(1960) 06 CAL CK 0010

Calcutta High Court

Case No: Appeal from Appellate Decree No. 1522 of 1955

Satish Chandra Kar		APPELLANT
	Vs	
Sm. Kadambini Dasi		RESPONDENT

Date of Decision: June 8, 1960

Citation: (1961) 1 ILR (Cal) 907

Hon'ble Judges: K.C. Sen, J

Bench: Single Bench

Advocate: Tinkari Sarkar, for the Appellant;Sarat Chandra Janah and Arun Kumar Janah, for the Respondent

Final Decision: Allowed

Judgement

K.C. Sen, J.

This appeal is directed against the judgment and decree passed by the learned Subordinate Judge, Second Court, Midnapore, on April 12, 1955, affirming those of the learned Munsif of Jhargram, dated October 5, 1953. The suit out of which this appeal arises was instituted by the Plaintiff for declaration of title and for khas possession of the land described in schedule Ka of the plaint. She also prayed for declaration of title of schedule Kha land and for confirmation of possession of the same and, in the alternative, for recovery of Khas possession. A claim for mesne profits against the Defendants in respect of the Ga schedule property has also been made. The lands of the disputed interest No. 48 of mouza Ektali was the property of one Dhiranarayan De recorded in the name of his wife, Parbati Dasi.

2. Maheswar and Umesh were the sons of Dhiranarayan. Maheswar predeceased his father and so Umesh got all the properties inherited from his father. Umesh''s maternal uncle was Titaram Chandra. As he had no land, he could not get married and before marriage Umesh gifted away in favour of his, future aunt 9 29 including the suit land. Thereafter, Titaram possessed the land on behalf of his wife for more than twelve years. After his death, Rajabala was in possession through her bhag-chasis for more than twelve years and, therefore, by inheritance the Plaintiff

got the property. The Defendants Nos. 1 and 2 are the sister''s son of Umesh while their mother, Defendant No. 3, is the sister of Umesh. Defendant No. 4 is the bhag-chasi of Defendants Nos. 1 and 2. It is alleged that these Defendants dispossessed the Plaintiff in Sravan, 1359 B.S. for which this suit has been instituted.

3. The Defendants in their written statement denied the Plaintiff''s title and have said that the property being a "Joutuk" one belonging to Parbati. on her death, it was inherited by her daughter, the Defendant No. 3, and the deed of gift is the result of some fraudulent mechanisation on the part of Rajabala''s father. The sheet anchor of the defence case is that the said Umesh had no right to transfer the property by a deed of gift during her mother''s life time in favour of her maternal aunt, Rajabala, and, therefore, the Plaintiff is not entitled to succeed.

4. The court of the first instance held that the deed of gift was a valid document and, accordingly, without further discussing the merits of the Plaintiff''s case, as made out in the plaint, decreed the suit in her favour. Against this, an appeal was perferred by the Defendants and the lower appellate court, came to his conclusion that under the deed of gift, this Plaintiff could not acquire any title as it was found by him that the property was the Ajoutuk property of Parbati Dasi and that being so, during her life time this property could not have been transferred by gift in favour of Rajabala by Umesh. But he decreed the suit in favour of the Plaintiff on a finding that the Plaintiff has acquired adverse possession and the invalid title as per deed of gift ripened into a valid title by virtue of adverse possession.

5. Mr. Sarkar, appearing for the Appellants, contends that the finding of adverse possession by the lower appellate court was unwarranted by law inasmuch as no case with regard to tins matter has been made out in the plaint.

6. It will appear that no issue has been framed in the court of the first instance regarding adverse possession. But the learned lower appellate court elaborately discussed the oral evidence adduced, regarding possession and has come to a definite finding that within twelve years before the death of Parbati, the Plaintiff and her predecessor had been possessing the land adversely to her. This finding is undoubtedly a finding of fact and Mr. Sarkar contends that although this is a finding of fact, it is not supported by evidence in record. On a perusal of the judgment, it appears that he lias discussed the evidence minutely and relying upon the statements of the witnesses of both the parties has come to the conclusion that the present Plaintiff and her predecessor were iu adverse possession. Accordingly, nothing can be said against the finding of fact and it cannot also be contended that it is not! borne out by the evidence in record. The Appellants'' grievance is that as no issue has been framed in the court of the first instance in this matter, his client has been prejudiced by the finding of adverse possession by the lower appellate court. Undoubtedly this contention has some force and I may say that an issue in this regard ought to have been framed by the learned Munsif. But on a perusal of the record, it appears that both parties adduced evidence regarding possession and

each party tried to make out o case that she was in possession adversely to the other. Furthermore, the fact remains that after Rajabala''s death, these Defendants wanted to butt in and disturb the possession of the Plaintiffs which as a fact has been found in favour of the Plaintiff by the lower appellate court. This being the position, the question of law arises whether the lower appellate court was justified in coming to such a finding without any issue being recorded in this regard in the court of the first instance. It appears from the recitals in the plaint (vide paras. 4 and 10) that the Plaintiff and her mother had been openly, notoriously and peaceably in possession of the land from the time when the deed of gift was executed. Against this averment, no definite denial has been made in the written statement excepting that the statement made in this regard was not true. The parties presumably had in their minds the pleadings in this regard and as such they adduced evidence thoroughly in support of their respective possession. In this connection, Mr. Sarkar has referred me to a decision in Nepen Bala Debi v. Siti Kanta Banerjee (1916) 15 C.W.N. 158. Therein it has been held inter alia that "where no case of acquisition of title by adverse possession is made in the plaint nor is the question raised directly or indirectly in the issues, the Plaintiff ought not to be allowed to succeed on such a case". This principle of law does not apply to the facts of this particular case in view of the fact that the Plaintiff has clearly made out a case by adverse possession in paragraphs 4 and 10 of the plaint. Further down, their Lord-ships have held in their decision as follows:
But where the question reduces itself to one of law upon facts admitted or proved, it is not only competent to the Court but also expedient in the interests of justice to entertain the plea of adverse possession if such a case arises on the facts stated in the plaint and the Defendant is not prejudiced or taken by surprise

7. I am of opinion that the present case is really governed by the second principle of law enunciated by Sir Asutosh Mookerjee and Mr. Justice Teunon in the said case. Here, in the plaint, there is a clear averment and in terms thereof both the parties have adduced evidence regarding their own possession. It has also been held amongst others in the recent Supreme Court decision in Nagubai Ammal and Others Vs. B. Shama Rao and Others, that evidence let in on issues on which the parties actually went to trial should not be made the foundation for decision of another and different issue, which was not present to the minds of the parties and on which they had no opportunity of adducing evidence. But that Rule has no application to a case where parties go to trial with knowledge that a particular question is in issue, though no specific issue has been framed thereon, and adduce evidence relating thereto. This decision it seems to me affirms the decision in Nepen Bala Debi''s case.

8. Regard being had to this principle of law, I am of opinion that when both parties have adduced evidence before the trial court regarding adverse possession and when there is a clear averment in the plaint of this fact, the Defendants cannot be

said to have in any way been prejudiced, only because the lower appellate court disbelieved that the Plaintiff had acquired title by virtue of the deed of gift, but has believed that the invalid title has ripened into a valid title by adverse possession against the true owner. In the circumstances, I am of opinion that the appeal must not succeed. It is, therefore, dismissed and the judgment and decree of the lower appellate court is hereby affirmed. Considering the circumstances, each party is directed to bear his own costs in this appeal.