

(2011) 11 CAL CK 0009
Calcutta High Court
Case No: S. A. No. 420 of 2001

Sri Gopal
Bhattacharjee

APPELLANT

Vs

Sri Dwijen Kumar Roy
and Another

RESPONDENT

Date of Decision: Nov. 30, 2011

Acts Referred:

- Limitation Act, 1908 - Article 142, 144
- Limitation Act, 1963 - Article 65

Hon'ble Judges: Tarun Kumar Gupta, J

Bench: Single Bench

Advocate: Gopal Ghosh, for the Appellant; Asish Bagchi and Mr. D. K. Roy, for the Respondent

Final Decision: Dismissed

Judgement

Tarun Kumar Gupta, J.

This appeal is directed against judgment and decree dated 29th March, 2001 passed by learned Additional District Judge, 9th Court at Alipore in Title Appeal No.286 of 1999 confirming the judgment and decree of eviction dated 4th of October, 1999 passed by learned Civil Judge (Junior Division), First Court, Alipore in Title Suit No.299 of 1990.

2. Respondent No.1 Dwijen Kumar Roy being plaintiff filed a suit being Title Suit No.299 of 1990 in the learned Trial Court alleging that he was the owner of the suit property and allowed defendant No.1 Chandi Charan Nandy to reside there as his licensee in 1976 on condition that Chandi Charan Nandi would vacate the same on demand. Chandi Charan Nandi wrongfully and without knowledge of the plaintiff handed over possession of the same to defendant No.2 Gopal Bhattacharjee. Plaintiff revoked his leave and licence granted to defendant No.1 Chandi Charan

Nandy by sending a notice dated 12th of April, 1990. In spite of receipt of said notice defendant No.1 did not deliver vacant possession of the suit property to the plaintiff. Accordingly, plaintiff filed the suit for recovery of possession on revocation of licence, against both defendant No.1 and defendant No.2.

3. Defendant No.1 Chandi Charan Nandi filed a written statement denying material allegations of the plaint and contending inter alia that he did not know either the plaintiff or the suit property and there was no question of residing in suit property as a licensee under plaintiff at any point of time. He was a permanent resident of Baidyapur under P. S. Kalna, District Burdwan. He lived for some period in a rented house at 19/2, Russa Road (S) 3rd Lane during his student days. After completion of his studies he left said rented house and continued to reside in his house at Baidyapur in the year 1975. He did not induct defendant No.2 Gopal Bhattacharjee in the suit property. Defendant No.2 used to reside in the suit property and carried business after keeping building materials thereupon. The suit was liable to be dismissed with cost.

4. Defendant No.2 Gopal Bhattacharjee also contested the suit by filing a written statement denying material allegations of the plaint and contending inter alia that he denied the ownership of said land with structure standing thereupon by the plaintiff. His further case is that ownership, if any, of the plaintiff at any point of time had already been extinguished on account of exclusive open and adverse possession of the same by said defendant with full knowledge of all since 1976. Defendant No.1 never resided in the suit property and did not induct the present defendant No.2 thereupon. Defendant No.2 acquired a good title over the entire suit property and a structure thereupon which he constructed with his own money for his own benefit. The defendant was running a business therefrom and had ration card, electric connection, income tax clearance certificate and other papers incorporating the address of suit property. The claim of title of plaintiff in suit property is false and the suit was liable to be dismissed with cost.

5. On the basis of the pleadings of the parties learned Trial Court framed several issues including one issue (issue No.3) as to whether defendant No.1 was a licensee under plaintiff and whether defendant No.1 inducted defendant No.2 in the suit property" And issue No.4 namely whether defendant No.2 acquired any title in the suit property by way of adverse possession?

6. Initially the suit was decreed on contest against both the defendants vide judgment and decree dated 29th of November, 1997. Defendant No.2 only preferred an appeal being Title Appeal No.77 of 1998 making plaintiff and respondent No.1 as respondents. The matter was remanded back to the learned Trial Court for deciding issue No.3 first then issue No.4 on the materials already on record after giving opportunities of hearing to both sides vide judgment dated 30th of July, 1998. Thereafter, there was fresh hearing and further judgment dated 4th of October, 1999 in favour of the plaintiff. Again only defendant No.2 filed an appeal being Title

Appeal No.286 of 1999 making plaintiff and defendant No.1 as respondents. After contested hearing again the appeal was dismissed by the order impugned dated 29th of March, 2001. Hence is this Second Appeal.

7. At the time of admission of the second appeal it was held by the Division Bench that the appeal would be heard on ground Nos. II, III, V and X as taken in the memo appeal.

8. The substantial questions of law to be decided in this appeal were recasted as follows.

(1) Whether learned Courts below substantially erred in law by holding granting leave or licence to defendant No.1 by plaintiff without any substantive evidence on record?

(2) Whether learned Courts below substantially erred in law by disregarding the evidence of defendant No.2, both oral and documentary regarding his open and adverse possession of the suit property since 1976 and thereby acquiring title to the same by way of adverse possession extinguishing title of the plaintiff, if any, thereupon.

9. Mr. Ghosh, learned counsel for the appellant, submits that though there was no convincing evidence, not to speak of documentary evidence, from the side of plaintiff still learned Courts below came to the findings that plaintiff gave leave and licence to defendant No.1 Chandi Charan Nandi to reside in suit property in 1976 as "Bhagnay" of his friend. According to Mr. Ghosh said alleged friend of plaintiff being a vital witness was not examined in this case to corroborate plaintiff. He further submits that in view of specific denial both from the side of defendant No.1 and present appellant defendant No.2 on that issue learned Courts below came to said finding practically without any basis and hence said finding can be said to be perverse and can be set aside during hearing of this second appeal. In this connection he has referred to the evidence of witnesses already recorded in the Trial Court. In this connection he referred a case law reported in (2001) 4 SCC Kulwant Kaur and others vs. Gurdial Singh Mann and others, wherein it was held the scrutiny of evidence will be totally prohibited in the matter of exercise of jurisdiction in second appeal would be too broad a proposition and too rigid an interpretation of law not worthy of acceptance. It was further held that in a second appeal a finding of fact, even if erroneous, will generally not be disturbed but where it is found that the findings stand vitiated on wrong test and on the basis of assumptions and conjectures and resultantly there is an element of perversity involved therein, the High Court will be within its jurisdiction to deal with the issue. In support of his contention that even in the second appeal the Court has the power to interfere in the concurrent findings of fact if the same was not based on evidence or perverse, he referred case laws reported in (2001) 6 SCC M. S.V. Raja and another v. Seenii Thevar and others. In that case also Hon'ble Apex Court held that when both the

Courts below concurrently erred in recording the finding with no evidence to support High Court was justified in upsetting said findings.

10. Mr. Ghosh has next submitted that the suit was barred by the principle of limitation as plaintiff was out of possession over 12 years before filing the suit and that there was ample evidence to show that plaintiff's title was already extinguished by way of adverse possession of the suit property by appellant defendant No.2 since 1976 openly and adversely. According to Mr. Ghosh learned Courts below failed to take note of evidence on record, both oral and documentary, on its true perspective resulting miscarriage of justice. He further submits that there were both oral and documentary evidence in support of said possession of defendant No.2 in suit property openly and adversely since 1976 but learned Courts below disregarded the same without any just cause. In support of his contention he referred several case laws namely AIR 1923 Patna Chattrapat Pratap Bahadur Sahai v. C. G. Lees and others, AIR 1961 Madhya Pradesh Daryasingh Harisingh and another v. Kalma Nihala, AIR 1960 Mysore Baswanneppa Yellappa and another v. Basavannappa and others and AIR 1962 Manipur Kshetrimayum Kumud Singh v. Elangbam Ibohal Singh. In all those cases it was held that in a suit for ejectment it was the duty of the plaintiff not only to prove his title but also that he was in possession within 12 years of the date of the suit. Admittedly, all those decisions were relating to Article 142 and 144 of the Limitation Act, 1908. Presently, the question of limitation is governed by the Limitation Act, 1963.

11. Mr. Asish Bagchi, learned counsel for the respondent No.1, on the other hand, submits that the findings of learned Lower Courts about granting of licence to defendant No.1 by plaintiff and the act of defendant No.1 to induct his sister's husband defendant No.2 in the suit property without any authority and behind the back of the plaintiff and revocation of licence by plaintiff against defendant No.1 and the period of stay of defendant No.2 in the suit property which was less than 12 years were all findings of facts based on evidence on record and that this Court in the second appeal should not interfere the same unless it can be shown that those were based on no evidence or on the basis of only assumptions and conjectures and / or were perverse. According to Mr. Bagch there was no documentary evidence to show that appellant defendant No.2 came into possession of the suit property in 1976 or that he was in possession of the same since then openly and adversely within knowledge of the plaintiff or that in the process he acquired any title by way of adverse possession.

12. Admittedly, there was no document of induction of defendant No.1 in the suit property in 1976 by the plaintiff. There were only oral evidence in support of the same by plaintiff and denial evidence of the defendant No.1. Defendant No.1 could not file any document to show that he was residing in his native place at Burdwan since 1975. Again though defendant No.2 was husband of his sister, but initially he tried not to recognize defendant No.2 as a person known to him. In view of the

above learned Lower Courts observed that the evidence of defendant No.1 suffered from contradictions and falsehood and was not believable. During evidence respondent No.1 plaintiff frankly admitted that at that point of time it was not possible for him to contact his friend for examining him as a witness in the case. Learned Lower Courts did not give undue stress to said inability of plaintiff. I find nothing wrong in it. The incident of granting licence held in 1976. The suit was filed in 1990 and the plaintiff deposed in 1996, i.e., about 20 years after the incident. A person may not have contact with his friend / acquaintance after long 20 years.

13. Admittedly, defendant No.2, present appellant, was a third party in the matter of granting of alleged licence by plaintiff in favour of defendant No.1 and accordingly he had nothing to say in the matter. In support of his alleged occupation of the suit property since 1976 he produced a bunch of papers but the earliest one was of 1982. Admittedly, no document whatsoever could be filed to show that defendant No.2 was in possession of the suit property for any period prior to 1982. It is true that one neighbour of defendant No.2 deposed that he found defendant No.2 to occupy the suit property since 1976 but his evidence was not found to be believable by learned Courts below as he was in a transferable job and often stayed outside and being a neighbour tried to help defendant No.2 in the suit. Learned Lower Courts also scanned the entire evidence on record and found that defendant No.1 was guilty of suppression of material facts and also gave untrue versions and hence was not believable. Learned Trial Court had the opportunity to note the demeanor of the witnesses during evidence and even if there was no specific note about the same still the same made impressions upon the mind of learned Trial Court which helped him to assess the oral evidence of a witness in its true perspective. Admittedly, an Appeal Court is deprived of said facility and should not usually interfere with findings of fact of learned Trial Court in absence of perversity. There is also no explanation as to why plaintiff will choose defendant No.1 of all persons as the person whom he gave licence to stay in the suit property in 1976 if it is admitted for argument's sake the defendant No.1's version that he did not even know plaintiff. It appears that in coming to the said finding of fact that defendant No.1 came into possession of the suit property as a licensee of plaintiff in 1976 and later on he handed over possession of the same to defendant No.2 behind the back of plaintiff, learned Courts below being Courts of findings of fact marshalled the evidence on record and the circumstances and also considered the preponderance of evidence.

14. In this connection it is also pertinent to note that mere long continuous possession cannot be treated as adverse so long it is not within the knowledge of the original owner. In the present case defendant No.2 first of all denied the ownership of the suit property by the plaintiff in his written statement and thereafter he made out a case of extinguishing of said title, if any, of plaintiff by way of his adverse possession for over 12 years. Unless a person admits the owner of the land as owner first then he cannot be permitted to say that he was possessing the

property of said owner adversely and openly within knowledge of the owner. During evidence also appellant defendant No.2 admitted that he did not know the plaintiff though he heard his name. As such, even appellant defendant No.2 was able to establish his continuance possession in the suit property since 1976 still the same would not have been adverse to its real owner i.e., the plaintiff as defendant No.2 did not know the true owner of said property. However, it came out from the documentary evidence on record that the earliest document of possession of suit property by appellant / defendant No.2 was of the year 1982. The suit was filed in 1990. As such, said possession of appellant /defendant No.2 cannot be treated as adverse, extinguishing the lawful title of the plaintiff in the suit property. In this connection the case law reported in AIR 1976 Calcutta page 55 may be noted wherein it was held by this Court that in a suit for possession of a property on basis of title Article 65 of the Limitation Act, 1963 is applied and the period of limitation of 12 years starts from date when defendant's possession became adverse possession. I have already stated that appellant/defendant No.2 who was asserting title through adverse possession was required to prove that he was in continuance possession of the property openly and adversely and within the knowledge of the plaintiff the original title holder and that he has failed to prove the same.

15. Accordingly, I do not find any merit in the instant appeal. As a result, the appeal stands dismissed on contest against respondent No.1 and ex parte against respondent No.2 /defendant No.1. However, I pass no order as to costs.

16. Send down Lower Court record along with a copy of this judgment to the Lower Court at the earliest.

17. Urgent xerox certified copy of this judgment be supplied to learned counsel / counsels of the parties, if applied for.