(1924) 11 CAL CK 0064

Calcutta High Court

Case No: None

Hangeswar Kundu and Others		APPELLANT
	Vs	
Surjya Narain Mondal and Others		RESPONDENT

Date of Decision: Nov. 28, 1924

Citation: AIR 1925 Cal 1221 : 87 Ind. Cas. 336

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

Bench: Full Bench

Judgement

Suhrawardy, J.

The only question that arises for consideration in this case is whether the plaintiff''s suit is barred by limitation, or in other words whether the defendants have acquired exclusive title to the land in suit by virtue "of the adverse possession, The predecessors of the parties were joint co-owners in respect of several properties'' consisting of hashil land, patit lands, jungles and tanks. Bisu, the predecessor of the appellants in the other appeal (S.A. No. 1256 of 1922) brought in 1906 a suit for partition of the mouza, which belonged to the joint family. The heirs of the other brothers, including Balai (the father of the appellants in this appeal), filed a written statement in that suit in which they alleged that hashil, patit and other lands were partitioned amongst the co-sharers long ago and some of the tanks and jungles were left unpartitioned. Thereupon Bisu withdrew the suit in 1908. In 1908 the defendants'' lessee brought a criminal case against the plaintiffs for catching fish from the tank in suit and the plaintiffs were fined on the 9th June 1908. The present suit was instituted on the 1st June 1920. Both the Courts have found that plaintiffs'' suit is barred by limitation.

2. It has been argued before us that the case being one between coparceners of a joint family, the law has been wrongly applied by the lower Courts to the facts of the present case. It is contended that in order to make the Statute of Limitation run against a co-owner in a suit, in respect of property, which was at one time held

jointly by all the co-owners, there must be a finding as to actual ouster by the plaintiffs co-owners;and it is further contended that this ouster must be express and such as will give sufficient notice to the dispossessed co-owner of the commencement of the act of dispossession by his co-owner. It is not correct to say that in order to make limitation run against a coparcener by adverse possession of a co-owner, there must be ouster from possession of the other co-owner. It is not necessary to cite authorities in support of this proposition as it is firmly settled by several decisions of the Privy Council as well as of this Court. But the real question that has always come up for consideration is as to what amounts to ouster from possession. The findings in the present case are that the suit was brought by one of the co-owners for partition of properties alleged to be joint in 1906, in which the plaintiffs'' predecessors and other co-sharers alleged that some of the properties had long been partitioned, and one of such properties was the disputed tank. In support of the written statement, it is found the defend-ants without suit produced a certain pottah and a kabuliyat, dated the 17th Ashar 1299, which were exchanged between Defendants Nos. 1 to 7 and their lessee, Tara Chand Kewat in respect of the disputed tank. It is not apparent whether these documents were actually filed; but a list of the documents filed by the defendants in that case has been produced. From these facts the Court of Appeal below has found that there was a partition of the mouza between the four original brothers long before the memory of the existing generation. After partition Defendants Nos. 1 to 7 or their predecessors were found to be in exclusive possession of the tank In suit and the plaintiffs and their predecessors not only never asserted any claim to this tank thereafter, but their predecessors admitted that there was a previous partition of a portion of the joint property including the disputed tank. It is further found that the defendant in the suit of 1906 did give notice to their co-sharers of the fact that the tank was claimed exclusively by the predecessors of Defendants Nos. l to 7 and that they were setting up adverse possession of it against the other co-sharers. The Court below has further accepted the story of Defendants Nos. 1 to 7 that they were possessing the tank from a very long time by letting it out to the kewats or fishermen. From these circumstances the Court of appeal below has drawn the following conclusion: "In such circumstances I agree with the learned Trial Court and find that the plaintiffs were not in possession within 12 years before suit. I prefer the evidence of possession on the defendants'' side and hold that they hold adverse and exclusive possession of the tank since the partition of the mouza between the four original co-sharers which took place long before the memory of the living generation." The" learned Judge further proceeds to observe thus: "Even if it be held that the tank was ijmali property but by some arrangement between the co-sharers the Defendants Nos. 1 to 7 are holding exclusive possession of it, these suits must fail because such exclusive possession cannot be disturbed unless by a partition suit." It is contended by the learned advocate for the appellants that these findings are not sufficient to constitute ouster in law and reference has been made in this connexion to the decision of the Judicial Committee in the case of Hardit Singh v. Gurmukh Singh AIR

1918 P.C. 1 and It is maintained that in order to constitute ouster there must be an express exclusion of the other co-sharers from the property in suit. It is difficult to lay down any definite rule of law as to what constitutes an ouster, but every case must depend upon its own facts and the Court of fact is entitled to find whether certain set of facts presented before it does or does not amount to ouster. The decisions of the Judicial Committee, which are based on fact and law are not sure guides in such questions which arise in second appeals. But we are unable to hold that the facts found in the present case do not in law amount to ouster. The latest case on this point, in which all the previous decisions on this question were cited and considered, is the case of Varadu Pillai v. Jevarathnammal AIR 1919 P.C 44. Viscount Cave in delivering the judgment of the Judicial Committee has quoted with approval the doctrine to be found in the case of Cully v. Deed. Taylerson [1840] 9 L.J.Q.B. 288, which is as follows: "Generally speaking, one tenant-in-common cannot maintain an ejectment against another tenant-in-common because the possession of one tenant-in-common is the possession of the other, and to enable the party complaining to maintain an ejectment, there must be an ouster of the party complaining. But, where the claimant, tenant-in-common, has not been in the participation of the rents and profits for a considerable length of time, and other circumstances concur, the Judge will ask the ''jury to presume that there has been an ouster." We are of opinion that the elements found in this case would in law in the view of their Lordships in the case last mentioned, amount to an ouster. In this view of the matter It is not necessary to refer to the cases which have all proceeded upon the particular facts found in them.

3. The learned Subordinate Judge has also held that the suit is barred by limitation under Article 142, Lim. Act. The plaintiffs came to Court on the allegation that they were in possession and were dispossessed by the defendants, practically by the findings of the Criminal Court on the 9th June 1908. The learned Subordinate Judge has found that they were not in possession on that date and as they came to Court on the allegation of possession and dispossession he was of opinion that Article 142 applied and that the suit was barred by limitation. It is contended by the appellants that this Article is not applicable to the case of co-owners. It is unnecessary in view of our findings on the first point to express any opinion upon this point.

4. The result is that this appeal fails and is dismissed with costs.

S.A. No. 1256 of 1922.

5. The sole appellant is the purchaser of the shares of the sons of Bisu, who are the grandsons of Bansi, one of the four brothers constituting the joint family. The learned vakil appearing for him has adopted the arguments advanced by the learned advocate in S.A. No. 1257 of 1922 and has further argued that his'' client being a mortgagee and purchaser in execution of the mortgage decree, time against him ought to run from July 1914 the date of his purchase and in support of this contention has relied upon the case of Aimadar Mondal v. Makhan Lal Dey

[1906] 33 Cal. 1015. The facts found in that case., however, are that the plaintiffs, mortgagors, were in possession at the time of mortgage and, therefore, the principle established thereon that adverse possession against the mortgagor is not really against the mortgagee does not apply in the present case.

6. We think that the view taken by the Court below is correct and this appeal is dismissed with costs to the respondents represented by Babu Bejoy Kumar Bhattacharjee.

Cuming, J.

7. I agree.