

(1997) 09 GAU CK 0059

In the Gauhati High Court

Case No : Second Appeal No. 11 of 1991

Uttam Kumar Sen and Others

APPELLANT

Vs

Gita Das Choudhury and Others

RESPONDENT

Date of Decision : 11-09-1997

Acts Referred:

Evidence Act, 1872 — Section 35

Tripura Land Revenue and Land Reforms Act, 1960 — Section 43

Citation : (1998) 3 GLT 299

Hon'ble Judges : N.G. Das, J

Bench : Single Bench

Advocate : S. Deb and A. De, for the Appellant; A.C. Bhowmik and D.C. Roy, for the Respondent

Judgement

N.G. Das, J.—This Second Appeal arises from the judgment of the learned District Judge, South Tripura dated 29th January, 1991, whereby learned District Judge dismissed the appeal of the present Appellants affirming the judgment of the learned Munsiff, Sabroom passed on 7.12.1984 in T.S. No. 1 of 1981 decreeing the suit of the Plaintiff (now represented by LRs) as Respondents in this Second Appeal.

2. The Plaintiff i.e. the predecessor of the present Respondents filed the suit in the year 1981 for a decree of khas possession of the huts more particularly described in the Schedule "Kha" to the plaint and also for restraining the Defendants from entering into or doing any act of possession in the land measuring 11 gandas 2 karas 1 krant and 3 dhurs appertaining to C.S. plot No. 1113 of khatian No. 467 of mouza Sabroom (more particularly described in the Schedule "Ka" to the plaint. The Plaintiffs case was that in the year 1957 he reclaimed the land described under schedule "Ka" to the plaint and after doing so he constructed a residential house thereon and thereafter allowed his younger brother to stay in the house. Subsequently, he also constructed a few more huts to accommodate other members of the family. During last survey settlement

operation i.e. in the year 1964 the original owner viz. Smti. Debalaxmi Devi appeared and at that time the Plaintiff purchased the aforesaid land from her by an un-registered deed at a consideration price of Rs. 100/-. But the vendor viz. Smti. Debalaxmi Devi could not execute the sale deed as at that time she had been suffering from leprosy. However, the Plaintiff allowed his maternal cousin Defendant No. 3 to stay with him in one of those huts for prosecution of his studies in Sabroom High School as his maternal uncle Defendant No. 1 requested him for his accommodation. In the meantime, the family of the Plaintiff became enlarged and it was difficult on his part to accommodate the Defendant No. 3 to stay with him. So, the Defendant No. 3 was separated and he started living in a separate hut in the same homestead. But it was alleged that taking advantage of the absence of the Plaintiff the Defendant No. 3 with the help of Defendant No. 1 reconstructed a deserted cow-shed of Plaintiff and converted it to a kitchen. When the Plaintiff came back to his house he was surprised to see it and hence he asked the Defendant No. 3 to vacate. But the Defendant No. 3 turned a deaf ear to that request. The Plaintiff, therefore, issued a pleader notice. But the Defendants did not vacate the suit premises even after receipt of the notice of the pleader. Therefore, the Plaintiff filed the suit for the reliefs as stated above.

3. The Defendants resisted the suit by filing a written statement wherein they denied all the material averments of the plaint and contended further that Defendant No. 1 was the real owner of the land by purchasing it from one Indu Bhusan Dewanji and after this purchase he permitted the Plaintiff to stay in a house which was constructed by him through his younger brother (now dead). The Defendant No. 1 was at that time working in Calcutta so after his retirement he came back and started living in the suit premises. The further contention of the Defendants was that during last survey settlement operation the Defendant No. 1 asked the Plaintiff to look after the survey operation in respect of the suit land. But the Plaintiff in collusion with the officers of the survey settlement office got his name entered in the khatian which fact he came to know only after institution of the suit. It was contended that two daughters of Defendant No. 1 who are now married got their education staying in the same house and as such the claim of the Plaintiff that he constructed the house or that he permitted Defendant No. 3 to stay there for the purpose of prosecution of his studies are nothing but a myth. The answering Defendants also averred that they acquired the right to the suit land by virtue of their adverse possession of it for more than the period of statutory limitation.

4. Upon the pleadings the learned trial Court framed eight issues for determination of the suit. Both the parties adduced oral as well as documentary evidence in support of their respective claim of possession and title. The learned trial Court after appreciation of the evidence on record arrived at the conclusion that the Defendants were licencees of the Plaintiff and they forcibly took possession of the cow-shed. With this finding learned Munsiff decreed the suit for eviction of the Defendants from the suit premises.

5. Aggrieved by this judgment and decree the present Appellants preferred an appeal before the learned District Judge who, however, upheld the judgment of the trial Court. Hence, this Second Appeal.

6. Mr. S. Deb, the learned senior counsel appearing on behalf of the Appellants has at the very outset contended that the judgment of the courts below are perverse inasmuch as there was practically no proof to show that the Plaintiff acquired title to the suit land. It is argued by Mr. Deb that record of rights namely, khatian on the basis of which the Courts-below made their findings is perverse as record of rights cannot confer title to any one in respect of any land. It is, however, not in dispute that finally published khatian as exhibited in this case indicates that the Plaintiff is in possession of the land. Section 43 of the Tripura Land Revenue and Land Reforms Act, 1960 which is relevant for the purpose may be extracted as under:

43. Publication of the record of rights.

(1) When a record of rights has been prepared, the Survey Officer shall publish a draft of record in such manner and for such period as may be prescribed and shall receive and consider any objections which may be made during the period of such publication, to any entry therein or to any omission therefrom.

(2) When all objections have been considered and disposed of in accordance with the rules made in this behalf, the Survey Officer shall cause the record to be finally published in the prescribed manner.

(3) Every entry in the record of rights as finally published shall, until the contrary is proved, be presumed to be correct.

7. The above Provision clearly indicates that record of rights shall be presumed to be correct unless and until that has been rebutted.

8. The entry in record of rights is admissible in evidence u/s 35 of the Evidence Act. The principle on the basis of which it has been accepted to be admitted is that law reposes the confidence in public officers entrusted with public duties that it be presumed that they will discharge their duties with accuracy and fidelity. The Privy Council in AIR 1937 69 (Privy Council) has pointed out that entries on such Government records are evidence of title mainly because they are good evidence of possession but if contrary to the facts as to the possession at the time they were made they carry little, if any, weight.

9. Keeping the above legal position in view, the finally published khatian marked as Ext. 1 must be construed to have authenticity as to the possession of the Plaintiff in the suit premises.

10. The Plaintiff's case was that he reclaimed the suit property and after reclamation he constructed huts thereon for residential purpose. But during survey settlement operation the original owner, namely, Smt. Debalaxmi Devi came when he purchased the land by dint of an unregistered kabala which could

not be registered as at that time the executant Debalaxmi was suffering from leprosy. But he remained in possession and on the basis of the unregistered deed of sale and his possession he paid the land revenue. The trial Court as well as the first Appellate Court discussed about this point and held that the Plaintiff's documents clearly indicate that he had better title than the Defendants namely, the present Appellants who could not even show a piece of paper in support of their claim that they purchased the suit land from one Indu Bhusan Dewanji. The trial Court also discussed the evidence in details and made the finding that the plea of adverse possession was not proved by the Defendants i.e. the present Appellants.

11. The Privy Council held in *Arumugham Chetty v. Periyannan Servai* that "a possession on the part of one party, which is not shown to have commenced in wrong, can only be disturbed by distinct proof of a superior title in Anr. party." (25 WR 81 (PC)). So, where the Plaintiff was peaceably dispossessed or was ousted by due process of law, he can succeed in an ejectment action only by proof of a better title. The better title need not be the abstract legal title which can only reside in one person or set of persons at a time." [per Vivian Bose in *Pannalal v. Bhaiyalal* AIR 1937 Nag 281], but may be any title which is preferable to that of the Defendant in possession. The question that frequently arises in this connection is whether the possessory title is sufficient for ejecting the Defendant who has himself no title to the property.

12. The Privy Council observed in *Perry v. Clissold* (1907) AC 73 : 95 LT 890 (P) : *Armony v. Dalanivir* (1722) Stra 505 : 93 ER 664 : *Hannah v. Peel* (1945) 2 All ER 288 : (1945) 1 KB 509 : *The Panchayat Board, Akumella Vs. Dubba Venkata Reddi and Another*, : *Gobind Prasad v. Mohan Lal* 24 All. 157, "It cannot be disputed that a person in possession of land in the assumed character of owner and exercising peaceably the ordinary rights of ownership has a perfectly good title against all the world but the rightful owner."

13. It is not in dispute that a finally published khatian is prepared after doing some preliminary works at certain stages viz. bujarat, attestation etc. In the instant case, there is nothing on the record to show that the present Appellants or any one on their behalf raised any sort of objection before the survey settlement officer at any of those stages about the entries. The contention of the Defendants in this regard was that they for the first time came to know about the record of rights only after institution of the suit. The survey operation started as far back as in the year 1964 and the finally published khatian Ext. 1 was prepared on 20.3.68. The contention of the Defendant was that he sent Plaintiff to the office of the Survey Settlement for presentation of his case, but taking advantage of that the Plaintiff in collusion with the officials of the survey settlement office got his name entered into the khatian. The courts-below after discussion of the evidence rejected the plea and I also find no infirmity in the finding. There is nothing on record to show that the answering Defendants made any sort of enquiry in respect of the record of rights even though it was averred

that the Plaintiff was sent to the office of the survey settlement for presenting the case on behalf of Defendant No. 1.

14. The answering Defendant No. 1 stated that he purchased the land in suit from one Indu Bhusan Dewanji. But not a scrap of paper he produced in support of that purchase.

15. Mr. A.C. Bhowmik, the learned Counsel appearing on behalf of the Respondents has contended that in the back-ground of the facts particularly the concurrent findings there is no scope for interference with the findings of the courts-below. It may be noted here that in a second appeal there is hardly any scope to reverse the findings of facts recorded by the trial Court and the appellate Court unless the finding is shown to have been made on the basis of no evidence.

16. In the case of Parsini (dead) thorough LRs. Vs. Atma Ram and others, the Supreme Court made the following observation:

On a finding of fact, though the learned Single Judge could go into the question of law, he confined his consideration in a second appeal under a limited parameter. It would appear that the learned Single Judge trenched as if he was the first Appellate Court and considered the evidence by himself and came to the conclusion that the genuineness of the Will had not been proved. The Division Bench, therefore, has rightly gone into the question within the parameters of law and held that the learned Single Judge was not right in reversing the finding of fact recorded by the trial Court and the appellate Court. Thus, we consider that there is no substantial question of law warranting interference.

17. In the case of Samsuddin Rahman and others Vs. Bihari Das and others, the Supreme Court made a similar observation which is as under:

Significantly, the trial Court as well as the first Appellate Court had recorded a clear finding of fact that the Plaintiffs-Appellants had proved on the basis of the oral evidence that it had taken 15/16 years for the accretion to be visible and demonstrable, requiring steps to be taken by the State of Assam, one of the Defendants-Respondents to straighten matters under the provisions of Section 34(c) of the Regulation. The High Court was thus in grave error in upsetting the judgment and decree of the lower appellate Court and in this manner denying relief to the Plaintiff-Appellants as granted by that Court.

18. In Navanethammal, Appellant v. Arjuna Chetty Respondent reported in AIR 1996 SC 3521 the Supreme Court made the observation under para 20 of its judgment as under:

In our considered view the lower appellate Court has fairly appreciated the evidence in the above background and has reached the conclusion that the suit was not barred by limitation. Even assuming that Anr. view is possible on a reappraisal of the same evidence, that should not have been done by the High Court as it cannot be said that the view taken by the first Appellate Court was

based on no material.

19. In view of the above position of law and particularly in view of the documentary evidence I am constrained to hold that the findings made by the Courts-below on facts do not call for any interference.

20. The Courts-below also dealt with the plea of adverse possession taken by the Defendant-Appellants. The plea of adverse possession is not always a legal plea. It is always based on facts which must be asserted and proved. A person who claims adverse possession must show on what date he came into possession, what was the nature of his possession, whether the factum of his possession was known to the legal claimants and how long his possession was open and undisturbed. These are all questions of facts and unless they are asserted and proved, a plea of adverse possession cannot be inferred from them.

21. In the instant case, on perusal of the evidence on record I find that both the Courts dealt with this point adequately and does not call for any interference.

22. For the reasons mentioned hereinabove, the appeal is dismissed with costs.