

(1917) 06 CAL CK 0035
In the Calcutta High Court

Asistulla

APPELLANT

Vs

Sadatulla and Another

RESPONDENT

Date of Decision : 08-06-1917

Acts Referred:

Specific Relief Act, 1877 — Section 31

Citation : 41 Ind. Cas. 747

Hon'ble Judges : Walmsley, J;Asutosh Mookerjee, J

Bench : Division Bench

Judgement

1. This is an appeal under Clause 15 of the Letters Patent from a judgment of Mr. Justice Mullick in a suit for recovery of possession of land on declaration of title. The case for the plaintiffs is that on the 21st March 1897 they, along with defendants Nos. 1 and 8, purchased the disputed property from the proprietor, but that, by the fraud of the first defendant who was entrusted with the preparation and execution of the every once, the (sic) names of the plaintiffs were omitted from the document. The plaintiffs were for a declaration of their title and for recovery of the lands from the defendants who have wrongfully kept them out of possession. The Courts below have concurrently found that the allegations of the plaintiffs are well founded and have decreed the claim. The decree has been affirmed by Mr. Justice Mullick. In the present appeal, this decision has been assailed as erroneous in law. It has been argued that the plaintiffs cannot establish their title till the conveyance is rectified by the insertion of their names, that the time to obtain rectification of the conveyance by a suit properly framed for the purpose has elapsed, and that they cannot by a suit for possession on declaration of title indirectly obtain relief to which their claim has been lost by lapse of time. In our opinion there is no foundation for this contention.

2. Section 31 of the Specific Relief Act, which has been pressed upon our notice, no doubt entitled the plaintiffs to obtain rectification of the conveyance. But the question remains, whether it is not open to them to establish their title by proof

that although the conveyance was drawn up in favour of defendants Nos. 1 and 8, they were beneficial owners under the transaction. In our opinion, it was open to them to establish this case by oral evidence. This view is supported by the decision in *Mahendra Nath Mukherjee v. Jogendra Nath Roy Chaudhury* (1). Sir Francis Maclean, C. J. observed in that case that title may be established without rectification of an instrument, even though the time to secure a rectification of the instrument has elapsed, and that it is open to a party to give evidence to prove that his name has been omitted from the document by fraud or mistake. Mr. Justice Banerjee pointed out in the same case that Section 92, proviso 2 CWN 260, of the Indian Evidence Act is not limited in its application to suits for rectification of instruments, but that in suits for possession, evidence of the same character would be admissible as in suits for rectification. He further expressed the opinion that no advantage would be gained if the parties were driven to a separate suit for rectification to be followed by a suit for possession on the strength of the rectified instrument. *Fife v. Clayton* (1807) 13 Ves. (Jun.) 546 : 33 E. R. 398 : 9 R. R. 220; *Steel v. Haddock* (1855) 10 Ex. (643 at p. 645: 24 L. J. Ex. 78 : 3 C. L. R. 326 : 3 W. R. 172 : 156 E. R. 597 : 102 R. R. 748. The identical principle had been previously laid down by this Court in *Mahomed Bhoy Puddumsee v. Chutterput Singh* 20 C. 854 : 10 Ind. Dec. (N.S) 574 on the strength of the decision in *Mitchell v. Lapage* (1816) Holt N. P. 253 : 17 R. R. 633 and has subsequently been applied in *Madhavji v. Ramnath* 30 B. 457 : 8 Bom. L. R. 354; *Mahadeva Iyer v. Gopala Iyer* 8 Ind. Cas. 390 : 34 M. 51 : 8 M. L. T. 289 : (1911) 1 M. W. N. 36; *Rangasawmi Aiyangar v. Souri Aiyangar* 29 Ind. Cas. 588 : 29 M. L. J. 229 : 39 M. 732 : (1915) M. W. N. 418 : 18 M. L. T. 75; *Kota Chinna Mellayya v. Kannekanti Veeriah* 31 Ind. Cas. 671 : 3 L. W. 651; *Karuppa Goundan v. Periathambi Coundan* 30 M. 397 : 2 M. L. T. 336; *Dagdu v. Bha(sic)a* 28 B. 420 : 6 Bom. L. R. 126. We are of opinion that the view taken by Mr. Justice Mullick is correct and that his decree must be affirmed.

3. The result is that this appeal is dismissed with costs.