

(1928) 12 AHC CK 0025
In the Allahabad High Court

Rajai and Another

APPELLANT

Vs

Lala Behari Lal and Another

RESPONDENT

Date of Decision : 10-12-1928

Acts Referred:

Transfer of Property Act, 1882 — Section 123

Citation : 115 Ind. Cas. 141

Hon'ble Judges : Niamatullah, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

Niamatullah, J.—This is a defendants' appeal arising out of a suit brought by the plaintiff respondents for a declaration that the defendants are not entitled to occupy a small house consisting of three rooms situate in Mirzapur. It is common ground that the house in dispute belonged to one Shanker Bin, now represented by the plaintiff-respondents, who purchased it from the former's successor-in-interest, Rajender Bin, by a sale-deed, dated the 2nd August, 1920.

2. The defence was that by an agreement, dated the 25th July, 1891, Shanker Bin granted the house to the defendant No. 1's uncle Khaderu. The agreement provides that the grantee and his heirs would be entitled to occupy the house on condition of their keeping the house in proper repairs, that the grantee and his heirs are not entitled to transfer the house, and that in case they do so, the grantor reserved to himself the right to resume possession of the house. This agreement was not registered. But the defendant No. 1 claims that he and his uncle have remained in possession in terms of the agreement since the year 1891.

3. The Court of first instance dismissed the suit but on appeal the lower Appellate Court has granted the declaration prayed for by the plaintiff-respondents. The defendants have appealed to this Court.

4. The circumstances leading to the present declaratory suit are briefly these.

The plaintiff-respondents at first brought a suit for ejectment of the defendants on the allegation that the latter occupied the house with the permission of the plaintiffs for a few years before the institution of that suit, and that the plaintiffs were entitled to eject them. The defendants set up the agreement of 1891 already referred to. The suit was decreed by the Court of first instance and the plaintiff-respondents obtained delivery of possession in execution of the decree. On appeal by the defendants the learned Subordinate Judge set aside the decree of the Court of first instance and dismissed the suit. Before the defendant-appellants could regain possession by restitution in pursuance of the decree of the Appellate Court the plaintiff-respondents instituted the present declaratory suit out of which the present appeal has arisen, praying in the alternative that if the defendants recover possession in the meantime the suit may be treated as one for possession, a contingency which has not yet happened.

5. The court of first instance dismissed the suit holding that the agreement of 1891 though unregistered cannot under the circumstances of the case, be altogether ignored, and that the possession of defendant No. 1 and his uncle since 1891 was a bar to the plaintiffs' claim to recover possession.

6. On appeal the learned Subordinate Judge decreed the suit holding that the plaintiffs as owners were entitled to recover possession and that the agreement of 1891 not being registered could not be relied on by the defendant-appellants in support of their right to retain possession of the house.

7. On second appeal to this court it has been argued on behalf of the defendant-appellants that the decree in the earlier suit operates as *res judicata* and that the plaintiffs are not entitled to maintain a second suit either for declaration or for ejectment. I am unable to accept this contention in its entirety. The earlier suit was dismissed, because the plaintiffs' case that the defendants had been in possession for about seven years under an agreement other than the one of 1891 was held not to have been established and that the defendants' possession was under the agreement of 1891 and extended for the whole period since that time. The learned Subordinate Judge had found that "in this case the plaintiffs alleged tenancy which according to them arose about six or seven years ago. But the defendants succeeded in proving that they and their predecessors-in-title have been in possession for more than thirty years on the basis of an agreement according to which they were not liable to be dispossessed. For these reasons I decree the appeal and dismiss the plaintiff's suit."

8. While I hold that the finding contained in the passage quoted above operates as *res judicata* on the question whether the defendants and their predecessors have been in possession for over thirty years under the agreement of 1891, it does not, in my opinion, preclude the plaintiffs from agitating the question as to whether they are entitled to eject the defendants in spite of that agreement and the possession of the grantee in terms thereof. There was no adjudication as to the adverse character of the defendants' possession.

9. The court of first instance held on evidence in a well-reasoned finding that the defendant No. 1 and his predecessors were all along in possession from 1391. But on appeal the learned Subordinate Judge, who happens to be the same officer who decided the earlier case, and from whose judgment I have already quoted a relevant passage, has now held that "it is not established by the evidence that defendants or their ancestors have been in continuous possession since that time," He does not refer to the evidence discussed by the Court of first instance and completely ignores his own previous judgment on the question. As already indicated by me the question of defendants' possession since 1891 is no longer open in view of a clear decision arrived at in the earlier case. I must reject the finding of the learned Subordinate Judge, if it can be called a finding at all.

10. The defendants' possession for more than twelve years in pursuance of the agreement of 1891 being established, the next question, is whether it can confer upon them the right to retain possession of the house. It has been urged by their learned Counsel that the agreement having been acted on, the parties cannot resile from it; and reliance is placed on the well-known case of Mahomed Musa v. Aghore Kumar Ganguli 28 Ind. Cas. 930 : 42 C. 901 : 17 Bom. L.R. 420 : 21 C.L.J. 231 : 28 M.L.J. 548 : 19 C.W.N. 250 : 13 A.L.J. 229 : 17 M L.T. 143 : 2 L.W. 258 : (1915) M.W.N. 621 : 42 I.A. (P.C.) which proceeds on the doctrine of part performance and on estoppel. It is not necessary for me to consider whether the principle enunciated in that case is applicable to the circumstances of the case before me, as I am clearly of opinion that the third and last contention of the defendants-appellants must succeed. The agreement of 1891 being unregistered, cannot be relied on by the defendant-appellants as creating a title. But as held in Sagun Balkrishna v. Kaji Hussen 27 B. 500 : 5 Bom. L.R. 303 it can be looked into to ascertain the assertion of title made by the grantee in entering upon the house, which he retained for more than twelve years on that footing. The same view was taken in Rama Sahu v. Gowro Ratho 59 Ind Cas. 350 : 44 M. 55 : (1920) M.W.N. 711 : 12 L.W. 649 : 39 M.L.J. 639 : 29 M.L.T. 10 . After the lapse of twelve years the defendant No. 1's uncle and the defendant No. 1 himself acquired by adverse possession the title which the agreement if registered would have conferred upon them. In Varada Pillai v. Jeevarathnammal 53 Ind Cas. 901 : 43 M. 244 . : (1919) M.W.N. 724 : 10 L.W. 679 : 24 C.W.N. 346 : 38 M.L.J. 313 : 18 A.L.J. 274 : 2 U.P.L.R. (P.C.) 64 : 22 Bom. L.R. 444 : 46 I.A. 285 (P.C.) where an unregistered deed of gift was in question, their Lordships of the Privy Council observed that: "It was not contended before the Board that the above transactions effected a valid gift of the property to Duraisani; for such a gift must, u/s 123 of the Transfer of Property Act, be made by registered deed. Nor, having regard to Section 91 of the Evidence Act, can the recitals in the petitions be used as evidence of a gift having been made. But the defendant's case is that Duraisani, although she may have acquired no legal title under the transactions referred to, in fact took possession of the property when it was transferred into her name and retained such possession until her death in December, 1911, after which it passed to the

defendant as her successor, and accordingly that the plaintiffs' claim is barred by upwards of twelve years' adverse possession. The High Court upheld this contention; and their Lordships, after considering the evidence, have arrived at the same conclusion." Exactly the same considerations are applicable to the facts before me.

11. The learned Advocate for the respondents has strenuously contended that the agreement of 1891 not being admissible in evidence and the defendants' possession being admittedly permissive, no case of adverse possession can arise. I am unable to accept this argument. It is settled-law that limited interest can be acquired by adverse possession if all other conditions are satisfied.

12. Another objection put forward on behalf of the plaintiff-respondents is that no plea of adverse possession was taken in the written statement. I, however, find that in para. 9 of their written statement the defendants have clearly pleaded that their predecessor-in-interest took possession under the agreement of 1891, and he and his successors (the defendants themselves) have been in possession ever since as "proprietors". If anything the defendants have overstated their case it cannot be suggested that no plea of adverse possession was set up by them.

13. In view of the findings arrived at by me the decree of the lower Appellate Court cannot stand. It is accordingly set aside and that of the Court of first instance is restored.

14. The defendant-appellants will have their costs in all the Courts.