

Equivalent citations: AIR 1942 Cal 233

Hemanta Kumari Debi And Ors. vs Midnapore Zemindary Co. Ltd. on 6/5/1941

JUDGMENT

1. This appeal arises out of a suit for recovery of khas possession with mesne profits of certain lands . . . or in the alternative for assessment and recovery of fair rent from the beginning of 1339 B.S. (1932-33 A.D.) to the Pous last of 1342. The disputed lands appertain to permanently settled mouza Sibnagar diar otherwise known as Araj Sibnagar. Plaintiffs are owners of 12 as 9 gds. 2 krs. and 2 krant share in zamindari and mourashi jote right. The remaining share of the mouza belongs to the defendant in putni right. The plaint lands have been surveyed by a Commissioner and have been shown in his map as part of plot C, the whole of plots D and E. At the time of the trial in the lower Court plaintiffs withdrew their claim in respect of plot E. Plaintiffs' claim for possession of plot D was not opposed before us by the defendant. Plaintiffs are therefore entitled to get khas possession of that land to the extent of their share, viz., 12 as 9gds. 2krs. and 2 krants. The lands being admittedly sandy, plaintiffs' claim for mesne profits in respect of this land does arise. The dispute in this appeal is confined to 396 bighas of land in plot C (hereinafter referred to as the disputed land) to the immediate east of a jote held by the defendant under the plaintiffs at an annual rent of Rs. 76-8-0.

2. The ease of the plaintiffs is that the defendant is in possession of this disputed land as a trespasser and that they came to know of this trespass on 23rd January 1924 and consequently they are entitled to recover khas possession with mesne profits of the disputed land to the extent of their share. They also claim Rs. 1-8-0 per bigha as fair rent for their share of the disputed land in the alternative. The defence of the defendant so far as it is relevant for the purpose of the present appeal is that they have acquired a tenancy right in the whole of the disputed land by adverse possession for more than 12 years. As regards the rate of fair rent, the defendants allege that 4 as. per bigha is the fair rent. The trial Judge has accepted the defence of the defendant. He has accordingly dismissed the plaintiffs' claim for khas possession of the disputed land but has decreed fair rent at the rate admitted by the defendant. Hence this appeal by the plaintiffs. The first point for determination in this appeal is whether the defendant has acquired tenancy right to the whole of the disputed land by adverse possession for more than 12 years.

3. No doubt the case of the plaintiffs as made in the plaint is one of dispossession by the defendant after they had been in possession, at least constructively, of the disputed land. But the defendant admits that the plaintiffs have title to these lands. It is also admitted that before the defendant went into possession as a tenure-holder the lands were under water. The defendant does not claim to have been in possession in assertion of any title other than that of a tenant under the plaintiffs. In our opinion when the defendant in possession sets up a title only to a limited interest which even if completed would not extinguish the title of the plaintiff, it is for the defendant to establish his title in order to defeat the claim of the plaintiff. The claim of the defendant is now confined to the interest acquired by adverse possession. Adverse possession-the temporary and abnormal separation of the enjoyment of property from the title to it is a "jus possessionis" in a person having no 'jus possidendi' and means possession which is hostile under a claim or colour to title. The possession must be actual, open, uninterrupted, notorious, exclusive and continuous. When such possession is continued for 12 years it confers an indefeasible title upon the possessor.

4. The extent of the title acquired by adverse possession depends on the extent of the claim or right under which possession is obtained and kept. If claim is restricted to a limited interest in the property, e. g., tenancy . right in the property, possession is adverse to the extent of that limited interest only. There can be no question of absolute title by adverse possession when only a limited interest has been asserted. It is not disputed that the lands in suit appertain to the permanently settled mouja Sibnagar. The case of the plaintiffs is that the disputed lands are the lands reformed in situ within the permanently settled area of the said mahal. Neither in the plaint nor in their evidence the plaintiffs make it clear when this reformation took place. The plaint is that after this reformation in situ the defendant company came into the exclusive possession of the disputed land in

sixteen annas as a trespasser, without any right, and was realising rents from the tenants.

5. The evidence of C.W. 19 shows that in the record of rights of mouja Araj Sibnagar which was prepared under Ch. 10, Bengal Tenancy Act, in 1913-14, the disputed land was recorded in the possession of the defendant in the right of a tenure-holder, the lands being recorded partly in the khas possession of the defendant company and partly in its possession through the tenants. The reformation in situ as alleged by the plaintiffs admittedly took place prior to this date. There were dearah proceedings for resumption of the disputed land along with other lands in the year 1918. From the dearah khatian (Ex. 12), it appears that the defendant was assessed to rent in respect of the disputed land as tenure-holder. The documentary evidence on the side of the defendant (Ex. A series, Ex. G series, Ex. E series, Ex. F series, Exs. C and C-1) support the entries in the cadastral survey record and the dearah khatian. They prove defendant's possession of the disputed land from 1910-1924 partly in khas and partly through tenants under the Udbandi system.. They also show possession of the defendant through rayats and in khas from 1925 to 1934. The contention of the appellants is that the possession of the defendant from 1910 to 1934 was not continuous inasmuch as (a) the disputed land remained completely under water in 1931 and 1932 and (b) the disputed land goes under water every year in the rainy season and remains under water from Asar to Aswin.

6. Plaintiffs examined some witnesses to prove that five or six years prior to 1937 the disputed land remained under water for 2 or 3 years. The trial Judge has not believed this evidence. Their evidence has been placed before us and we are of opinion that the trial Judge was right in disbelieving this. Again even if the disputed land remained completely under water in 1931 and 1932 the defendant completed their adverse possession for the statutory period before 1931. The evidence on the side of the plaintiffs to show that the disputed land remains under water every year, from Asar to Aswin, is not at all satisfactory, but the evidence of defendant's witness 5 before the Commissioner is that the disputed land gets flooded during the rainy season every year and remains under water for two or three months. There cannot be any doubt therefore that the disputed land gets flooded during the rainy season and remains under water for 2 or 3 months. The question then is whether this annual flooding is of such a nature as to place the disputed land out of the control of the defendant company and thus to disturb the continuity of its possession, whether the defendant company on its part became dispossessed by the vis major of the floods. Dispossession of a trespasser by vis major has the same effect as voluntary abandonment of possession by him.

7. It is true that the doctrine of constructive possession is not available to a trespasser. In fact 'constructive possession' is only the right to take physical possession and is the 'jus possidendi.' Such a right does not exist in a trespasser. He has only the 'jus possessionis' and this is a distinct right dependent for its existence on a certain relation between a person and thing. "Possession," as has been pointed out by Markby, "originally expresses the simple notion of a physical capacity to deal with a thing as we like, to the exclusion of every one else." In order to constitute possession in a legal sense, there must exist, not only the physical power to deal with the thing as we like and to exclude others, but also the determination to exercise that physical power on our own behalf. It thus involves a physical fact (corpus) and a mental state (animus). To constitute possession the claim of the possessor must be effectively realised in the facts. To gain possession there must thus be certain physical relations and a certain intent. The question is how far these facts must continue to be presently true of a person in order that he may continue in the rights which follow from their presence. Absolute security for the future is not requisite, for it cannot be had. All that is necessary is that according to the ordinary course of affairs one is able to count on the continuing enjoyment of the thing. (Salmond Jurisprudence, Edn. 9, p. 378, footnote (1)). In order to prove the continuance of possession, it is not necessary to prove an actual bodily continuous possession. Possession may be continuous even though the actual acts of possession are at considerable intervals. How many acts of possession will lead to the inference of continuity of possession would depend upon the nature of the subject possessed. The will itself may be sufficient if manifested in an appropriate environment of facts.

8. The evidence on the plaintiffs' side (P. Ws. 1, 3, 11 and 18) is that the disputed land yields two crops and that its flooding during the rainy season does not interfere in any way with the raising of these two crops. It

may be that in some years the crops raised before the rainy season were destroyed by floods but as soon as the time for raising the second crop came the land was cultivated and crop was grown. The lands being capable of yielding only two crops and the tenants of the defendant having raised these two crops every year in spite of the annual flooding during the rainy season, it cannot be held that the possession of the defendant's tenants was not continuous throughout the year. In fact their possession is not in dispute in this case. There is no evidence that they could not use the lands even if they wanted to do so. The evidence is that they did not use these lands during these months and that from the very character of the land nothing active was required to be done in respect of them. It is not the evidence that the land was not capable of any use or enjoyment during this period; only nothing active was required of the occupier to do. The defendant has realized rent from the tenants year after year from the year 1910 to 1934, and the tenants raised the usual crops year after year during all these years. In our opinion the nature and the extent of the flooding established in this case did not, at any point of time, place the land beyond the power or control of the defendant's tenants and the defendant was never dispossessed by the vis major. We, therefore, hold that the defendant had been in continuous possession of the disputed land for more than 12 years before the institution of the present suit.

9. It was contended on behalf of the plaintiffs that even if the defendant was in possession for more than 12 years it was not necessarily adverse possession inasmuch as the defendant is also a co-sharer of the plaintiffs in the disputed land. It is true that the co-sharer may exclusively possess joint lands and his exclusive possession is not necessarily adverse. In the present case, however, plaintiffs' case in the plaint is that the defendant entered into the disputed land as a trespasser and was in possession of the land as a trespasser. Further, the counterfoils (Ex. E series) of the rent receipts granted by the defendant to their tenants and the dearah khatian (Ex. 12) clearly show that the defendant was in possession of the disputed land not as a co-sharer of the plaintiffs but as tenure-holder. The trial Judge was, therefore, right in holding that the defendant has acquired the limited interest of tenant in the disputed land by adverse possession for more than twelve years.

10. The next contention on behalf of the appellants is that the trial Judge should have assessed fair and equitable rent in accordance with the principle laid down in Section 52, Clause (3), Ben. Ten. Act. The case of the defendant in the written statement is that they were in possession of the disputed land as part of their jote of Rs. 76-8-0. The trial Judge found that the disputed land is outside their jote. The defendant is therefore in possession of excess lands. The defendant is a tenure-holder in respect of the disputed land. The evidence in this case shows that the average rate of rent per bigha paid to defendant by the actual cultivators is Re. 1-4-0. Deducting 10 per cent. as collection charge the net profit per bigha is Re. 1-2-0. We are of opinion that plaintiffs should get half of the net profit, viz., 9 annas per bigha. We accordingly assess the fair rent at 9 annas per bigha of the disputed land. The result therefore is that this appeal is allowed in part. Plaintiffs' claim for khas possession in respect of plot D mentioned in Commissioner's map is decreed. Their claim for mesne profits in respect of that plot is dismissed. Plaintiffs' claim for khas possession of 396 bighas in plot C of the Commissioner's map is dismissed. They will get from the defendant Rs. 630-13-0 as fair rent for their share of the disputed land from 1339 B. S. to Pous 1342 B. S. at the rate of Rs. 168-3-6 per year with interest at 6 per cent. per annum from this date until realization. Parties will bear their own costs throughout this litigation.

F.A. No. 221 of 1938 with cross-objection.

11. 7th May 1941--In course of the hearing of this appeal, the learned advocate for the appellants stated that his clients were not willing to proceed with the appeal and the learned advocate for the respondent company also stated before us that his clients were not willing to proceed with the cross-objection. The appeal and the cross-objection are accordingly dismissed. There will be no order for costs either in the appeal or in the cross-objection.