

(1935) 03 CAL CK 0037
In the Calcutta High Court

Mahendra Narayan Roy Chaudhury and Others	APPELLANT
Vs	
Dakshina Banjan Roy Chaudhury and Others	RESPONDENT

Date of Decision : 19-03-1935

Acts Referred:

Letters Patent Act, 1865 — Section 15

Citation : AIR 1936 Cal 34 : 160 Ind. Cas. 870

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

Bench : Division Bench

Judgement

R.C. Mitter, J.—This appeal is on behalf of defendants in a suit instituted by the plaintiffs for declaration of title to a certain property and for recovery of possession. The Court of first instance granted the plaintiffs a decree for eight annas share and dismissed their claim with regard to the remaining portion of the property. The plaintiffs and the defendants being both dissatisfied with the decree passed by the trial Court preferred appeals which were heard together by the Subordinate Judge, Second Court, at Faridpore. The learned Subordinate Judge dismissed the defendants' appeal but allowed the plaintiff's appeal. A decree has accordingly been passed which is entirely in favour of the plaintiffs. The defendants have preferred this appeal against the decree made by the Subordinate Judge, second Court, Faridpore. To follow the controversies between the parties the following facts have to be stated. The property which is the subject-matter of the dispute, that is to say the share of the property which is the subject-matter of the dispute, originally belonged to one Krishna Chandra Banerjee. He married twice. By his first wife he had a daughter named Digambari and by his second wife, Uma Sundari, he had another daughter of the name of Sushila. During his life-time Krishna Chandra Banerjee made a gift of half of the properties to his wife Uma Sundari who survived her husband. On the death of Krishna Chandra Banerjee. Uma Sundari was in possession of the eight annas share of the property in suit as an heir of Krishna Chandra Banerjee and the remaining eight annas on the basis of the gift made to her by her husband. She died in the year 1301 and on her death the share which had been gifted to her

devolved upon her daughter Sushila. The share which belonged to Krishna Chandra Banerjee at the time of his death was inherited by both of his daughters, Digambari and Sushila. Sushila died in the year 1309 and this position is accepted that on her death the eight annas share which she inherited from her mother as her Stridhan property passed to the brother's sons of Krishna Chandra Banerjee, their names being Probhat, Jagat and Gopal. The other eight annas share of the property which devolved upon Sushila and Digambari by inheritance vested in Digambari alone by survivorship. It appears that before the death of Sushila a suit had been instituted by a third party to recover a sum of money from Sushila, Digambari and other persons and a decree was passed with Sushila appearing as one of the defendants. In 1904, this decree was put into execution and the property in suit was purchased by one Kailash Chandra. It does not appear whether the legal representatives of Sushila in respect of the property inherited by her from her mother as Stridhan were represented in the execution proceedings or not.

2. If they were represented in the execution proceedings then the effect of the sale would be to pass only the life interest of Sushila, because it is well established that if a female inherits a Stridhan property she does not get an absolute interest in it. At the date of the sale Sushila was dead and therefore the purchaser Kailash did not acquire anything. That sale undoubtedly passed the 8 annas share of the estate of Krishna Chandra which ultimately devolved upon her daughter Digambari by inheritance, but inasmuch as there is no evidence that the debt in respect of which the suit was brought was a debt binding on the estate of Krishna Chandra, the 8 annas interest in the property which Digambari inherited from Krishna Chandra would no doubt pass but it would give the purchaser an interest which would last as long as Digambari would be alive. The position therefore of Kailash was that he had acquired no interest in the 8 annas of the property, that 8 annas being the subject-matter of the gift of Krishna Chandra to his wife Uma Sundari, and had acquired the other 8 annas share in the property but had only a limited interest in it, namely an interest, which, as I have stated above, would last for the life-time of Digambari. In the year 1313 Kailash sold whatever he had purchased to Digambari. It may be that Kailash was the benamidar of Digambari. But whether he was a benamidar or not the position is not in the least altered. Digambari died in the year 1332 and on her death the 8 annas share of the property which belonged to Krishna Chandra Banerjee and devolved by inheritance on Digambari passed to the sons of Jagat and Probhat who were then the reversioners of Krishna Chandra Banerjee.

3. The plaintiffs have purchased from these reversionary heirs. With regard to the other 8 annas, the subject-matter of the gift, Digambari remained in possession till her death. In the year 1321 there was an Ekrarnama with Digambari as the first party and Probhat, Jagat and Gopal as the second parties. In the Ekrarnama it is recited that Krishna Chandra Banerjee had made a gift of 36 items of property. After the settlement record had been finally published one of the items had been amalgamated with others. Therefore the position was that

there were really 35 items of property which were in existence at the time of this Ekrarnama. The Ekrarnama recites that Probhat, Jagat and Gopal had instituted a certain suit against some third parties. As a result of the proceedings in that suit they apprehended that they would lose by lapse of time the interest which they got in the said 35 items of property on the death of Sushila. Then follow many clauses in the deed. In Cl. Ka of the deed it is recited that rights of the second parties in all the 35 items of property which were the subject-matter of the gift would remain intact and their rights in the property described in the schedule of that document would not be in any way affected because they were left in the possession of Digambari. The schedule to the document comprises 27 items of property and does not mention the property which is in dispute now. In Clause Ja it is stated that in respect of these 27 items of property Digambari would be in possession as a licensee and from out of the income thereof she would maintain the Dev Sheva of Krishna Chandra Banerjee. Then it is stated that seven items of property are in possession of strangers and the second parties would recover the possession of the same. With regard to the property in suit it is simply stated that it has been sold.

4. No mention has been made as to who is the purchaser and who is in possession of that particular item of the property. It appears that in the year 1332 shortly before her death Digambari made a gift of the property in suit to two persons, namely Promoda and Romesh who in their turn have sold it to the defendants in 1332. So far as the title of the plaintiffs is concerned there cannot be any dispute with regard to half share of the property which Digambari inherited from her father; they are the reversioners. With regard to the other half which Krishna Chandra Banerjee made a gift of in favour of Uma Sundari their fathers became the owners on the death of Sushila and the present plaintiffs who are the sons as I have stated above, of Jagat, Probhat and Gopal have inherited the same from their father. Dr. Sen Gupta appearing on behalf of the defendants-appellants contends that although the title may have devolved upon the plaintiffs in the manner stated above their rights to the properties have been extinguished by adverse possession on the part of Digambari. The lower appellate Court has repelled that contention. Dr. Sen Gupta for the purpose of establishing adverse possession on the part of Digambari has relied upon the Ekrarnama of 1321. Mr. Das for the purpose of repelling that contention has also relied upon the same document. It is therefore necessary to consider the effect of that document, because on its effect the question as to this eight annas share of the property in suit would depend.

5. So far as the 8 annas share of the property which Digambari inherited from her father is concerned there cannot be any question of adverse possession. The sale of the year 1904 only passed to Kailash, as I have stated above, an interest which would last for the life-time of Digambari. So long as Digambari was alive the present plaintiffs, who became entitled to the properties as reversioners only on the death of Digambari, would have no right to get possession and therefore if Kailash and any transferee from Kailash made any assertion that he had a higher

right during the life--time of Digambari that assertion would be of no avail as against plaintiffs whose right to get possession accrued only in 1332 on the death of Digambari. On this principle I hold that with regard to that share the claim of the defendants founded on adverse possession must fail. With regard to the other 8 annas share, the subject--matter of the gift, the position stands in this way. Sushila died in the year 1309 and on her death the plaintiffs' predecessors Jagat, Probhat and Gopal became entitled to possession. If they had been kept out of possession for 12 years certainly their interest in that share would have been extinguished. The further question is whether in the circumstances of this case that share has been extinguished. By the sale of the year 1904 at which Kailash purchased, Kailash became a rightful owner to the extent of half of the property, namely the share which vested in Digambari by inheritance. The other 8 annas share in the property did not pass. When Digambari took a conveyance from Kailash she stepped into the shoes of Kailash. The position therefore of Digambari from the year 1313 was that she was a co--sharer along with Jagat, Probhat and Gopal. In 1313 there had not been a prescription for a period of 12 years. Their title was still there. It had not been and could not have been extinguished by time because this is only four years from the death of Sushila. It may be assumed that Digambari was solely in possession of the property in suit but she was a cosharer. She had the right to remain in possession because undoubtedly she was the owner of 8 annas of the property. The question therefore is whether her possession became adverse from the year 1313 or the possession of Kailash became adverse from the year 1904. It is an undoubted proposition of law that if a cosharer is in possession of the whole of the joint property her possession ordinarily would be referred to a lawful title. It would not be adverse against her cosharer unless there be an assertion of a hostile title by him to the knowledge of his co-sharers.

6. This principle has been well settled and it is not necessary to cite any case law on the point. The matter has been fully discussed and settled by the decisions of their Lordships of the Judicial Committee in the case of *Hadit Singh v. Gurmukh Singh* 1918 P C 1. The question therefore is did Digambari assert a hostile title and that to the knowledge of her co-sharers, Probhat, Jagat and Gopal. Dr. Sen Gupta contends that there was such an assertion in the Ekrarnama of the year 1321. Mr. Das says that there is no assertion therein at all but the Ekrarnama goes further and admits the possession of Digambari as a possession of the licensee in respect of all the properties which were the subject--matters of the gift. I cannot on a fair reading of the Ekrarnama subscribe to the last contention of Mr. Das. Digambari admits that she is in possession as a licensee but her admission is expressly limited to 27 items of property described in the schedule. That in my judgment is the effect of Cls. Ka and Ja of that deed. But I do agree with the other contentions of Mr. Das that there is no assertion of a hostile title by Digambari in respect of the property in suit. In Clause Ja of the document there is only a recital of the fact that the property in suit has been sold. The document is silent as to who had purchased the property or who was enjoying

the property as owner. Even the facts as to who was in possession of the property in suit in the year 1321 is not mentioned in the document. There is no assertion in the document that Digambari was holding possession of the same, much less she was holding possession of the same in her capacity as the purchaser from Kailash. In Clause Ka of the document the second parties to the same assert that their title would not in any way be affected to the properties which were the subject--matter of the gift and the first party acquiesces in that statement. This is inconsistent with the position that the lady, Digambari intended to assert her hostile and exclusive title to the property in suit.

7. The construction attempted to be put by Dr. Sen Gupta on Clause Ja of the document where it was stated that property in suit had been sold would be inconsistent with the stipulation contained in Clause Ka of the document. I accordingly hold that the learned Subordinate Judge is right in holding that the possession of Digambari was the possession of a cosharer and there was no assertion of any hostile title by her to the property in suit. That being so Digambari did not acquire any interest in the property by adverse possession. The suit being instituted within 12 years of Digambari's death there is no answer to the plaintiffs' claim. In this view of the matter I affirm the decree passed by the Subordinate Judge and dismiss the appeal with costs. Leave to appeal u/s 15 of the Letters Patent has been asked for but is refused.