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Mirza Shamsher Bahadur and Others Vs Munshi Kunj Behari Lal and others

Court: Calcutta High Court

Date of Decision: Aug. 29, 1907

Final Decision: Allowed

Judgement

1. The subject-matter of the litigation giving rise to this appeal consists of three large tracts of lands in the kitas called Bharkalwar, Bhaya Bigha

and Gordag, which are claimed by the Plaintiffs-Respondents as included within their Mouzah Baliari. 1345 bighas out of the disputed lands are

said to be covered by hills and jungle and the remainder, about 200 bighas, are under cultivation. Out of the latter area, 138 bighas are situated in

Bharkalwar and 62 bighas in Gordag. The Plaintiffs alleged that at the time of the settlement proceedings, the Defendants claimed possession of all

these lands under a deed of gift executed in their favour, on the 28th April 1875, by the Maharaja of Deo, a neighbouring zemindar now

represented by the 5th and 6th Defendants to this suit. The Settlement Officer held that although according to the Revenue Survey Maps, the lands

of Bharkalwar and Gordag were included in Mouzah Baliari, they were in the actual occupation of the Defendants. The Plaintiffs contend that the

effect of this decision of the Settlement Officer was practically to place them out of possession. They consequently commenced this action for

declaration of title and for recovery of possession. The claim was resisted on various grounds amongst which it is sufficient to mention the pleas of

limitation and denial of the title of the Plaintiffs. The Court of first instance came to the conclusion that the whole of the disputed area was situated

within the zamindari of the Plaintiffs. Upon the question of limitation that Court held that as regards the lands covered by hills and jungles the

Plaintiffs were in possession, actual or constructive, within 12 years of the suit. As regards the cultivated lands, the Subordinate Judge held that the

Plaintiffs were in possession of the 62 bighas in Gordag within the statutory period, and that the cultivation by the Defendants of these lands

commenced about six years before the suit. As regards the 138 bighas in Bharkalwar however the Subordinate Judge found that the Plaintiffs had

failed to prove their possession within 12 years and that the undisputed documentary evidence justified the conclusion that these lands had been

under cultivation from a period antecedent to 12 years before the suit. In this view of the matter the Subordinate Judge made a decree in favour of

the Plaintiffs for the jungle and hilly lands of Bhaya Bigha and the cultivated lands of Gordag but dismissed the suit in respect of the cultivated lands

of Bharkalwar.

2. The Plaintiffs as well as the Defendants appealed against this decree, the former in respect of the lands the claim to which had been dismissed,

and the latter in respect of the lands for which the claim had been allowed. The whole question of title and possession therefore was re-opened in

the appeal. At the hearing before the District Judge it was admitted on behalf of the Defendants that in default of other evidence of title the Revenue

Survey Maps must be accepted as evidence of title and possession, and that according to these maps the lands in dispute appertained to Mouzah

Baliari which was admittedly the property of the Plaintiffs. The District Judge therefore held that the conclusion of the subordinate Judge upon the

question of title to all the disputed lands must be affirmed. Upon the question of possession the District Judge held that in respect of the jungle and

hilly lands the possession must be presumed to be with the original owner, especially as the evidence of the Defendants was in adequate to prove

any actual possession over such lands. In respect of the cultivated lands of Gordag the District Judge held that the Defendants were in possession

for about 6 or 7 years, and that the Plaintiffs had been previously in possession thereof. As regards the cultivated lands of Bharkalwar the District

Judge held that the onus was upon the Defendants to prove adverse possession for more than 12 years, and, as they had failed to do so, and as

the possession of the Plaintiffs must be presumed to have continued until the Defendants came into occupation, the title of the Plaintiffs to these

lands could not be taken to have been extinguished. In this view of the matter the District Judge allowed the appeal of the Plaintiffs and dismissed

the appeal of the Defendants. The result was that the entire claim of the Plaintiffs was allowed.

3. Against this decree the Defendants have appealed to this Court. On their behalf the decision of the District Judge has been assailed substantially

on two grounds, namely, first, that the question of title has not been properly investigated inasmuch as the District Judge misunderstood the legal

effect of the admission which was made before him, and, secondly, that upon the question of limitation he ought not to have thrown the burden of

proof upon the Defendants in respect of any portion of the claim.

4. In support of his first contention learned Counsel for the Appellants has contended that there was no intention on the part of the Defendants to

abandon the question of title and that the District Judge ought to have determined that point upon the whole of the evidence in the record. It is clear

however on the judgment of the District Judge that the Defendants admitted that in default of other evidence of title, the Revenue Survey Map of

1843 must be accepted as evidence of title and possession, and that according to these maps, the lands in dispute appertained to the zamindari of

the Plaintiffs. As to factum of the admission it is not open to the Defendants to challenge the accuracy of the statement contained in the judgment of

the District Judge. If the admission was not as a matter of fact made, or if it was substantially different from what it was taken by the District Judge

to be, the proper course for the Defendants was to apply for a review of judgment because the District Judge and he alone was competent to state

with any approach to accuracy, what was the precise admission which had been made before him.

5. We must therefore proceed on the assumption that the admission stated in the judgment of the District Judge was as a matter of fact made. This

admission, it will be observed, is divisible into two parts. The first branch of the admission is that in default of other evidence of title the Revenue

Survey Maps must be accepted as evidence of title and possession. This admission is in accordance with what must now be taken to be the settled

law as pointed out by their Lordships of the Judicial Committee in the case of Moharaj Jagadindra v. The Secretary of State L.R. 30 I.A. 44 (53) :

s.c. ILR 30 Cal. 291 (1902), where their Lordships affirmed the view taken by this Court in the case of Satcowri Ghosh v. The Secretary of State

ILR 22 Cal. 252 at p. 257 (1894). that Revenue Survey Maps are admissible as evidence of possession and consequently of title. The Privy

Council state that maps and surveys made in India for revenue purposes are official documents prepared by competent persons and with such

publicity and notice to persons as to be admissible and valuable evidence of the state of things at the time they are made. They are not conclusive

and may be shown to be wrong but in the absence of evidence to the contrary, they may be properly and judicially received in evidence as correct

when made. When therefore in the Court below it was admitted on behalf of the Defendants that the Revenue Survey Maps must be accepted as

evidence of title and possession, the admission was in accordance with settled law. Even if such admission bad not been made, the District Judge

would have been perfectly justified in his conclusion that the Revenue Survey Maps are evidence of title and possession, and that till that evidence

was rebutted by other evidence of title, effect must be given to the state of things as indicated by the Revenue Survey Maps.

6. The second branch of the admission was that the lands in dispute are shown by the Revenue Survey Map of 1843 to appertain to Mouzah

Baliari. This was an admission upon a question of fact. It has not been suggested before this Court that the Revenue Survey Map of 1843 does not

bear out this statement. We must take it therefore that the admission upon this part of the case was correct and that the Revenue Survey Map of

1843 does show that the disputed lands were at the time found to appertain to the zamindari of the Plaintiffs. The conclusion therefore seems to us

to be irresistible that the finding of the District Judge upon the question of title cannot be assailed, and we must proceed on the assumption that the

Plaintiffs have established their title to the whole of the lands in controversy.

7. The second ground urged on behalf of the Appellants relates to the question of limitation. So far as this question touches the jungle and hilly

lands of Bhaya B(sic)gha and the cultivated lands of Gordag, we are of opinion that the judgment of the District Judge cannot be successfully

assailed. In respect of the jungle and hilly lands, possession must be presumed to be with the rightful owner, that is, with the Plaintiffs in this case.

This view is supported by the decision of this Court in the case of Mahamad Ali Khan v. Khaj(sic) Abdul Gunny I. L. R. 9 Cal. 744 (1883) and

by the decision of their Lordships of the Judicial Committee in Raj Kumar Roy v. Gobind Chunder I. L. R. 19 Cal. 660 (1891-92).. As regards

the cultivated lands of Gordag, the District Judge has found that the evidence of the Defendants themselves establishes that they had no possession

of these lands at a period earlier than 6 or 7 years before the institution of this suit. The Plaintiffs therefore have not lost possession of the cultivated

lands in Gordag for more than 6 or 7 years. There is consequently no bar to their recovery of possession so far as these lands are concerned.

8. As regards the cultivated lands of Bharkalwar, however, the position is different. The district Judge holds that in respect of these lands the

Defendants are bound to prove adverse possession for more than 12 years, because the plea that the title of the Plaintiffs has been extinguished by

adverse possession, is taken by the Defendants and it is for them to establish it. In our opinion, this view cannot be sustained. It is now firmly

settled, beyond all possibility of controversy, that the Plaintiff in an action for ejectment must not only prove his title but also his possession within

12 years of the suit. This is clear from the cases of Saheb Pershad Sein v. Rajendra Kishore Singh 12 M.I.A. 337 (1869) and Nitrasur Singh v.

Nund Lall Singh 8 M.I.A. 199 (1860). The same view was subsequently affirmed by a Full Bench of this Court in the case of Mahomed Ali Khan

v. Khaja Abdul Gunny ILR 16 Cal. 473 : s.c. 16 I.A. 26 (1888). Subsequent to the decision of the Full Bench, the same view has been reaffirmed

by their Lordships of the Judicial Committee in the cases of Mohima Chandra Mazumdar v. Mohesh Chandra Neoghi ILR 16 Cal. 473 : s.c. 16

I.A. 26 (1888) and Nawab Mahommud Amanulla Khan v. Budan Singh ILR 17 Cal. 137 (1889).

9. It was argued however by the learned Advocate-General on behalf of the Respondents that the decisions of the Judicial Committee in the cases

to which reference has been made do not lay down any general rule of law and must be restricted in their application to the particular

circumstances of the case then before the Court. He further suggested that as a matter of principle, a Plaintiff who has established his title ought to

succeed unless the Defendant can prove a better title or establish that he has acquired a good title by adverse possession which has extinguished

the title of the Plaintiff. We are unable to accept either branch of this contention. There can be no question that the rule laid down by their

Lordships of the Judicial Committee is of general applicability and in our opinion there is good reason for it. The Plaintiff who brings an action for

ejectment has to establish, not merely that he had title at some remote period antecedent to the suit. In order to entitle him to succeed, he must

establish that he had a valid subsisting title at the date of the institution of the suit, in other words he has to prove not only that he has title but also

that he has been in possession within 12 years before the suit.

10. This view may at first sight seem to be not quite consistent with what is implied in the decision of their Lordships of the Judicial Committee in

Innasimuttu Udayan v. Upakarath Udayan L.R. 26 I.A. 210 : s.c. ILR Mad. 10 (1899). In that case, the Plaintiff who sued to eject the Defendant

admitted the possession of the latter for seven years next before the suit and the Defendant produced documentary evidence of possession during

the preceding five years, which was exactly similar in kind to the evidence which accompanied his possession during the seven years. In these

circumstances, Counsel of the Defendant before the Judicial Committee, appears to have taken upon himself to prove that there was prima facie

evidence of the possession of the Defendant for 12 years, and to have contended that this shifted the onus upon the Plaintiff to show that

possession of the Defendant began within 12 years of the suit. It was in these circumstances, that the Judicial Committee held that the documentary

evidence of possession exactly similar in character to what accompanied the admitted possession went back far behind the 12 years in question,

and that this was sufficient to throw on the Plaintiff the burden of rebutting the inference arising from the fact of possession accompanied by these

documents. Their Lordships held upon an estimate of the conflicting evidence that this burden had not been sustained by the Plaintiff. In fact, the

case for the Defendant was so strong that it was not necessary for him to contend that the fact of the admitted possession of the Defendant for 7

years was sufficient to throw the burden upon the Plaintiff to prove that he had been in possession within 12 years of the suit. This decision of the

Judicial Committee cannot, consequently, be taken, to weaken; in any way the effect of the earlier decisions to which we have already referred.

We hold, therefore, that in an action for ejectment, the onus is on the Plaintiff to prove his title, and to show that he was in possession and was

dispossessed of the disputed property within 12 years before the date when he filed the suit.

11. The question may, however, and does in fact frequently, arise as to what is necessary for the Plaintiff to prove, in order to establish his

possession within 12 years of the suit. The character and value of the property, the suitable and natural mode of using it, the course of conduct

which the proprietor might reasonably be expected to follow with a due regard to his own interests, all these matters greatly varying, as they must,

under various conditions, are to be taken into account in determining the sufficiency and effectiveness of possession. For instance, where land has

been shown to have been in a condition unfitting it for actual enjoyment in the usual mode at such a time and under such circumstances that that

state naturally would, and probably did, continue until 12 years before the suit, it may properly be presumed that it did so continue, and that the

Plaintiffs" possession continued also until the contrary is shown. See Mahamad Ali Khan v. Khaja Abdul Gunny ILR 8 Cal. 744 (1883). In

substance, therefore, we have arrived at the conclusion that the Plaintiff in an action for ejectment must prove possession actual or constructive,

within 12 years before suit. If the condition of the disputed property was such that it did not admit of actual occupation, the presumption is that

legal possession continued with the rightful owner, and it is sufficient for the Plaintiff "o prove either that the property continued in such state within

12 years of the suit, or that the condition continued up to a date so near the 12 years that the natural and probable inference is that the condition of

the property was similar up to a date within 12 years of the suit. If this is established by the Plaintiff, the presumption would be that the possession

of the Plaintiff also continued within 12 years of the suit. This presumption, however, is rebuttable and the Defendant may show that he has been in

actual occupation of the property or of any portion thereof, for more than 12 years before suit. If the presumption is thus rebutted and the adverse

possession of the Defendant is proved in respect of any portion of the property, the suit of the Plaintiff must fall to that extent.

12. Now in the case before us, the District Judge has not found what was the condition of the land in Bharkalwar at a period about 12 years

before the date of the institution of the suit. All that he has found, is that the Survey Map of 1843 shows that at the time of the survey the lands

were jungle. This however does not necessarily lead to the presumption that the lands continued to be jungle up to the 11th April 1892, within 12

years of which date the present action was commenced. We start with the possession of the Plaintiffs over jungle lands in 1843 but there is no

finding as to the subsequent condition of the property.

13. In these circumstances, it is impossible to support the decision of the District Judge upon this part of the case. The presumption which he raised

in favour of the Plaintiff would be available, only BO long as the lands continued to be jungle. The presumption, however, would cease to be

operative after the land was cleared of jungle, and was brought under cultivation. This part of the case, therefore, must be retried. The District

Judge must in the first instance direct his attention to the condition of the land at a period 12 years antecedent to the suit. If he finds that the land at

that time was covered with jungle or that at a period not very remote from that time, the land was jungle so as to justify the inference that the same

condition continued at a time just within 12 years of the suit the Plaintiffs are entitled to the benefit) of the presumption that they had constructive

possession as rightful owners. When the District Judge deals with this part of the case, he may, if the state of the evidence justifies. It, apply the

principle laid down by their Lordships of the Judicial Committee in Ranjit Ram Pandey v. Goberdhan Ram Pandey 20 W.R. 25 (1873), namely,

where the evidence of possession is equally unsatisfactory on both sides, the presumption may be made that possession was with the true owner. If

the District Judge comes to the conclusion that the Plaintiff has made out a prima facie case and is therefore entitled to the benefit of the

presumption, he will next consider whether the Defendants have been able to rebut that case by their evidence. When he deals with this part of the

case, regard must be had to the principle of law that a trespasser is not entitled to the benefit of constructive possession. It was ruled by this Court

in the case of Mohini Mohan Roy v. Promoda Nath Roy ILR 24 Cal. 256 (1876)., that the doctrine of constructive possession applies only in

favour of the rightful owner, and must not, as a rule, be extended to the wrong-doer, whose possession must be confined to land of which he is

actually in possession.

14. This rule is substantially identical with the principle enunciated by their Lordships of the Judicial Committee in the case of Clark v. Elphinstone

6 App. Cas. 164 (1880), Agency Company v. Short 13 App. Cas. 793(1883) and Secretary of State v. Krishnamoni Gupta ILR 29 Cal. 518

(1902) In the first of these cases it was held that as against the rightful owner, the possession of a trespasser is available only when there is actual

possession of the disputed land or overt, or physical act of ownership done upon it. The true owner is not affected by ideal possession of the land

or possession which exists only in the imagination of the parties. In the second case, the Judicial Committee held that when an intruder has

relinquished possession, the possession so abandoned, leaves the original owner in the same position in all respects as he was before the intrusion

took place. In the third case the Judicial Committee held that when land in the possession of a trespasser is submerged the possession reverts in the

eye of law, to the original owner.

15. The principle Upon which this rule of law is based, was elaborately examined by Mr. Justice Storey in Clarke v. Courteney 5 Peters 319. in

which that eminent Judge observed that the reason for the rule is plain. Both parties cannot be seised at the same time of the same land under

different titles, and the law therefore adjudges the seisin of all which is not in the actual occupancy of the adverse party, to him who has the better

title. If a man enters into land having title, his seisin is not bounded by his occupancy but is held to be co-extensive with his title; but if a man enters

without title his seisin is confined to his possession by metes and bounds. Where two persons are in possession of land at the same time under

different titles, the law adjudges him to have the seisin of the estate who has better title. Both cannot be seised. Their seisin follows the title. If

therefore a mere trespasser without any claim or pretence of title, enters into the land and holds the same adversely to the title of the true owner, it

is an ouster or disseisin of the latter, but in such oases the possession of the trespasser is bounded by his actual occupancy, and consequently the

true owner is not disseised except as to the portion so occupied. It follows consequently that if the true owner be in possession of a part of the

land, claiming title to the whole, then his seisin extends by construction of law to all land which is not in the actual possession or occupancy by

enclosure or otherwise of the party claiming adversely as a trespasser, or under a defective deed or title. This principle has been repeatedly

affirmed, see Hunny Cutt v. Peyton 102 U.S. 383, De Burton v. Young 134 U.S. 255 and Smith v. Gale 144 U.S. 526. It follows consequently

that if a Plaintiff establishes by evidence, direct or presumptive, his possession actual or constructive, of the disputed land in Bhar-kalwar within 12

years of the suit, and if the Defendants are called upon to prove their case of adverse possession for over 12 years, in respect of any portion of

those lands, the evidence as to their possession must be carefully scrutinized. It must be found in respect of each parcel of land whether the

possession of the Defendants has extended over 12 years, and such possession, if any, must be actual occupation.

16. The result therefore is that this appeal must be allowed in part, and the decree of the District Judge modified. So far as the 1345 bighas of

jungle and bill lauds and 62 bighas of cultivated lands in Gordag are concerned, the appeal must be dismissed, and the decree of the District Judge

affirmed. So far as the 138 bighas of cultivated lands in Bharkalwar are concerned, the appeal must be allowed and the decree of the District

Judge reversed. The case in so far as it relates to these 138 bighas, will be remanded to the District Judge in order that he may rehear the appeal In

accordance with the observations contained in this judgment.

17. As regards the cost of this appeal, the Respondents have succeeded to a substantial extent. They will therefore have half the cost of this

appeal; the other half of the costs of this appeal will abide the ultimate result. Let the records be sent down at once.