

(1925) 12 CAL CK 0048
In the Calcutta High Court

Case No : Appeals from Appellate Decrees Nos. 2319 of 1923 and 362 of 1924

Abinash Ch. Chowdhury

APPELLANT

Vs

Tarini Charan Chowdhury and Others

RESPONDENT

Date of Decision : 16-12-1925

Acts Referred:

Citation : (1925) 12 CAL CK 0048

Final Decision : Dismissed

Judgement

Mukerji, J.—The events which have led up to the suit out of which these appeals arise have been narrated in detail in the judgment of the District Judge. The facts, so far as they are necessary to be stated for the purpose of these appeals and are undisputed, are these: one Nur Mohamed alias Nur Meah claiming to be a mutwali in respect of a wakf created by his father Dost Mahammad, granted an istemrari lease of an entire village called Bamangao to one Abdul Aziz in the year 1891. In the same year and some two months later Abdul Aziz rented a lease of an 8 annas share of the village in kayemi maurasi jote right to the predecessors of the Plaintiffs. In 1898 litigation arose for declaration of title administration of the estate, and accounts, etc., in the shape of suits which are instituted by some of the heirs of Dost Mahammad against the said Nur Meah and others. In these suits Abdul Aziz was a party but the predecessors of the Plaintiffs were not. The relief claimed as against Abdul Aziz was the setting aside of the lease granted by Nur Meah in his favour. The trial Court dismissed the suits as against Abdul Aziz holding that the Plaintiffs should, if so advised, institute separate suits for setting aside the lease; and as regards the other Defendants the suits were decreed, the wakf created by Dost Mahammad being declared invalid. The decrees of the trial Court were affirmed on appeal to this Court in 1902. When the appeals to this Court were pending, one Alamgir, son of Nur Meah, as the then mutwali of the wakf dispossessed the plaintiffs' predecessors. In 1904 a common manager was appointed in respect of the estate. In 1915 proceedings under sec. 145, Cr. P. C., were started between some of the Plaintiffs' predecessors and the common manager. Those proceedings ended in a declaration in favour of the latter on the

21st May 1916. Thereafter on the 18th January 1917 the Plaintiffs instituted the present suit for declaration of their kayemi maurasi jote right to the 8 anna share of the village and for recovery of possession thereof. The trial Court decreed the suit to the extent of a 4 annas 17 g. 8 d. share being the share of Nur Meah in the village as one of the heirs of Dost Mahammad with possession thereof and mesne profits. This decree has been modified by the lower Appellate Court which has reduced the Plaintiffs' share to 3 as 2 g. 8 d. From the decree of the lower Appellate Court two appeals have been preferred, the appeal of the common manager being No. 2319 of 1923 and that of the Plaintiffs No. 362 of 1924.

2. In appeal No. 2319 of 1928 the substantial question in controversy is that of limitation. It is urged on behalf of the Appellant, the common manager, that the Plaintiffs' suit is barred upon the facts found by the Courts below and which are not now in dispute. This bar is sought to be established in this way : It is said that the Plaintiffs must prove that they were in possession within twelve year the suit, but thru they have failed to do so as they were out of possession since it having been found by the learned Judge that the Plaintiffs' predecessors were dispossessed in 1305 by Alamgir claiming as mutwali of Dost Mahammad's wakf, and Alamgir remained in possession till 1311 when the common manager took possession on his appointment as such. The Plaintiffs answer this contention by stating that after the institution of the proceedings under sec. 145, Cr. P. C. there was an attachment under the proviso to cl. (4) of that section on the 23rd September 1915 which lasted till the 21st May 1916 on which date the final order in those proceedings was passed, and that during this period Plaintiffs' predecessors as the rightful owners of their 8 annas share must be deemed in law to have been in possession thereof. The Appellants challenge the correctness of this proposition and they further assert that even if its correctness be assumed, the Plaintiffs were not the rightful owners who may be entitled in the benefit of it as their right had been extinguished in consequence of their having refrained from instituting a suit for regaining the possession which they had lost when they were dispossessed by Alamgir and having remained continuously out of possession for more than twelve years, that is to say till the date of the attachment. To this the Plaintiffs rejoin that when Alamgir's possession ceased and that of the common manager began in 1311, the law would presume a discontinuity and that there was an interval, however momentary, during which the Plaintiffs, who at that date had admittedly not lost their right and were rightful owners, must be taken to have been in constructive possession. These contentions have been developed in detail on both sides, and various interesting questions have been discussed in the course of the arguments.

3. The first question which arises for consideration upon these arguments is with whom did possession lie during the attachment under the proviso to cl. (4) of sec. 145 of the Code of Criminal Procedure, that is to say, did it lie with the rightful owners whoever they were or with the common manager who was found to have been in possession at the date of the institution of the proceedings.

4. In the case of Joyanti Kumar Mookerjee v. Middleton I. L. R. (1900) Cal. 785 an order under sec. 141, Cr. P. C., was interpreted as an attachment suspending the previous possess whatever it might be, and was regarded as an intervention by the Magistrate by reason of which no evidence could be adduced as to the possession of any of the parties during the period that the order was in force and it was observed that "at the same time the former possession continued, and although the lawful of its rights had been forbidden for a time, the possession had never ceased to exist." In the case of Ismail Ghani Ammal v. Katima Rowther 13 Cr. L.J. 23 the Madras High Court, in dealing with a case in which a Receiver had been appointed prior to the institution of proceedings under sec. 145, Cr. P. C., held that the possession of the Receiver may, for the purpose of sec. 145, Cr. P. C., be properly regarded as possession on behalf of the party who should be ultimately found by the Magistrate to be in possession immediately before the date of his appointment, as, for the purpose of limitation, the possession of the Receiver is held to be the possession of the party entitled to possession. In the case of Palany Chetty v. Rathina Chetty 15 Cr. L. J. 509, the power of a Magistrate to appoint a Receiver in proceedings under sec. 144, Cr. P. C., was doubted, and where a person had been appointed with the consent of parties to take charge of the property in dispute, he was not considered to be a Receiver, and it was doubted whether the possession of such a person could be treated as that of a Receiver whose possession is that of the party who may be found entitled to possession under sec. 145, Cr. P. C. In the case of Rajah of Venkatagiri v. Isakapalli Subbiah I. L. R. (1902) Mad. 410, it was held that an attachment under sec. 140, Cr. P. C., operated in law for purposes of limitation, simply as a detention of custody, pending the decision by a Civil Court, on behalf of the party entitled, and for such purposes the seizin or legal possession was, during the attachment, in the true owner. It was observed that "such attachment operates in law for the purposes of limitation simply as detention or custody of the property by the Magistrate, who, pending the decision by a Civil Court of competent jurisdiction, holds it merely on behalf of the party entitled, whether he be one of the actual parties to the dispute before him or any other person. For the purposes of limitation the seizin or legal possession will during the attachment be in the true owner and the attachment by the Magistrate will not amount to dispossession of the owner or to his discontinuing possession." In the case of Ramaswamy Ayyar v. Muthusamy Ayyar (1906) I. L. R. 30 Mad. 12 in the case of paddy, taken possession of by the Magistrate in the course of proceedings relating to a criminal charge of theft in respect of it, it was held that where the property is seized by the Magistrate, the property passes into legal custody and such custody is for the benefit of the rightful owner. In Brojendra v. Abdul Razac (1915) 22 C. L. J. 283, it was held that during an attachment under sec. 146, Cr. P. C., the seizin or legal possession is in the true owner and that the attachment does not amount to either dispossession of the owner or the discontinuance of his possession. The learned Judges in that case relied for their conclusion upon the decision of the Judicial Committee in the case of Khagendra Narain Chowdhury v. Matangini Debi L. R. 17 I. A. 62 : I. L. R. (1890) Cal. 814 in which

the attachment under the 530th and 531st sections of the Code of 1872 was considered as placing the Government really in the position of stakeholders, the decision in the case of Ramaswamy v. Muthusamy I. L. R. (1906) Mad. 12 to which reference has already been made, the decision in the case of Beni Prasad v. Shahojhazada I. L. R. (1905) Cal. 856 in which the possession of the Magistrate after attachment under sec. 146 was held to be one on behalf of such of the rival parties as might establish a right to possession on their own account and the decision of the Judicial Committee in the case of Karan Singh v. Bakar Ali Khan L. R. 9 I. A. 99: I. L. R. (1882) All 1 in which the possession of the Government in the Revenue Department of land which had been attached by the Collector to secure payment of revenue which had been endangered in consequence of disputes relating thereto was considered to be possession not adverse to the owner, though the Collector had subsequently paid over the surplus proceeds of the estate to a stranger. Reliance also was placed in that decision upon the principles deducible from the decisions of the Judicial Committee in the case of Trustees and Agency Company v. Short (1888) L. R. 13 A. C. 793 and Secretary of State v. Krishna Mani Gupta L. R. 29 I. A. 104: I. L. R. 29 Cal. 518 : (1902) 6 C. W. N. 617 and the observations of Baron Parke in Smith v. Lloyd (1854) 9 Exch. 562. The same view was taken of the effect of an attachment under sec. 146, Cr. P. C., in a later decision of this Court in the case of Sarat Chandra Maiti v. Bibhabati Debi (1921) 34 C. L. J. 302, in which it was observed that the authority of the decision in the case of Deonarain v. Webb I. L. R. (1900) Cal. 86 in which the Plaintiff had been dispossessed from his raiyati lands and subsequent to such dispossession there was an attachment under sec. 146, Cr. P. C., and it was held that the Plaintiff was not entitled to have a fresh start of limitation from the date of the attachment as he had already been dispossessed before that date, must he considered as shaken by the decision of the Judicial Committee in the case of Secretary of State v. Krishna Mani L. R. 29 I. A. 104: I. L. R. 29 Cal. 518 : (1902) 6 C. W. N. 617. The intervention of public authorities for the preservation of peace was considered operating in the same way as the vis major of floods and by analogy it was held that the constructive possession of the land after such intervention remains, if anywhere, in the true owner.

5. It may perhaps be doubted whether the principles applicable to the case of dispossession of a trespasser by some force major which means a discontinuance of his possession, and which renders the subject-matter of possession derelict so as to make it incapable of possession, so that the constructive possession (if anywhere) remains in the true owner is, strictly speaking, applicable in the case of an attachment under sec. 146, Cr. P. C.; but it is not necessary to discuss this question as the application of any other principle that may legitimately be applied to the case leads exactly to the same result. The true view seems to be to treat the Government, to quote the words of Lord Morris in the judgment of the Judicial Committee in the case of Khagendra Narain Chowdhury v. Matangini Debi L. R. 17 I. A. 62: I. L. R. (1890) Cal. 814 as being "really in the position of

stake-holders." The purposes of the two attachments, one under the proviso to cl. (4) of sec. 145 and the other under sec. 146, Cr. P. C., are different, and the stakes are not the same. In the case of the former, the attachment subsists till the decision under sec. 145, cl. (4), that is to say, till it is decided which party was in possession at the date of the proceedings; in the latter case it lasts until a competent Court has determined the rights of the parties or the person entitled to possession. It may be that an attachment under sec. 145, cl. (4) may terminate on the proceedings being dropped or an attachment under sec. 146, Cr. P. C., may be withdrawn when the Magistrate is satisfied that there is no longer any likelihood of a breach of the peace; but that does not affect the character of the attachments. The objects of the two attachments are obviously different. The possession in the case of the one enures to the benefit of the party who was in possession at the date of the proceedings and in the case of the other to the party or to any person, either a party to the proceedings or not, who may be adjudged, on the basis of his rights to be entitled to possession. Proceedings under Chap. XII of the Criminal Procedure Code are of a quasi-civil character and the Magistrate intervenes and attaches the property much on the same lines and with a similar purpose as when a Receiver is appointed by the Court in a civil action, in order to prevent a scramble and to preserve the property until the rights of the parties are ascertained. The possession of a Receiver appointed under such circumstances is exclusively the possession of the Court, the property being regarded as in the custody of the law in *gremio legis* for the benefit of whoever may be ultimately determined to be entitled thereto. The object of proceedings under sec. 145, Cr. P. C., being to determine which party was in possession at the date the proceedings and to declare such party to be entitled to retain possession, the possession of the Court during attachment in the course of those proceedings should enure for the benefit of such party in whose favour such a declaration is made. The object of an attachment under sec. 146, Cr. P. C., is to hold the property in anticipation of an action in which the right or title to possession is to be declared by a competent Court and the possession of the Court during such attachment should enure for the benefit of party or person in whose favour a competent Court would make such a declaration.

6. In the case of an attachment pending, the proceedings which may result in a further attachment under sec. 146, Cr. P. C., the result which will follow from an application of these principles need not be considered in the present case.

7. The effect of the possession of a Receiver appointed by a Court with a similar object on the statute of limitation has been considered in several cases which are referred to in Halsbury's Laws of England, Vol. XIX, p. 139, under para. 269, where the law is summarized in these words :-- "Where the Court during the pendency of an action is in possession of property by a Receiver, that, possession enures for the benefit of the party to the action, ultimately declared to be entitled, so that during such possession time will run against, but not in favour of a person who is a stranger to the suit." In the same Book, Vol. XXIV, p. 384,

para, 723, it thus said :--" So also the possession by the Receiver necessarily displaces the possession of the owner or occupier to some extent, for the purpose of the appointment does not interfere with the rights and liabilities of the parties to the action in relation to strangers. It is not such an interruption of possession as prevents the statutes of limitation running in favour of the Defendant as against strangers to the action, though it does prevent their running in favour of strangers as against the party obtaining the appointment." The rightful owner may not be a party to the action, in which case time will run against him, but not in his favour.

8. For the foregoing reasons, in our judgment, the common manager and not the Plaintiffs must be treated as having been in possession during the attachment under sec. 145, cl. (4), Cr. P. C. and consequently the Plaintiffs' suit is barred by limitation. In view of the opinion I have formed on the aforesaid question, none of the other matters which arise upon the arguments addressed to us need be considered. The appeal must be allowed, the decrees of the Courts below set aside and the suit dismissed with costs in all the Courts.

9. As regards the Plaintiffs' appeal No. 362 of 1924 it was not seriously pressed and it must necessarily fail in view of the fact that the suit is barred. That appeal accordingly should be dismissed, but without costs.

Suhrawardy, J.

I agree.