

(1941) 04 CAL CK 0011
In the Calcutta High Court

Chairman, District Board

APPELLANT

Vs

Jagatpat Singh Dugar, Principal and Others

RESPONDENT

Date of Decision : 08-04-1941

Acts Referred:

Bengal Tenancy Act, 1885 — Section 106

Citation : AIR 1941 Cal 676

Hon'ble Judges : Pal, J

Bench : Division Bench

Judgement

Pal, J.—This is an appeal by the plaintiff in a suit u/s 106, Ben. Ten. Act. The plots of land in dispute are the O. S. plots Nos. 9 and 11 of Mouza Badarganja, P. S. Badarganja, District Rangpur. These plots were recorded in the khas khatian of the defendant as appertaining to his putni. The plaintiff's case is that these are borrow pits of the District Board Road No. 3 and have been wrongly recorded in the defendant's khatian. They should be recorded in the plaintiff's khatian No. 647. The defendant's case is that the disputed plots recorded in his khas khatian really appertain to his putni and that he has been in possession of the same all along. Since the O. S. record, these plots have been settled with one Dwarika Prosad Saha, (pro forma defendant 3) and this Dwarika is now in possession. The character of the disputed land is not such as to admit of continuous occupation by either party. Both the parties claim title to it and both parties assert their respective possession of the same by reason of some occasional acts of enjoyments. In these circumstances the learned Assistant Settlement Officer took into consideration the evidence of title adduced by the parties and having come to the conclusion that the title was with the plaintiff found possession with him and granted him the relief claimed. On appeal by the defendant the Court of appeal below refused to go into the question of title, being of opinion that the same could not be gone into in a proceeding u/s 106, Ben. Ten. Act, and dismissed the plaintiff's suit, finding the possession with the defendant and leaving the question of title open.

2. In the present appeal it is contended on behalf of the appellant that in view of the character of the property in dispute and in view of the admitted fact that the property admits of only sporadic acts of enjoyment and that both parties asserted such acts of enjoyment the Court of appeal below was wrong in refusing to determine the question of title. Mr. Gupta contends that in the circumstances of the present case the determination of the question of possession itself depends upon the decision on the other question, The finding that the acts of enjoyment exercised by the defendant constituted his possession in preference to the acts of enjoyment exercised by the plaintiff is not a finding of fact but is an inference of law drawn from the facts sound and as such can be assailed in this second appeal. The learned advocate appearing for the respondent contended that the scope of a suit u/s 106, Ben. Ten. Act, is very much limited and that in such a suit no question of title can be gone into. He further contended that the finding as to the possession amounted to the rejection by the Court of appeal below of the plaintiff's case of his exercise of some acts of enjoyment and consequently should not be interfered with in second appeal. It cannot be denied that the scope of a suit u/s 106, Ben. Ten. Act, is very much restricted. Section 106, Ben. Ten. Act, lays down that

a suit may be instituted before a revenue officer...for the decision of any dispute regarding any entry which a revenue officer has made in. or any omission which the said officer has made from the record..."The revenue officer shall hear and decide the dispute, whether such dispute be between landlord and tenant, or between landlords of the same or of neighbouring estates, or between tenant and tenant, or as to whether the relation-ship of landlord and tenant exist or as to whether land held rent-free is properly so held, or as to any other matter.

3. The suit contemplated by Section 106, Ban. Ten. Act, must be in respect of a dispute regarding any entry made or regarding any omission from the record. When an entry has as a matter of fact been made in the record of rights and that entry is disputed a suit regarding that will be maintainable irrespective of the question whether or not such an entry comes within any of the clauses of section 102, Ben. Ten. Act. When, however, the suit is regarding any omission, it necessarily follows that the omission complained of must be of something required to be recorded by S.102, Ben. Tan. Act. It cannot be said that anything has been omitted unless and until it is established that the same was required by law to be recorded. The revenue officer is thus constituted a tribunal of limited authority and the tribunal being of statutory origin, the conditions and qualifications annexed to the provisions conferring jurisdiction upon it must be strictly complied with. The suit contemplated by Section 106 is for decision of a dispute regarding any entry made in or omission from the record. It is obvious that a revenue officer is not invested with power to entertain a suit for recovery of possession : Nilmony Kumar v. Kedarnath Ghosh 17 CWN 750; Chandi Charan Law Vs. Lal Bewa and Others, and Brojo Mohan Pal Vs. Darsan Pal and Others, . The suit under this section is in the nature of a declaratory one and the whole object is only to secure a prompt correction of an erroneous record: Kalisundari

v. Girija Sankar 15 CWN 974. But whatever investigation may be required in order to give effect to the relief [regarding any entry in or omission from the record shall be within the scope of a suit under this section. If investigation of title necessary for such a purpose it will certainly be within the competence of the (revenue officer exercising jurisdiction under this section to do that: see Umedullah v. Ram Chandra 14 CWN 812. that in a suit under this section the revenue officer has primarily to go on the question of actual possession. But there may be cases where the determination of the question of possession itself may be dependent on the question of title and in my judgment the present case is one of that type.

4. "Possession" expresses the simple notion of a physical capacity to deal with a thing as we like, to the exclusion of every one else. According to Markby "the primary and main object of ownership is the protection of this physical capacity. The legal notion of possession, however, is not, as has been pointed out by Markby, confined to this simple physical condition. In order to constitute possession in a legal sense, there must exist, not only the physical power to deal with the thing as we like, and to exclude others but also the determination to exercise that physical power on our own behalf. We gain possession with the body and mind, but not with the mind only, nor with the body only. Salmond defines possession of a material object as "the continuing exercise of a claim to the exclusive use of it". According to Holmes:

When we say of a man that he has possession, we affirm directly that all the facts of a certain group are true of him, and we convey indirectly or by implication that the law will give him the advantage of the situation To gain possession a man must stand in a certain physical relation to the object and to the rest of the world, and must have a certain intent The physical relation to others is simply a relation of manifested power coextensive with the intent Besides our power and intent as towards our fellow-men, there must be a certain degree of power over the object.

5. The manifestation of power is only important as a manifestation of intent, and the intent which the law should require is an intent to exclude others. To gain possession there must be certain physical relations and a certain intent. The question is how far these facts must continue to be presently true of a person in order that he may continue in the rights which follow from their presence. There must be always the same animus as at the moment of acquisition, and a constant power to reproduce at will the original physical relations to the object. Absolute security for the future is not requisite, for it cannot be had. All that is necessary is that according to the ordinary course of affairs one is able to count on the continuing enjoyment of the thing. In order to prove possession, it is not necessary to prove a continuous actual bodily possession. Where there is the requisite animus it is not necessary that the property should be enjoyed in any particular manner-It would suffice if some overt act is done upon the land or in relation to it in the execution of the animus. In *Clark v. Elphinstone* (1881) 6 AC

164, it was observed by the Privy Council that it was not necessary that some act should always be done upon the spot in dispute itself, but that it was enough if some overt acts of ownership were done in relation to that spot, as, for instance, enclosing it. As was pointed out by a Full Bench of the Calcutta High Court in *Mohamed Ali Khan v. Khaja Abdul Gunny* (83) 9 Cal 744, possession is not necessarily the same thing as actual user:

The nature of the possession to be looked for, and the evidence of its continuance, must depend upon the character and condition of the land in dispute. Land may be either permanently or temporarily incapable of actual enjoyment in any customary modes as by residence or tillage or receipts of a settled rent. It may be incapable of any beneficial use, as in the case of land covered with sand by an inundation it may produce some profit, but trifling in amount, and only of occasional occurrence as is often the case with jungle land. In such cases it would be unreasonable to look for the same evidence of possession as in the case of a house or a cultivated field. All that can be required is that the plaintiff should show such acts of ownership as are natural under the existing condition of the land, and in such cases, when he has done this, his possession is presumed to continue as long as the state of the land remains unchanged, unless he is shown to have been dispossessed.

6. Possession always means possession of that character of which the thing is capable. If the land be not capable of any user, mere non-user of it does not lead to the inference that the plaintiff is not in possession. No particular kind of user is necessary to establish possession. All that is necessary to show is that some acts were done and were done in exercise of a right of ownership. There is one well established doctrine which should always be remembered in cases like the present. I mean the doctrine that "possession follows title": see AIR 1931 162 (Privy Council) . In *Jones v. Chapman* (1849) 2 Ex 803 at p. 821 Maule J., expounded the doctrine thus:

If there are two persons in a field, each asserting that the field is his, and each doing some act in the assertion of the right of possession, and if the question is, which of these two is in actual possession, I answer, the person who has the title is in actual possession, and the other person is a trespasser.

7. In such a case who is in possession is to be determined by the fact of the title, each having the same apparent actual possession:

the question as to which of the two really is in possession, is determined by the fact of the possession following the title, that is, by the law, which makes it follow the title,

8. The same doctrine was accepted as good law by Lord Blackburn in *Bristow v. Cormican* (1878) 3 AC 641 at p. 661. His Lordship stated the doctrine by saying that:

An entry claiming title gives possession if the person entering shews title, that is

a right of possession, in himself or those under whom he claims.

See also *Kynoch, Limited v. Rowlands* (1912) 1 Ch 527 at pp. 533.34 per Joyce J., where his Lordship says:

It is a well-settled principle with reference to land at all events...that where possession in fact is undetermined or the evidence is undecisive, possession in law follows the right to possess. As far back as the time of Littleton it was said: "Where two be in one house or other tenements together to claim the said lands and tenements, and the one claimeth by one title, and the other by another title, the law shall adjudge him in possession that, has right to have the possession of the same tenements.

9. The case in *Jones v. Chapman* (1849) 2 Ex 803 is referred to there as the important leading case on the point. Coming to the question of the acts of possession the learned Special Judge nowhere reversed the clear finding arrived at by the learned assistant settlement officer that the plaintiff "has been exercising acts of possession all along and has exercised possession even quite recently." The learned special Judge disposes of the question thus:

The sola evidence of possession adduced in this case on behalf of the District Board is that the District Board contractor had been cutting earth from the disputed plots and argument is made that therefore the District Board must be in possession of the disputed plots, But as I have pointed out, the plots from which earth is cut by the District Board contractor do not necessarily belong to the District Board. The contractor has no scruples in the matter of removing earth from any place which is convenient to him, irrespective of the person who is in possession of it, The learned assistant settlement officer did not at all consider this aspect of the case.

10. It is difficult to see what this finding amounts to. The learned assistant settlement officer first found title with the plaintiff and then found that the plaintiff did exercise acts of possession on these plots by taking earth therefrom. These were clear findings and certainly these findings were sufficient to support his conclusion, namely, that the possession of the plots was with the plaintiff. There was no omission on his part to deserve the reproaches of the learned Special Judge. The learned Special Judge on his part refuses to go into the question of title and then again does not say one way or the other whether he accepts the statement that the plaintiff took earth from the disputed plots from time to time. The plaintiff did not seek to prove his title to the plots by his acts of user. Had he done that then only the observation of the learned Special Judge that the contractor had no scruples in the matter of removing earth from other's lands would have been pertinent. In my judgment, in the facts and circumstances of this case, it will not be possible to determine the question involved in the case without going into the question of title. It shall have to be found whether or not the plaintiff has succeeded in establishing that the title to the two plots is with him and whether he has succeeded in establishing any act

of user as pleaded by him so as to entitle the Court to find the actual possession of the plots with him. The result is that this appeal is allowed. The judgment and decree of the Court of appeal below are set aside and the case is sent back to that Court for the rehearing of the appeal in the light of the observation made above. The appellant will get his costs of this appeal from the principal defendants. Further costs will be at the discretion of the Court of appeal below. Leave to appeal is prayed for and is refused.