Nausha Mian vs Umrao Singh on 5 December, 1950

Equivalent citations: AIR1951ALL626, AIR 1951 ALLAHABAD 626

JUDGMENT

Mustaq Ahmad, J.

1. This is a deft.'s appeal in a suit for possession over plots Nos. 15, 16, 17 & 18 of village Malwara in district Moradabad. The pltf.'s case was that he had been in possession of those plots as a zamindar but that the deft., some time prior to the suit, had unlawfully dispossessed him. He further alleged that, in the course of his possession, the deft, had constructed some cattle troughs on plot 15, which, like plot 18, was an uftada land, except that on plot 18 there was also a well. The pltf.'s case also was that plots 16 & 17 had been in possession of one Bahadur Shah who left the village some time back, after which these plots had reverted to the pltf. zamindar but had been wrongfully taken possession of by the deft.

2. The defence was that all the four plots in dispute had been in possession of Bahadur Shah whose heir the deft. was & that he had been in possession of the same as such. As regards the troughs on plot 15 there was a plea that they had been erected in place of older kuchcha troughs.

3. Both the Cts. below, while decreeing the suit in regard to plots 15 & 18, dismissed the claim about the other two plots 16 & 17. As both the parties had succeeded & failed in part in the trial Court, there was an appeal by the deft. & cross-objections by the pltf. in the lower appellate Ct. Similarly, in this Ct. the present appeal was filed by the deft. & there are also cross objections by the pltf.

4. The Cts. below passed concurrent decrees on concurrent findings. So far as the decreed portion of the claim is concerned, the lower appellate Ct. first remarked that the deft. had pleaded adverse possession for over 12 years & on that account invoked the bar of limitation. At the end of his discussion of the question of limitation the learned Judge found that "the daft. cannot be said to have bean in adverse possession so as to turn it into title & ownership regarding plots Nos. 15 & 18 "

> This means that the learned Judge imagined that there had been in fact a plea of adverse possession taken by the deft. & that the bar of limitation had been pleaded on that basis. When looking into the written statement, I find that no such plea had been taken at all, although the deft. had pleaded the bar of limitation on the ground that the pltf. had not been in possession of the plots for over 13 years. There is a fundamental difference between the two positions, (l) that the pltf. had not been in possession of the property for over 12 years, that is to say, he was dispossessed more than 12 years prior to the suit, & (2) that the deft. had been in adverse possession of the property for over 12 years. This is so, although in either case the plea in effect is that the suit is time barred. It involves essentially a question of the burden of proof.

> In the one case, the burden would be on the pltf. to prove his former possession & subsequent dispossession within 12 years of the suit, & in the other it would be for the deft. to prove his continued adverse possession for over 12 years. In the present case there can be no doubt, on the assumption that the deft. had pleaded adverse possession & on that basis the bar of limitation, the lower appellate Ct. held that he had failed to prove such a plea. I have already said that there was in fact no such plea & that the plea actually taken was that the pltf. had not been in possession of the lands within 12 years prior to the suit. This being the position, the burden was on the pltf. to prove his original possession & subsequent dispossession by the deft. & not on the deft. to prove his adverse possession, for over 12 years. That is to say, the pltf. had to prove that the suit was within time under the provisions of Article 142 & not for the deft. to prove that the suit was barred by Article 144, Limitation Act. The Judicial Committee in Mohammad Amanullah Khan v. Badan Singh, 17 Cal. 137 : (16 I. A. 148 P. C.), held:
>
> "The proprietary right would continue to exist until, by the operation of the law of limitation, it has become extinguished; but if a claim comes within the terms of Article 142 (enacting that when the pltf., while in possession of the property, has been dispossessed, or has discontinued possession, limitation shall run from the date of the dispossession or discontinuance), in such a case, by the law of Act XV [15] of 1887 & previously of Act IX [9] of 1871, adverse possession is not required to be proved in order to maintain a defence."

5. There is no change in the present Article 142 & 144, Limitation Act, & there is, therefore, no reason why the rule enunciated above by their Lordships should not apply even under these Articles. The point was considered in this Ct. in the case of Kunji v. Niyaz Husain, 1984 A. L. J. 147 : (A. I. R. (21) 1934 ALL. 362) in which the rule was laid down thus:

> "Where the pltf. sues for possession of immoveable property on the basis of his title & pleads dispossession two months before the suit, & the defts. do not assert adverse possession but plead possession under an irrevocable license, the Article of the Limitation Act which is applicable to such a suit is Article 142, & the burden is on the pltf. to show that his dispossession took place within 12 years of the suit."

6. The rule was cited with approval in the F. B. case of Bindhyachal Chand v. Ram Gharib Chand, 1934 A. L. J. 973 : (A. I. R. (21) 1934 ALL. 993 F.B.) where the same position was affirmed.

7. Taking the present case, the pltf. did allege in the plaint his prior possession & subsequent dispossession by the deft. on a certain date. The deft. denied having dispossessed the pltf. on the date so alleged, but pleaded the absence of the pltf's possession since a much longer period. The question of the period until which the pltf. had been in possession of the plots prior to the institution of the suit at once became the subject of a controversy between the parties, the onus being clearly on him & not on the deft. as held in the decisions I have just cited. I cannot, therefore, think that, in this state of the pleadings & the law relevant to the same, it was legally possible for the Cts. below

without the pltf. himself proving his possession within 12 years to hold that the pltf. was still entitled to a decree for possession over plots 15 & 18. So far as the former plot 15 was concerned, there was a definite finding by the lower appellate Ct. in the following words :

> "Therefore, I agree with the learned Munsif & believe that the deft. has been in possession of the western portion of plot No. 15 having cattle troughs on it for the last 16-17 years."

It was in fact unnecessary for the deft. to have established his own possession or his having exercised such possession in a particular form during any period of time. The lower appellate Ct. having imagined that the deft. had pleaded the bar of limitation on the basis of his adverse possession for over 12 years, approached the question from that stand point. It was enough to find that the pltf. had not been in possession of the lands for over 12 years to defeat his suit. A fortiori, in the absence of such finding, the pltf. could not be given such a decree.

8. It was suggested by the learned counsel for the resp. that I should remit an issue at least with regard to plot 18, about which there is no finding by the lower appellate Ct. as to how the deft. had been using it during the period of his possession. As I have remarked, the pltf. in his plaint did allege his prior possession & subsequent dispossession by the deft. Knowing the law, as everyone is presumed to do, it was his duty to adduce evidence to prove his possession & dispossession at a time within 12 years of the institution of the suit. Instead, he appears to have relied on the result of the effort made by the deft. to prove his possession within 12 years. As held in the observations I have above quoted, it was primarily his duty to make out a case for possession subject to the bar of limitation provided by Article 142, Limitation Act. In this he failed. To remit an issue on the question would necessarily be to give him a further chance of filling up a gap which can be allowed only on the hypothesis that a party may be excused for not observing the law when he is presumed to know it. This, surely, is not permissible. On referring to the plaint, I find that plot 18 bears a very small proportion to the adjoining plot 15, & I am convinced that the incidents applicable to both these plots must be the same. In the circumstances, I have no alternative but to set aside the findings of the Cts. below with regard to plots 15 & 18 & dismiss the pltf's. claim in respect thereof.

9. As regards the cross objections filed by the pltf.-resp., the argument of his learned counsel is that the position of Bahadur Shah having been only that of a licensee, neither his possession nor that of his transferee could be adverse to the zamindar. It may be remembered that the pltf's. case with regard to these plots 16 & 17 also was that he had been in possession of them, as of the other two plots, & that he had been dispossessed by the deft. on a certain date mentioned in the plaint along with the latter plots. The trial Ct. found that the pltf. had never been in possession of plots 16 & 17. As a matter of fact, on one of them there was a residential house of Bahadur-Shah & the other was the land of the sahan of that house. Before the lower appellate Ct. it was conceded by the counsel appearing for the pltf. that the entire evidence produced by the pltf. about his possession might be rejected. Perhaps it was hoped that, even if all that evidence was eliminated, there would be no obstacle to the claim being decreed. I, for my part, do not understand that position. Given the fact, then, that the pltf. had not been in possession of these plots also for over 12 years, the same difficulty arises in respect of them as I have mentioned in connection with the other two plots, 15 &

18. Besides, as the lower appellate Ct. has pointed out, Bahadur Shah was in possession of these plots as a licensee & that he had no right to transfer the subject o£ the license. It was also found that the license had been transferred by Bahadur Shah several years before his death & certainly more than 12 years prior to the present suit. On these materials, the Cts. below held that the deft., who had been in possession of these plots for such a long period, had prescribed an absolute title by adverse possession. Learned counsel for the resp. has contended that the possession of a licensee can never be adverse. This is true speaking generally. But where the licensee assumes or arrogates to himself the right of transferring the subject of the license, which in fact he cannot transfer, this surely involves an assertion of an absolute title & consequently a denial of the title of the actual owner. In such a case the possession of the transferee must be unlawful from the date of its inception. That is to say, so far as the present case is concerned, the possession of the deft. was adverse for more than 12 years. In this view, the claim with regard to plots 16 & 17 also was barred by limitation.

10. On these findings, I have no alternative but to allow the appeal & dismiss the cross-objections both with costs, with the result that the entire suit is "dismissed with costs throughout.

11. Leave to appeal under the Letters Patent is refused.