
(1929) 05 PAT CK 0026

In the Patna High Court

Shyam Kreshto Shaw and Others

APPELLANT

Vs

Ganesh Kahar and Others

RESPONDENT

Date of Decision : 24-05-1929

Acts Referred:

Citation : AIR 1930 Patna 20 : 124 Ind. Cas. 634

Hon'ble Judges : Fazl Ali, J;Chatterji, J

Bench : Division Bench

Judgement

Chatterji, J.—The suit out of which this appeal has arisen related to an area measuring 57 acres of land out of survey plot No. 1224 marked as plots A and B in the sketch annexed to the plaint. Within the ambit of plot No. 1224 is situated a small plot bearing No. 1223 which belongs to the defendants as tenants under the plaintiff second party (the Maharaja of Gidhour). The Commissioner appointed in the case found the area of plot B to be 17 of an acre; and 40 was the area of plot A. According to the Commissioner 15 of an acre out of plot B was outside the cadastral survey of plot No. 1224. The plaintiffs have withdrawn their suit with regard to this portion of plot B, which according to the Commissioner, fell outside survey plot No. 1224. The suit was limited to the remaining part of the area under claim in respect of which the plaintiffs got a decree with the exception of the portion of plot A delineated in red by the Commissioner. The present appeal relates to this portion of the claim which was disallowed by the Courts below; while the defendants have filed a cross-objection in respect of the disputed land which was decreed in favour of the plaintiffs.

2. Both the survey plots Nos. 1223 and 1224 have been recorded in the finally published Eecord of Eights as the gairmazrua malik's land, but the defendants' possession is re corded in the remarks column with regard to the small plot No. 1923. The plaintiff's case is that the entire plot No. 1224 was settled with the plaintiffs first party by the plaintiff second party who is the admitted malik of the village in 1914 and came to be in the possession of the plaintiff second party as a tenant thereof, that defendant No. 1 who had taken settlement of plot No.

1223 for the purpose of making Bhatta Chuna (a lime kiln) encroached upon the plaintiffs, plot No. 1224 and beyond the limits of their plot by putting up several huts and stacking bricks, Goles etc., in spite of protest from the plaintiffs first party in 1921.

3. The defence of the defendants who all belong to the family of defendant No. 1 is that defendant No. 1 took a permanent settlement of plot No. 1223 from the ancestors of plaintiff second party, built a house, and has been in possession and occupation of the same for over 24 years and that over twenty years ago these defendants constructed several kilns on plot No. 1224 for carrying on business and constructed pucea (brick built) walls with the permission of the ancestor of the plaintiffs second party and under an agreement that the defendants would hold this land for ever.

4. The learned Munsif held that the defendants had failed to prove their alleged Do-amiBandobast (permanent Settlement) of plot No. 1224 and also negated the defendants' case of adverse possession so far as the green portion of the disputed land was concerned but found that they had acquired title by adverse possession over the red portion of the disputed land. Accordingly he passed a modified decree in favour of the plaintiff except for the red portion. Against this decree an appeal was preferred by the plaintiffs and a cross-appeal by the defendants. The learned Subordinate Judge agreed with the Munsif in holding "that the defendants failed to establish the alleged Doami Settlement of 1224 or any portion thereof with him."

5. He also held the question of adverse possession wholly against the defendants because, according to him the evidence that the adverse possession of the defendants commenced openly and to the knowledge of the landlord and it continued for full period of 12 years, was wanting. To use his own words the defendants failed miserably to prove their case of adverse possession " He however, applied the principle of equitable estoppel to the red portion of the plan in dispute and held that equitable estoppel was a bar to plaintiffs getting a decree for the red portion. In this view he confirmed the decree passed by the trial Court. There is an appeal on behalf of the plaintiffs first party against the dismissal of the claim with regard to the red portion, while the defendants have filed a cross-appeal that the suit should have been dismissed in its entirety.

6. It is urged by the learned Advocate for the plaintiffs that the Subordinate Judge was quite wrong in applying the principle of equitable estoppel to the present case while it is urged on the other side that the disputed land had been settled with the defendants and that they had established their case of adverse possession of a limited character as against the plaintiffs.

7. The judgment of the learned Subordinate Judge on the question of equitable estoppel runs as follows:

As regards red portion of the land bounded by letters "A, B and C" as shown in , " the Commissioner's map No, 2 though the alleged adverse possession of the

defendant over it for twelve years has not been established still there can be no doubt that the principle of equitable estoppel applies to the red portion of the disputed land in respect of which plaintiff's claim has been disallowed. Crer this land it has been satisfactorily proved that there is pucca structure of the defendant for more than several years. The landlord's kuehheri is close to this lard. Plaintiffs first party too do not appear to have raised any objection regarding the structure having been built thereon. Rather from the fac!s?and circumstances the conclusion is irresistible that both sets of plaintiffs stood by and defendants erected the pucca Structure on the said portion of land without any objection whatsoever....If both sets of plaintiffs allowed the defendants to erect pucca building on the land which as a matter of fact they did without any objection it is certainly true that the plaintiffs cannot after some years turn round and succeed in ejecting the defendants from the said lands in which pucca structures stand. Though their adverse possession does not apply to the red portion of the disputed land but there can be no doubt that equitable estoppel is a bar to plaintiffs getting a decree in respect of the said red portion.

8. It is to be regretted that the learned Subordinate Judge has accepted a loose and inadequate statement of the rule of equity in deciding the case. The leading authority of the law on the subject is Ramsden v. Dyson (1866) 1 H.L. 129 : 12 Jur. (N.S.) 506 : 14 W.R. 926. The rule as observed in Stocking v. Tata Iron and Steel Co. 41 Ind. Cas. 175 : 2 P. L.J. 600 : (1917) Pat. 273 : 2 P.L.W. 133 is if a stranger build on any land supposing it to be his own, and the real owner does not interfere but leaves him to go on, equity considers it to be dishonest in the owner to remain peaceful and afterwards to interfere and take the profit; but if a stranger builds knowingly upon any land, there is no principle of equity which prevents the owner from insisting on having back his land with all the additional values which the occupier has imprudently added to it. The same principle has been enunciated by their Lordships of the Privy Council in Beni Ram v. Kundan Lal 21 A. 496 : 26 I.A. 58 : C.W.N. 502 : 7 S. P.C.J. 523 : 1 B. L.R. 400 (P.C.) following Ramsden v. Dyson (1866) 1 H.L. 129 : 12 Jur. (N.S.) 506 : 14 W.R. 926 . In the case of Kazemini Mutwali Vs. Manik Chandra Pramanik, a tenant invoked the plea of equitable estoppel on the ground of having erected a building Of a parmanent character. Their Lordships state that the finding that the erection of the pucca building on the land in suit was known to the mutwalli or his agent is not enough and proceed to observe that "the tenant must in the first place show that he had an honest belief that he had a permanent right in the land and that the landlord knew that the tenant-defendant was acting under each belief and further that the landlord knowing that the tenant-defendant was acting under such a belief stood by and allowed the erection of the permanent structure."

9. The chief point to be remembered in applying the rule of equitable estoppel is that the person building must show that he had an honest belief in his right to do so. Both the Courts below hold that the defendants failed to establish the alleged Doami (permanent) settlement of plot No. 1224 or any portion thereof. The

Appellate Court states that Jno salami was paid to the landlord" and makes the following observation:

Defendants" case is that the alleged settlement with him was made in 1307 which was several years before the final publication of the Record of Rights which took place in 1316. There is house of defendant in 1323 and his possession over the same has been recorded in khatian in the remarks column. It does not appeal to reason that had plot No. 1224 or any portion thereof been settled with the defendant and if they had been in possession over the same from the time of alleged settlement why their possession was not similarly recorded in the khatian.

10. This indicates that the defendants could not possibly have an honest belief that they had a permanent or any right to plot No. 1224 or any part thereof or, as a matter of that any right to erect any kind of permanent structure on plot No. 1224. The report of the Commissioner deputed in this case shows "that the most important object is the bungalow-like construction with tiled roof, brick walls, brick pillars, rooms and verandahs. This is defendant's office, godown, karkhana as well as cowshed.... This bungalow includes plot No. 1223 which was at first a small room but has now been extended and made into this present bungalow. While measuring this present bungalow I marked the portion of it which was plot No. 1223. Defendants pointed out this portion."

11. Thus the defendants extended their original bungalow on plot No. 1223 and made an encroachment on plot No. 1224. I have already mentioned that the defendants could not have entertained a reasonable belief that they had a right of erecting structure on plot No. 1224. It may be possible to Bay that they made that extension under the erroneous belief that the land so encroached upon formed a part and parcel of plot No. 1223 but that is not their case either in the written statement or in the argument advanced in any of the Courts. Further they could not have been under any such notion, because, as the Commissioner states, the defendants pointed out the portion of the bungalow which was on plot No. 1223. This gives an indication that they were aware of the extent of plot No. 1223. From what has been said above it is manifest that no principle of equitable estoppel could be invoked in favour of the defendants who, it may be mentioned did not raise any such plea in their written statement, and they as wrongdoers must suffer the penalty of their tortious act, knowingly done.

12. It is, however, urged by the learned Advocate for the respondent that the plaintiffs cannot succeed because (1) the defendants have acquired title by adverse possession and (2) the plaintiffs 1st party have got no valid title to plot No. 1224. There is no dispute that plot No. 1254 is contiguous to the defendants plot No. 1223 and was a piece of waste land. If a tenant encroaches upon a waste land of his landlord the latter is entitled to treat him either as a trespasser or as a tenant. If the landlord treats him as a trespasser he is entitled to sue him in ejectment within 12 years from the date when he becomes aware of the encroachment. Abdul Hossain and Others Vs. Afsaruddin and Others, but the principle is well-recognised that in order to constitute acquisition of title by

adverse possession the possession must be actual and not merely constructive. As laid down by their Lordships of the Privy Council in *Secretary of State for India v. Krishnamoni Gupta* 29 C. 518 : 29 I.A. 104 : 6 C.W.N. 617 : 4 B. L.R. 537 : 8 S. P.C.J. 269 (P.C.) in order to sustain a title by adverse possession there must be actual possession of a person claiming as of right by himself or by persons deriving title from him. The learned Munsif has discussed the evidence on the point and states that the present suit is just within the period of 12 years and no title to plaintiff No. 1 can accrue by adverse possession. The learned Subordinate Judge in appeal refers to the view expressed by the Munsif in one part of his judgment that he does not consider the defendants' possession for more than 12 years to be quite satisfactory and proceeds to make the following observation:

Assuming that defendants were in possession for more than 12 years that is not quite sufficient to make out their case of adverse possession, unless it is established that their possession (adverse) commenced openly and to the knowledge of the landlord and it continued for full period of 12 years defendants cannot succeed; such evidence being wanting I must hold against the defendant. In such circumstances I hold that the defendants failed miserably to prove their case of adverse possession and which was not specifically pleaded by them in the written statement.

13. The point is, therefore, concluded by the finding of fact. There is no substance in the contention that the defendants have acquired a right by adverse possession or that the plaintiffs' suit is barred by limitation.

14. It is contended on behalf of the defendants that the plaintiffs 1st party have acquired no valid right of tenancy in plot No. 1224 or any part thereof, inasmuch as they got settlement by virtue of a *pareha* which is not registered and cannot prove the tenancy. This document is admissible "in evidence for a collateral purpose to explain the nature and character of one's possession : (*Maharani Janki Kuer Vs. Birj Bhikhan Ojha and Others*, Then it is well-established that though the act itself is not clothed in the formalities required by law the defect may be supplied by the actings of the parties, that is, by the doctrine of part performance. If there be a part performance by the party seeking relief, to the knowledge of the other party proof will; be admitted of the verbal contract in cases where an acton of specific performance would lie: *Nand Lal Mahton and Others Vs. Dhanukdhari Mahton and Others*, The plaintiffs 1st party have got into possession of plot No. 1224 and in fact their possession over the undisputed portion of this plot is not denied. The plaintiff 2nd party who is the landlord of the village recognises them as tenant and joins them in this suit for ejectment of the defendants.

15. In my opinion the unregistered *parcha* followed by possession has perfected the plaintiffs title. The actings of the parties in this case have been such as to supply all defects in title.

16. In the result the appeal is allowed, the judgment and decree of the Courts below are modified and the plaintiffs are allowed a decree for possession of the dismissed portion of the claim as well by directing the removal of the structures on plot No, 1224 within two months from the date: in default these would be removed in execution proceedings. The cross-appeal is dismissed. The plaintiffs-appellants shall get their costs of this appeal from the defendants-respondents.

Fazl Ali, J.

17. I agree.