Chooni Lall Khemani Vs Nilmadhab Barik and Others

Court: Calcutta High Court

Date of Decision: Nov. 25, 1924

Citation: AIR 1925 Cal 1034

Judgement

1. The facts giving rise to this appeal are that Ganganarain (father of the plaintiff) and Sarbeswar (father of Defendants Nos. 2 and 3) lived together

as uncle and nephew and that Sarbeswar lived on the property in suit for a long time and that defendants Nos. 2 and 3 mortgaged it with Bama

Charan who in execution of the mortgage decree put it up to sale and it was purchased by Defendant No. 1 on the 12th July 1919 and delivery of

possession was taken by him on the 11th June 1920. Thereupon the plaintiff brought the present suit for recovery of possession on establishment

of title. The defence was that the land belonged to the common ancestor of the parties and that it fell to the share of Sarbeswar who had

possessory right to it and that Defendants (Nos. 2 and 3 sons of Sarbeswar, were in possession for more than 12 years and had acquired a right

by adverse possession to the land. There were also the other questions raised with regard to the plaintiff''s knowledge of the transaction between

defendants Nos. 2 and 3 and Bama Charan which it is not necessary to refer now.

2. Both the Courts have decreed the plaintiff''s suit. The Defendant No. 1 has appealed and several points have been urged on his behalf by the

learned vakil for the appellant.

3. The first point raised by him is that under the Hindu Law, if a property is bought in the name of a son during the life-time of the father, the

presumption is that it is purchased by the father. The facts found in this case are that at the time when this property was purchased the plaintiff''s

grandfather was alive. It was purchased in the name of and by Ganganarain who was a schoolmaster and Ganganarain acquired this property for

himself. The learned Subordinate Judge in the lower appellate Court has not clearly stated his findings; but it is apparent from a reading of the

judgment that what he means to say is that though Ganganarain''s father was alive at the time when the property was purchased, but as

Ganganarain was a schoolmaster and had sufficient means to purchase the property for himself, the property did not belong to the joint family. He

also observes that it is the ordinary law that if any property is purchased by a son in his name during the father''s life-time, the presumption will be

that the son acquired it for himself and that it was not the family property. The learned vakil for the appellant has taken objection to this statement

of the law and we are invited to consider the case of Parbati Dasi v. Rajah Baikunta Nath Das (1914) 15 M.L.T. 66. There the Judicial

Committee had to deal with a very different set of circumstances. Then there was no evidence that the junior member of the joint Hindu family, in

whose name the property was purchased, had any source of income or any separate fund with which the property was purchased. Their Lordships

laid down the rule that where there is a dispute as to whether the property standing in the name of a junior member of a Hindu family is his self-

acquired property the criterion is to consider from what source the money came with which the purchase was made. In that case the finding of fact

was that the son in whose name the property stood had no separate fund or that the property in dispute was not purchased with money belonging

to him and their Lordships held that in the absence of such evidence the presumption is clear and decisive that it was acquired by the father in the

name of the son. This principle does not apply to the facts of the present case. We think that the finding on this point arrived at by both the Courts

below, that the property in dispute was the self-acquired property of Ganganarain, concludes this matter.

4. It is next argued u/s 41, T.P. Act, that the plaintiff was estopped from challenging the purchase of Defendant No. 1. It is said that the plaintiff''s

father acted in such a way as to allow Sarbeswar to represent himself as the owner of the property in question and therefore the plaintiff should not

be allowed to avoid the transaction between Defendants Nos. 2 and 3 and the bona fide purchaser as Defendant No. 1 is. That section is based

on the well-known principle of representation or holding out. The facts found in this case do not help the appellant. The facts found in this

connection are that Sarbeswar was in very bad circumstances and that Ganganarain who was better off permitted him to live on this land by

erecting a hut on condition that his wife should cook in the plaintiffs'' house and that the husband and wife should do other menial works of the

plaintiffs'' family. Sarbeswar''s possession therefore was permissive and he had no title to convey to Defendant No. 1. On this finding it can hardly

be contended that Ganganarain or the plaintiff held out Sarbeswar as the real owner of the land. This point was not raised in the Court below, and

we do'' not know whether Defendant No. 1 was a real bona fide purchaser, for one fact that stands prominent is that the document relating to this

property was in the name of Ganganarain and it must set the purchaser on enquiry as to the title of his vendor. "

5. The third point argued is that if Defendants Nos. 2 and 3 were in permissive possession, the plaintiff had no right to bring a suit for khas

possession without serving them with a notice to quit. There is no substance in this contention. The property, it appears, is not in the possession of

Defendants Nos. 2 and 3. It is in the possession of Defendant No. 1 who Bo far as the plaintiff is concerned, is in adverse possession. In the

second place the Defendants Nos. 2 and 3 repudiated their character of being licensees and treated the property as their own. Reliance has been

placed for this contention by the learned vakil for the appellant in the case of C.J. Phillips v. Nund Coomar Banerjee [1867] 8 W.R. 385. In that

case the plaintiff brought a suit on the allegation that he was forcibly dispossessed. The defence was that the defendant was in permissive

possession and so it was found by the Court below. It was therefore held in that case that the plaintiff had no cause of action. The facts of that case

are not in common with the present case.

6. The fourth point urged by the learned vakil for the appellant is that the possession of Defendants Nos. 2 and 3 was not permissive, This is a

question of fact and we do not think that it can be raised in second appeal.

7. The last point taken on behalf of the appellant is, however, of some substance. Both the Courts below have relied upon two documents. Exhibits

4 and 5, which were executed between third parties, but in the recitals of boundaries of the lands covered by those documents the name of

Ganganarain appears as the owner of the land lying to the south of the land of one exhibit and to west of the land of the other exhibit. The lower

appellate Court, in giving its reasons for the conclusion that the plaintiff succeeded in proving his case, observes that the boundary documents

described the land in suit as belonging to the plaintiff or to his father. It is argued that these documents are not admissible in evidence and the

Courts below were not competent to take them as evidence in the case and for this purpose reliance has been placed upon the cases of Saraj

Kumar Acharji Chowdhury and Others Vs. Umed Ali Howladar and Others and Gopal Chandra Saha and Others, , and Abdulla v. Kunj Behary

Lal [1911] 14 C.L.J. 467. There was at one time a conflict of opinion upon the admissibility of documents between strangers, where one of the

parties to the suit was mentioned as owner of the boundary land; but recent decisions have finally settled the point. At one time it was attempted to

make such documents admissible in evidence u/s 11, Clause (2) of the Indian Evidence Act. In some cases the admissibility of such documents

was made to rest on Section 13 and in some other cases on Section 32, Clause (3) of the Indian Evidence Act. It is not necessary to go in detail

into all these decisions. We are of opinion that a document between strangers to the suit in which mention is made of one of the parties or their

predecessors as holding the land lying on the boundaries of the lands belonging to the executants of the document is not admissible in evidence.

The learned vakil for the respondent, however, has argued that, as no objection was taken in the Court of first instance to the admissibility of those

documents, the appellant is not entitled to question it at this stage. This objection cannot succeed as the documents being inadmissible in evidence

the omission to take objection to their admissibility in time does not affect their admissibility. It has been held by their Lordships of the Judicial

Committee in the case of Miller v. Babu Madho Das [1897] 19 All. 76 that an erroneous omission to object to such evidence does not make it

admissible. The omission to take the objection to the admissibility of a document becomes fatal only in cases where if the objection is taken in time,

any defect in its admissibility can be cured and the document made admissible. We accordingly hold that the documents (Exs. 4 and 5) are not

admissible in evidence and the lower Courts were wrong in relying upon them. There are other pieces of evidence no doubt relating to the title of

the plaintiff; but we in second appeal can hardly say that the findings of the Courts below as to the plaintiff''s title and the purchase made in his

name were not influenced by the reception of this inadmissible evidence and we are constrained to have recourse to the course adopted in the case

of Saraj Kumar Acharji Chowdhury and Others Vs. Umed Ali Howladar and Others and Gopal Chandra Saha and Others, . We, therefore, send

the case back to the lower appellate Court for decision on the other evidence.

8. The result is that this appeal is allowed, the decree of the lower appellate Court set aside, and the case remitted to that Court for its decision on

the issue of the plaintiff''s title after excluding from its consideration the documents, Exs. 4 and 5. All the other points raised must be taken to have

been decided against the appellant. Costs will abide the result.