(1931) 06 CAL CK 0023

Calcutta High Court

Case No: None

Mahendra Nath Bagchi	APPELLANT
Vs	
Tarak Chandra Sinha and Others	RESPONDENT

Date of Decision: June 11, 1931

Acts Referred:

- Limitation Act, 1963 - Article 141

Citation: AIR 1932 Cal 504

Hon'ble Judges: Suhrawardy, J; Graham, J

Bench: Full Bench

Judgement

Suhrawardy, J.

These two appeals are by defendant 1 arising out of two suits for recovery of possession of some lands brought by the plaintiffs under the following circumstances. According to the plaintiffs the lands in suits belonged to the debutter estate of one Ishan Chandra Bagchi of whom the plaintiffs claimed to be the reversionary heirs and that after the death of Ishan Chandra Bagchi the properties were in possession of his daughter Hara Sundari after whose death they vested in the plaintiffs as the sole reversionary heirs of Ishan Chandra Bagchi. Defendant 1, the appellant, alone contested the suit and claimed the property as belonging to his and defendant 2''s debutter, and he further claimed that they wore the reversionary heirs of Ishan Chandra Bagchi. The other defendants who are tenants and the pro forma defendants in one of the suits did not appear in the suits or in the appeals.

2. The main defence on which the appellant relies is limitation. In order to understand the plea it is necessary to give a few facts. The two suits which were numbered 96 and 541 of 1928 before the trial Court have to be considered separately because the facts are not the same in both cases. In Suit No. 96, the plaintiffs'' case now is that there wore tenants holding the lands under Hara Sundari which remained in plaintiff''s constructive possession after her death. In Suit No. 541 the plaintiffs'' case is that the land was, during the lifetime of Hara Sundari, in the

occupation of some tenants who left it and it gradually became jungly and fallow. It was in this state when Hara Sundari died.. The lands of both the suits were after Hara Sundari''s death really in the possession of the plaintiffs who had title to them until the defendants asserted their right to these lands by having them recorded in the Record of Rights as included in their debutter.

3. The trial Court found title with the plaintiffs but dismissed their suit on the ground of limitation. The appellate Court has decreed the plaintiffs'' suit and overruled the plea of limitation which was accepted by the trial Court. The findings which the learned Subordinate Judge has come to are that on the death of Hara Sundari the lands in suit must be considered to be in the possession of the plaintiffs who were entitled to them, that the defendants may be said, for the first time to have claimed possession of the lands in suits in 1914, when at the Bujarat, during the District Settlement proceedings, they got their names entered in respect of these lands. It is better to quote the findings of the learned Judge because the entire decision of the case depends on them. After referring to the evidence of some of the defence witnesses he says:

The evidence of these two witnesses, coupled with the admission of defendants 1 and 2 in Ex. 2, leaves no room for doubt in my mind that for the first time they had claimed the disputed lands at the time of the Bujarat and further it is clear from the said evidence that calculated from the time of the Bujarat those two suits are well within time.

4. The learned Judge further proceeds:

There is ample evidence for the plaintiffs to show that defendants 1 and 2 claimed the disputed lands for the first time at the time of the Bujarat.

5. Later, he observes:

It is clear beyond doubt that defendants 1 and 2 could not have been in possession of the disputed lands shortly after the death of Hara Sundari and before Magh or Falgun of 1319 B.S. Therefore the disputed lands must be presumed to be in constructive possession of the rightful owners, the plaintiffs, from the death of Hara Sundari up to the data of assertion of hostile title by defendants 1 and 2. There are some other findings to the effect that defendants 1 and 2 had never been in actual possession of the suit lands by receipt of rent from the tenants.

6. Hara Sundari died in 1902, the settlement proceedings were in 1914 and the present suits were brought in November 1924.

7. The appellant argues that Article 141, Lim. Act, applies to the present case and according to that article the suits not having been brought within twelve years from the date of the death of Hara Sundari they must be held to be barred by limitation, I am of opinion that on the findings arrived at by the learned Judge there can be no question of the [application of Article 141, Lim. Act, in these leases. Article 141 says

that a suit for recovery of possession of immovable property on the death of a Hindu or Mahomed an female should be brought within 12 years from the date of the death of the female. It is evident that a suit for recovery of possession must be brought in respect of property of which the reversioners were out of possession at the death of the female and which was in the possession of another person from whom they seek to recover it. On the findings which 1 have quoted the learned Judge held that at the time of the death of Hara Sundari no one was in possession of the lands and therefore the plaintiffs having title to them must be taken to be in constructive possession thereof. I am not in favour of using the words " constructive possession" in this connexion for, it may mean differently in different circumstances. By " constructive possession " is generally meant possession, as distinguished from actual possession, through a tenant or agent. It ha3 also been used in connexion with property which is incapable of actual possession and is said to be in the constructive possession of the owner as waste lands or lands under water. If a person is the owner of a property but does not use it for some time, it cannot be said that he is in constructive possession of it. He is in actual possession so long as he has the power to bring it into use whenever he likes.

8. Whatever that may be, the finding of the learned Judge is that at the time of Hara Sundari''s death the plaintiffs must be taken to have been in possession as possession follows title and there being no one in possession adverse to them they had no cause of action to bring a suit for recovery of possession to which Article 141 would apply. The finding is that the defendants having asserted their title in 1913 or 1914 the suits were not barred by limitation. The learned Judge has not found that the defendants were actually in possession of the disputed lands; he agrees with the plaintiffs that their cause of action arose in Magh or Falgoon 1320 B. S., when, at the time of the Bujarat, defendants 1 and 2 got these lands recorded as under their debutter. The findings of the learned Judge are in accordance with the case made by the plaintiffs in their plaint; this is, that the cause of action arose from the wrongful act of the defendants in 1320 B.S. Reference has been made on behalf of the appellant to a decision of their Lordships of the Judicial Committee of the Privy Council in the case of Runchordas Vandravandas v. Parvati Bai [1899] 23 Bom 725. There is nothing in that case which in any way applies to the facts of the present case. Their Lordships there held and gave expression to an evident provision of the law that Article 144 would apply to a case whore no other article of the Limitation Act applied and where Article 141 should not be applied. The case before us is to a great extent covered by the decision of the Madras High Court in the case of Saranga Sesha Naidu v. Periasamai Odayar AIR l921 Mad 272. Article 141 applies to a suit by which the plaintiffs seek to undo the effect of act or inaction of the female which would remain effective }(not avoided. It does not apply whore the cause of action arises after the death of the female.

9. In Suit No. 96 the learned Subordinate Judge has come to the conclusion that the defendants never realized any tent from the tenants on the lands, the other

defendants 3 to 7. With regard to Suit No. 541 the learned Judge, in agreement with the Munsif, has found that the lands wore jungly and patit before 1319. Thereafter, some of the tenants-defendants began to clear the jungle and cultivate the lands so that the plaintiffs'' cause of notion arose in that suit and in the other suit in 1320 when the appellant got them recorded in the Bujarat. On the findings of the lower appellate Court Article 141 must be held to have no application to this case and this contention must be overruled.

10. Another objection has been raised on the ground of limitation and that is that counting from the date when the suits must be taken to have been actually instituted, they arc on the plaintiffs'' own showing barred by limitation. What happened was this: The suits were tiled on 6th August 1924 in the Court of the Munsif at Netrokona. Suit No. 96 valued at Rs. 85. The Munsif at the trial hold that the value of the property in suit was Rs, 1,700 and returned the plaint to the plaintiffs on 19th November 1925. The plaint was presented before the proper Court on 20th November 1925. But the plaintiffs also appealed against the decision of the Munsif valuing the property at Rs. 1,700. That appeal was partly allowed and the value as fixed by the Munsif was reduced to Rs. 1,060 and accordingly the Munsif, Sadar, 3rd Court, sent back the plaint to Netrokona to be tried by the Munsif of that place having jurisdiction to try the same. In Suit No. 541, the plaintiffs had valued their claim at Rs. 110. The Munsif of Natrokona at the trial held that the value of the property involved in the suit was Rs. 2,368-12-0 and returned the plaint to the plaintiffs on 19th November 1925 and it was filed with proper court-fees in the proper Court on the day following. Meanwhile, the plaintiffs appealed against the valuation as fixed by The Munsif of: Netrokona and the appellate Court fixed the valuation at Rs. 1,478 and the Subordinate Judge before whom the plaint was refiled returned it to the plaintiffs on 23rd April 1926 and the suit was filed on the very same date in the 3rd Munsif''s Court Sadar, who apparently had jurisdiction to hear suits up to Rs. 2,000. On 26th May 1926 the plaintiffs gave up claim to a portion of the lands in possession of the pro forma defendants in that suit and got the plaint amended, thereby reducing the value of the suit to Rs, 281 as found by the Munsif. The plaint was accordingly returned to the plaintiffs on 26th May 1926 for re-presentation to the Munsif''s Court at Netrokona and it was filed there on 20th May 1926 which the appellant says must be taken to be the date when the suit was instituted. The learned Subordinate Judge found that the plaintiffs acted throughout bona fide and did not intentionally undervalue the suits and on this finding ho hold that the plaintiffs were entitled to deduction of time u/s 14, Lim. Act There can be no question that the view of the Judge with regard to Suit No. 96 is correct on the finding ho has arrived at. With regard to Suit No. 541 there is a difficulty that after the suit was sent to the proper Court for trial the plaintiffs withdrew a portion of. their claim and thereby reduced the valuation of the suit making it triable by an inferior Court. The objection would have had some force but for the fact that the plaintiffs had originally instituted their suit in the Netrokona Court. There is not

much force therefore in the contention of the appellant that indulgence u/s 14, Lim. Act, has been wrongly granted to the plaintiffs: see the case of Abhoy Churn v. Kritertha Moyi Dassi [1881] 7 Cal. 284. It may be mentioned in this connexion that this point was not taken in the trial Court and therefore no evidence was directed towards it.

11. The result is that the appeals fail and must be dismissed with costs.

Graham, J.

12. I agree.