauded not only the purchasers but his step brother too. The defendant No. 4 filed a written statement, admitting that the plaintiff was his long lost brother of whom nothing was heard for 35 years. The plaintiff has called in support of his case that he is the son of Fateh Ali several witnesses. The evidence of the witness No. 2 on his behalf is certainly worthy of

remark. He has not seen the plaintiff since he was four years of age and after a period of about 40 years, he is now able to identify the plaintiff as one of the lawful sons of the deceased Fateh Ali. The learned Judge was of opinion that, as the Marwari purchasers who knew nothing about the state of the family that existed before had not been able to contradict this evidence adduced by the plaintiff he was bound to hold that the plaintiff, was the son of Fateh Ali. He was not bound to do anything of the sort and the plaintiff, who came out from the depths of Chittagong and said that he was the son of the deceased Fateh Ali, had to adduce strong and cogent evidence to satisfy the conscience of the Court that the story set up by him was a true one. I do not think that the learned Judge dealt with that point at all correctly that, as the Marwari defendants had not been able to give contradictory evidence, the plaintiff was entitled to a finding that he was the son of the deceased Fateh Ali. I do not believe that he is the son of the deceased Fateh Ali.

2. The other point which the learned Judge has decided in favour of the defendants is this: The 17 cottas of land of item Ka of the schedule was sold by a deed apparently in 1880 to the Marwari defendants or rather to their predecessor, it does not matter which. That did not terminate the dispute and a suit was instituted in 1897 against the defendant No. 4 and his mother one Adam Bibi for khas possession of 3 cottas out of the plot of 17 cottas. The plaintiff in that suit obtained a decree and possession was given to him under the terms of that decree. There cannot be any doubt that as regards that the possession was adverse to the defendant No. 4, He was ousted by a decree of the Court and there could not be any act which would be more adverse to the plaintiff. If it is adverse against the co-sharer of the plaintiff, it is adverse against the plaintiff also, if his only possession as relied on is the possession of the co-sharer. I think the view of the learned Judge as regards that is correct.

3. The other point is as regards the 6 cottas of land out of the 16 cottas in schedule kha. It appears that the Marwari purchaser Audhoya Prasad built a pucca house there and filled in a tank, the tank having been filled something like thirty years ago. There was ample evidence, therefore, before the learned Judge for the view that there was an absolute exclusion of both the plaintiff and his step-brother, the defendant No. 4. Personally, I do not think for one instant that the plaintiff has proved his title as being the son of Fateh Ali. Even if he has, I agree with the learned Judge that he is not entitled to succeed in the present case.

4. The present Appeal, therefore, fails and must be dismissed with costs. The two Bets of respondents who here appeared are each entitled to a separate set of costs. The hearing fee will be according to the scale of the Court.

Cuming, J.

5. I agree.