

CALCUTTA HIGH COURT

Joy Gopal Singha

Vs

Probodh Chandra Bhattacharjee

(Nasim Ali, J.)

09.07.1935

JUDGMENT

Nasim Ali, J.

1. This appeal arises out of an action in ejectment. The plaintiffs' case shortly stated is as follows: One Girish Chandra Roy was the owner of the disputed land. He mortgaged it and in execution of a decree obtained on that mortgage it was purchased by one Nritya Gopal Singha in the name of Khagendra Ghosh on 14th March 1906. The plaintiffs as heirs of Nritya Gopal were in possession of the disputed land till they were dispossessed by defendants 1 and 2 in Aswin 1335 B.S. The suit was contested by defendants 1 and 2. They denied the title of Girish to the land in suit and pleaded that the property really belonged to one Ramkalpa, the grandfather of defendant 1. The trial Court came to the conclusion that defendants 1 and 2 were trespassers on the land and that Girish had 12 annas share in the land. It accordingly declared the plaintiffs' title to the extent of 12 annas to the disputed land and gave the plaintiff a decree for possession of that share. On appeal by the defendants to the lower appellate Court the learned Judge has affirmed the finding of the trial Court that the defendants are trespassers. The learned Judge however has found that Girish had only one-fourth share in the disputed land and consequently the plaintiffs were not entitled to get a decree for more than one-fourth share in the disputed land. Hence the present appeal by the plaintiffs.

2. Mr. Gupta appearing on behalf of the appellants has raised two points in support of the appeal. His first contention is that the plaintiffs having been found to be cosharer of the disputed land to the extent of four annas share and the defendants having been found to be trespassers, the plaintiffs were entitled to eject the defendants from the whole of the disputed land. If two persons are joint owners and a third person holds the land with the express sanction and acquiescence of one of the cosharers, he cannot be ejected from the whole of the land by the other cosharer. The latter can get a joint possession to the extent of his share: see *Hulodhar Sain v. Gooroo Das Roy*¹ *Radha Proshad Wasti v. Esuf*² Mitter, J., in *Naresh Chandra v. Haydar Sheikh*³, relying on the opinion of Baron Parke and *Baron Alderson in Deo d. Hellyer v. King*⁴ has held that a cosharer can only recover joint possession as against a trespasser to the extent of his share in the joint property. In 20 LJ Ex 301 (4) Plat B. however observed that a cosharer was entitled to recover possession of the whole. In affirming the decision of Mitter, J., in L.P. 104 of 1928, Rankin, C.J., observed as follows:

A theoretical and highly important question is raised as to whether or not one cosharer can maintain a case of trespass in the absence of other cosharers against the trespasser so as to get an order of eviction as distinct from an order of joint possession with the trespasser. That is a matter which has long been considered in this Court. The position as regards the execution of such an order and the position as regards the theory of the matter have in practice been in this Court dealt with by giving a decree for joint possession together with the trespasser and leaving it to the plaintiff to work out his further rights by a suit for partition. I do not think that there is anything unusual in the form of the decree.

3. In view of the finding of the lower appellate Court that the plaintiffs have succeeded only in establishing his title to the one-fourth share of the disputed land, they are only entitled to recover joint possession to the extent of four annas share with defendants 1 and 2. If the plaintiffs be given a decree for possession of 12 annas share on the ground that he is a cosharer to the extent of four annas share, this will entitle him to get mesne profits to the extent of 12 annas share which under the law he is not entitled to claim. In an action for ejectment the plaintiff must succeed on the strength of his own title and not on the absence of any title in the defendants. In *Currimbhoy & Co. Ltd. v. L.A. Greet*, 1930 Cal 113, C.C. Ghose, J., had held that a cosharer by himself can maintain an action of trespass against a wrong-doer. But from this it does not necessarily follow that he can get a decree for possession of the whole property. In fact as has been stated above the practice in this Court had been all along to give the cosharer a decree for joint possession with the trespasser leaving the plaintiff to work out his further rights by a separate suit for partition. This contention of the appellants therefore fails.

4. The second point urged by the learned advocate for the appellants is that even if the appellants have not succeeded in proving their title to the whole of the 12 annas share, they are entitled to eject the trespasser from that share on the strength of their previous possession. It is argued by the learned advocate on the authority reported in *Mt. Sundar v. Mt. Parbati*⁵ that if a person obtains possession lawfully, peaceably, without force or fraud and no one interested in the land opposes him, he is entitled to maintain his possession against all persons except those who can plead a preferable title, I am unable to accept this contention for two reasons. In the first place it has not been found by the lower appellate Court that the appellants were in possession of the 12 annas share of the land before they were dispossessed by the defendants. In the second place *Mt. Sundar v. Mt. Parbati*⁶ is not an authority for the proposition that where a person brings a suit for ejecting a trespasser and is not defending his possession, he can eject the trespasser from the whole of the land. If a person has entered into possession lawfully and peaceably and if his possession is attempted to be disturbed by a person who has no title, he can maintain his possession by an injunction from the Court. If however he is dispossessed and does not sue for possession under Section 9, Specific Relief Act, he can only succeed on the strength of his own title. Therefore it is clear that the plaintiffs in the present case having failed to prove their exclusive possession of 12 annas share before the dispossession by the defendants and the plaintiffs' title to the extent of four annas share only having been found, the lower appellate Court was right in passing a decree for joint possession in favour of the plaintiffs to the extent of four annas share only. The result therefore is that this appeal is dismissed with costs.

Henderson, J.

5. I agree and only desire to say this, that in dealing with the appellants' contention, that they are entitled to succeed on account of their previous possession, though they have not established

their title, the learned Judge found that this plea must be overruled in accordance with the accepted view of this Court. I am of opinion that the learned Judge correctly estimated the position with regard to the law in this Court and it is not necessary to say any more. In the second place, the previous possession of the plaintiffs was merely that of cosharers and it is quite meaningless to say that they were in possession of a share greater than that to which they were entitled.

Cases Referred.

1(1873) 20 WB 126

2(1881) 7 Cal 414

31929 Cal 28

4(185(SIC) 20 LJ Ex 301

5(1890) 12 All 51

6(1890) 12 All 51