

(1912) 07 CAL CK 0057
In the Calcutta High Court

Prosonna Kumar Mukherjee and Others

APPELLANT

Vs

Srikant Rant

RESPONDENT

Date of Decision : 02-07-1912

Acts Referred:

Citation : 16 Ind. Cas. 365

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

Bench : Division Bench

Judgement

Asutosh Mookerjee, J.—This is an appeal on behalf of the defendant in an action in ejectment. The subject-matter of the dispute is homestead land within the Bankura Municipality, originally held by one Gopal Chundra Mukerjee under a ghatwal. In 1878, the Collector, in execution of a certificate under the Public Demands Recovery Act, made against Gopal Chundra Mukerjee, sold his right, title and interest in the homestead. Dwarka Nath Mukerjee, now represented by his sons, defendants-appellants, purchased the homestead, and in the sale certificate granted to him the land was described as rent-free. The purchaser took possession of the homestead and never "paid rent to the ghatwal; it has, indeed, been found that although Gopal Chundra Mukerjee held under the ghatwal, he never paid any rent up to the time when his interest was sold in 1888, the ghatwal relinquished his office and his son, the present plaintiff, then an infant four years old, succeeded as ghatwal. Shortly before 1895, by agreement between the ghatwal, the Maharaja of Burdwan, who was the superior zemindar, and the Government, the ghatwal relinquished the office on condition that the property should be treated as resumed by the state, to be settled permanently with the Maharaja of Burdwan by whom it would be granted in Mokrari to the retiring ghatwal himself. This arrangement was carried out and in 1895, the plaintiff obtained the Mokrari Settlement from the Maharaja of Burdwan. In 1902, the plaintiff attained majority. On the 16th June 1904, the plaintiff commenced the present action to eject the defendants as trespassers. His case in substance is that Gopal Chundra Mukerjee had no transferable interest under the ghatwal and that, consequently., Dwarka Nath Mukerjee, the

father of the defendants, did not acquire any valid title by his purchase at the certificate sale in 1878. This is controverted by the defendants, who assert that Gopal Chundra Mukerjee, along with his brother, had a transferable rent-free right in the disputed property; they further contend that even if the alleged rent free right is not established, they have acquired a good title against the plaintiff by estoppel and adverse possession. The primary Court has found on the evidence that Gopal Chundra Mukerjee had no transferable right in the disputed lands and that the doctrines of estoppel and adverse possession are of no assistance to the defendants. The same view has been substantially accepted by the District Judge. The result has been that the Courts below have concurrently decreed the suit. On the present appeal, this decision has been assailed on behalf of the defendants on two grounds: first, that the claim is barred by limitation, and secondly, that the plaintiff is estopped from denying the title of the defendants.

2. In support of the first ground, reliance has been placed upon the circumstance that neither Gopal Chundra Mukerjee nor Dwarka Nath Mukerjee ever paid any rent to the ghatwal. This, however, is clearly insufficient to constitute adverse possession, because mere non-payment of rent or discontinuance of payment of rent does not by itself constitute adverse possession. *Madan Mohan Gossain v. Kumar Rameswar* 7 C.L.J. 615; *Troyluckho Tarinee v. Mohima Chunder* 7 W.R. 400; *Rungo Lall v. Abdool Guffoor* 4 C. 314 : 3 C.L.R. 119; *Poresh Narain v. Kassi Chunder* 4 C. 661; *Musyatullah v. Noorzahan* 9 C. 808 and *Prem. Sukh v. Bhupia* 2 A. 517. It is further clear that in a suit of this description, Article 144 of Limitation Act must be applied. Time, therefore, runs from the date when the possession of the defendants became adverse to the plaintiff. Now, although the term "plaintiff" as defined in Section 2 includes a person from or through whom a plaintiff derives his right to sue, this does not affect the present plaintiff, who, as Chatwal, does not claim through his father as his predecessor. *Ram Chunder Singh v. Madho Kumari* 12 C. 484 : 12 I.A. 188. The plaintiff when he succeeded as ghatwal was an infant and he has commenced the present suit within three years from the attainment of majority. The plea, of limitation cannot, therefore, be sustained. In support of the second ground, it has been contended that the plaintiff now claims title from the Secretary of State for India in Council, and as the Collector, on behalf of the Secretary of State, represented the disputed homestead to be saleable rent-free land when he enforced the certificate against Gopal Chundra Mukerjee, neither the Secretary of State nor the plaintiff deriving title from him can repudiate the position. This argument raises a question of considerable nicety but even if the argument be assumed for a moment to be well founded on principle, there are two preliminary difficulties which the appellants must overcome before they can derive any benefit from it. In the first place, the District Judge has observed that as the land was included in the ghatwali tenure. Dwarka Nath Mukerjee, the father of the defendants, presumably knew the true state of facts. It has not been disputed that if the true state of facts were known to Dwarka Nath Mukerjee or if he had ready means of

acquiring a knowledge of the truth, neither he nor his representatives can invoke the aid of the doctrine of estoppel Carr v. London and N.W. Ry. Co. (1875) L.R. 10 C.P. 307 : 44 L.J. C.P. 109 : 31 L.T. 785 : 23 W.R. 747; Proctor v. Bennis (1888) 36 Ch. D. 740 : 57 L.J. Ch. 11 : 57 L.T. 662 : 36 W.R. 456 and Standish v. Boss (1849) 3 Ex. 527 : 19 L.J. Ex. 185 : 77 R.R. 715. A difficulty however, is Created by the fact that the District Judge has not indicated the circumstance from which the presumption is drawn and the appellants assert that there is no evidence in support of the conclusion A further difficulty is caused by the fact that the defendants may reasonably contend that they were misled by the definite representation as to the character of the property and this is a sufficient excuse for the omission of Dwarka Nath Mukerjee to inquire into and to inform himself of the facts. Redgrave v. Hurd 20 Ch. D. 1 : 51 L.J. Ch. 113 : 45 L.T. 485. In view of the two possible aspects just mentioned, I am not prepared to hold, without farther investigation that the question of estoppel does not arise. In the second place, no doubt, the only material on the record as to what took place in the certificate proceedings is the sale certificate, and, as pointed out in Aman Ali v. Mir Hossain 10 C.L.J. 605 : 4 Ind. Cas. 739 the foundation of the estoppel must be laid on a representation made before and not after the sale. From this point of view, the defendants would have to produce the sale proclamation, and the sale certificate would not by itself be sufficient to sustain the plea of estoppel. I am not prepared, however, to hold on this ground that the plea of estoppel does not arise. It is well known that the description in the sale certificate is taken from the description of the property in the sale proclamation, and as no objection was taken in the Courts below that the entry in the sale certificate did not by itself afford sufficient foundation for the plea of estoppel, the defendants would in fairness be entitled to an opportunity to produce a copy of the sale proclamation before their plea was negatived. From this point of view, also, further investigation would be necessary. I shall, therefore, now proceed to examine whether there is any substance in the plea of estoppel.

3. The argument upon the question of estoppel has been sought to be presented from two points of view. It has been suggested, in the first place, that when in 1888, the father of the plaintiff relinquished his office as ghatwal, the properties reverted to the Crown, and the newly appointed ghatwal received the grant qualified by the estoppel which binds the Secretary of State. In the second place, it has been suggested that in 1895 when the present plaintiff as ghatwal relinquished his office, the property vested in the Crown, and the subsequent grantee, the Maharaja of Burdwan, took his estate qualified by an estoppel against the Secretary of State. It is not necessary to consider at what precise point of time a possible estoppel could take effect against the Secretary of State, because I have arrived at the conclusion that, as a matter of law, no title by estoppel ever accrued in this case in favour of the purchaser at the certificate sale. The contention of the appellant is that, in the certificate proceedings, the Collector got the disputed properties sold as the saleable rent-free homestead of Gopal Chundra Mukejee, and that consequently when the Collector himself

obtained the property upon relinquishment by the ghatwal, he, could not contest the title of the execution purchaser. In support of this position, reliance has been placed upon the doctrine recognised in Section 43 of the Transfer of Property Act. This argument, in my opinion, is fallacious. It need not be disputed that if a grantor, who has no title or a defective title or an estate less than what he assumes to grant, conveys with warranty or covenants of like import, and subsequently acquires the title or estate which he purports to convey, or, perfects his title, such after acquired or perfected title will enure to the grantee or to his benefit by way of estoppel. *Treviran v. Laurence* (1704) 6 Modern. 258; *Hermitage v. Tomkins* (1699) 1 Lord. Raymond. 729; *In re Horton, Horton v. Perks* (1884) 51 L.T. 420. This doctrine, however, can have no possible application to the case before us In the case of a voluntary private alienation, the deed, either expressly or by necessary implication, shows that the grantor intended to convey and that the grantee expected to become vested with an estate of a particular kind; the deed may consequently found an estoppel although it contains no technical covenants. This is clear from an examination of the principle which underlies the doctrine that "an interest when it accrues feeds the estoppel." *Doe de Christmas v. Oliver* (1829) 10 B. & C. 181 : 5 Man. & Ry. 203 : 8 L.J.K.B. 137 : 34 R.R. 358; *Webb v. Austin* (1829) 1 M. & G. 701 : 8 Scott. (N.R.) 13 L.J. C.P. 233; *Hayn v. Moltby* (1789) 3 T.R. 438; *Hamill v. Murphy* (1883) 12 L.R. Ir. 400: *Laws of England by Lord Halsbury Volume XIII Section 529*. The case of an execution sale, however, stands on an obviously different footing. The decree-holder does not guarantee the title of the judgment-debtor; the intending purchaser knows that under the law he can acquire nothing beyond the right, title and interest of the judgment-debtor. No doubt, the decree-holder himself, who is bound to notify before the sale all encumbrances on the property about to be sold, cannot subsequently set up against the execution purchaser a secret encumbrance in his own favour. *Boollub Sircar v. Kristo Coomar* 12 W.R. 303 : 3 B.L.R.,A.C. 407; *Munoo Lull v. Choonee Lall* 1 I.A. 144 : 21 W.R. 21; *Doolee Chund v. Oomda Begum* 24 W.R. 263; *Nursing Narain Singh v. Roghoobur Singh* 10 C. 609; *Srimati Giribala Debia v. Srimati Rani Mina Kumari* 5 C.W.N. 497; *Kasturi v. Venkatachalapathi* 15 M. 412; *Ram Chandra v. Jai Ram* 22 B. 686; *Sheshgiri Shanbhogi v. Salvador Vas* 5 B. 119 and *Husein v. Shankargiri* 23 B. 119.

4. This estoppel, however, of which the execution purchaser may avail himself against the decree-holder, is based on the ground that it was the statutory duty of the decree-holder to notify before the sale all liens on the property inclusive of those held by himself. That principle is clearly of no assistance to the appellants. Even as regards the judgment-debtor, there has been considerable divergence of judicial opinion as to whether the execution purchaser can avail himself of an estoppel in respect of after acquired title. To take one illustration, though in *Varnum v. Abbot* (1815) 12 Mass. 474 : 7 Am. Dec. 87 it was held that the extent of an execution raises an estoppel, as much as in the case of a conveyance, the contrary view, namely, that an execution sale of property not

belonging to the judgment-debtor does not estop him from asserting against the purchaser title subsequently acquired, has been maintained in cases of recognised authority. *Emerson v. Sensom* (1871) California. 552; *Flenner v. Traveder's Insurance Co.* (1883) 89 Indiana. 164; *Freeman v. Thayer* (1852) 29 Maine 369; *Meyendrof v. Frohner* (1879) 3 Mont. 282; *Frey v. Ramsoour* (1872) 66 N.C. 466; *Jentry v. Wogstoff* (1832) 14 N.C. 370. *Bigelow on Estoppel*, 1890, page 396. It is clear, therefore, that there is no estoppel in this case as against the decree-holder. Consequently, the defendants-appellants, as representatives of the purchaser at the certificate sale, cannot avail themselves of any possible estoppel against the Secretary of State or against the plaintiff as grantee from him through the Maharaja of Burdwau. It is further worthy of note that even if there had been any estoppel available against the Secretary of State, there could have been none against the plaintiff: none was created by reason of what happened in 1888, because the estate did not then vest in the Crown to be granted afresh to the plaintiff, nor was any created by reason of what happened in 1895, because the so-called after-acquired title of the Secretary of State was acquired by him on condition that a clear title would be granted to the Maharaja of Burdwan, as. zemindar and to the plaintiff as Mokarariiar under him. The doctrine does not apply where an after-acquired title is taken by the grantor under a conveyance made to him as a conduit and for the purpose of vesting the title in a third person. *Condit v. Bigalow* (1903) 64 N.J. Eq. 504 : 54 at Atlantiv. 160; *Philippi v. Leed* (1893) 19 Colo. 246 : 35 Pac. 540; *Sutton v. Jenkins* (38). From every possible point of view, therefore, the plea of estoppel proves unsustainable.

5. The result is that the decree of the District Judge must be affirmed and this appeal dismissed with costs.

Beachcroot, J.

6. I agree.