

(1914) 04 CAL CK 0034

Calcutta High Court

Case No: None

Nagendra Nath Ghose and
Another

APPELLANT

Vs

Ram Bharosa Haluai

RESPONDENT

Date of Decision: April 28, 1914

Citation: AIR 1914 Cal 839 : 24 Ind. Cas. 68

Hon'ble Judges: Holmwood, J; Chapman, J

Bench: Division Bench

Judgement

1. Two points are raised in this second appeal. The first that the learned Subordinate Judge was wrong in holding that the plaintiff's title had been proved, inasmuch as he did not call defendant No. 5 to show that there had been actual delivery of possession, the price of the property being less than Rs. 100, and it is further urged that Ganga Das Sil, the undoubted purchaser of the holding at a revenue sale, could not after his transfer by sale to defendant No. 5 give the plaintiff a clear title by giving him a conveyance. This argument is somewhat ingenious, but it fails to convince us.

2. As regards the first part of the contention, the plaintiff's sworn testimony that there was delivery of possession is quite sufficient if it is believed, and the Subordinate Judge appears to have Relieved it. It was not, therefore necessary to call defendant No. 5 : and if the Munsif had thought that the plaintiff's suit must necessarily, fail unless the defendant No. 5 was called, we think it would only have been right to have told the plaintiff this and not to have announced it when he came to write his judgment. As a matter of fact one man's evidence is as good as another's provided it commends itself to the Court.

3. As regards the granting of conveyance ex majori cautela to the plaintiff by Ganga Das Sil, we do not see that there is any objection in law or equity to such a course. If the purchaser from Ganga Das had had the misfortune to lose his kobala, which was not a registered instrument, and if the defendant thereupon said that tie was not

the purchaser from Ganga Das, there can be no doubt that Ganga Das, knowing the facts, was in duty bound to give the plaintiff a clear title as far as he could by reconveying him the property which, the defendant contended, had not already been conveyed to defendant No. 5. If, on the other hand it is admitted that it had been conveyed to defendant No. 5, then there is no further need of supporting the plaintiff's title.

4. The second objection taken to the judgment of the learned Subordinate Judge is that he has not reopened the question which was decided against the defendant by the Munsif, namely, as to whether there was a protected interest in the land in suit. We have been referred to the judgment of their Lordships of the Judicial Committee in *Lala Gauri Shanker Lal v. Janki Pershad* 17 I.A. 57 : 17 C. 809. and to the case of *Bhagoji v. Bapuji* 18 B. (SIC) 5 AT . 77.. What is laid down by their Lordships in the Privy Council case is what is embodied in the Code of Civil Procedure, that it is open to the defendant or any party to support the judgment and decree of the lower Court by traversing any ground which that Court may have found against that party. This is based on the fact that the decision being in their favour it is not necessary for them to file notice of objection. They can support the decree on the ground that the issue ought to have been decided in their favour. But their Lordships nowhere say that they need not support it : nor do they throw the burden upon the Judge in the Civil Court of raising a case for the party which he does not choose to raise himself. The Bombay case puts the same matter in a rather different form. It says that the Appellate Court is not entitled to accept facts found by the Court of first instance as incontestably proved merely because the respondent has not filed any cross-objection. But that was a case where the first Appellate Court as a Judge of fact held that it - was bound by the finding of fact of the original Court upon the only point which was at issue before him. The question was whether a certain gift was valid in Hindu Law. The Subordinate Judge found facts which showed that there had been a form of gift, but he held that it was not valid in Hindu Law. The Assistant Judge in appeal held that he was bound by the Subordinate Judge's finding of fact as to the form of the gift, and that in his opinion such a gift was valid in Hindu Law. Obviously this is an entirely wrong view for a Judge of facts to take. He was bound to deal with the facts found by the Subordinate Judge and state whether he agreed with them or did not agree with them. Here nothing of the kind occurs. The matter apparently was not agitated before the Subordinate Judge at all, for the defendant got Rs. 30 as compensation in the first Court for the ejectment under the decree and the amount of compensation was not questioned before the Subordinate Judge by either party. That seems to us to mean that the matter was not mentioned in the presence of the Judge, and we, therefore, think that it was not his duty to, and indeed he could not, reopen the finding against the defendants which they had accepted and did not move against.

5. The result is that this appeal must be dismissed with costs.