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**(1916) 05 CAL CK 0040**

**Calcutta High Court**

**Case No:** None

Nabin Chandra Ghose

APPELLANT

Vs

Nilkamal Mukhopadhyaya

RESPONDENT

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**Date of Decision:** May 22, 1916

**Acts Referred:**

- Limitation Act, 1963 - Section 28

**Citation:** 36 Ind. Cas. 11

**Hon'ble Judges:** Lancelot Sanderson, C.J; Asutosh Mukerjee, J

**Bench:** Division Bench

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### **Judgement**

Lancelot Sanderson, C.J.

In this case the suit was brought by the plaintiff asking for a declaration of his mourusi mokarrari right to certain lands and of his title acquired thereto by adverse possession for upwards of twelve years and for declarations that defendant No. 2 and Bhutni Molla never held the land in suit or paid any rent for the same, that the plaintiff and not defendants Nos. 2 to 8 was in actual possession of the land and the land consisted not of two plots but of only one plot bearing a rental Rs. 3-1-10 gandas and that the rent decrees obtained by defendant No. 1 against defendant No. 2 and Bhutni Molla were collusive and fraudulent and the plaintiff was not bound by those decrees and the land in suit was not liable to be sold in execution thereof.

2. It appears that the land in question was the property originally of one Karnadhar Mandal who created a tenancy in Kasim Molla; that was a non-transferable occupancy tenancy. In November 1895, a decree having been obtained against Kasim Molla, the interest of Kasim Molla was sold in execution of the money-decree which had been obtained, and the plaintiff bought the interest belonging to Kasim Molla at such sale. In April 1896, the plaintiff got possession of the land, and he remained in possession up to 1910 and in fact he remains in possession up to the present moment. In 1910, the plaintiff deposited a certain sum in Court because it

appears that in 1907 a decree had been obtained by the transferee from Karnadhar, who was defendant No. 1, against Kasim Molla's heirs for four years' rent (1903 to 1907) and in order to prevent the tenancy from being sold, the plaintiff, as I have already said, deposited the requisite amount in Court. I ought to mention that in 1898, two years after the plaintiff got possession, Karnadhar, the then owner, sold the property to defendant No. 1 together with the rents which were then in arrears, and it was mentioned in the conveyance that Kasim Molla was one of the tenants who were in arrears for rent: and although the plaintiff had already been in possession for two years at that time the plaintiff's name was not mentioned amongst the tenants whose rents were in arrears.

3. Now, the plaintiff, having deposited the money in Court in 1910, proceeded to bring this suit, which, as I have already said, was primarily for a declaration of his right, namely, mourusi mokarrari right to the land in suit.

4. The first Court dismissed the suit. The second Court decreed it, the learned Judge basing his decision on the ground that by reason of the plaintiff having been in possession from 1896 to the time the suit was brought, for more than twelve years, he had obtained a title to a limited interest in the land, and that limited interest was described by the learned Judge, not as mourusi mokarrari right as was claimed by the plaintiff, but an occupancy non-transferable right. The defendant appealed to the High Court, and Mr. Justice Mullick sitting alone allowed the appeal and dismissed the suit.

5. Now in this case it is clear, first of all, that there was no express contract of tenancy between the plaintiff, the alleged tenant, and defendant No. 1, the landlord: nor was there, in my opinion, an implied contract between the plaintiff and defendant No. 1, for the findings of fact by the learned Judge, by which we are bound, are as follows He says: "I find, therefore, the facts to be, that the plaintiff has all along since 1896, when he purchased the right, title and interest of Kasim Molla, been in possession of the lands in suit but has never paid any rent though he was willing to pay to the respondent who, however, has refused to recognise him." In addition to those facts there are two facts to be mentioned. One I have already referred to, namely, when Karnadhar sold his property to the first defendant, he obviously did not recognise the plaintiff as a tenant but recognised Kasim as a tenant and secondly, in 1907 a suit was brought by the present landlord, defendant No. 1, for four years' arrears of rent, in which suit the defendants were the heirs of Kasim and not the plaintiff in this case and, therefore, in my judgment, it cannot be said upon the facts that there was an implied contract between the landlord and the plaintiff.

6. The learned Vakil, who argued this case on behalf of the appellant, urged that by reason of the plaintiff being in possession for more than twelve years the plaintiff has acquired a title to a limited interest, which is a tenancy, and that he is entitled to a declaration by this Court of his tenancy: and he relies upon certain cases, to one of

which I intend to refer: *Icharan Singh v. Nilmoney Balidar* 35 C. 470 : 7 C.L.J. 499 : 12 C.W.N. 636. The judgment to which I refer is one given by my learned brother Mr. Justice Mookerjee and the late Mr. Justice Stephen. That was an action for ejectment and as far as I am aware all the cases to which our attention has been drawn, were actions for ejectment, and the defendant was objecting to be turned out, relying on the ground that he had been in possession of the land for the requisite number of years and during that time he had been asserting his right to be there as tenant of the plaintiff. My learned brother said in that case at page 476 Pages of 35 C. Ed. of the report: "As was pointed out by this Court in the case of *Ishan Chandra Mitter v. Raja Ramranjan Chakarbutty* 2 C.L.J. 125, possession of a limited interest in Immovable property may be just as much adverse for the purpose of barring a suit for the determination of that limited interest, as adverse possession of a complete interest in the property operates to bar a suit for the whole property: but such adverse possession of a limited interest, though a good plea to a suit for ejectment, is good only to the extent of that interest; the nature and effect of possession must depend upon the nature and extent of the rights asserted by the overt conduct or express declaration of the person relying on it, there can be no acquisition by adverse possession of an absolute title, when nothing but a limited interest has been asserted." I want to guard myself expressly by saying that I do not decide, and I do not think it is necessary for the decision of this case to come to any conclusion upon, the question whether that declaration of the law which is there laid down and which has been held to be applicable to a defence to an action for ejectment, is applicable to a case like this where the alleged tenant in occupation comes before the Court and asks for a declaration. I desire to make it quite clear that my judgment in this case is not intended to contain any opinion upon that question either in one way or the other. As far as I am concerned I wish to leave it entirely open for further consideration if it ever arises. Nor do I express any opinion as to what is the effect of Section 28 of the Limitation Act, whether the effect of that section is simply to extinguish the title of the person who is out of possession or whether it operates as an assignment or conveyance of the interest of the person who is out of possession to the person who is in possession. I leave the matter entirely open for future consideration if the occasion ever arises. Neither of these questions, in my opinion, need be decided in this case for this reason. Even if the law as stated in the passage which I have just read is applicable to this case, in my opinion, this Court cannot decree the declaration which the plaintiff is asking for. The plaintiff came to Court asserting that he was in possession of the land, that he had obtained a title to permanent tenancy which he said he had got from Kasim Molla. It having been held against him that the interest, which Kasim Molla had, was not a permanent tenancy but was a non-transferable occupancy right, he then turned round and says: Very well. I now base my claim to a declaration on the ground that I have been in possession of this land for twelve years, and ask the Court for a declaration that by reason of that adverse possession I have got a title to a non transferable occupancy holding. In my opinion, he cannot do that, because he came to Court with the

case--and this was his whole case--that he had been asserting during twelve years his right and title to a permanent tenancy, and that consequent by reason of the operation of the Statute of Limitation by adverse possession he obtained a title to that tenancy. It having been found that he never had such tenancy, how can he ask this Court to make a declaration that he has got title to a non-transferable occupancy holding? To put it shortly, he comes to the Court with the case that he has been in occupation of the land for twelve years asserting his title to one kind of tenancy; he now asks the Court in consequence of that occupation for twelve years to make a declaration that he has a right and title to another kind of tenancy. I draw attention again to the words used by my learned brothers Mr. Justice Mookerjee and Mr. Justice Stephen in the passage which I have quoted, namely, Such adverse possession of a limited interest, though a good plea to a suit for ejectment, is good only to the extent of that interest; the nature and effect of possession must depend upon the nature and extent of the rights asserted by the overt conduct or express declaration of the person relying on it. The express declaration alleged by the plaintiff in this case was that he was entitled to a mourusi mokarrari tenure, a permanent tenancy. According to his case his overt conduct had all along been that he was entitled to that tenure and had obtained it from Kasim Molla. It is impossible for him now to turn round and say that although I had no right to the tenure which I have asserted for these twelve years, still by adverse possession I am entitled now to come and ask the Court to make a declaration that I have a tenancy of a totally different kind.

7. For these reasons I think the learned Judge " was right when he dismissed the suit, and I think the appeal should be dismissed with costs.

Mookerjee, J.

8. The subject-matter of the litigation, which has culminated in the present appeal, is an agricultural holding at one time held by Kasim Molla as tenant under the first defendant. On the 14th November 1895, the plaintiff purchased the right, title and interest of Kasim Molla at a sale held in execution of a decree obtained against him by his creditor Karnadhar. On the 16th April 1896, the plaintiff obtained delivery of possession through Court, and it has been stated here that he was in possession at the date of the suit. On the 1st June 1907, the first defendant obtained a decree for arrears of rent for four years antecedent to the date of the institution of that suit. This decree was obtained against the other defendants to this litigation as the representatives of the original tenant. Execution was taken out in due course and steps were taken for the sale of the holding. The plaintiff thereupon, on the 10th August 1910, deposited the decretal amount in Court in the name of the judgment-debtors. On the 23rd December 1910, the plaintiff instituted the present action for a fivefold relief, namely, first, that his title as the holder of a permanent and transferable interest in the land, either by purchase or by adverse possession for the statutory period, be declared; secondly, that the decree for rent obtained by

the first defendant against the other defendants be declared collusive and fraudulent; thirdly, that an injunction be issued against the first defendant, so as to restrain him from hereafter instituting suits for arrears of rent in respect of the disputed land against any person other than the plaintiff; fourthly, that a decree be passed against the first defendant for refund of the sum deposited by the plaintiff on the 10th August 1910 to satisfy the rent-decree and fifthly, that such other relief be granted as the Court might consider fit and proper in the circumstances of the case.

9. The primary Court dismissed the suit. Upon appeal, the District Judge made a decree not precisely as prayed by the plaintiff; but in the following terms: "The plaintiff-appellant is entitled only to this relief that he is hereby declared to be a tenant holding a non-transferable occupancy right in respect of the land mentioned below under the first defendant." Upon appeal to this Court, the decree of the District Judge has been set aside by Mr. Justice Mullick. The present appeal has been preferred under Clause 15 of the Letters Patent against the judgment of Mr. Justice Mullick. In my opinion, on the facts found, the suit as framed must stand dismissed.

10. The plaintiff came into Court with a view to obtain a declaration of title as the holder of a permanent and transferable tenancy interest in the disputed land. That case has completely failed, as the Courts below have concurrently found that the land constituted a non-transferable occupancy holding. The purpose of the first declaration asked in the plaint is not far to seek and is plainly indicated by the other declarations already mentioned. The real object of the plaintiff is to obtain an injunction against the first defendant so as to prevent him from instituting suit; for arrears of rent in future against any person other than the plaintiff. The plaintiff seeks, in substance, to obtain a declaration that he holds the disputed land as a permanent transferable holding under the first defendant and as such he must be sued for arrears of rent in future. It is not disputed, and on the facts found it cannot be disputed, that the plaintiff is not entitled to this declaration. The plaintiff thus defeated, however, turns round and contends that he should be granted a declaration on the basis of the facts found by the District Judge. In my opinion, this application should not be entertained. When a plaintiff seeks a declaration of a specific character and fails to establish the facts whereon such declaration can be founded, he is ordinarily not entitled to a different declaration. If authority is needed for this elementary proposition, reference may be made to the decision in *Hemendra Nath Roy v. Upendra Naraian Roy* 32 Ind. Cas. 437 : 22 C.L.J. 419 : 20 C.W.N. 446 : 43 C. 743. No doubt, the Court has a discretion in a matter of this description, and may, if the defendant is not taken by surprise, grant the plaintiff a declaration different from the precise relief sought in the prayer clause of the plaint *Abhoy Churn Pal v. Kally Pershad Chatterjee* 5 C. 949 : 6 C.L.R. 260. But the case before us is obviously not of that character. Before the plaintiff can obtain a declaration that he has acquired the status of the holder of a non-transferable occupancy holding under the first defendant, questions of some nicety will require

investigation. His allegation that he has been recognised as such has not been substantiated. Has he then acquired such right by adverse possession of a limited interest on the principle explained in *Protab Narain Mukerjee v. Srimati Biraj Dasi* 20 Ind. Cas. 823 : 19 C.L.J. 77; *Ishan Chandra Mitter v. Raja Ramranjan Chakarbutty* 2 C.L.J. 125; *Icharan Singh v. Nilmoney Balidar* 35 C. 470 : 7 C.L.J. 49 : 12 C.W.N. 636; *Raktoo Singh v. Sudhram Ahir* 8 C.L.J. 557? What again is the true effect of Section 28 of the Limitation Act, as explained in *Gossain Dass Chunder v. Issur Chunder Nath* 3 C. 24; does it extinguish the interest of the owner and at the same time vest it in the adverse possessor; if so, does this hold good in respect of a nontransferable tenancy, not only as between the tenant and his dispossessor, but also as between the latter and the landlord; in other words, does the Statute of Limitation operate only by way of extinguishment, and not by way of assignment of the estate which is barred, as maintained in *Tichborne v. Weir* (1893) 67 L.T. (N.S.) 735 : 4 R. 26, and *O'Connor v. Foley* (1905) 1 Ir. R. 1 : 8 Ir. Law. Rep. J, affirmed (1906) 1 Ir. R. 20 : 8 Ir. Law. Rep. 607?. Does the the principle recognised in *Prohabati Dasi v. Taibaturnessa Chaudhurani* 20 Ind. Cas. 664 : 17 C.W.N. 1088 : 19 C.L.J. 62, and *Panchkari Chuttapadhya v. Maharaj Bahadur Singh* 28 Ind. Cas. 708 : 19 C.W.N. 136, apply not only to suits for ejectment by the landlord, but also to declaratory suits against the landlord? These are not all pure questions of law, some of them are mixed questions of fact and law. In the solution of some of these questions, one important matter for investigation, for instance, is what happened between the parties during the years 1896 to 1907? Did the landlord receive rent in respect of the disputed property during that period; if so, from whom? Was the rent paid by the original tenant whose interest had been sold in execution, or was it paid to the first defendant by the plaintiff in the name and as the agent of the original tenant? Did the plaintiff, in other words, assert a tenancy right in himself, or did he deal with the landlord on the hypothesis that the tenancy still contained in the original tenant, as in *Jadu Nath Belel v. Raj Naraian Mukherjee* 19 Ind. Cas. 884 : 17 C.W.N. 459 ,see also *Tarubai v. Venkat rao* 27 B. 43 : 4 Bom. L.R. 721. It is obvious that these matters may have a very important bearing upon the question of the determination of the status of the plaintiff. But none of them has been raised or investigated, because the plaintiff founded his claim on the allegation that the tenancy was permanent and transferable. That case has failed after a protracted trial; it is difficult to see on what conceivable principle he can now take shelter under entirely different allegations, and obtain a re-investigation.

11. Apart from this there is an additional reason why the plaintiff should not now be permitted to seek a declaration different from that mentioned in the plaint. His case now is that he has acquired a good title to the occupancy holding by prescription for the statutory period. He can establish it, if at all, only upon proof that he has asserted that specific title for the statutory period. But according to his own case as sought to be established by his evidence, the plaintiff has throughout asserted, as against his land-land, that he had acquired a good title to a permanent and

transferable holding. He cannot now turn round and contend that he has acquired the status, by prescription, of a raiyat in respect of a non-transferable occupancy holding. In my opinion, the plaintiff cannot possibly be allowed to depart from the allegations which he specifically made in the plaint and endeavoured to support by his evidence, and to succeed in a case totally distinct from and in some respects contradictory to that position.

12. I agree accordingly that the decree made by Mr. Justice Mullick must be affirmed, and this appeal dismissed with costs.