
(1935) 08 CAL CK 0040
In the Calcutta High Court

Bhabani Prosanna Lahiri and Another	APPELLANT
Vs	
Manindra Chandra Roy Choudhury and Others	RESPONDENT

Date of Decision : 23-08-1935

Acts Referred:

Criminal Procedure Code, 1898 (CrPC) — Section 145

Citation : AIR 1935 Cal 760 : 159 Ind. Cas. 752

Hon'ble Judges : Nasim Ali, J;Henderson, J

Bench : Full Bench

Judgement

Nasim Ali,

1. Appeal arises out of a suit for possession of a plot of land marked A in the Commissioner's map on declaration of plaintiffs' zamindary right there to Plaintiffs' case is that the disputed land is a part of the mal lands of the village Kamal Kachhna of which they are the proprietors, that they were all along in possession of the same till they were dispossessed therefrom by an order of the criminal Court, u/s 145, Criminal P.C. The defence of defendants 1 and 2 is that the disputed land is rent free and that it was never in the possession of the plaintiffs or their predecessors. They also claim title by adverse possession for more than 12 years. The trial Judge held that though the disputed land was mal land of Kamal Kachhna, the defendants had a title of legal origin the exact nature of which was lost in antiquity. In this view the learned Judge did not consider it necessary to come to any finding on the question of adverse possession set up by the defendants. He accordingly dismissed the suit. On appeal by the plaintiffs to the lower appellate Court the learned additional District Judge had confirmed the decree of the trial Court on the ground that the plaintiffs' title to the disputed land as zamindars had been extinguished by adverse possession of the defendants for more than 12 years. Hence this second appeal by the plaintiffs:

The question whether possession is adverse or not is often one of simple fact, but it may be a conclusion of law or a mixed question.

2. It is a question of legal conclusion to be drawn from the findings on simple facts: *Luchmeswar Singh v. Monwar Hossain* (1892) 19 Cal 253.

3. The facts found are: (1) The disputed land is a vacant plot of land which was never under cultivation but was capable of possession; (2) the plaintiffs never exercised any acts of possession down to. 1327 when possession was taken by them forcibly dispossessing the defendants; (3) no actual acts of possession were exercised on the land before 1313 B. S; (4) the defendants stacked bricks on the disputed land in 1313 B.S. with a view to construct a building thereon; (5) the defendants fenced round the disputed land in 1315 B.S. and the fence was in existence for a year or so; (6) two corrugated huts were erected by the defendants on the disputed land in 1315 B.S. but they were removed in Chaitra 1316 B.S.; (7) a pathshala ghur was erected on the south-west corner of the disputed land in 1316 B.S. with the permission, of defendant 2; (8) the defendants successfully opposed in Agradhayan 1316 B.S. the selection of the disputed land as a site for a proposed boarding house for Batra Khettrya students of Government H.E. School at Rangpur; (9) the defendants cleared jungles on the disputed land in 1319 B.S. in pursuance of a notice issued by the Municipality (10) defendants realised rent from a circus party for 15 days in Bhadra 1321; (11) temporary college hostel was erected on the disputed land with the permission of defendant 1 in 1324 and was removed in 1325; (12) by an amicable partition the disputed land was allotted to the share of the defendants and masonry boundary pillars were erected along the northern and eastern limits of the disputed land in 1325; (13) defendant realised rent from a circus party for occupation of the disputed land in Chaitra and Baisakh 1326 B. S.; (14) Mukunda's jatra was held on the disputed land in Falgoon or Chaitra 1326 with the permission of defendant 1; (15) A circus company attempted in Sravan 1327 B.S. to hold performance on the disputed land by taking settlement from defendants at the rent of Rs. 5 per day, but the performance could not be held on account of an injunction from the Collector and (16) the defendants are paying Municipal taxes since 1323 B.S. The question is whether these facts establish adverse possession of the defendants for the statutory period. The following principles are well established:

4. (a) In order to establish adverse possession it must be shown that possession was adequate in publicity, in continuity and in extent: *Badhamoni Debi v. The Collector of Khulna* (1900) 27 Cal 943.

(b) It is sufficient that the possession should be overt and without any attempt at concealment so that the person against whom time is running ought if he exercises due vigilance to be aware what is happening: 61 IA 78 (3).

(c) It is not necessary in order to establish adverse possession that proof of acts of possession should cover every moment of the requisite period... The facts of possession may be continuous though actual acts of possession are at considerable intervals. How many acts will infer the fact is a question of proof and presumption independent of prescription. The nature of the requisite

possession must necessarily vary with the nature of the subject possessed. The possession must be the kind of possession of which the particular subject is susceptible: *Secy, of State v. Debendra Lal*, 1934 PC 23.

A series of isolated acts of trespass with no continuity of possession would fall short of the requisite and if in fact there has been interruption, possession during such interruption must be deemed to be with the person having the lawful right. It must also be actual as opposed to ideal possession: *Abhoy Sankar v. Satyendra Prosanna* 1925 Cal 981.

If a person enters upon the land of another and holds possession for a time, and then without having acquired title under the statute abandons possession the rightful owner on the abandonment is in the same position in all respects as he was before the intrusion took place. There is no one against whom he can bring an action. He cannot make an entry upon himself. There is no positive enactment nor is there any principle of law which requires him to do any act, to issue any notice, or to perform any ceremony in order to rehabilitate himself. No new departure is necessary. The possession with intruder ineffectual for the purpose of transferring title ceases upon its abandonment to be effectual for any purpose. It does not leave behind any cloud on the title of the rightful owner or any secret process at work for the benefit in time to come of some casual interloper or lucky vagrant.... The statute applies not to want of actual possession by the plaintiff but to cases where he has been out of and another in possession for the prescribed time. There must be both absence of possession by the person who has the right and actual possession by another whether adverse or not to be protected to bring the case within the statute: *Trustees, Executors and Agency Co. v. Short* (1881) 13 AC 793.

5. When possession has been abandoned

the civil possession is not only out of the trespasser but is vested again in the owner. This result seems to depend on the failure of the physical element in possession and it is not necessary to refer specially to the intention. The possessor has in fact discontinued his occupation whether he intends to return or not, *Lightwood on Possession of Land*, para, 61.

But in determining whether there had been discontinuance of possession intention cannot be left out of account. For after all the adverse character of possession must be based to a certain extent on the intention to exclude the real owner: *Abhoy Sankar v. Satyendra Prosanna* 1925 Cal 981 cited above.

The doctrine of constructive possession cannot be invoked in favour of a wrongdoer so as to enable him to obtain thereby a title by limitation: *Secy, of State v. Krishnamoni Gupta* (1902) 29 Cal 518.

6. (d) Title by adverse possession is strictly limited to what has been actually possessed by the trespasser. The maxim *tantum prescriptum quantum*,

possessum is rigorously applied to him. The application of this general rule however depends on the facts of each, particular case. Possession is a question, of fact, and extent of possession may be an inference of fact: *Nageshwar Bux Roy v. Bengal Coal Co* 1931 PC 186.

Act of possession over a part of any immovable property may no doubt in many cases be evidence of de facto possession of the whole. But possession by a wrongdoer over a part (except where there is a clear connexion and interdependence between the part actually possessed and the whole of which it is a part) must be confined to the part of which he is actually in possession: *Mohini Mohan Roy v. Promoda Nath Roy* (1897) 24 Cal 256.

7. The contention of Mr. Gupta on behalf of the appellants is that the findings of the learned Additional District Judge about the continuity and extent of defendants' possession for the statutory period is based mainly upon the presumption of constructive possession in favour of the defendants during the years in which they were not in actual possession. This contention is supported by the following passage in the judgment of the learned Judge:

Once possession is acquired it is possessed without actual possession. Possession is the intention to hold together with power to hold; in other words the physical possibility of possessing the property according to will.

8. These observations of the learned Judge indicate that he was of opinion that only the intention to possession without actual possession would be sufficient in law to prove continuous possession of a trespasser though in fact he was not in possession for some years within the statutory period. This view is clearly opposed to the principles which have been indicated above. Again the findings of the learned Judge show that a pathsala was in existence on a small portion of the disputed land. It is not clear from the judgment of the learned Judge whether the defendants exercised any acts of possession over the remaining portion of the disputed land from 1317 to 1320 and 1322 to 1323. It has not been found whether there is any close connexion and inter-dependence between the portion on which the pathsala stands and the whole of the disputed land of which it is part. The finding of the learned Judge, that the defendants were in continuous possession of the whole of the disputed lands from 1314 to 1327, appears to me to have been influenced to a large extent by his view that a trespasser can rely, for acquiring title by adverse possession on ideal or constructive possession in the land trespassed upon, though he has not in fact possessed it for some years during the statutory period. If in fact the defendants discontinued their possession it is immaterial whether they intended to return or not. The question of intention is relevant only for the purpose of determining whether in fact the possession was discontinued. I am not satisfied in the present case that the learned Judge approached the question of adverse possession from the proper point of view. Again the trial Court found that the defendants had a title of legal origin, the exact nature of which was lost in antiquity. The learned Judge has not come to any clear finding on this point. I am therefore of opinion that the case

should be reheard by the lower appellate Court. The result therefore is that this appeal is allowed. The judgment and decree of the lower appellate Court are set aside and the case is sent back to that Court for re-hearing of the appeal according to law. Costs will abide the result.

Henderson, J.

9. I have nothing to add with regard to adverse possession, but desire to say something on the other point at issue in this appeal whether the defendants adduced evidence which would entitle a Court of fact to infer that their possession must have had a lawful origin and to pronounce in favour of a lost grant. As must almost be inevitable, in view of the pleadings, the evidence was chiefly directed to show assertions of title and acts of possession. It is clear that evidence which might be quite valueless for the purpose of establishing adverse possession, may throw considerable light on the other question at issue. The learned Subordinate Judge delivered a most careful judgment and came to the conclusion that the defendants had established a lost grant. In dealing with adverse possession the learned Additional District Judge-in my opinion quite rightly did not rely upon anything previous to the year 1313.

10. But it is obvious that in dealing with the other point great importance attaches to the evidence that the defendants were in possession of the disputed land for many years through Mohesh, who in his turn sublet it to the Tushbandar Estate, and to the evidence with regard to the difficulties which the defendants experienced in inducing the Court of Wards to surrender the plot when they themselves required it for the construction of their own residence.

11. In my opinion it cannot be questioned that there was ample evidence on the record to justify the finding of the trial Court with regard to a lost grant. If the Judge sitting in appeal had on a consideration of that evidence, affirmed that judgment I should not have been prepared to interfere with his conclusion in second appeal. The real question for our determination on that part of the case is whether he did so affirm the original judgment. I must confess that on first reading the judgment I reached the conclusion that there was no finding on this point at all. But on re-perusing it, it appears to me that the learned Judge did intend to affirm that finding. The legal advisers of the appellants also apparently took this view (vide ground No. 1 in the petition of appeal). But in view of the halting and at times unfortunate language used by the learned Judge it is impossible to feel any certainty on this point. As my learned brother is strongly of opinion that there is no real finding on the point, I consider that the most satisfactory course is to direct a re-hearing of the appeal on both points. I therefore concur in the order which he proposes to make.