(1926) 02 CAL CK 0031

Calcutta High Court

Case No: None

(Kumar) Birendra Nath Ray Bahadur		APPELLANT
	Vs	
Satis Chandra Joardar and Others		RESPONDENT

Date of Decision: Feb. 5, 1926

Citation: AIR 1926 Cal 1166

Hon'ble Judges: Page, J; Cuming, J

Bench: Full Bench

Judgement

Cuming, J.

In the suit out of which this appeal has arisen the plaintiffs sued to recover possession of some 155 bighas of land on the ground that they form part of their ancestral patni taluk. Their case is that these lands were formerly in their possession as part of their taluk and that they were diluviated many years ago when the whole mouza was diluviated and was under water. In the year 1896 they began, to re-form but remained unfit for cultivation up to the year 1905; that when they went to take possession of the lands on the strength of their former possession before the diluvion and their putni right they were resisted by the defendant who declared that he had obtained possession of these lands in Assar 1312 corresponding to June 1905 in execution of a decree. The defendant resisted the plaintiff''s suit on various grounds, one of which was that the suit was barred by limitation as the plaintiffs were not in possession of the lands within 12 years of the date of the suit.

2. The suit has been subject of a number of decisions. The first Court dismissed the plaintiffs'' suit on the ground that the question between the parties was res judicata. On appeal to the District Judge he reversed this finding and remanded the case for trial to the first Court. An appeal to the High Court against this order of the District Judge was unsuccessful. The case then went back to the Subordinate Judge, and in January 1924 he dismissed the plaintiffs'' suit holding that it is barred by limitation.

He held that it was not proved that the plaintiffs had been in possession of these lands within 12 years before the institution of the suit. The plaintiffs appealed to the District Judge. The District Judge held that Article 141 and not Article 142 applied to the suit, and on this finding he found that the suit was not barred by limitation. He allowed the appeal, decreed the suit and ordered that the plaintiffs would recover possession of the decretal land by ejecting the defendant. Further, that the plaintiffs would get wasilat for the period of three years before the institution of the suit till delivery of possession. The defendant appeals to this Court, and in this appeal he has contended that the article which applies to the present suit is Article 142 and not Article 144.

3. There was a preliminary objection by the respondents that the appeal was incompetent, their ground apparently being that no copy of a decree of the lower appellate Court having been filed to this Court along with the memorandum of appeal as required by the Civil Procedure Code. The facts would appear to be these: The appeal was actually heard by the District Judge on the 30th June 1925 when ha set aside the judgment of the Subordinate Judge. The decree was signed on the 4th of July. The appeal was filed in this Court on the 14th August. On the 14th September, on an application by the plaintiffs, the District Judge, as the learned advocate for the respondents described it, brought the decree into conformity with the judgment. He would seem to contend, if I understand him rightly, that the decree of the 4th July was thereby set aside and for it a new decree was substituted, and as there is no copy of this decree before the Court the appeal is incompetent. But the real facts are that on the 14th September the District Judge did not in any way alter the decree or bring it into conformity with the judgment, because as a matter of fact the decree was already in conformity with the judgment. What he did was to add a few words in order, apparently, to make it quite clear what the decree meant, although I may say, speaking for myself, that the decree was perfectly clear before. He did not in any way alter the decree. Therefore I do not think that the appeal is incompetent.

4. I will now deal with the appeal before us. The appellant contends that the article which would apply to the present case is Article 142 of the Limitation Act and not Article 144. To discover which is the correct article applicable to the case it is sufficient for us to look at the allegations in the plaint. The plaintiff''s case there is that these lands formed part of their patni taluk and that they were in possession of them up to some time, which they do not state, when the lands diluviated and when they re-appeared the plaintiffs went to exercise acts of possession over them but found the defendant in possession. In other word''s their suit is one for recovery of possession after dispossession. The learned advocate who has appeared for the respondent devoted some considerable time in endeavouring to persuade us that this suit for some reason or other was not a suit for recovery of possession. It seems to me perfectly clear on the plaint itself that it is a suit for recovery of possession after dispossession and therefore Article 142 applies. In dealing with, this paint the

learned Judge remarked:

So this is not a case in which, while in possession, the plaintiff has been dispossessed or has discontinued possession. If it is said that the plaintiffs'' father wanted to enter into possession before the diluvion, the plaintiff was not certainly dispossessed and neither did he discontinue possession by reason of the diluvion.

5. I admit that I am unable to follow the learned Judge''s argument. In view of the fact alleged in the plaint the plaintiffs'' own case is that they were in possession before the diluvion, and if it is now their case, that they seek to eject the defendant, it is perfectly clear that they are seeking for recovery of possession. In that view of the case, as the plaintiffs sue in ejectment, they must prove that they were in possession within 12 years of the date of the suit. They may no doubt prove that by relying on their former possession and contend that the former possession continued until they were dispossessed by somebody else. The facts are that the Natore defendant obtained delivery of possession on the 26th of June 1903 which is 11 years 11 months and 27 days before the date of the suit and that before that time the Tagores were actually in possession. It is, therefore, quite clear that, far from the plaintiffs having proved that they were in possession within 12 years, there is positive evidence that they were not in possession within 12 years prior to the suit.

6. The result therefore must be that the appeal must succeed and the plaintiffs'' suit dismissed with costs in all the Courts.

Page, J.

7. I agree that the appeal must be allowed and the plaintiffs'' suit dismissed. But I desire to add that I limit the reasons upon which I found my decision be those which I am now about to state.

8. The dispute has arisen in respect of 155 bighas of char land to the south of the river Goria. That land was part of a far larger area of 1351 bighas as to the ownership of which there has been a perennial dispute between the Natores, on the one hand and the Tagores on the other. From time to time certain other persons such as the Majumdars and the plaintiffs have laid claim to their property. But the protagonists in their dispute are the Natores and the Tagores. In 1897 the matter came to a head and in a suit between these two families it was held that the Natores were entitled to all the lands within a certain mouza which would include the lands in dispute. That did not suit the views and aspirations of the Tagores, and they entered into an agreement with the plaintiffs that if the plaintiffs would institute a suit claiming title to and a right to possession of this property the Tagores would bear the expenses of the litigation. Pursuant to this agreement the plaintiffs filed the Suit No. 308 of 1908 against the Natores who are the present defendant-appellants. In the event on the 12th July 1915 the High Court decreed that the plaintiffs were not entitled to the property on the north of the river but

declared that the plaintiffs were entitled to the triangular portion of 155 bighas to the south of the river which is the subject-matter of the present proceeding.

9. The plaintiffs thereafter applied for delivery of possession of the triangular portion to which their title had been declared in execution of the decree in Suit No. 308 of 1908. But the High Court held that; inasmuch as the plaintiffs had not prayed for possession in the suit they were not entitled to obtain possession in execution of the decree, and further refused to permit the plaintiffs to amend the decree so that they would be entitled thereunder to apply for possession to be delivered to them. Meanwhile, the is, before the High Court had passed the order to which I have just alluded the plaintiffs in June 1917 instituted the present suit relying on the title which the High Court had already declared to be with them and sought a decree that they were entitled to possession of this triangular portion of the property upon the declaration of their title thereto. Now in the course of the tortuous steps taken in this proceeding the suit found its way to the High Court and the respondents contend that the Court is bound to accept the findings previously arrived at by the High Court in this suit. In an appeal in this suit from an order of the District Judge remanding the suit for re-trial Mr. Justice Richardson referred to and relied on the following observations of Chatterjee, J., in he appeal in Suit No. 303 of 1908.

10. We do not think that there is any satisfactory evidence definitely pointing to the possession of this triangular portion when it re-formed after the northward progress of the Gorai, in fact it was not claimed in the title suit of 1897.

11. Now, the matter stands thus: the plaintiffs have been declared entitled to the triangular portion in dispute; but up till 1908 the date of the title suit brought by the plaintiffs against the Natores it must be taken that there is no evidence, upon which the Court can rely, to justify a finding that the defendant respondent the Natores or anybody else were in actual possession of this 155 bighas. The result is that the plaintiffs'' title which has been declared is good against all persons except those who can prove a paramount title or a title by adverse possession. In this suit which is a suit for possession against the Natores the Natores pleaded that they were put into possession of this triangular portion of the land by the sheriff in execution of a decree on the 26th of June 1905. The learned District Judge, as I apprehend his judgment, has come to the same conclusion on this matter as that to which Mr. Justice Richardson seems to have arrived when the suit came before this Court on appeal for I find in his judgment that he observes:

when the same question was agitated between the parties to the present suit the High Court held that Natore had neither title to nor possession at any time of the land in question in this suit and it was not the subject-matter of the litigation of 1897. I therefore hold that the plaintiffs'' claim is not time-barred.

12. Mr. Bose on behalf of the respondent has urged upon us that we are bound to accept the finding of fact by the High Court in these proceedings. Well he has

appealed to Ceasar, and to Ceasar let him go. It must be taken therefore, pursuant to the finding of the High Court, and as I read the judgment of the District Judge also that notwithstanding the written statement of defendants it is not proved that the defendants were in possession of the property in dispute up till 1908. I invited the learned advocate for the respondents in those circumstances to point out any evidence that the defendant took possession of this land between 1908 and 1917 when the present suit was instituted, and he frankly admitted that there was no evidence to that effect.

13. Indeed, so precarious must be the possession by anybody of this property that it was stated at the present time the 155 bighas in dispute are again under water. This was stated by the learned advocate for the respondent. Now, in this suit to what reliefs are the plaintiffs entitled. They are clearly not entitled to claim a declaration of their title to the land in controversy for that has already been granted to them and they are not justified in asking the Court again to do that which it has already done. What they claim and seek is delivery of possession of this property by defendant. But in order to be entitled to such reliefs against the appellants they must satisfactorily prove that at the date when they filed their suit the defendants were in possession of the property. In the circumstances to which I have adverted, in my opinion, it must be taken that they have failed to prover that essential ingredient in their alleged cause of action against the defendants. It follows, therefore, in my opinion, that the claim of the plaintiffs in this suit must be dismissed. I agree that the appeal should be allowed with costs.