Vishnu Bhikaji Adhikari Vs Babla Lakha Jathar

Court: Bombay High Court

Date of Decision: Oct. 7, 1920

Acts Referred: Khoti Settlement Act, 1880 â€" Section 10
Land Revenue Act, 1879 â€" Section 84

Citation: AIR 1921 Bom 38 : (1921) 23 BOMLR 411 : 61 Ind. Cas. 594

Hon'ble Judges: Norman Macleod, J; Fawcett, J

Bench: Division Bench

Final Decision: Dismissed

Judgement

Fawcett, J.
The plaintiffs are Khots of a village in the Ratnagiri District. They sued to recover possession of certain land which was in the

possession of the defendant No. 1, who is the appellant in Appeal No. 55 of 1918. The plaintiffs" case was that one Babu Daji was the occupancy

tenant of the land, and that he had relinquished the same in the plaintiffs" favour in 1913. They claimed, therefore, to be entitled to the land in suit.

The defendant No. 1, Lakha, alleged that he was the occupancy tenant as heir of one Sada Narshet, who died in the year 1898, and that as he had

been in possession for over twelve years any right of Babu Daji had been extinguished.

2. The trial Court held that Babu Daji, and not defendant No. 1. was the rightful occupancy tenant as heir of Sada Narshet, It also held the

Rajinama to the plaintiff"s proved, and accordingly passed a decree in favour of the plaintiffs for possession and mesne profits.

3. In appeal by the defendant No. 1 to the District Court, it was held that defendant No. 1 was not Sada"s heir, and that although defendant No. 1

had been in possession for over twelve years, still that did not give him the occupancy right. On the other hand, his possession since 1898 as a

tenant prevented his being treated as a trespasser, and as such required to give up his land without any notice. Such notice admittedly not having

been given the plaintiffs were not entitled to a decree for possession. It accordingly modified the lower Court"s decree, holding that the plaintiffs

were entitled only to a declaration of their ownership of the property in suit.

4. Both parties have appealed from this decision. Taking the defendant"s appeal first, the only substantial point put before us by his pleader is that

there is nothing in the Khoti Settlement Act to prevent adverse possession operating, and that on the finding of the lower appellate Court the

plaintiffs" right to recover possession of the land should be held to be extinguished. The real point, however, is whether the defendant No. 1 "s

possession was adverse as against the Khoti as well as against the rightful occupancy tenant. It might, no doubt, be urged that as the plaintiffs

claimed by virtue of the relinquishment in their favour by Babu, and the latter"s title had been extinguished by adverse possession, the possession of

defendant No. 1 operated also against the plaintiffs who claimed through Babu. An instance in which such a contention succeeded is the case of

Goblnda Nath Shaha Ghowdhry v. Surja Kanta Lahiri ILR (1899) Cal. 460. But that case has been dissented from in Thamman Pande v. The

Maharaja of Vizianaqram ILR (1907) All. 593, in which it was held that possession acquired during the continuance of a lease will not ordinarily

be adverse possession as against the lessor until at any rate such time as the lessor becomes entitled to possession. This follows the ordinary

definition of "adverse possession ", namely, " possession by a person holding the land on his own behalf or on behalf of some person other than the

true owner, the true owner having a right to immediate possession ". In the present case, the defendant No. 1 in his written statement says that

since 1898 he has been paying dues to the Khot while in possession of this land, and the case is, therefore, similar to one where the possession is

acquired during the continuance of a lease. So long as the Khot received proper dues from the defendant No. 1 he was not prejudiced, and there

is no reason for saying that the defendant No. 1"s possession was adverse to him; in other words he had not a right to the immediate possession of

land which was in the possession of a tenant paying the proper dues. This is in accordance with a ruling of this Court in Yesa bin Rama v.

Sakharam Gopal ILR (1905) Bom. 290: 7 Bom. L.R. 941, where the whole question of the result of an alienation by an occupancy tenant in a

Khoti village is carefully considered. That decision was given before the amendment of Section 10 of the Khoti Settlement Act, 1880, by Bom.

Act No. VIII of 1912, and in view of the terms of Section 10, as it then stood, it was held that an occupancy tenant, whose tenancy is not

determined; did not forfeit his tenancy by parting temporarily with the possession of his land to another without resigning the land to the Khot, and

so long as his tenancy was not determined, the land was not at the disposal of the Khot. Section 10, as now amended, provides that if an

occupancy tenant resigning the land or any portion of the land in his holding or does any act purporting to transfer such land or any portion thereof

or any interest therein without the consent of the Khot (except in certain cases), such land shall be at the disposal of the Khot as Khoti land free of

all encumbrances, other than liens or charges created or existing in favour of Government. This amendment, however, does not affect the present

case, the twelve years'' adverse possession of defendant No. 1 being complete before the amendment was enacted. The case, therefore, falls

within the ruling in Yesa bin Rama v. Sakharam Gopal. In that case it was further held that, though an occupancy tenant cannot transfer his

occupancy right without the consent of the Khot, yet there was nothing to prevent him from disposing, at his will, of any rights which he possesses

other than such occupancy right. Thus he can, as long as his own tenancy is undetermined, grant to another the right which is in him, but he cannot

give a right which would survive his own interest, so as to force upon the Khot a tenant claiming in his own right a permanent occupancy as against

the Khot, surviving after the rights of the transferee had determined. Accordingly it was held that the transferee cannot claim for himself any

permanent tenure on a fixed statutory rent, and although the plaintiff Khot was not allowed to recover possession of the land transferred, yet he

was granted a declaration that no occupancy tenant''s rights in the land had been transferred by the occupancy tenant to his transferee. It follows

from this that the defendant No. 1''s adverse possession against Babu only operates to extinguish Babu''s right to the actual possession of the land,

and does not operate to annihilate his occupancy tenant''s right which he could, therefore, transfer to the Khot. As pointed out in the trial Court''s

judgment, the defendant No. 1 does not allege that his possession was prior to the commencement of the revenue year 1845-46 so as to entitle

him to a right of occupancy tenant u/s 5 of the Khothi Settlement Act, 1880, and that right could not be transferred to him by Babu under the

decision just referred to. It cannot accordingly have been acquired by adverse possession, for that would give greater right to possession by wrong

or usurpation than to possession under transfer from the rightful occupancy tenant, and as already remarked the possession was not adverse

against the plaintiffs. I think, therefore, that the lower Court was correct in saying that defendant No. 1''s adverse possession for over twelve years

does not give him the occupancy right.

5. We were referred by the appellants'' pleader to the judgment of this Court in S.A. No. 922 of 1914, in which the plaintiff had been held to have

been in possession of the land in suit for over twelve years before the Khot obtained a relinquishment from a registered occupancy tenant, and it

was decided that the title acquired by prescription under the Indian Limitation Act by the plaintiff had not been displaced by the recent possession

of the Khot, which was much less than twelve years before the suit. The plaintiff was accordingly held entitled to a decree for possession. That

decision does not, however, really affect the view taken above. The plaintiff in that case had been forcibly dispossessed by the Khot, and the

relinquishment in his favour was before the amending Act of 1912. The lower appellate Court in its judgment says that"" the Khot had then either to

allow the transferee to continue in possession or if he wanted to evict him, he was bound to give him a notice according to the Bombay Land

Revenue Code. But he was not to take the law in his hands by getting a Sodpatra for himself from one who had no subsisting right. Therefore the

plaintiff can maintain the suit to recover his lost land."" That recognises the right of the Khot to serve a notice upon the plaintiff under the Bombay

Land Revenue Code, and then obtain possession in due course of law, and as he had not given such notice, the plaintiff was entitled to recover

possession. Had he given such notice the decision might have been different.

6. The plaintiffs'' Appeal No. 992 of 1917 objects to the decision of the District Judge that the defendant No. 1 was entitled to the three months''

notice prescribed by Section 84 of the Bombay Land Revenue Code. This, however, is clearly correct and in accordance with the view taken in

Yesa bin Rama v. Sakharam Gopal. In that case it was held that the Khot could not claim to treat the person in possession under a right derived

from the occupancy-tenant either as a trespasser or even as a yearly tenant, so long as the privileged occupant''s rights remain undetermined by

resignation, lapse or duly certified forfeiure. Here, however, there has been a resignation by the rightful occupancy tenant, and the most that

defendant No. 1 can claim is to be a tenant u/s 8 of the Khoti Settlement Act, Under the provisions of that section, in the absence of any specific

agreement between himself and the Khot, he must be held to be a yearly tenant liable to pay rent to the Khot at the rates prescribed and

accordingly he is entitled to the notice prescribed in the case of yearly tenants u/s 84 of the Bombay Land Revenue Code. The result is that both

appeals should, in my opinion, be dismissed with costs.

Norman Macleod, Kt., C.J.

7. I agree.