(2003) 11 CAL CK 0041

Calcutta High Court

Case No: S.A. No. 777 of 1990

Ranjit Kumar Bhowmik		APPELLANT
	Vs	
Subodh Kumar Roy and Others		RESPONDENT

Date of Decision: Nov. 14, 2003

Acts Referred:

- Limitation Act, 1963 - Article 64, 65

Citation: (2004) 2 CHN 180

Hon'ble Judges: Amitava Lala, J

Bench: Single Bench

Advocate: Tarak Nath Roy and Birendra Kr. Bhowmick, for the Appellant;Siddhartha Chaudhuri, Basudeb Ghosh and Deb Dulal Chakraborty, for the Respondent

Final Decision: Dismissed

Judgement

Amitava Lala, J.

The suit was instituted for recovery of khas possession upon declaration of plaintiff''s title and for permanent injunction and damages etc. Initially, the plaintiff lost the suit and an appeal was preferred. The Appellate Court was pleased to pass an order of remand. Although no order of remand is, available in the file but the same was remanded on the ground of framing the issues in connection with the adverse possession admittedly and also on the ground of limitation. From the issues as framed by the Court of first instance, I find that the Issue No. 7 is in respect of adverse possession. No issue on the ground of limitation has been specifically framed. The suit was again dismissed. The Issue No. 7 being the issue of adverse possession had been dealt with by saying that the fact of dispossession as on 10th January, 1971 had not been proved. Admittedly, no documentary evidence in respect of adverse possession had been taken note of. On scanning of oral evidence of D.W. 1 and D.W.2, the Court found that the defendants-respondents were in possession of the land in dispute for 25 years. The Court of first instance held that it was also true that the defendants-respondents had acquired

an adverse possession on the suit land by lapse of time i.e. more than 12 years. Again, an appeal was preferred. The Appellate Court framed certain points for the purpose of coming to an appropriate conclusion. Out of such point, the point of adverse possession and limitation were taken. The First Appellate Court came to a conclusion by analysis of evidence that the defendants-respondents had not been able to prove their title either by transfer or by acquisition on the ground of long adverse possession. Their possession for 12 years as above had not been believed by him. But the plaintiff cannot also be entitled to a decree of khas possession unless he proves his title and possession over the suit property for about 12 years before institution of the suit. That having not been done. So, his remedy is barred by time. The suit is, therefore, barred by limitation. The additional point which has been taken by the Appellate Court is that the property was alleged to be in the occupation of Tollygunge Municipality and subsequently by Calcutta Municipal Corporation. Therefore, Calcutta Municipal Corporation was a necessary party in the suit. In absence of Calcutta Municipal Corporation, no effective and final decree could be passed. Therefore, the suit is bad for defect of the parties.

2. The learned senior Counsel appearing on behalf of the plaintiff-appellant emphasised his argument only on the question of title and adverse possession but no submission had been made in connection with such defect on account of non-joinder of necessary parties. His whole contention was that the title had been proved. There was no need to go into other part i.e. possession etc. These were all consequential in view of establishment of title.

3. However, neither the Court of first instance nor the first Appellate Court believed the contention of the plaintiff-appellant in respect of the title. According to both the Courts below the same had not been proved. The real import of the order of the first Appellate Court was neither the title had been proved nor the possession had been proved by either of the parties but the suit must fail on account of the defect of the parties i.e. non-joinder of necessary parties. Had there been an argument on account of such point, it would have been much more beneficial for the plaintiff-appellant in the Second Appeal to come to a definite conclusion with this regard but that was not presented. The only conflicting part of the arguments of the learned Counsels before this Court between the parties is the applicability of Article 64 vis-a-vis Article 65 of the Limitation Act.

4. The learned Counsel appearing for the plaintiff-appellant relied upon a judgment reported in Bhushan Lal (deceased by L.Rs.) Vs. Suresh Kumar and Others, to give distinct feature under Articles 64 and 65 of the Limitation Act. The ratio of the judgment is that Article 64 does not apply to suits for possession based on title and has been now restricted to suits based on possessory title. Article 65 of the Limitation Act applies to suits based on title. It is not necessary for a plaintiff to prove his possession within 12 years in suit for possession based on title. A suit can only be defeated if the defendant is able to prove adverse possession for over 12 years. The suit for possession is not barred by Article 64. The suit can fail only if the defendants succeed in proving adverse possession for over 12 years. According to the learned Counsel appearing for the

plaintiff-appellant, the suit is for a recovery of khas possession or a declaration of plaintiff''s title which has not been believed either by the Court of first instance or by the first Appellate Court. Therefore, the title cannot be said to be proved. If the title is not proved to the satisfaction of Article 65 of the Limitation Act as above, in that case admittedly even on the basis of the judgment cited by the learned Counsel for the appellant such Article does not apply but Article 64 apply. The Court having no other alternative came to a conclusion on the basis of proof. The Court of first instance accepted the ground of adverse possession. Thereby, the Court accepted the Rule 1 of Article 64 of the Limitation Act but neither the same nor the title had not been accepted by the First Appellate Court. Therefore, the balancing factor in between the two Courts is 1 : 0. But in coming to conclusion the lower Appellate Court committed certain errors. In one hand appeal was dismissed confirming the judgment and decree of dismissal passed by the learned Court below but disbelieved adverse possession of the defendant-respondent on an extraneous consideration that the possession was in the hands of non-party i.e. Tollygaunge Municipality subsequently Calcutta Municipal Corporation. It is to be remembered right of adverse possession is firstly a shield than a sword. When the lower Appellate Court was of the view that the suit was not filed within 12 years from the possession thereby hit by law of limitation and by not making the municipality as party defendant, hit by principle of non-joinder of necessary party, there was no need to make such observation. Cause of action, if any as against the Municipality is different from the same and can be established only in respect of any suit between Municipality and defendants-respondents. But till this date it cannot be said to be established. The Court of first instance relied upon Commission''s report. Moreover the question of non-joinder of necessary party is related to the determination as to the question of adverse possession vis-a-vis the title. Therefore, the title cannot be said to be genuinely proved in absence of such party. On the other hand, in the absence of such party, adverse possession cannot be disbelieved.

5. Thus, the balance of convenience supports definitely the cause of the defendants-respondents. Therefore, the respondent''s cause is marginally edging over the cause of the appellant. Hence, upon expunging the observation of the lower Appellate Court to the extent of adverse possession the appeal is liable to be dismissed. Accordingly, the appeal is dismissed. Interim order, if any, stands vacated. Lower Court records are directed to go down at the earliest for necessary steps.

6. There will be no order as to costs.