
(1935) 05 CAL CK 0023
In the Calcutta High Court

Hemendra Nath Roy Choudhury

APPELLANT

Vs

Jnanendra Prasanna Bhaduri and Others

RESPONDENT

Date of Decision : 14-05-1935

Acts Referred:

Limitation Act, 1963 — Article 140, 141

Citation : AIR 1935 Cal 702 : 159 Ind. Cas. 1101

Hon'ble Judges : Derbyshire, C.J.; R.C. Mitter, J

Bench : Full Bench

Judgement

R.C. Mitter, J.—The plaintiff who is the appellant before us sued for possession of some plots of land, his case being that they form parts of his estates bearing touzi Nos. 1624, 1644 and 1647 of the Mymensingh Collectorate. The defendants claim the said lands to be parts and parcels of their estate bearing touzi No. 1646 of the aforesaid Collectorate. Both the Courts below have found that portions of the lands in suit surrounded by red lines in Commissioner's map fall within the plaintiff's estates, but on the question of limitation the Courts below have differed.

2. For the purpose of deciding the question of limitation it is necessary to consider the following facts: Golak Nath Roy was the proprietor in the past of the estates claimed by the plaintiff. He died on 10th May 1846, without any issue but survived by a widow, Jahnvi Choudhurani. He had given his wife power to adopt a son to him. Shortly after his death his widow, Jahnvi Choudhurani adopted Baikuntha Nath Roy Choudhury who on his adoption become the full owner of the properties left by Golak Nath. On 6th. September 1865, Baikuntha Nath however executed an ekrarnama (Ex. 3) in favour of his adoptive mother, Jahnvi Choudhurani. It is not disputed that by the said document a life estate was created in favour of Jahnvi Choudhurani, in respect of the properties left by Golak Nath, and Baikuntha Nath was to get possession on her death. Jahnvi Choudhurani died on 24th February 1900. Baikuntha died on 27th April 1887 leaving him surviving a widow, Rani Dinomani. He left no son, but gave Rani

Dinomani power to adopt a son to him. On the death of Jahnvi Choudhurani Dinomani went into possession of the estate, in which, according to Hindu law, she had a widow's estate till 3rd August 1914, when she adopted the plaintiff. Ordinarily the estate would have vested in the plaintiff in absolute right from the date of the adoption and he would have been entitled to take possession, but a few days before the adoption his natural father, he being a minor then, entered into an agreement with the adoptive mother, Rani Dinomani, by which Rani Dinomani was to remain in possession of the estate as a life tenant and on her death the plaintiff was to get possession. This agreement was executed on 17th July 1914 and has been marked Ex. 3(a). Rani Dinomani died on 9th September 1918 and the suit was filed on 8th September 1930 and registered on 10th September 1930. The plaintiff contends that his suit is in time, Arts. 140 and 141, Lim. Act, being the articles applicable to the case.

3. It is well settled that if a life tenant be dispossessed the reversioner or remainderman is in time if he institutes the suit for possession of immovable property within 12 years of the death of the life tenant, and if successive life estates had been created the remainderman or the reversioner will be in time if he institutes the suit for possession within 12 years of the death of the last life tenant.

4. Adverse possession against a life tenant will not be adverse possession against the reversioner of the remainderman. This has been settled by the decision of the Judicial Committee of the Privy Council in *Runchordas v. Parbatibhai* (1899) 23 Bom 725 and whatever doubts had been raised after that decision in India in regard to suits for possession of immovable property by a reversioner succeeding on the death of a Hindu widow has been removed by the later decision of the Judicial Committee in *Jaggo Rai v. Utsava Lal* 1929 PC 166. It is also well settled that if the cause of action arose during the lifetime of the last full owner, the subsequent interposition of a life estate or a widow's estate would not bring into operation either Article 140 or Article 141, Lim. Act, on the principle formulated in Section 9 of the said Act.: Article 142, Lim. Act would apply, time running from the date of the dispossession. This has been laid down in *S. Sesha Naidu v. Peria Sami Odyar* 1921 Mad 272 57 and 958. The same principle is involved in the judgment of Lord Atkin in *Skinner v. Nauni Lal Singh* 1929 PC 158. In the case before us the plaintiff alleged that Jahnvi Choudhurani had been dispossessed in the year 1878, when she was holding the estate as a life tenant. He satisfied the learned Munsif but the learned Subordinate Judge has held that he has failed to prove the said fact. The learned Subordinate Judge has held further that the defendants had taken possession of the lands in suit before 1865 that is, at a time when Baikuntha was the absolute owner, but we do not consider that his said finding is based on evidence. The learned Subordinate Judge first observed that the oral evidence adduced by the parties was unconvincing. He then referred to the evidence of D.W. 3. He then referred to the defendants' chittas (Ex. A series), the earliest of which is of the year 1871 and came to the conclusion that the defendants were in possession through tenants from before the year 1865.

We have gone through the evidence of the said witness which is vague to a degree, and does not carry the defendants' possession to a period prior to 1865. The chittas also do not carry the defendants' possession to a period earlier than 1870 or 1871. Feeling this difficulty the learned Subordinate Judge made the following observations:

It gives a clear indication that the jotes of Gagan and Ashraf (defendants tenants on the lands in suits) were old tenancies and were created before the landlords' (defendants) survey of 1278 B.S. (1871). In the circumstances it would be a quite proper thing to presume possession retro in favour of the defendants.

5. It is on this observation that he based his finding that the defendants' possession began in 1865. We do not consider that this is the proper way of deciding the said question. There is a presumption that a state of things found to exist at a particular point of time continues, but there is no rule of evidence by which one can presume backwards: *Manmatha Nath Haldar v. Girish Chandra Ray* 1934 Cal 707 at p. 769.

6. For these reasons we hold that the finding of the learned Subordinate Judge that the defendants' possession began before 1865 is not binding on us. It must therefore be taken that the plaintiff has failed to prove that the dispossession was after 1865 and that the defendants have also failed to prove that they began to possess before 1865. The question therefore turns upon the question of onus. The plaintiff came to Court on the allegation that the estate was in possession, firstly, of a life tenant (Jahnvi Choudhurani), then in the possession of Rani Dinomani as the holder of a widow's estate up to the date of the adoption of the plaintiff, and then in her as the holder of a life estate under the ante-adoption agreement, Ex. 3(a) with the natural father of the plaintiff till her death on 9th September 1918, He brings his case prima facie under Arts. 140 and 141, Lim. Act. If the defendants want to avoid the operation of these articles they must prove the necessary facts, namely that limitation began to run from the time when Baikuntha was the full owner, that is to say he was dispossessed when he was the full owner. Dr. Basakh has urged that the onus is on the plaintiff to prove that the dispossession was after 1865 on the authority of the case of *Mohendra Nath v. Shamsunnessa Khatoon* 1915 Cal 629, and has laid emphasis on a sentence to be found at p. 164 of the report. We do not think that the learned Judges in that case intended to decide the question of onus. In that case the last full owner, Satya Kinkar Ghoshal, died in the year 1833. The defendants proved by documentary evidence that their predecessors had been in possession since 17th August 1831, at least they carried their possession to the year 1834. Mukherjee, J., pointed out that there was no article in the Limitation Act then in force corresponding to Article 141 of the Act of 1908 a corresponding article being first introduced in the Limitation Act of 1871. It was also pointed out that the law in force till 1873, when the Limitation Act of 1871 came into force, was that adverse possession which extinguished the title of a female heir taking a

limited estate under the Hindu law also extinguished the title of the reversioner, and that if the possession of the defendants began before 1861 the title of the plaintiffs would have been extinguished before the Limitation Act of 1871 came into force, and once the title was extinguished, while the Limitation Act of 1859 or Regn. 3 of 1793 or 2 of 1805 was in force, it could not have been revived by the introduction of the Limitation Act of 1871. These facts and observations, in our judgment, considerably weaken the force of the observations made by the said learned Judge at p. 164 that:

Before the plaintiffs can rely on Article 141 they must consequently prove that their predecessor, Satya Kinkar Ghoshal was in possession at the time of his death on 5th November 1833.

7. Dr. Basakh has taken a further point before us which was not taken in either of the Courts below. He says that there is evidence that the defendants had taken possession in the year 1871. The chittas Ex. A series certainly prove the defendants' possession in 1871. He says that the suit would have been in time if brought within 12 years of Jaharvi Choudhurani's death. This position he is bound to concede, for in two cases decided by this Court brought within 12 years of that lady's death, Article 140 was applied: see *Pramatha Nath Roy v. Dinomani Choudhurani* (1921) 34 CLJ 129 and *Secy, of State v. Wazed Ali* 1921 Cal 687. But he says that a suit brought beyond that time is barred. The basis of his contention is that the ante-adoption agreement Ex. 3(a) is void and conferred no estate on Rani Dinomani. He says that an ante-adoption agreement by which the possession of an adopted son is postponed is invalid under the law but can be held valid only if there is custom to support it, and as no custom is alleged or proved in this case, the plaintiff was from the date of his adoption the full owner entitled to possession and he not having sued within 12 years from date of his adoption within three years of his attaining majority the suit is barred. For supporting his main proposition that such an ante adoption agreement is void unless there is a custom, he relies upon the case reported in *Krishna Murthi Ayyar v. Krishna Murthi Ayyar* 1927 PC 189.

8. In that case Viscount Dunedin examined the Bombay and Madras cases in detail and summarised the various reasons given in them for upholding an ante-adoption agreement postponing the enjoyment of the adopted son. He held that the real ground on which such agreements could be supported was custom, and his observations indicate that such a custom had grown up in India and has been recognized repeatedly by the Courts. No Calcutta case was considered there, but there are decisions of this Court upholding such agreements: see for instance *Panchanon Mazumdar v. Benoy Krishna Banerjee* 1918 Cal 395. Apart from the question as to whether Dr. Basakh will be allowed to raise the point for the first time here, which involves investigation of facts not put in issue in the Court of first instance, we do not consider the point to be of any substance for as Lord Dunedin observed in *Rama Rao v. Raja of Pittapore*, 1918 PC 81 at p. 154 that:

When a custom or usage, whether in regard to a tenure or a contract or a family

right, is repeatedly brought to the notice of the Courts of a country, the Courts may hold that custom or usage to be introduced into the law without the necessity of proof in each individual case. It becomes in the end a matter of process and pleading.

9. We accordingly allow the appeal, set aside the judgment and decree passed by the learned Subordinate Judge and restore those of the learned Munsif. The appellant will have his costs of this Court and of the lower appellate Court.

Derbyshire, C.J.

10. I agree.