
(1923) 11 CAL CK 0030
In the Calcutta High Court

Hasim Ali and Others

APPELLANT

Vs

Abjal Khan and Others

RESPONDENT

Date of Decision : 22-11-1923

Acts Referred:

Criminal Procedure Code, 1898 (CrPC) — Section 145
Evidence Act, 1872 — Section 13

Citation : AIR 1924 Cal 1046 : 82 Ind. Cas. 392

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

Bench : Division Bench

Judgement

Mookerjee, J.—This is an appeal under Clause 15 of the Letters Patent from the judgment of Mr. Justice Walmsley in a suit for confirmation or recovery of possession of a tank on establishment of exclusive title thereto.

2. The plaintiffs set up a three-fold title, namely, title by inheritance, title by purchase and title by adverse possession. The Court of first instance held that title was established not in respect of the entire tank but with regard to a share in it; and unable to determine the precise extent of that share, the Court gave the plaintiffs a joint decree along with the seventeenth defendant. On appeal the Subordinate Judge reversed this decision and dismissed the suit. That decree has been affirmed by Mr. Justice Walmsley.

3. The appeal raises three points for consideration, namely, first, whether reliance should have been placed upon the proceedings in a case u/s 145, Criminal Procedure Code; secondly whether the alleged title by adverse possession had been established; and thirdly, whether the plaintiffs were entitled to a declaration of title to an unascertained share.

4. As regards the first point, it appears that the appellants were the first party in a proceeding u/s 145, Criminal Procedure Code in 1916. Their case then, as now, was that they were entitled to the exclusive possession of the tank and that there was a likelihood of a breach of the peace as the second party (predecessors-in-interest of the defendants) claimed wrongful possession jointly

with them. Upon investigation, the Magistrate came to the conclusion that the plaintiffs were not in exclusive but in joint possession, and that" there was no likelihood of a breach of the peace. On these grounds proceedings were discontinued on the 22nd March, 1917.

5. It is plain that the fact, that there was a proceeding u/s 145, Criminal Procedure Code, that there was an inquiry into the matter and that there was a decision adverse to the allegations of the plaintiffs, is a relevant fact, and the Subordinate Judge has properly treated this as evidence. The view of the Subordinate Judge is supported by the decision of the Judicial Committee in *Dinomoni Chowdhurani v. Brojomohini Chowdhurani* (1901) 29 Cal. 187. In that case Lord Lindley pointed out that orders for possession under the provisions of the Criminal Procedure Code relating to disputes regarding immovable properties are police orders made to prevent breaches of the peace and decide no question of title; but such orders are admissible in evidence on general principles as well as u/s 13 of the Indian Evidence Act to show the fact that such orders were made. Consequently, the first point must be decided against the appellants.

6. As regards the second point, the Subordinate Judge held that the alleged title by adverse possession had not been established. The parties are co-owners and in order to establish title by adverse possession in favour of one co-owner against another, it must be established by unambiguous evidence that there was a complete ouster to the knowledge of the co-sharer. This is settled beyond controversy by recent decisions of the Judicial Committee which affirm the principle that the possession of one co-sharer can be said to be adverse against another, only if there is an open denial of title, and limitation can run, if at all, only from that date; see the observations of Lord Macnaghten in *Corea v. Appuhami* (1912) A.C. 230 of Lord Dunedin in *Muttu Nayagam v. Brito* (1918) A.C. 895 of Lord Buckmaster in *Hardit v. Gurmukh* AIR 1918 P.C. 1 of Viscount Cave in *Varada v. Jeevarathnammal* AIR 1919 P.c. 44 and of Lord Atkinson in *Arab Ali v. Mahmud Ali* AIR 1922 P.C. 84 see also *Balaram v. Syama Charan* (1920) 33 C.L.J. 344 *Joyanarain v. Suchitra* AIR 1922 Cal. 3 *Jagannath v. Ghandni Bibi* AIR 1921 Cal. 743 and *Kailas v. Bijay* AIR 1923 Cal. 18 The Subordinate Judge has accurately analysed the evidence to show that it does not support the theory of exclusive possession and complete ouster.

7. As regards the third point, Mr. Justice Walmsley has correctly held that the plaintiffs cannot claim a decree for declarations of title. The specific title alleged by them has not been established. On the other hand, the difficulty remains that the extent of their share cannot be determined on the evidence as it stands. In such circumstances, it is impossible to make a decree in favour of the plaintiffs in respect of an unknown share : see *Hemendra v. Upendra* (1915) 43 Cal. 743 *Nobin Chandra v. Nilkamal* (1916) 25 C.L.J. 537 *Basaveswaraswami v. Bellary Municipal Council* (1915) 38 Mad. 6.

8. The result is that the decree made by Mr. Justice Walmsley affirmed and this appeal is dismissed with costs.