

(2008) 11 CAL CK 0018

Calcutta High Court

Case No: F.A. No. 1 of 2008

Tapan Kumar Mukherjee alias
Tapan Mukherjee and Others

APPELLANT

Vs

Nirmal Kanti Guha and Others

RESPONDENT

Date of Decision: Nov. 21, 2008

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Section 11
- Presidency Small Cause Courts Act, 1882 - Section 41, 47, 49

Hon'ble Judges: Rudrendra Nath Banerjee, J; Bhaskar Bhattacharya, J

Bench: Division Bench

Final Decision: Dismissed

Judgement

Bhaskar Bhattacharya, J.

The Judgment of the Court was delivered by:

1. This first appeal is at the instance of plaintiffs in a suit for declaration and permanent injunction and is directed against the judgment and decree dated 24th September, 2007 passed by the learned Judge, 13th Bench, City Civil Court at Calcutta, in Title Suit No. 158 of 2002, thereby dismissing the said suit.

2. The appellants before us filed a suit being Title Suit No. 158 of 2002 in the City Civil Court at Calcutta thereby praying for the following relief:

a) A decree for declaration that the plaintiffs are owners of the suits No. 5, on the 3rd floor at premises No. 115E, Lenin Sarani, Police Station Muchipara, Kolkata - 700 013.

b) Decree for declaration that the plaintiffs have every right to have peaceful possessions of the suit property.

c) Permanent injunction restraining the defendant No. 1 and his associates from creating any disturbance to the peaceful possession of the plaintiffs in the suit property.

c-1) Declaration that the order passed in S.C.C. Suit No. 151 of 1998 is a nullity and cannot be enforced and the same is not binding upon the plaintiffs as the plaintiffs have become the owners.

d) Cost and Advocate's fees.

e) Such other relief or reliefs as this learned Court may deem fit and proper.

3. The case made out by the appellants may be summed up thus:

a) One Sukumar Mukherjee, since deceased, the father of appellant Nos. 1, 3 and 5 and the husband of appellant No. 4, had been residing at the suit flat described in the schedule to the plaint from the year 1968. The said Sukumar Mukherjee died on 2nd April, 1993 leaving the appellants as his sole heirs and legal representatives.

b) On the death of the said Sukumar Mukherjee, the appellants had been in exclusive possession of the suit flat without any objection or resistance from any person and in fact, they had been residing in the said flat for the last 34 years.

c) The respondent No. 1 is a tenant in respect of another flat situated on the 1st floor of the said premises, being premises No. 115E, Lenin Sarani, Kolkata- 700 013.

d) The respondent No. 2 claimed to be the owner of the entire premises No. 115E, Lenin Sarani, Kolkata - 700 013 and the respondent Nos. 3 and 4 are the Joint Receivers appointed by the High Court at Calcutta in Suit No. 416 of 1978.

e) Neither the appellants were nor their predecessor was the licensee in respect of the suit property and in fact, they were in adverse possession against the real owner by exercising the right of full ownership over the flat and the order of eviction passed in S.C.C. Suit No. 151 of 1998 was not binding upon them.

f) The respondent No. 1 was a person of quarrelsome nature and for the last 3 years was trying to oust the appellants from the suit property and on January 22, 2000 the respondent No. 1 with some associates came to the suit property and asked the appellants to vacate the same. In view of such threat the appellants made complaint before the local police station.

g) The respondent No. 1 had no right, title or interest in the suit property and was forcibly trying to oust the appellants from the suit property.

h) The cause of action of the suit arose first on 22nd June, 1968 when the predecessor-in-interest of the appellant took possession of the suit flat, thereafter on 22nd January, 2002 when the respondent No. 1 threatened the appellant to vacate the suit property and also on 23rd June, 1980 when the appellant acquired right of adverse possession and the cause of action was continuing day-to-day.

4. The suit was contested by respondent No. 1 by filing written statement thereby denying the material allegations made in the plaint and the defence of the respondent No. 1 may be epitomised thus:

a) The respondent No. 1 was a tenant in respect of the suit flat from 1967 and permitted Sukumar Mukherjee, the predecessor-in-interest of the appellants, to use the suit flat for a temporary period for his acute need as he was the friend of the respondent No. 1.

b) On the death of said Sukumar Mukherjee, the respondent No. 1 further permitted the appellants on their request to stay in the flat for further period. Subsequently, the respondent No. 1 revoked the permission by giving notice and filed a proceeding u/s 41 of the Presidency Small Cause Courts Act which gave rise to S.C.C. Suit No. 151 of 1998.

c) The appellants appeared in the said suit and contested the suit by filing written statement and adducing evidence. The learned Judge, 2nd Bench, Small Causes Court, Calcutta, on contested hearing allowed such application on 22nd February, 2002. In the said proceedings, the appellants took the stance that their predecessor was granted permission by the original owner, viz. Bipin Behari Sadhukhan to stay in the suit property.

d) The appellants having already suffered an order of eviction in the said proceedings u/s 41 of the Presidency Small Cause Courts Act, the suit filed by the appellants was not maintainable. The appellants cannot claim hostile title or adverse possession against their own inductor.

5. At the time of hearing of the suit the appellant No. 1 and appellant No. 4 gave evidence in support of the plaint case while respondent No. 1 alone gave evidence in opposing the allegation made in the plaint.

6. The learned Trial Judge, as indicated earlier, by the judgment and decree impugned herein, dismissed the suit by not only disbelieving the case of the appellants but also on the ground of limitation.

7. Being dissatisfied, the appellants have come up with the present appeal.

8. After hearing the learned Counsel for the parties and after going through the materials on record we find that apart from the fact that the appellants have put forward an absurd claim of adverse possession in the suit, the suit itself is liable to be dismissed simply on the ground that the same was barred by limitation.

9. We find that the suit was filed in the year 2002 whereas the respondent No. 1 filed the proceedings u/s 41 of the Presidency Small Cause Courts Act in the year 1998 after revoking the licence. Therefore, it is established that the appellants' alleged right in the suit property was first clouded when the notice of revocation of licence was served and subsequently, proceedings were initiated in the Small Causes Court

in the year 1998.

10. According to Article 58 of the Limitation Act, 1963 in case of a suit for declaration as prayed for in the present proceedings, the period of limitation is 3 years and it commences when right to sue has first accrued. In the case before us, the right to sue accrued definitely in the year 1998 when the respondent No. 1 instituted an eviction proceeding in the Presidency Small Causes Court u/s 41 of the Act. The appellants did not avail of the provision contained in section 47 of the said Act and decided to contest the proceedings and just before conclusion of the said proceedings, filed the present suit in the City Civil Court.

11. Therefore, after contesting the proceedings u/s 41 of the Presidency Small Causes Court Act for more than 3 years the present suit was filed.

12. We, thus, find that the suit out of which the present appeal arises is patently barred by limitation.

13. It is now well-settled law that mere possession of a party in the property does not give rise to adverse possession unless the possession is found to be open and adverse against the rightful owner. The law is equally settled that a licensee who has been put in possession cannot assert adverse possession against his inductor merely on the basis of his continuous possession which commenced through the induction as a licensee. He must prove overt act or claim of specific hostile title against the lawful owners. In the case before us, it has already been established in the proceedings before the Presidency Small Causes Court that the appellants were inducted as the licensee by the respondent No. 1 and such order has attained finality. Therefore, the initial grant of licence to the appellants or their predecessor by the respondent No. 1 is established and such finding is res judicata even in this proceeding notwithstanding the fact that the finding on such question in the previous litigation was made by the Small Causes Court because of the Explanation VIII of section 11 of the Code of Civil Procedure. Therefore, in order to get relief in this proceeding based on the alleged title by adverse possession, the appellants are required to prove that notwithstanding initial induction as a licensee, they have subsequently asserted adverse possession by their specific denial of the right of the defendants and such fresh assertion of hostile possession has ripened into adverse possession creating title of the property in their favour.

14. In the case before us, the appellants, however, has not made out such a case but has maintained their defence that the respondent No. 1 never inducted them in the property which is contrary to the concluded finding of the Small Causes Court. We are quite alive to the position of law that notwithstanding the order of eviction passed by the Small Causes Court in a proceeding u/s 41 of the Act, the licensee is entitled to get back possession by filing a suit if it can prove his title in the property. But the Small Causes Court being competent to decide the question of grant of license or revocation thereof, its finding on those questions is final and res judicata

even before the subsequent suit in Civil Court by virtue of Explanation VIII of section 11 of the Code as mentioned earlier.

15. Therefore, after suffering an order u/s 41 of the Act, if the licensee wants to overcome the order of eviction, it has to file a civil suit as provided in section 49 of the Act and in such a suit, he is required to prove that although he was at one point of time a licensee, subsequently he has acquired lawful title to the property and by virtue of such title, he is either entitled to recover possession if he had been already evicted or to maintain the possession if the order of eviction has not been executed.

16. In the case before us, the appellants have asserted title not on the basis of any transaction inter vivos or by testamentary disposition through the real owner but by adverse possession by denying even the grant of license by the respondent No. 1 which they are not entitled to do after suffering an order of eviction in the proceedings u/s 41 of the Act. It is not their case, that subsequent to grant of license, they asserted hostile title from a subsequent point of time. It has been admitted by the appellant No. 1 in his evidence that the appellants never paid Corporation Tax. In order to claim right adverse to the lawful owner, one must come forward openly to take the responsibility of payment for the service rendered by the municipality to the owner of the building as provided in the Municipal Statutes. If such statutory liability is discharged by the paper-owner and the alleged adverse possessor does not venture to disclose his identity before the Municipality and to make payment claiming to be the real owner, his possession cannot be said to be adverse to the paper-owner who is bearing such statutory liability. Similarly, the appellant No. 1 has admitted that he knew that apart of respondent No. 2, there are other co-owners, but curiously enough, those co-owners are not made parties to the suit. The person claiming declaration of title by adverse possession as plaintiff cannot succeed unless all co-owners are made parties in the suit and they are given opportunity to oppose the claim of the plaintiff.

17. As pointed out by the Supreme Court in the case of [P.T. Munichikkanna Reddy and Others Vs. Revamma and Others](#), in order to prove adverse possession, such possession must be hostile enough to give rise to a reasonable notice and opportunity to the paper-owner. The following observations made therein are relevant and quoted below:

It is important to appreciate the question of intention as it would have appeared to the paper-owner. The issue is that intention of the adverse user gets communicated to the paper-owner of the property. This is where the law gives importance to hostility and openness as pertinent qualities of manner of possession. It follows that the possession of the adverse possessor must be hostile enough to give rise to a reasonable notice and opportunity to the paper owner.

18. Therefore, in the absence of all the co-owners of the property, the suit filed by the appellants was not even maintainable and their claim of adverse possession is

bound to fail when their possession is found to have commenced by virtue of licence granted by an admitted tenant of the property and no evidence has been adduced to show that they denied the right of such tenant at least twelve years prior to the filing of the suit.

19. We, thus, find that in the facts of the present case the learned Trial Judge rightly disbelieved not only the case of adverse possession but also correctly decided the issue of limitation in favour of respondent No. 1.

20. We consequently find no reason to interfere with the judgment and decree passed by the learned Trial Judge.

21. The appeal is therefore devoid of any substance and is dismissed with costs which we assess at Rs. 300 G.Ms.

22. The urgent xerox certified copy be given to the parties, within seven days of filing application.