

(1928) 02 CAL CK 0063
In the Calcutta High Court

Sourindra Nath Basu and Others

APPELLANT

Vs

Nirmal Chandra Banerjee and Others

RESPONDENT

Date of Decision : 07-02-1928

Acts Referred:

Citation : AIR 1928 Cal 882 : 117 Ind. Cas. 693

Judgement

1. This appeal arises out of a suit for establishment of title and recovery of khas possession of five plots of land A B C D and E described in the plaint said to be appertaining to the plaintiff's tenancy of 2 1/2 bighas bearing a rental of Rs. 2-8-0 under the defendants and standing in the name of Ram Sona Dassi. Both the Courts below have allowed the plaintiff's claim with reference to four plots A C D and B and dismissed the suit so far as it related to plot B. The present appeal by the plaintiffs is accordingly confined to plot B which is a cutcheri bari. The plaintiff's case is that all the five plots in suit were purchased by Ram Sona Dassi (the plaintiff's predecessor) from Bagdi, the original holder of the tenancy, in 1261 B.S. Under the defendant who is the zemindar there was a putnidar by the name of Sristidhar Mondal who took a lease from the plaintiff's predecessor of plot B and had his cutchery bari. Thereafter Sristidhar's successor-in-interest in the putni Rama Nath Burman executed a registered kabuliyat in respect of plots A and B in 1301 in favour of the plaintiff's predecessor and was in possession by payment of rent till he was dispossessed by the defendants in 1908. The plaintiff thereafter obtained a decree against Rama Nath for arrears of rent under the lease and purchased it at auction in execution of rent decree on 3rd November 1914. It further appears that the plaintiff's predecessor brought a suit against Sristidhar for rent of plot B but it was dismissed and the decree of dismissal was upheld by the High Court in second appeal. The defendants are the purchasers of the zemindari interest of the property in suit in a revenue sale and subsequently they obtained by purchase the putni right of Rama Nath in the estate, and took possession of the land in suit on 11th January 1908.

2. Now as to the plaintiff's title to this property, it has been found by the Courts below that the kobala under which the plaintiff's predecessor Ram Sona is

alleged to have purchased among other properties the land in suit from Padu Bagdi was not a genuine document. This finding has not been challenged before us. The position therefore is that the plaintiff has no title to this property. The substantial question which has been ably argued by Mr. Chakrabarty on behalf of the plaintiffs is that though he has no title to the land in suit he has by adverse possession against the persons who was entitled to khas possession of the property, obtained a good title to it. This contention is based on the fact that in 1301 the putnidar Rama Nath executed a kabuliyat in favour of the plaintiff "a predecessor in respect of the land in suit though actually it belonged to him on that date and remained in possession thereof till 1314 B.S. or 1908 as a tenant under the plaintiffs; and therefore, according to the principle of the decision of the Judicial Committee in the Secy. of State v. Krishna Mani Gupta [1902] 29 Cal. 518 the plaintiff obtained a good title by adverse possession as against Rama Nath himself. It may be noted at the start that this case was not made out in the Courts below and there is no sufficient discussion of the evidence bearing upon this point. It is a question which is not free from consideration of facts and it is difficult for us in second appeal to appreciate its true bearing on the facts of this case. But as it has been placed before us as a question of law on the facts found in the case it is necessary to examine it closely. If the case as set up by the plaintiff namely that in 1301 Rama Nath had the title to the land in suit but he executed a kabuliyat in favour of the plaintiff alleging plaintiff's possession therein and (sic) himself as a tenant in respect thereof and remained in possession of it as a tenant under the plaintiff for a period of more than 12 years by payment of rent, is proved the plaintiff is undoubtedly entitled to succeed on the principle of Krishna Mani Gupta's case [1902] 29 Cal. 518. But the findings of the lower appellate Court do not support the plaintiff's case as put before it. With regard to the kabuliyat executed by Rama Nath in favour of the plaintiffs, the learned Subordinate Judge in the appellate Court makes the following observation:

If we accept Rama Nath's said kabuliyat as a genuine and bona fide document, we find that the plaintiff's case is proved to be true in respect of all the sub-plots. There are, however, sufficient reasons for finding that Rama Nath's said kabuliyat was executed under exceptional circumstances and does not support the plaintiff's case in respect of plot B. Hatan Bose (predecessor-in-interest of the plaintiff) was practically in Rama Nath's employ and it was not unlikely that such a kabuliyat was obtained under registration at the instance of an Ammuktear.

3. Later on after discussing some evidence on the point and referring to the judgment in a suit which was brought by Rama Nath against the defendants for recovery of the plots A and B in which Rama Nath succeeded in obtaining a decree in respect to plot A but his claim with respect to plot B was dismissed, the learned Judge observes thus:

The said judgment shows under what exceptional circumstances Rama Nath's

kabuliyat might have been executed and there is nothing in the present suit to suggest a contrary state of things.

4. In the judgment in that case it was found that the story that Sristidar (the former putnidar) had taken settlement of the land from Haran was not true and that the plaintiffs had failed to prove that Rama Nath continued to pay rent to Haran after execution of the kabuliyat in 1301 till his rights were sold away in 1914; and as regards the kabuliyat of 1301 after Haran Bose had lost his rent suit against Sristidhar there was a litigation between Rama Nath and Sristidhar for years about this patni and that the kabuliyat was executed about the time of litigation and so it was not impossible that Rama Nath executed the kabuliyat at the time in order to get the help of Haran Bose, an influential tenant and the son of a former ijaradar of the mahal. These are the findings in the previous case upon which the Subordinate Judge relied and the observation made by him that Haran Bose was a servant of Rama Nath and the kabuliyat and registration of it were procured at the instance of the Am-muktear sufficiently establishes the basis upon which the learned Subordinate Judge has practically found that the kabuliyat was not a bona fide document. He has further gone on to consider the nature of the suit brought by Rama Nath against the defendants for recovery of this plot of land and plot A. He observed that that case, though it was brought in the name of Rama Nath, the plaintiff in the present case was really the plaintiff in that case and accordingly he was, of opinion that the decision in that case operated as *res judicata* against the plaintiff who though not a party in form was the real plaintiff; and if that decision did not operate as *res judicata* it would certainly be very good evidence against the plaintiff. This opinion as expressed by the learned Subordinate Judges supported by authority but it is not necessary to discuss it as the present case can be disposed of on the findings of fact arrived at by him namely that the kabuliyat of 1301 on which the plaintiff bases his claim for adverse possession against Rama Nath was not a bona fide document. There is further no finding in this case that Rama Nath continued to occupy the land as the plaintiff's tenant or ever paid rent to the plaintiff in respect of it. The question of adverse possession is a question of fact and the claim can only arise when a party remained in possession as against the party who had actually the right Co possession. If the kabuliyat of 1301 was brought about for some purpose with the collusion of Rama Nath and the plaintiff's predecessor Haran Basu, the plaintiff's possession under it will not be adverse as against Rama Nath who remained in actual possession as he was before the kabuliyat was executed, with the knowledge that it was his property of which he was in possession and that the kabuliyat was at sham transaction. The title claimed by adverse possession must fail. It has been found that the plaintiff has no title by purchase to this land; as it is found that he acquired no title by adverse possession the plaintiff's suit must fail.

5. The learned Subordinate Judge has also held that the plaintiff's suit is barred by limitation. The defendant obtained possession of this land in January 1908 and the present suit was brought in April 1920. The learned vakil for the

appellants argues that time runs not from the date of the defendant's possession but from the date of his purchase of Rama Nath's interest on which date he acquired the right to possession of the land in suit; and for this view he relies upon the well known principle that possession against a tenant or a lessee is not necessarily adverse as against the landlord or lessor. But this principle only applies where the landlord or the lessor has title to the land and the right to immediate possession, if impediments in the shape of a lease or tenancy disappear. In the present case the plaintiff on his own showing was a trespasser or in constructive possession of the land in suit through his tenant Rama Nath whether under a temporary or a permanent lease it makes no difference, when in such a case the tenant holding the land under a trespasser is dispossessed, the dispossession would affect the tenant and the landlord also under whom he was holding; and it is more so when the rightful owner dispossesses the tenant and takes possession of the property which really belongs to him. In any view of the matter the plaintiff's suit must be taken to be barred by limitation; and as a trespasser he cannot claim that dispossession of Rama Nath by the defendant in 1908 did not affect his interest which at that moment he had none.

6. On all these grounds we are of opinion that there is no merit in this appeal and it must be dismissed with costs.

7. The defendant has filed cross-objections in this appeal in respect of plots other than plot B. But we are told that the defendants had filed a separate appeal in respect of those plots which was dismissed by this Court under Order 41, Rule 11 Civil P.C. The cross-objections therefore cannot be heard. They are dismissed without costs.