(1954) 04 CAL CK 0010

Calcutta High Court

Case No: Appeals from Appellate Decrees No''s. 108 and 141 of 1949

Kuran Krishna Mitra		APPELLANT
	Vs	
Nepal Chandra Ghosh		RESPONDENT

Date of Decision: April 2, 1954

Acts Referred:

- Transfer of Property Act, 1882 - Section 51

Citation: (1956) 1 ILR (Cal) 113

Hon'ble Judges: P.N. Mookerjee, J

Bench: Single Bench

Advocate: Pramatha Nath Mitra and Sushil Chandra Dutta, in S.A. No. 108 and Apurbadhan Mukherjee and Chandra Narain Laik, S.A. No. 141, for the Appellant;Atul Chandra Gupta, Apurbadhan Mukherjee, Binayak Nath Banerjee and Chandra Narayan Laik, in S.A. No. 108 and Pramatha Nath Mitra and Sushil Chandra Dutta, in S.A. 141, for the Respondent

Judgement

P.N. Mookerjee, J.

These two appeals arise out of a suit for partition. In the two courts below there were disputes as to facts and also on questions of law. In this ''Court all the parties have accepted the findings of facts, concurrently made by two courts below, and the dispute is now confined to their respective legal rights flowing from those undisputed facts and certain finding''s on questions of fact on which the courts below'' have differed.

2. The facts found by the two courts below which are no longer in dispute may briefly be stated as follows:

The disputed cadastral survey dags Nos. 1176 (.56 decimals); 1009/1274 (2.41 acres) and 1009/1275 (.15 decimals) along with'' other properties originally belonged to one Barada Prasad Mitra, Barada died leaving two sons, Suren and Upen, as his heirs, Suren died in or about 1929 leaving his two sons, Kuran and Balai, as his heirs.

Kuran is Plaintiff No. 1 of this suit and Bala: is pro forma Defendant No. 3. Kuran has got 8 annas share in the suit properties, 4 annas by inheritance from his father Suren and Anr. 4 annas by purchase from his brother Balai, who go the same as Suren''s other heir. Suren also left a daughter Padmarani who obtained by purchase the 4 annas share of the suit properties, which had devolved on her vendor Kanai as ont of the heirs of his father "Open. Padmarani is Plaintiff No. 2 of the present suit and Kanai is pro forma Defendant No. 2. In or about 1336 B.S., corresponding to the English year 1929 Upen leased out the northern portion of cadastral survey plot Nos. 1009/1274 and 1009/1275 to the extent of three-fourths of the said plots to Defendant No. 2, Nepal Chandra Ghosh. Upen died in or about 1939 leaving his two sons, Netai and Kanai, as his heirs who acquired, by such inheritance from their father 8 annas share of the suit properties. As already stated, Kana transferred his entire interest in the suit properties, namely, his, four annas share, in favour of Plaintiff No. 2, Padmarani. This transfer took place on October 21, 1946. In January, 1946, Netaji who is pro forma Defendant No. 1 before me, had already sold his one-fourth share in the two cadastral survey plots Nos. 1009 /127 and 1009/1275 to Defendant No. 1, Manmatha Nath Mukherjee.

3. On the above facts the admitted position is that the Plaintiff No. 1 has an 8-anna share in the suit properties, the remaining 8 annas share belong to Plaintiff No. 2 and Defendant No. 1 and pro forma Defendant No. 1. As amongst these latter three persons, Plaintiff No. 2 has 4 annas share in all the three disputed dags and pro forma Defendant No. 1 and Defendant No. 1 have the other 4 annas share in cadastral survey dags Nos. 1176 and 1009/l274 and 1009/1275, respectively. The Defendant No. has his lease from Upen in respect of the northern portion imprising three-fourths of these last two dags and the effect of his lease and of the possession and rights of Defendant No. 2 hereunder on the title of pro forma Defendant No. 1, Defendant No. 1 and the Plaintiffs is the chief point for consideration in these two appeals.

4. Before I proceed further, I deem it necessary to state in brief the main defences to the suit. Defendant No. 2 pleaded limitation and adverse possession and also set up in express terms the plea. of acquisition of the limited interest of a tenant by adverse possession or prescription. He also pleaded waiver, estoppel and acquiescence and claimed protection as a bona fide lessee for value without notice who had made considerable improvements of the lands, leased out to him, openly and to the knowledge of the Plaintiffs and their co-sharers. The trial court negatived all the above defences and decreed the Plaintiff''s suit declaring Plaintiff No. 1''s title to an 8-anna share of the suit lands unencumbered by any tenancy right of Defendant No. 2. He also declared the Plaintiff No. 2''s title to a 4-anna share out of the remaining 8 ahnas share subject to the said Defendant''s tenancy right and made similar declarations in favour of Defendant No. 1 and pro forma Defendant No. 1, respectively, a respect of cadastral survey dags No. 1009/1274 and 1009/1275 and cadastral survey dag No. 1176. On appeal by Defendant No. 2 this decision has

been modified by the learned subordinate Judge by making the decree in favour of Plaintiff No. 1 also subject to Defendant No. 2''s tenancy. The appeal of Defendant No. 1, however, was dismissed by the lower appellate court. The learned Subordinate Judge accepted the Defendant No. 2''s plea of acquisition of a tenancy by adverse possession and apparently also his plea of estoppel, waiver and acquiescence and the further plea of protection for bona fide impprovements (vide Section 51 of the Transfer of Property Act) and rejected the other defence pleas. Against this appellate decision the present two appeals have been preferred by the Plaintiff No. 1 and Defendant No. 1. The former''s appeal is the earlier S. A. No. 108 of 1949 and the latter''s the later Second Appeal No. 141 of 1949, and I shall deal with them in that order.

Second Appeal No. 108 of 1949.

5. Upen died in 1937 or 1939 and the present suit was instituted 1946. It has been found by the two courts below that there was never any ouster or assertion of hostile title by Upen as against Suren''s branch, but, on the other hand, the latter''s title was expressly recognised by him up to 1933 when, in the record-of-rights, which was prepared obviously from informations furnished by him, these properties were shown as joint properties of the two branches. After Upen''s death the same joint title was acknowledged by his heirs as late as 1942 and 1946 and the defence case of the said heirs'' collusion with the Plaintiff No. 2 has not been substantiated. The courts below have also negatives the story of amicable partition, set up by the Defendant No. 2 to support Upen''s exclusive title to the suit properties. On the materials before me I have no reason to doubt the correctness on any of the above findings of the two courts below and I accept the said findings and proceed to decide this appeal on that footing namely, that there was no previous partition and Plaintiff No. 1 claim of title to the suit lands is not barred by limitation and adverse possession so far as they do not relate to the defence plea of acquisition of the limited interest of a tenant by adverse possession or prescription. There thus remain only two questions for consideration, namely, the question of prescriptive tenancy on Defendant No. 2 and the question of the bar of estoppel, waiven and acquiescence in favour of that Defendant. On these two questions the courts below have differed. The trial court answered them in the negative. The lower appellate court has expressly accepted the defence case on.the first and apparently also on the second, although the learned Munsif, whose decree was under appeal before it, had recorded in his judgment that this issue of estoppel, waiver and acquiescence which was issue No. 3 in the suit had not been pressed before him. The'' finding of the lower appellate court that Defendant No. 2 is also protected on the authority of the decision of this Court, reported in Dakhyan Dassi v. Mana Rout and Ors. (1913) 19 C.W.N. 407. amounts, in effect, to a finding in favour of the said Defendant on the said issue No. 3 and, in my opinion, this aspect of the matter, namely, the relation on Defendant No. 2''s plea of protection as bona fiddle lessee for value without notice who has effected considerable improvement in the lands under his lease

openly and to the knowledge of the Plaintiffs and their co-sharers-which plea has apparently been accepted by the learned Subordinate Judge-to issue No. 3 was not properly appreciated in the two courts below. I will: therefore consider both the above questions, namely, the question of Defendant No. 2''s claim of prescriptive tenancy and the question of estoppel, waiver and acquiescence so far as it arises on the finding of the learned Subordinate Judge that he was a bona fide lessee for value without notice who had effected considerable improvements in the lands under his lease as stated above, and was as such entitled to protection on the authority of Dakhyan Dassi''s case. Apart from this limited question of estoppel, waiven and acquiescence, it seems to me necessary also to examine the rights of a lessee from one co-sharer in respect of specific parcels of joint lands as against the other co-sharers and, in the circumstances of this case, the further question-and this, strictly speaking, has nothing to do with estoppel-of the availability of the benefits of Section 51 of the Transfer of Property Act to the Assesse-Defendant No. 2 may also be relevant and appropriate and may require consideration.

6. The lower appellate court has found that Defendant No. 2 has recquired a valid tenancy by prescription or adverse possesion. In the opinion of the learned Subordinate Judge, here has been ouster by Defendant No. 2 of the co-sharers of his lessor Upen by reason whereof his tenancy right on the lands, claimed by him, has been perfected in law as against his lessor''s said co-sharers. With this view of the learned Subordinate Judge, I am entirely unable to agree. It has been found by the learned Subordinate Judge himself that there never was any assertion of hostile title by Upen or his heirs against his or their co-sharers. That Upen had a right to grant the lease to Defendant No. 2 subject to his co-sharers'' inherent right of partition cannot be disputed. Although there was no ouster by Upen, it was certainly open to these co-sharers, if they felt aggrieved by Upen''s act, to enforce Partition. This - remedy, possibly, the only remedy, was certainly open to them but, unless there was ouster or denial of their title either by Upen or his heirs or the lessee-Defendant No. 2 they were not bound to seek it within any particular period of time and its enforcement would not be barred by lapse of time. I have already said that there was no ouster at any time by Upen or his heirs, nor do I find anything in the present record to justify me in holding that, at any particular time prior no the present suit, the lessee-Defendant no 2 possessed or claimed no possess the lands, held by him, in assertion of any hostile title as against his lessor''s co-sharers or in denial of their title to the same. Such possession as he had or claimed to have in the said lands was under the lease given by Upen which would be fully valid as against Upen and his heirs and possibly also against all persons except the other co-sharers of the superior estate, and, even against the latter, until partition, unless, of course, their right to such partition is barred or adversely affected, either wholly or in part, by some recognised principle of law and, that being so, no question of prescription or adverse possession in any shape or form can arise as between the Defendant No. 2 and the Plaintiff. Defendant No. 2''s possession of the disputed lands was elearly

referable to a lawful title and was not prima facie adverse and, as I have already said that there is nothing in the present record to indicate that, prior to the present suit, he ever asserted any hostile title as against Suren''s branch, i.e., Plaintiff No. 1 and his brother Balai (pro forma Defendant No. 3) whose interest had passed to him (Plaintiff No. 1) by purchase''or that he ever denied their title to the said lands, no question of adverse possession can arise as between the parties to the present suit. I am supported in this view by the decision of this Court in the case of Balaram, Guria and Ors. v. Shyama Charan, Mandal an Ors. (1920) 24 C.W.N. 1057, which was even more extreme in this respect Defendant No. 2''s possession was thus not adverse in fact, no could it be adverse in law as against Plaintiff No. 1. I hold therefore, that Defendant No. 2''s plea of acquisition of a tenancy as against Plaintiff No. 1 by adverse possession or prescription cannot succeed and the decision of the learned Subordinate Judg on that point cannot be supported.

7. I turn next to the general question of a lessee''s rights against his lessor''s co-sharers. On this question, too, I have already sufficiently indicated my views in the earlier- paragraph. The lessee has "perfect rights" as against his lessor and possible also against the whole world except his lessor''s co-sharers to whos right of partition, so long as it subsists in law, the lessee''s leas would be subject and subordinate. Barring this infirmity the lessor''s rights would be otherwise "perfect", but there can be question that this infirmity attaches to his rights and inevitable renders them subject to the right of partition of the other co-sharers of the superior estate. (Vide, Niranjan Mukherjee v. Saudamini Dassi ILR (1926) Cal. 694(F.B.) and the cases, there approved, particular) Sarat Chandra Barman v. Hur Govinda Burman ILR (1878) Cal. 510. Joy Sanka Gupta v. Bharat Chandra Burdhan ILR (1899) Cal. 434. Tarini Kanto Majumda v. Iswar Chandra Chakraborty (1912) 21 C.L.J. 603 and the unreported case Niranjan Mookerjee v. Siva Prosad Mukherjee and Ors. (1917) S.A. 384 of 1913 (unreported decided on March 30,1917) decided by Fletcher and Smither, JJ.). It is true that in the Full Bench decision and in the other Bench decisions, to which particular attention has been drawn above, the leases under consideration were of a permanent character but the principle there enunciated, were of general application and were meant cover all cases of alienation, temporary or permanent. Question of limitation or adverse possession or special principles of law equity apart, the general principles, regulating the rights of transferee from a co-sharer vis-a-vis the other co-sharers, went laid down for all kinds of transfer. The Full Bench case above cited explained and affirmed the very comprehensive scope of the principle laid down by their Lordships of the Judicial Committee in Byjnath Loll v. Ramoodeen Chowdhury and Ors. (1873) L.R. 11 IndAp 106 and ruled out once for all the attempted distinction between mortgage and leases, or between a partition, amicably or through the civil court, and a partition under the Estates Partition Act, in the matter of application of the said principle. The decision in Watson''s case((1890) L.R. 17 I.A. 110 (Privy Council))also recognises this paramountcy of the other co-sharers'' right of partition while affirming a co-sharer''s right to cultivate joint

lands for the benefit of all the co-shaers. I hold, therefore, that, as a general proposition, Defendant No. 2''s rights under the lease, granted to him by TJpen, cannot be set up against Plaintiff No. 1''s claim to have a partition of the joint lands unaffected by the same.

8. We are left then with the two other questions, namely, (i) the limited question of estoppel, waiver and acquiescence in the light of the decision of this Court in Dakhyani Dassi v. Memo Raut and Ors. (1913) 19 C.W.N. 407 and (ii) the question of applicability of Section 51 of the Transfer of Property Act or the underlying principles thereof. The decision of these two questions which strictly arise only as between Defendant No. 2 and Plaintiff No. 1, depends on findings as to conduct, acts or omissions of the lessee-Defendant No. 2 and his lessor''s co-sharer Plaintiff No. 1 and as to the prejudice suffered or improvements made bona fide or in good faith, as required by the relevant law, on the part of the leasee-Defendant. This aspect of the matter does not appear to have been properly appreciated in, the trial court and, although the lower appellate court may be said to have substantially recorded a finding in the lessee-Defendant''s favour, I am not prepared, in the circumstances of this case, to accept that finding as one, arrived at on as full a consideration of the relevant materials as the point deserves. It is necessary, therefore, that the case should go back to the lower appellate couft for a proper consideration of the above two questions in accordance with law in the light of the observations I have made above and this appeal must succeed to that extent. No other point, however, will be open for discussion before the lower appellate court at this rehearing.
9. From what I have stated above this appeal ought to succeed in part. The decree of the lower appellate court ought to be set aside and the matter sent back to that court for a rehearing of the appeal before it in accordance with law in the light of the directions contained in this judgment. I must also make it clear that, in finally determining and adjusting the rights of the different parties, the court will bear in mind the equities that arise for consideration in partition suits and the general principles, so often invoked for their adjustment.

S.A. No. 141 of 1949.

10. The Appellant in this appeal is Defendant No. 1 who claims title under the lessor-more correctly, under his heirs and successors-of the leassee-Defendant No. 2. Clearly the adjustment of the rights of this Appellant will depend, in I large measure, on the rights of the said lessee-Defendant as against his lessor''s co-sharer Plaintiff No. 1 which are the subject-matter of the other appeal, which I have decided to remand for a rehearing by the lower appellate court. Inevitably, therefore, this appeal also must be sent down so that the rights of all the parties may be suitably adjusted according to law. This Appellant''s arguments at the rehearing will, however be limited to the adjustment of his rights in the light of the decision in the other appeal of Defendant No. 2 and to the questions remitted above, so far as they affect the present Appellant-Defendant (Defendant No. 1).

S.A. No. 108 of 1949 and S.A. No. 141 of 1949.

11. In the result, therefore, both the appeals succeed in part The decrees of the lower appellate court are set aside and the matter is sent back to that court for a rehearing of the two appeals before it, in accordance with law in the light of the directions contained in this judgment. I do also make it perfectly clear once again that in finally determining and adjusting the rights of the different parties the court will keep, in view the equities that arise for consideration in partition suits and the general principles, so often invoked for their adjustment.

12. Costs of these appeals will abide the final result.