(1978) 10 AHC CK 0016

Allahabad High Court

Case No: Second Appeal No. 979 of 1973

Smt. Bitola Kuer		APPELLANT
	Vs	
Sri Ram Charan and Others		RESPONDENT

Date of Decision: Oct. 24, 1978

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Section 11
- Evidence Act, 1872 - Section 101, 102, 103, 104, 114
- Limitation Act, 1963 - Article 65

Citation: AIR 1978 All 555

Hon'ble Judges: S.J. Hyder, J

Bench: Single Bench

Advocate: D.P.S. Chauhan, for the Appellant; Raja Ram Shivhare, for the Respondent

Final Decision: Allowed

Judgement

S.J. Hyder, J.
The plaintiff who has lost from both the courts below has now filed this second appeal.

2. The suit was for possession over the house in dispute. It is not necessary to burden this judgment by repeating the averments made in the pleadings of the parties. The two courts below have found as a fact that the house in dispute, which is situated in village Hardaspur in the district of Budaun belonged to one Malkhan Singh. He had a son named Surat Singh. Surat Singh married three wives--one after the other. His first wife was Jamuna Kuer from whom he had a daughter named Larh Kuer alias Lalsukh. Plaintiff Bitola Kuer is the daughter of Larh Kuer. The second wife of Surat Singh was Deva Kuer. He had no issue from the second wife. The third wife of Surat Singh was Ram Piari. Ram Piari was also issueless. When Surat Singh died, only Deva Kuer and Ram Piari were alive and they entered in possession of his extensive property as the widows of the last male owner. Relations between Deva

Kuer and Ram Piari were not cordial after the death of Surat Singh. Deva Kuer and Ram Piari alienated some of the properties which they held as widows'' estate. Deva Kuer died first. The death of Ram Piari took place on August 26, 1947. Larh Kuer and Bitola Kuer, the present plaintiff-appellants, instituted suit No. 5 of 1949 for setting aside the said alienation and other kindred relief. The said suit was partly decreed. It was dismissed in respect of certain other reliefs. These are concurrent findings of fact which cannot be challenged in this second appeal. The trial court framed a number of issues. The suit which was instituted on April 3, 1967 was dismissed on the finding that the plaintiff Smt. Bitola Kuer has not been able to prove her possession over the said property within 12 years of the suit. The trial court in its judgment referred to original suit No. 5 of 1949 filed by Larh Kuer and Bitola Kuer as plaintiffs and it held that since that suit was dismissed in so far as related to possession over the house in dispute, it went a long way to prove that Bitola Kuer or her mother Smt. Larh Kuer were not in possession of the said house. The trial court was also of the view that as the plaintiff had failed to prove possession within 12 years of the suit, it should necessarily be inferred that the defendant was in adverse possession of the house in suit for more than 12 years. The trial court held that the plaintiff''s title to the property in dispute was extinguished by the adverse possession of the defendant.

3. At this stage, it may be mentioned that the sole defendant in the suit giving rise to this second appeal was one Mani. He died during the pendency of the suit and his heirs were brought on record and they are now the respondents in this second appeal.

4. The first court of appeal not only substantially affirmed the finding of the trial court on the question of limitation, it also held that the suit was barred by the principle of res judicata. The plea of res judicata was sustained on the basis of the decree in original suit No. 5 of 1949 to which I have already referred above.

5. The appellant has assailed the finding of the first court of appeal on the question of res judicata and also on the question of limitation. It may be stated at the very outset that Mani was not a party to suit No. 5 of 1949. In any view of the matter he or his legal representatives could not rely on Section 11 of the CPC to non-suit the plaintiff. In order to attract the doctrine of res judicata, the following conditions must exist :--

(1) That the litigating parties in the earlier suit and the subsequent suit are the same.

(2) That the subject-matter of the earlier suit and the later suit must be identical.

(3) The matter must have been finally decided between the parties in the earlier suit,

(4) The earlier suit must have been decided by a court of competent jurisdiction.

6. The first condition enumerated above was clearly lacking, I will presently show that the second and third conditions, referred to above, were also not fulfilled. However, before entering on the said question, it may be pointed out that the defendants-respondents have only filed copies of the judgment and decree in the aforesaid suit No. 5 of 1949. The plaint and the written statement of the said suit have not been produced on the record. The Supreme Court in the case Syed Mohd. Salie Labbai (Dead) by L.Rs. and Others Vs. Mohd. Hanifa (Dead) by L. Rs. and Others, has laid down the law in the following words (at page 1577) :--

"In our opinion, the best method to decide the question of res judicata is first to determine the case of the parties as put forward in their respective pleadings of their previous suits, and then to find out as to what had been decided by the judgments which operate as res judicata."

7. In the absence of the pleadings of suit No. 5 of 1949, it cannot be decided as to what was the subject-matter of the said suit. The two courts below have only referred to the relief stated in the decree and the operative portion of the judgment, incorporated in the decree, wherein it is stated that the suit of the plaintiffs was being dismissed in respect of the reliefs which had not been specifically granted by the terms of the said decree. It is true that the plaintiffs of the said suit had claimed a relief of possession of the house in dispute and they had also prayed for grant of compensation for removal of material of the house in dispute by defendants 8 to 11 of the said suit. But from the perusal of the judgment in suit No. 5 of 1949, it appears that the said defendants of the suit aforesaid had only denied having taken wrongful possession over the house in suit but they had further pleaded that they did not remove its material. The trial court, while dismissing the suit, had dealt with the question with regard to the removal of the material of the house now in dispute in the following words :--

"There is no evidence to show that defendants 8 to 11 have appropriated the materials of the house at Hardaspur. I find the issue against the plaintiffs."

8. The finding recorded in the judgment in suit No. 5 of 1949 cannot be said to be a finding by which the possession of the plaintiffs of the said suit was negatived over the site of the house in dispute. This incidentally also highlights the wisdom behind the observations of the Supreme Court in the case Syed Mohd. Salie Labbai which I have extracted above. I, therefore, conclude that there was absolutely no material from which it could be concluded that the dispute in suit No. 5 of 1949 was identical with the dispute in the present suit. It could not also be held that the question regarding possession of the house in dispute was finally decided between the parties in the said suit. From this it follows that the court of appeal was wrong in holding that the present suit was barred by the principle of res judicata.

9. Coming to the question of limitation, it must be observed that the suit giving rise to this second appeal was instituted after coming into force of the Limitation Act,

1963. The trial court was clearly wrong in basing its finding on the question of limitation on considerations based on Article 142 of the Limitation Act, 1908. The suit was on the basis of title and was governed by Article 65 of the Limitation Act, 1963. The plaintiff could not be non-suited if she failed to prove her possession over the property in dispute within 12 years of the date of the institution of the suit. According to the finding recorded by the two courts below, the plaintiff had succeeded in proving her title. She could be denied the relief of possession only if the defendant succeeded in showing that he was in adverse possession of the property in dispute for more than 12 years. The two courts below have not taken into account the relevant consideration which ought to have been taken into account in arriving at the conclusion that the plaintiff''s suit was barred by limitation.

10. Under the Limitation Act of 1908, Article 141 related to a suit for possession by a Hindu or Mahomedan claiming to be entitled to the possession of immovable property on the death of a Hindu or Mohammedan female. The period of limitation for such a suit was 12 years to be computed when the female died. In the case of Kalipada Chakraborti and Another Vs. Palani Bala Devi and Others, it was held as follows :--

".....The law can now be taken to be perfectly well settled that except where a decree has been obtained fairly and properly without fraud and collusion against the Hindu female heir in respect to a property held by her as a limited owner, the cause of action for a suit to be instituted by a reversioner to recover such property either against an alienee from the female heir or a trespasser who held adversely to her accrues only on the death of the female heir. This principle, which has been recognised in the Law of Limitation in this country ever since 1871, seems to be in accordance with the acknowledged principles of Hindu Law. The right of reversionary heirs is in the nature of spes successionis, and as the reversioners do not trace their title through or from the widow, it would be manifestly unjust if they are to lose their rights simply because the widow has suffered the property to be destroyed by adverse possession of a stranger."

11. The same principle has been reiterated in the case of Ram Kristo Mandal and Another Vs. Dhankisto Mandal, , Shelat, J. as he then was, speaking for the court stated as follows (at p. 208) :--

"A person who has been in adverse possession for 12 years or more of the property inherited by a widow from her husband by any act or omission on her part is not entitled on that account to hold it adversely as against the next reversioners on the death of such a widow. The next reversioner is entitled to recover possession of the property if it is Immovable within 12 years from the widow''s death under Article 141. This rule does not rest entirely on Article 141 but is in accord with the principles of Hindu Law and the general principle that as the right of a reversioner is in the nature of spes successionis and he does not trace that title through or from the widow it would be manifestly unjust if he is to lose his right by the negligence or

sufferance of the widow."

12. The Limitation Act of 1963 does not re-enact the provisions of Article 141 of the Act of 1908 in identical terms. The substance of the said Article of 1908 is however, reproduced in the shape of an Explanation to Article 65 of the Limitation Act of 1963 which may now be read:--

"Explanation-- For the purposes of this Article-

(a) ....

(b) Where the suit is by Hindu or Muslim entitled to possession of the Immovable property on the death of a Hindu or Muslim female, the possession of the defendant shall be taken to become adverse only when the female dies."

13. From what has been stated above it follows that in spite of the repeal of the Limitation Act of 1908, the law laid down by the Supreme Court in the case of Kalipada Chakraborti (supra) and Ram Kristo Mandal (supra) still holds good.

14. The two courts below have not taken the said provision of law into account in finding that Mani was in adverse possession of the house in dispute for a period of more than 12 years and, as such, the title of the plaintiff was extinguished u/s 27 of the Limitation Act. Amongst the widows of Surat Singh, Ram Piari was the last to die, She was admittedly in possession of the estate of Surat Singh in the capacity of widow of the last male holder. The Courts below were under a duty to compute the period of limitation from the death of Smt. Ram Pyari which occurred on Aug. 28, 1947.

15. As already pointed out earlier, the trial court held that the plaintiff-appellant had failed to prove her possession over the house in dispute within twelve years of the date of the institution of the suit. From this, it has concluded that the defendant was in adverse possession over the house in dispute. The lower appellate court has only expressed its agreement with the finding recorded by the trial court. None of the two courts below have addressed themselves to the question as to what constitutes adverse possession and on whom the burden of proving such possession rests. They have also not examined the evidence produced by the parties with a view to find out as to whether the title of the plaintiff had been extinguished by adverse possession of the defendant.

16. It is well settled that title ordinarily carries with it the presumption of possession and that when the question arises is to who was in possession of land, the presumption is that the true owner was in such possession. In other words, possession follows title. The inevitable corollary from this principle is that the burden lies on the person who claims to have acquired title by adverse possession to prove his case. As early as the case of Radhamoni Debi v. Collector of Khulna (1900) ILR 27 Cal 943 (PC); Lord Robertson expressed the principle in the following words:

"It is necessary to remember that the onus is on the appellant and that what she has to make out is possession adverse to the competitor .... But the possession required must be adequate in continuity, in publicity, and in extent to show that it is possession adverse to that competitor;"

17. The same principle was reiterated by the Privy Council in (1934) 66 MLJ 431 (Privy Council) . In that case, Sir Lancelot Sanderson, delivering the opinion of the court, stated :

"There is no doubt that the title to the lands was in the plaintiff, and the onus was on the appellants defendants to prove the adverse possession relied on."

18. In the said opinion of the Judicial committee, the observations of Lord Robertson in the case of Radhamoni Debi (supra) were referred to and approved. The Supreme Court in Dr. J.N. Banavalikar Vs. Municipal Corporation of Delhi and another, laid down the law on the question in the following words (at page 317) :

"Now, the ordinary classical requirement of adverse possession is that it should be nec vince clam nec procario. (See (1934) 66 MLJ 134 (Privy Council) . The possession required must be adequate in continuity, in publicity and in extent to show that it is possession adverse to the competitor. (See Radhamoni Devi v. Collector of Khulna, (1900) 27 I A 136 at p. 140 (PC))."

19. As indicated above in this judgment, I feel that the case has not been properly tried. The question of adverse possession was the only question which properly arose for the decision of the court of appeal below. The said question has not been decided in its correct legal perspective. I am consequently of the view that this second appeal should be allowed. The decree of the lower appellate court should be set aside and the case remanded to it for decision in accordance with the observations made in the body of this judgment.

20. I, therefore, allow this appeal and set aside the decree of the lower appellate court. The case is remanded to the court of appeal below for decision in accordance with the observations, made above. The decision shall be made on the basis of the evidence on the record and parties will not be permitted to produce any additional evidence oral or documentary. The cost of this second appeal shall abide the result.

Appeal allowed and case remanded.