

(1922) 05 CAL CK 0023

Calcutta High Court

Case No: None

Nehar Bewa and Another

APPELLANT

Vs

Kador Bakas Mohammed

RESPONDENT

Date of Decision: May 15, 1922

Citation: 68 Ind. Cas. 282

Hon'ble Judges: Sauteed Mookerjee, J; Chotzoer, J

Bench: Division Bench

Judgement

1. This is an appeal by the plaintiffs in a suit for recovery of possession upon establishment of title. The Court of first instance decreed the suit. Upon appeal that decision has been reversed by the subordinate Judge. We are unable to affirm the decision of the Subordinate Judge as not liable to be successfully challenged in second appeal. There are two points which have been urged against the judgment on behalf of the appellant. In the first place, it has been contended that there is no clear and definite finding upon the question of title. The property stood originally in the name of Bhedu, one of three brothers (Bhedu, Saidu, and Kanu). One side affirmed that although the property stood in the name of Bhedu it was owned by all the three brothers. Another side asserted that Kanu had no interest in the property so that after the death of Bhedu the property, passed to Saidu and after his death to Kalua, the predecessor in interest of the defendants. Upon this fundamental question of title the lower Appellate Court does not come to any definite finding. In the determination of this question the fact of possession of the property must be taken into account and when the evidence of possession is considered, it must also be borne in mind that Bhedu, Saidu and Kanu were members of a joint family and the question of adverse possession as between co-sharers may consequently have to be taken into consideration.

2. In the second place, it has been urged against the judgment of the Subordinate Judge that he placed reliance upon recitals in a deed of release executed by Nana (the son of Kanu and brother of the two plaintiffs) in favour of the defendant. No

doubt the fact that Nanu executed a deed of release constitutes a transaction, which is relevant for the purpose of investigation of the question in controversy. But the recitals in the document do not become a part of the evidence. They are assertions by a person who is alive and who might have been brought before the Court if filcher of the parties to the suit had so desired. This distinction is frequently overlooked and when a document has been admitted in evidence as evidence of a transaction the parties are often apt to refer to the recitals therein, as relevant evidence.

3. We are of opinion that in the circumstances of this case the appeal should be allowed, the decree of the Subordinate Judge set aside and the case remanded to him for re-consideration in accordance with law. The Subordinate Judge will take steps to have Nana examined as a Court witness with liberty reserved to both sides to cross-examine him if so advised. Costs will abide the result.