Mahabir Pandey and ors. Vs. Sashi Bhusan Dubey and ors.

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Court : Kolkata

Decided On : Jan-09-1981

Reported in : AIR1981Cal74,85CWN357

Judge : B.N. Maitra, J.

Acts : Evidence Act, 1872 - Section 35; ;Hindu Succession act, 1956 - Section 14(1)

Appeal No. : A.F.A.D. No. 1035 of 1967

Appellant : Mahabir Pandey and ors.

Respondent : Sashi Bhusan Dubey and ors.

Advocate for Def. : Subrata Nayek, Adv.

Advocate for Pet/Ap. : B.N. Chakraborty Thakur and ;Manjula Dhar Chowdhury, Advs.

Disposition : Appeal allowed

Judgement :

B.N. Maitra, J.

1. The plaintiff's case is that the disputed property belonged to one Dwarika Nath Roy, whose name was properly recorded in the C. S. Khatian. He possessed the property all along and died on the 19th May, 1934, leaving his widowJahnabi, pro forma defendant No. 3, and his mother, Mahamaya alias Parbati. Jahnabi inherited that property as Dwarika's sole heir, She and Parbati lived on the homestead left by Dwarika. Then Jahnabi went away else-where and Mahamaya alias Parbati alone managed the property. The latter breathed her last five years before the filing of the suit. By a registered kobala executed on the 9th Nov., 1962, Jahnabi sold the suit land to the plaintiffs. But the principal defendants Nos. 1 and 2 did not allow them to take possession of the property on the assertion that they had purchased the same from Lakshmibala, who had acquired the same from her mother, Parbati, on the footing of a deed of gift. The land was erroneously recorded in Mahamaya's name in the R. S. Khatian. The suit is for a permanent and mandatory injunction and also for recovery of khas possession on the declaration of the plaintiff's title thereto.

2. Defendants Nos. 1 and 2 filed a written statement denying the plaintiff's allegations. It has been alleged, inter alia, that the disputed property belonged to Dwarika's father, Kedar Nath, who left his house in 1930 as a mendicant. So in the C. S. Khatian, the name of Kedar Nath and of his son, Dwarika, was also recorded.

Dwarika had no title or possession. After Kedar Nath left his house, his wife Mahamaya possessed the property as Kedar Nath's heir. She hud her name mutated in the landlord's 'sherisla*. She gifted her property to her daughter, Lakshmibala, by a registered document on the 9th March, 1959. The latter in her turn transferred it to them.

3. The learned Munsif believed the plaintiff's version and decreed the suit. Defendants went up on appeal and lost the same. Hence this second appeal.

4. It has been contended on behalf of the appellants that in paragraph 7 of the plaint there is a clear averment that the suit land has been erroneously recorded in Mahamaya's name in the R. S. Khatian. But there is no prayer that there should be declaration that such entry is wrong. Kedar Nath left the world in 1930. The C. S. Khatian was finally published in 1932, when his son Dwarika was 12 years old. They were governed by the Dayabhaga School of Hindu Law. The period of 7 years envisaged by the provisions of Section 108 of the Indian Evidence Act was not considered by the courts below. In view of the entry in the R. S. Khatian, the entry in the C. S. Khatian will have no value. The plaintiffs could not prove that the property belongedto Dwarika. The mere entry in the C. S. Khalian in Dwarika's name will not confer any title on the plaintiffs because the sale in their favour was made in 1962, whereas Mahainaya gifted the suit land to her daughter, Lakshmibaia, as far back as 1959.

5. The learned Advocate appearing on behalf of the plaintiff-respondents has contended that the fate of the appeal is concluded by the findings of fact arrived at by the learned Subordinate Judge. That court has held that the defendants could not rebut the presumption of correctness of the entry in the C. S. Khatian and could not prove that the property belonged to Kedar Nath. After that finding, the appellants cannot re-agitate that point in second appeal. Both the Courts disbelieved the evidence of the defendants and hence this Court should hold that Dwarika and not Kedar Nath was the owner of the disputed land.

6. There is a clear averment in paragraph 7 of the plaint that the entry in the R. S. Khatian regarding the suit land in Mahamaya's name is erroneous. Neither the learned Munsif nor the learned Subordinate Judge considered this important aspect of the case. In the case of Shankarrao v. Sambhu Wallad, reported in 45 Cal WN 57 : (AIR 1940 PC 192), Sir George Rankin stated that where in coming to a finding of fact, the first appellate court has given no effect whatsoever to the statutory presumption contained in Section 135-J of the Bombay Land Revenue Code of 1879 (corresponding to- the presumption under Section 103-B of the Bengal Tenancy Act), the finding is not binding upon the High Court in second appeal.

7. In the case of Durga Singh v. Tholu, reported in : [1963]2SCR693 , Mudholkar, J. has stated that when there is a conflict between the entries in the C. S. Khatian and the new record of rights, the recent one will be presumed to be correct. This case was followed in the case of Hrishi-kesh v. State of West Bengal, reported in : AIR1978Cal556 . Hence the courts below arrived at an erroneous finding that the defendants could not rebut the presumption of the correctness of the entry in the C. S Khatian. In view of the entry in the R. S. Khatian, the defendants had no business to show that the entry in the C. S. Khatian was incorrect. The approach of the courts below is wrong. Hence the perverse findings arrived at on the basis of such wrong angla cannot be sustained in second appeal.

8. Sir John Beaumont in the well-known case reported in AIR 1946 PC 59 at p. 6thas stated that in a suit for title the plaintiff is to succeed on the basis of his own case and not on the weakness of the defendant's version. The same observation has been made by the Supreme Court in M. M. B. Catholicos v. M. P. Athanasius, AIR 1954 SC 526 at p. 538. The learned Advocate appearing on behalf of the plaintiff-respondents has contended that in 1932, when the C. S. Khatian was finally published, Dwarika was aged 12 years. There is no denial that they were governed by the Dayabhaga School of Hindu Law. So there is no doubt that Kedar, not Dwarika, was the owner. The Courts below overlooked the provisions of Section 108 of the Indian Evidence Act, which enjoin that if a person is not heard of for a period of 7 years, then the presumption of death can arise. In the case of Molla Cassim v. Moolla Abdul in (1906) 10 Cal WN 33 (PC), the Judicial Committee has stated that the provisions of Sections 107 and 108 of the Indian Evidence Act supersede the rules of Hindu Law, which require 12 years' absence before the presumption of death of a person, of whom nothing has been heard during that period, can be made. Since the plaintiffs tried to establish their title to the property and recover khas possession, it was incumbent on them to prove that Dwarika was the actual owner of the property and it was not the duty of the defendants to establish the same. Since the plaintiffs failed to establish by clear and cogent evidence that Dwarika was the actual owner of the disputed land, it must be held that the plaintiffs acquired no title thereto on the footing of their purchase.

9. The entry in the R. S. Kbatian was not touched upon by the courts below. There is no cogent evidence to show that such enlry is erroneous. So that entry shall be presumed to be correct since it has not been shown to be wrong by the plaintiffs by clear and cogent evidence. In the case of Pankajini v. Sudhir in : AIR1956Cal669 it has been stated that the entry in the record of rights may at the most be relevant as some evidence of title and may raise a presumption of title by virtue of Section 103-B (5) of the B. T. Act. Parbati was recorded as the person in possession of the disputed property when the R. S. Khatian was finally published. Before her, Kedar owned it and she had the interest of a limited owner, and I hold accordingly.

10. Section 14(1) of the Hindu Succession Act uses the word 'possessed' in a broad sense, K. Swami in : AIR1959SC577 , Section 14(1) is large in its amplitude andcovers every kind of acquisition of property of a Hindu female. The sweep is very broad, V. Tulasumma, AIR 1977 SC 1944. According to the provisions of Section 14(1) of the Act, such interest ripened into that of a full owner after those provisions came into force with effect from the 17th June, 1956. The transfer was made by her to her daughter Lakshmibala on the 9th March, 1959. She was thus a full owner of the property. Hence the defendants acquired title to the property on the basis of their purchase from Lakshmibala, and I hold accordingly.

11. The appeal is allowed. The judgment and decree appealed against be hereby set aside and the suit dismissed.

12. There will be no order as to costs.