(1955) 03 CAL CK 0022

Calcutta High Court

Case No: Appeal from Original Decree No. 66 of 1953

Subodh Gopal Bose		APPELLANT
	Vs	
Khairunnessa Bai		RESPONDENT

Date of Decision: March 25, 1955

Acts Referred:

- Bengal Land Revenue Sales Act, 1859 - Section 37, 37(4)

Citation: 60 CWN 361

Hon'ble Judges: P.K. Sarkar, J; Mookerjee, J

Bench: Division Bench

Advocate: Atul Chandra Gupta and Joygopal Ghose, for the Appellant;Apurba Charan Mukherjee and Provash Chandra Basu, for the Respondent

Judgement

Mookerjee, J.

The only dispute which falls to be decided in this appeal is whether the plaintiff whose title has been declared by the Trial Court is entitled to recover joint possession of the property in suit. The subject-matter of the present litigation is certain premises in Alipur in the southern part of Calcutta. The plaintiff appellant claims that he had purchased at a revenue sale touzi No. 6 of the Collectorate of 24-Parganas in January, 1986, in sixteen annas share. He is emitted to have all the lands included within that touzi free from all incumbrances with the right to annul all tenures as also other interest which are not protected under any one of the exceptions detailed in section 37 of the Bengal Land Revenue Sates Act, 1859, (Act XI of 1859). The plaintiff claims that the land in suit appertains in part to Touzi No. 6 aforesaid and the defendant is a trespasser in respect of that portion of the premises which falls within the said touzi; the interest of the defendant is an incumbrance. Notice is alleged to have been given, and the defendant not having allowed the plaintiff joint possession, the present suit had to be filed.

2. The defence in the main was that no portion of the plot in dispute was covered by Touzi No. 6. The defendant had purchased in 1919 the interest of one Ramesh Chandra Sen in 3 bighas 11 cottas and odd of the premises in dispute and had subsequently purchased an additional area from the Calcutta Corporation out of the surplus lands put up for sale. The defendant claimed that even if it be found that the land in suit appertained partly to touzi No. 6, the land had been held in permanent right at a fixed rent from before the Permanent Settlement, or in any event, before the settlement of touzi No. 6 which had taken place about 1882. Even if it be found that the plaintiff had acquired an interest in touzi No. 6 at a revenue sale the interest of the plaintiff in the land in suit was a fractional one, intermixed and intermingled with such fractional shares of other co-sharer proprietors of different other touzis and the plaintiff was not entitled to annul any interest in one of such fractional touzis. Alternatively, it was claimed that the right of the defendant was protected under the First, Second and Fourth exceptions mentioned in section 37 of the Bengal Land Revenue Sales Act, 1859. The defendant stated, inter alia, that immediately after her purchase she had put up very substantial buildings on the plot and for about fifteen years she had been occupying the said premises with the knowledge of the then proprietor of touzi No. 6 from before the said touzi was put up to sale for recovery of arrears of revenue.

3. Various issues were raised and the learned Subordinate Judge came to the conclusion that the land in suit was covered in part by touzi No. 6 and the plaintiff was entitled to have his title declared as a Revenue Sale auction-purchaser. By the notice of annulment, even if legal and valid, the plaintiff was not entitled to recover joint possession to the extent of his share in the property as it must be deemed that the defendant, as by the nature of her occupation and user, could be taken to have obtained some sort of a lease-hold right in the property, and thus her case was brought within the Fourth exception to section 37 of the Bengal Land Revenue Sales Act, 1859.

4. The plaintiff has come up to this court on appeal, and the only point raised is that the plaintiff is entitled to recover joint possession. The defendant has neither preferred any appeal nor filed any cross-objection. The result therefore, is that the decree of the Trial court declaring the plaintiff''s title to the property in suit, as prayed for, has become final. A faint attempt was made by the learned Advocate for the defendant respondent to reopen that question in this Court, but he gave up that attempt when he found the futility thereof.

5. In Mouza Alipore, the lands of a very large number of touzis are intermixed. Touzi No. 6 is one of those nineteen different touzis (vide Exhibit 2). The conclusion reached by the trial Court that the lands now in suit are covered by different touzis, including touzi No. 6, cannot and has not been assailed.

6. In Khemankari v. Rani Harshamukhi, (1) (47 C.W.N. 58), it has) been held that the purchaser of an entire estate in the permanently settled districts of Bengal sold for

arrears of revenue due on account of the same can annul an under tenure created under the said estate as well as other estates so far as it lies within the estate sold.

7. The claim of the defendant that she holds a tenancy right in respect of the interests covered by the different touzis, including touzi No. 6. cannot be sustained. It appears from Exhibit F, the putni patta created in December. 1884, in favour of Gosaidas Ghose. that such a putni had been created by the proprietors of different touzis of which touzi No, 6 was not one. The settlement that was made in favour of Romesh Chandra Sen was of the interest which had been obtained by Gosaidas under the putni patta mentioned above. In the conveyance Which was executed by Romesh Chandra Sen in favour of the present defendent. (Exhibit A1), it is only the right which was created under the putni of 1884, that was being transferred. From a plain reading of the documents, the only case that can be made is that a tenancy right was being created on the basis of the putni which was created in 1884. The present defendant, therefore, cannot on the strength of her title deed or the documents of title in favour of predecessors or superior landlords claim her interest to be in excess of the putni right. She is, therefore, trespasser in respect of the share of the property in suit as is covered by the lands of touzi No. 6. The learned Subordinate Judge, however, was prevailed upon to accept the position that though there was no proof of actual settlement of lease under touzi No. 6 in favour of the defendant the Court would be entitled to presume that the previous proprietor of Touzi No. 6 had allowed the defendant or her predecessor to occupy the lands as a tenant.

8. Reliance was placed in this connection by Mr. Mukherjee on Bhagoo Bibee v Ram Kant Roy Choudhury (2) (I.L.R. 3 Cal. 293). What was decided in that case was that notwithstanding a party might fail to show that his tenure was created prior to the Permanent Settlement, yet he was entitled to the benefit of the Fourth exception to section 37 of Act XI of 1859, in respect of any permanent structures that might be upon his holding. What'' had been claimed was that the under-tenure came within the first exception to section 37 of Act XI of 1859 as a mokurari taluk held at a fixed rent from the time of the Permanent Settlement; secondly, it was contended that there being permanent buildings and other improvements having been effected on the disputed lands, the defendants were further protected by the Fourth exception to section 37 of the said Act. This Court reversed the decision of the lower Appellate Court on the first point. Certain documents which had been produced in support of the defendant''s case that the tenure had been in existence from before the Permanent Settlement had not been properly dealt with by the Courts below. If such documents were found to be genuine, there might be ample evidence from which the Court might presume that the under-tenure was in existence at the time of the Permanent Settlement. If this point succeeded the plaintiff''s suit must fail. On the other alternative defence taken by the defendants, it was observed that in respect of that much of the lands comprised in it as was covered with permanent buildings etc., the defendants were entitled to exemption from ejectment under the Fourth

exception to that section. It was not the case of either party that the defendant was a trespasser. The question was whether he had the right of an under-tenure holder from before the Permanent Settlement or from a subsequent date. If such a right is to be anulled by the purchaser at a revenue sale, clearly the Fourth exception will be attracted, and such portion of the lands as may be covered by permanent buildings, etc., would be excluded from being taken possession of by the purchaser. As was observed by this Court at p. 296 of ILR 3 Calcutta referred to above, under such circumstances the Court would declare the first party defendant entitled to retain possession of such portion paying rent for such occupation. This decision is not an authority for the proposition that even when a person is found to be a trespasser he can invoke the operation of the Fourth exception or any of the other exceptions which are specifically made available for the protection of tenants in occupation.

9. We have in this connection been referred to the earlier decision in Brojo Soondar Biswas v. Gouri Persaud Roy (3) (S.D.A., Dee, 1852. p. 645), as also to the subsequent decisions in Ajgur Ali v. Asmat Ali (4) (I.L.R. 8 Cal 110), Gobinda Charan Sen v. Joy Chandra Das, (5) (I.L.R. 12 Cal. 327); and Najemodden v. Syed Hassan (6) (9 C.W.N. 852). None of these decisions support the novel proposition which was attempted to be enunciated on behalf of the defendant.

10. The learned Subordinate Judge has refused the plaintiff''s prayer for joint possession relying upon the decision in Sremunt Ram Dey v. Kookoor Chand, (7) (15 W.R. 481). We do not think that the observations of this Court in that case can in any way assist the defendant. The substance of the decision in that case was that an auction purchaser at a sale for arrears of rennue creating a putni thereof cannot sue to annul an under-tenure within that putni as his entire power under Act XI of 1859 passes to the putnidar who alone can institute such a suit. There is no observation in that case wherefrom it can be deduced that a trespasser erecting a substantial structure or digging a tank will be saved from the operation of section 87 of Act XI of 1859 whereby an undertenure may be annulled by the revenue sale purchaser.

11. Reliance, however, was placed in this Court on Ashamoyi Basu v. Sarbatosh Sen, (8) [A.I.E. 1939 Cal. 526: s.c. ILR (1939) 2 Cal. 236]. It was contended that as had been observed by the Division Bench of this Court, the word "lease" as used in, section 37(4) of Act XI of 1859, was used in the ordinary sense of a tenancy, and though a tenancy must be based upon a contract, either express or implied, mere non-payment of rent was not conclusive to show that there was no tenancy. There is an apparent fallacy in this argument. What Mukherjea, J. (as he then was) observed was that agricultural tenancies of ten came into existence in Bengal without a definite stipulation as to the amount of rent payable, it being understood that as between the owner and the squatter that the latter Would pay the amount of rent which was customary or which was fair and equitable. If a man under such circumstances was found to be holding land under another with his consent, express or implied, and was legally liable to pay rent to the latter for the land he

held, the Court would presume that a tenancy had been constituted even if the amount of rent was not determined and no rent was actually paid.

12. The special circumstances under which an agricultural tenancy may come into existence or may be presumed to have come into existence, though no rent is fixed or has been paid, cannot he attracted in the case of non-agricultural tenancies. Tenancies can be created only in a particular manner, and when there is a definite proof that no tenancy was created by the owner of touzi No. 6 in the present case, the mere fact that structures had been raised near about 1920-21, and the defendant had been in possession for about a decade and a half would not raise any presumption, far less can such evidence be considered to be sufficient to prove the creation of tenancy, or the existence of a "lease" u/s 37 of Act XI of 1859.

13. It might have been possible for the defendant to have made an attempt to prove acquisition of tenancy right by adverse possession. No foundation for such a case had been made in the written statement. No issue had been raised in the Lower Court, and no such attempt had been made in this Court. Only at a later stage of the argument, when an enquiry was made from the Court as to whether such a case had been made, that the learned Advocate for the respondent attempted to spin out such a case from paragraph 16 of the written statement.

14. Paragraph 16 of the written statement refers to an alternative case which was made basing a claim on legal rights, that even though the land in suit was found to appertain to touzi No. 6, the defendant would be protected under the First, Second and Fourth exceptions mentioned in section 37. No facts were alleged. No materials were referred to either in the written statement or during the evidence that was led during the trial in support of a case of acquisition of limited right of tenancy. If such a case had been made the parties would have had an opportunity of adducing evidence on the same, but there was no such attempt.

15. That 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 complete interest in the property operates to bar a suit for the whole property is an accepted proposition of law, but as in the case of all kinds of adverse possession, 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. Vide Seshamma v. Chickaya, (9) 25 Madras 507; Ishan Chandra Mitter v. Raja Ramranjan Chakraborty, (10) 2 C.L.J. 125, 136.

16. Under such circumstances, it is not necessary for us to consider as to what would have been the position had such a case been made. We may, however, just indicate that even if such a case had been made, it would have been a very difficult thing to prove that when a tenant is found to have taken settlement from a number of co-sharers and trespassing upon the lands of one of the co-sharers who has not settled the tenant, how can the latter know or acquiesce in the defendant raising

structures over a portion of the amalgamated holding, but it is not necessary for us to pursue the matter any further.

17. The reasons given by the learned Subordinate Judge for refusing the plaintiff''s prayer for recovery of joint possession cannot be sustained. But at the same time there are difficulties in the way of the plaintiff getting such an order at this stage which had not been adverted to in the judgment of the trial Court. The learned Sub-ordinate Judge was not correct, in suiting the proposition as one or law that the plaintiff is not entitled to recover joint possession either now or at any stage. If there be (sic) as there are, as we shall indicate immediately, to the plaintiff obtaining joint possession of the property in suit, the plaintitt''s prayer is to be dismissed not in limine, but conditionally.

18. The lands of a large number of touzis being intermixed, it is not known which portion of the properly will be allotted to the owner of Touzi No. 6 in a proper suit or proceeding for partition. As to what will be the form of that proceeding it is not for us to anticipate, but the difficulties which are ahead cannot be overlooked. The rights of the plaintiff to get joint possession would be limited to this extent that the plaintiff would not be emitted to enter into occupation at this stage of the property in suit. He must wait till after the result of a proper suit or proceeding if and when such a suit or proceeding is brought. This is due to the fact that it is not known which portion of the property in suit will be or can be allotted in favour of the plaintiff as the revenue sale purchaser of touzi No. 6.

19. Mr. Gupta appearing on behalf of the appellant indicated that he would be satisfied with such a limited declaration as the form in which the learned Subordinate Judge had given the decision was capable of an interpretation of having a wider implication. In view of the decision, it is not necessary for us to consider whether the whole of the land in suit which is not covered by buildings is or is not essential for the enjoyment of the house. That question must be left open to be decided in the future suit or proceeding which may be brought for partition.

20. The result, therefore, is that this appeal is allowed in part and the judgment and decree passed by the trial Court are modified to this extent only that the prayer for recovery of joint possession by the plaintiff is allowed subject to the condition that the plaintiff will not be entitled to enter into occupation or exercise any right thereon until he obtains a decree or order by a competent Court in a suit or proceeding for partition. The declaration of the plaintiff''s title to the property in suit, already made by the learned Subordinate Judge stands, as it has already been indicated that that is not the subject-matter of the appeal before us. The plaintiff appellant will be entitled to half the costs of this Court.

P.K. Sarkar, J.

I agree.