

(1926) 11 CAL CK 0013
In the Calcutta High Court

Sm. Gouribala Debi and Others

APPELLANT

Vs

Probhas Chandra Batabyal and Others

RESPONDENT

Date of Decision : 26-11-1926

Acts Referred:

Citation : AIR 1927 Cal 931

Hon'ble Judges : Mukerji, J;Graham, J

Bench : Full Bench

Judgement

Mukerji, J.—The defendants are the appellants in this appeal. The suit out of which it arises was instituted by the plaintiffs for establishment of their title to a tank and its banks which bear Nos. 1621 and 1622 in the settlement map of village Ajabnagar The plaintiffs claimed nishkar right in this property alleging that it is included in the Taidad of Bhagirath Batabyal, and asked for the declaration of title, confirmation of possession or in the alternative for recovery of possession and a declaration to the effect that the record of right is wrong. In the record of rights, it may be stated here, the property is recorded in the names of the defendants. The defendants' case shortly stated was that the property is included in another Taidad called Becharam Batabyal's Taidad and that in the ordinary course of succession they have acquired title to it and are in possession of it.

2. The Munsif made a decree declaring the plaintiffs' niskar right to an undivided 2/15th share of the property in suit and confirmed their possession in respect of that share.

3. The defendants preferred an appeal and the plaintiffs a cross-appeal. The result of these was that the Subordinate Judge declared the plaintiff's title to the entire 16 annas of the property as against the defendants, and confirmed their possession therein and declared the record of rights to be wrong.

4. Now the position seems to be this. The Munsif found that the genealogy upon which the plaintiffs relied was not complete and contained some false and

unfounded statements, that they had not made their co-sharers parties to the suit, and that they had succeeded in establishing their title only to the extent of 2-15th share. The Subordinate Judge held that the record of rights which stands in the defendants' favour has been amply rebutted by the plaintiffs' evidence, that the entry in the record of rights is wrong, that the defendants have no right to the property, and that the plaintiffs have got title to and are in possession of it. As regards the extent of the plaintiffs' title, the Subordinate Judge was not satisfied that the plaintiffs have got no other co-sharer living, and though he found that the plaintiffs' title had been made out only to the extent of 2-15th, he was satisfied that the defendants were not plaintiffs' co-sharers. As he found the plaintiffs' evidence of possession to be satisfactory, he decreed the suit as above stated, making a reservation that the plaintiffs' co-sharer, if any, will not be bound by this judgment.

5. The decision of the learned Judge has been challenged before us upon several grounds which ultimately resolve themselves into two, the first being that the plaintiff's title should not have been declared, upon the findings of the learned Judge himself, to any thing beyond the 2-15th share, and the second being that if the first, ground succeeds the plaintiff's possession should be confirmed to the extent of that share only.

6. The first ground obviously must succeed as there is no point in making a declaration to the extent of 16 annas as against the defendants only which will not be operative as against the plaintiffs' co-sharers. This declaration is wholly unnecessary in view of the fact that the declaration as to the erroneous character of the entry in defendants' favour is being retained, and if this declaration is made it may lead to complications.

7. As regards the second ground I am of opinion that the decree confirming the plaintiffs' possession in the entire sixteen annas of the tank need not be disturbed as the defendants have been found to be trespassers. The plaint discloses sufficient materials for a cause of action for a prayer for confirmation of possession. The finding of the learned Judge is that the plaintiff's have been all along in possession, and it is the prayer for the confirmation of possession with which we are here concerned. It is unnecessary in the present case to enter upon the discussion of the question whether and under what circumstances a suit for recovery of possession may succeed as-against a trespasser merely on the strength of previous possession for any period short of the statutory period of twelve years, a question which has led to considerable diversity of judicial opinion so far as this Court is concerned beginning with the case of *Nisa Chand Gaita v. Kanchiram Bagani* [1899] 26 Cal. 579 and ending with that of *Naba Kishore Tilakdas Vs. Paro Bewa*, . The present case, in my opinion, falls well within the dictum of the Judicial Committee in the case of *Mt. Sundar v. Mt. Parbati* [1889] 12 All. 51 in which their Lordships observed that] possession lawfully attained in the sense that it was not procured by force or; fraud but peaceably, no one interested; opposing, is entitled to be maintained against all

comers except such as could plead a preferential title. I am accordingly of opinion that the declaration as to confirmation of possession which the plaintiff has succeeded in getting in the Court of appeal below should be allowed to stand.

8. The result is that this appeal succeeds only to this extent that the declaration as to the plaintiff's title to be found in the decree of the learned Subordinate Judge will be expunged, and the rest of the said decree will stand. In view of the technical nature of the appellants' success, he will get no costs in this appeal and each party will bear their own costs therein.

Graham, J.

9. I agree.