

**(1918) 02 CAL CK 0035**

**Calcutta High Court**

**Case No:** None

Mrs. E.J. Delauney

APPELLANT

Vs

Pranhari Guha, Chandra Kumar  
Guha and Others

RESPONDENT

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**Date of Decision:** Feb. 7, 1918

**Citation:** 45 Ind. Cas. 879

**Hon'ble Judges:** Richardson, J; Beachcroft, J

**Bench:** Division Bench

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### **Judgement**

Richardson, J.

This is an appeal from the judgment and decree of the Subordinate Judge of Noakhali, dated the 25th April 1916, The suit is a suit in ejectment and it was brought by the plaintiff against various defendants. The suit was dismissed in the trial Court but decreed in the lower Appellate Court. The appellant before us is the defendant No. 4 and there are also cross-objection by defendant No. 1. The plaintiff traces his title to a lady named Nanda Kumari wife of Sarat Chandra Guha. Sarat Chandra died in 1299 (B.S.) and Nanda Kumari in 1300 (B.S.). The case made is that the land in dispute is included in the land purchased by Nanda Kumari from one Gourhari Gnha under a conveyance, dated the 17th Sralan 1296. On Nanda Kumari's death her rights in this property are said to have devolved upon her son Mohini, and on his death the property is said to have passed to the son of his sister Ganga Monee. That son died an infant and the property is then said to have devolved on his father, the defendant No. 5, from whom the plaintiff obtained it under a shikmi taluti lease, dated the 10th Aswin 1317. The learned Subordinate Judge has found that this title is established.

2. It is contended in this appeal, firstly, that the Subordinate Judge has erred in law in the way in which he has dealt with the burden of proof on the question whether the property in the hands of Nanda Kumari was what is known" as Yautuka or what is known as Ayautuka. The learned Subordinate Judge says this: "There is no

evidence that Nanda Kumari had any Yantuk property or she purchased e property of Exhibit 3 with the proceeds of any Yautnk property. Hence if the disputed land belonged to Nanda Kumari it was her Yautnk property. Ayautnk property of a Hindu female governed by the Dayabhaga School is inherited by her son in preference to her daughter. Hence Mohini was the legal heir of Nanda Kumari." It is argued that the learned Subordinate Judge has wrongly thrown the onus of proving that the property was Yautuka on the appellant. The "Yautuka" of a Hindu wife consists of the gifts made to her during the nuptial ceremonies. The particular property in question was purchased 17 or 18 years after the lady's marriage. If the purchase was made from any special fund; it would seem that the burden of proving that should fall upon the person who asserts it. But apart from that the Judge in another part of this judgment has found that the property did in fact descend from Nanda Kumari to Mohini and though apparently at the time Mohini had two married sisters alive, no objection was taken by them and no claim was made by them to the whole or any part of the property. In the circumstances, therefore, it cannot, in my opinion, be said that the learned Subordinate Judge has erred in the mode in which he has dealt with this part of the case. In this connection, it is further suggested that the learned Subordinate Judge was not entitled to say that the Ayautuka property of a Hindu female is inherited by her sons in preference to her daughters. The learned Pleader has referred to a text the meaning of which he says is doubtful or ambiguous. But the proposition laid down by the Subordinate Judge, who is, himself a Hindu, appears to represent the commonly accepted view of the order of succession to Ayautnka property. To such property the sons and the maiden daughters may be entitled in equal shares but the married daughters are postponed to the sons (Shastri's Hindu Law, 3rd Edition, page 415).

3. The second contention of the learned Pleader is that the Subordinate Judge has not found that at the date of Mohini a death Ganga Monee's son was in existence. But the fact was not disputed. "There is no dispute" says the Subordinate Judge, that the infant son of Ganga Monee and the defendant No. 5 inherited the property of Mohini or, in other words, the son of Ganga Moni was the heir of Mohini and the defendant No. 5 was the heir of the, aforesaid son." It is impossible to go behind a positive statement of this kind made by the Subordinate Judge in the course of a long and careful judgment.

4. The third point taken is that the learned Subordinate Judge has in some way neglected to deal with the case as put for the plaintiff in the first paragraph of the plaint. That paragraph refers to a partition or exchange of properties which took place between Nanda Kumari and her husband. The first paragraph of the plaint, however, cannot be read by itself. It must be read with the rest of the plaint. There is no definite statement there that the property now in dispute was property obtained by Nanda Kumari in exchange for some property of her which went to her husband. A definite statement on the subject will be found in paragraph 5 of the plaint. That paragraph states: "That the aforementioned Nanda Kumari Guha was owner in

possession of the land of Schedule (Ea) by virtue of the aforesaid purchase under a deed of private sale and in right by adverse possession." The plaint, therefore, specifically affirms that the land specified in the first schedule or the land in dispute was purchased by Nanda Kumari from Gourhari; and there is the further assertion of a right by adverse possession to that land. Moreover, there is a clear finding in the judgment of the Subordinate Judge that the conveyance executed by Gourhari in favour of Nanda Kumari does include the disputed land. There is, therefore, in an appeal confined to questions of law no substance in this contention.

5. Then as to limitation, that turns on the question of possession. It is suggested that the learned Subordinate Judge has not sufficiently dealt with this question. What is it that the Subordinate Judge has found? He has found that this property descended from Nanda Kumari to Mohini. He has found that by the pattah of the 22n4, Chaitra 1899 the property was leased by Mohini to Bisweswar Guha, the father of defendants Nos. 2 and 3. These defendants are the first cousins of defendant No. 1. In the year 1307 a portion of the land covered by the lease of 1893 was surrendered by or on behalf of defendants Nos. 2 and 3. The portion so surrendered was settled by Mohini with Nabin Chandra Guha, the brother of defendant No. 1, and apparently is now in the undisputed possession of Nabin. As I read the judgment of the Subordinate Judge, he has further found that the land in dispute continued in possession of defendants Nos. 2 and 3 as tenants of Mohini till the year 1908. In that year a Record of Rights was published. The Subordinate Judge's view, stated, if not expressly at any rate with sufficient clearness, is that subsequent to the publication of the Record of Rights the defendant No. 1, under colour of any title from the defendant No. 4, somehow continued to dispossess defendants Nos. 2 and 3 and that the possession of defendant No. 1 does not go back beyond the year 1908. The plaintiff had some difficulty in realising his rent from defendants Nos. 2 and 3 and he brought a rent suit against them and secured a decree. Thereafter they paid rent for one year, but finally surrendered the land to the plaintiff. The plaintiff says that he attempted to obtain possession after this second surrender, which occurred at the end of 1911 or beginning of 1912, and was unsuccessful and he dates his cause of action from the year 1913. On the facts as found by the Subordinate Judge it is quite clear that this suit is within the time allowed by the law of limitation.

6. Another objection taken by the learned Pleader is that the Subordinate Judge has not dealt with defendant's title. The defendant No. 4 is the owner of a 4-anna share of the Zamindari right, but that is not the title under which she claims in the present suit. She claims as a purchaser at a Court sale. The sale certificate is dated the 5th December 1908 and it purports to pass the Taluki title. This title, however, is the very title which Nanda Kumari is said to have purchased long before from Gourhari, in whom according to the Subordinate Judge the title vested. Neither the plaintiff nor her predecessor-in-interest was a party to the rent suit in execution of the decree in which the sale was held. Therefore, neither the decree itself in the rent suit nor the

sale in execution of that decree can bind the plaintiff. As to this title set up by defendant No. 4 and defendant "No. 1 under him, the Subordinate Judge"s view" is perfectly clear. He has found that defendant No. 1"s settlement is a fictitious one; and he adds that before 1308 jhe had no right in the land. He adds that defendant No. 4 was never in khas possession of the disputed land. She did not take delivery of possession of the disputed land through Court. She did not take amicably. The defendant No. 1, who either dispossessed the defendants Nos. 2 and 13 during their minority or was in collusion with them, attorned to defendant No. 4 who simply got rent for 1316 and 1317 (B.S.) for the disputed land from the defendant No. 1 in 1909 and 1910. She as a Talukdar had no concern with the disputed land other than the receipt of this rent." It is obvious that, whether rightly or wrongly, the Subordinate Judge is of opinion on the merits that the title of defendant No. 1 as also of defendant No. 4 was purely a paper and fictitious title.

7. Coming to the cross-objections filed on behalf of defendant No. 1, the first objection on his behalf is that he has been made liable for mesne profits. He says that mesne profits ought to be paid not by him but by defendant No. 4. Whatever the relation may be between defendant No. 1 and defendant No. 4 the possession of the defendant No. 1 as against the plaintiff is that of a trespasser and the plaintiff is entitled to mesne profits as against him. The next objection raises the question of the possession of defendant No. 1 over again. That I have already dealt with and I need not repeat what I have said. It has also been argued for the defendant No. 1 that the Subordinate Judge has not definitely found that the lands in suit are identical with the land leased to the plaintiff by the document of the year 1317, That document is Exhibit No. 1 on the record. The two plots of land to which the first schedule of the plaint refers are both found by the Subordinate Judge to be included in that document. He says that plot No. 2 of Exhibit No. 1 includes the plaint land. There is no substance, in my opinion, in the cross-objections urged on behalf of defendant No. 1. The plaintiff pot being the appellant, I guard myself from being understood to express any opinion on the question whether it was open to the defendant No. 1 to take any of these cross-objections except the first.

8. The result is that the appeal and the crossobjections must be dismissed. The plaintiff is entitled to his costs of the appeal and the cross-objections from defendant No. 4 and defendant No. 1 respectively.

9. Beachcroft, J.--I agree.