

(1878) 07 CAL CK 0020
In the Calcutta High Court

Bejoy Chunder Banerjee

APPELLANT

Vs

Kally Prosonno Mookerjee

RESPONDENT

Date of Decision : 24-07-1878

Acts Referred:

Citation : (1879) ILR (Cal) 327

Hon'ble Judges : Prinsep, J;Markby, J

Bench : Division Bench

Judgement

Markby, J.—It is not necessary to consider in this case the effect of the unchastity of Bhobotarinee upon her right to inherit her husband's estate. For even if she had been chaste, we agree with the Subordinate Judge that she could not succeed during her husband's life time, and that, however long her husband might be absent, he would, upon his return, resume his position both as to his wife and his property. The inference of a man's death from his absence maybe rebutted at any time. This we believe to be the universal rule. Nor, under the circumstances, could Bhobotarinee, whom we must take to have originally held possession on her husband's behalf, acquire a title by adverse possession against her husband. One who holds possession on behalf of another does not by a mere denial of that other's title make his possession adverse so as to give himself the benefit of the Statute of Limitation. But the question whether the plaintiff has gained a title by possession is different. He did not derive his possession from the defendant either actually or constructively. He took from Bhobotarinee as widow. We must, therefore, see what is the plaintiff's position under Act IX of 1871, which is the Act applicable to this case. As I understand that Act, as soon as the possession of the holder of land becomes adverse to that of the true owner, the Statute begins to run.

2. By adverse possession I understand to be meant possession by a person holding the land, on his own behalf, of some person other than the true owner, the true owner having a right to immediate possession. If by this adverse possession the Statute is set running, and it continues to run for twelve years,

then the title of the true owner is extinguished and the person in possession becomes the owner.

3. This being so, it seems to be clear that if Bhototarinee had conveyed this land absolutely to the plaintiff, and the plaintiff had entered into possession on the strength of this conveyance, his possession would have been adverse as against the husband and the Statute would have begun to run. Consequently, after twelve years' possession, the plaintiff would have gained a good title as against the husband whose title would have been extinguished.

4. On the other hand, if the plaintiff had only been let into possession by Bhototarinee as tenant for a term, I greatly doubt whether he could have successfully pleaded the Statute of Limitations as a protection to his possession even during the term. I doubt whether under the decisions of this Court his possession, which was clearly not adverse to Bhototarinee, would be treated as adverse to her husband.

5. But, however this latter point may be (and I do not now wish to express any opinion upon it), the present case is not one of lessor and lessee for a term. The plaintiff holds as owner and not as lessee on the terms of paying a fixed sum annually to the former owner. It is true that what he pays is called a "rent," and under Reg. VIII of 1819, the person entitled to receive such a rent would have remedies for the recovery of it in some respects similar to the remedies of a landlord for rent proper. But there is no reversion--no rights are reserved, the ownership of the land was intended to pass entirely to the plaintiff; the interest which Bhototarinee intended to grant to the plaintiff in this land was heritable, transferable, and perpetual. The estate granted to the plaintiff is what English lawyers would call an estate-in-fee. I do not think, therefore, that the possession of the plaintiff can be considered as the possession either of the actual grantor of the lease or of the true owner of the land; it was, I think, clearly possession on his own behalf.

6. I do not rest my decision in this case upon any assertion of title by Bhototarinee. I assume for the present purpose that when she granted this lease she must be taken to have been the wife of Kali Prosonno in possession of her husband's estate on his behalf, and with only the powers which a wife would have under such circumstances; that she could not therefore make a valid *mourasi* grant. But she did in fact make one; and under that grant the plaintiff entered. In doing so, he was, as against Kali Prosonno, a wrong-doer and a trespasser, but none the less by his entry on the land he put Kali Prosonno out of possession. The Statute, therefore, commenced to run, and in twelve years Kali Prosonno lost, and the plaintiff gained, a title.

7. Considering the discreditable circumstances under which the plaintiff came into possession, I feel considerable reluctance in giving him the benefit of the Statute of Limitations; but the Legislature in this country has not thought fit in laying down its rules of prescription and limitation to make any distinction

between cases where the possession begins by wrong, and cases where the possession commences, in a "just cause," although it may be under a defective title. And though I consider that distinction to be a sound one and though it is recognised by the Hindu Law (Mitakshara, Chap. III, Sec. iii, "On the effect of possession"), I do not think it is within the province of Courts of Justice to qualify the express and deliberate enactments of the Legislature.

8. I think, therefore, that we are bound to reverse the decisions of the Court below, and to give the plaintiff a decree for possession. The conduct of Kali Prosonno in dispossessing the plaintiff was clearly wrongful. But I do not think that we are called upon to award any costs up to decree.

Prinsep, J.

9. I agree in setting aside the order of the Lower Court and decreeing the suit in favour of the plaintiff on the ground that Kali Prosonno on his return was not entitled to eject the plaintiff.