A

KSHITISH CHANDRA BOSE

v.

COMMISSIONER OF RANCHI

February 6, 1981

B

[S. MURTAZA FAZAL ALI, A. VARDARAJAN AND A. N. SEN, JJ.]

Right to assail, in an appeal against the second judgment of the High Court, the correctness of its first judgment, explained.

Law relating to adverse possession and title by prescription, clarified.

C

Second appeal before the High Court, scope of section 100 *Civil Procedure Code.*

Allowing the appeal and answering against the respondent municipality both on the question of title and adverse possession, the Court

D

HELD : 1. The order of remand by the High Court being an interlocutory judgment which did not terminate the proceedings, it is open to the appellant to assail even the first judgment of the High Court and if it is held that the first judgment was legally erroneous, then all the subsequent proceedings, namely, the order of remand, the order passed after remand, the appeal and the second judgment given by the High Court in appeal against the order of remand would become *non est.* [767 D-F, 767 A-B]

E

Keshardeo Chamria v. *Radha Kissen Chamria & Ors. and (vice versa)* [1953] SCR 136; *Satyadhyan Ghosal & Ors.* v. *Smt. Deorajin Debi & Anr.* [1960] 3 SCR 590, followed.

2 : 1 All that the law of adverse possession requires is that the possession must be continuous, open and without any attempt at concealment. It is not

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necessary that the possession must be effective so as to bring it to the specific knowledge of the owner. Such a requirement may be insisted on where an ouster of title is pleaded, but that is not so in the instant case. [768 B-C]

2 : 2. If a person asserts a hostile title even to a tank and despite the hostile assertion of title no steps were taken by the owner to evict the trespasser, his title by prescription would be complete after thirty years. [769 F-G]

G

3. The High Court had no jurisdiction to entertain the second appeal or findings of fact even if it was erroneous. In the instant case, the High Court clearly exceeded its jurisdiction under Section 100 of the Civil Procedure Code in reversing concurrent findings of fact given by the trial court and by the appellate court. [769 G-H, 770 A]

H

Pattabhiramaswamy v. *Hanumayya,* AIR 1959 SC 57, *Raruha Singh* v. *Achal Singh,* AIR 1961 SC 1097; *Mst. Kharbuja Kuer* v. *Jangbahadur Rai,* [1963] 1 SCR 456; *R. Ramachandran Ayyar* v. *Ramalingam Chettiar,* [1963] 3 SCR 604, followed.

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 1034 of 1971. A

Appeal by Special Leave from the Judgment and Order dated 30-9-1970 of the Patna High Court in Appeal from Appellate Decree No. 733 of 1967.

V. S. Desai, D. N. Mukherjee and *N. R. Chaudhury* for the Appellant. B

K. K. Sinha and *S. K. Sinha* for the Respondent.

The Judgment of the Court was delivered by

FAZAL ALI, J.—This is a plaintiff's appeal by special leave against a judgment and decree of the Patna High Court dated 30th September, 1970 and arises in the following circumstances :— C

The plaintiff filed a suit for declaration of his title and recovery of possession and also a permanent injunction restraining the defendant municipality from disturbing the possession of the plaintiff. It appears that prior to the suit, proceedings under s. 145 were started between the parties in which the Magistrate found that the plaintiff was not in D possession but upheld the possession of the defendant on the land until evicted in due course of law.

In the suit the plaintiff based his claim in respect of plot No. 1735, Ward No. I of Ranchi Municipality on the ground that he had acquired title to the land by virtue of a Hukumnama granted to him by the E landlord as far back as 17th April, 1912 which is Exhibit 18. Apart from the question of title, the plaintiff further pleaded that even if the land belonged to the defendant municipality, he had acquired title by prescription by being in possession of the land to the knowledge of the municipality for more than 30 years, that is to say, from 1912 to 1957.

F

The trial court accepted the plaintiff's case and decreed the plaintiff's suit both on the question of title and adverse possession. The defendant filed an appeal before the Additional Judicial Commissioner, Ranchi (Chota Nagpur) which after a consideration of the evidence affirmed the finding of the trial court and maintained the decree of the trial court on both points. Thereafter, the respondent went up in G second appeal to the High Court which was heard by a single Judge of the Court who held that there was no clear evidence to show that the plaintiff had obtained title by adverse possession and by his judgment of 17-2-1967 (hereinafter to be referred to as the first judgment) remanded the case to the trial court for a decision only on the question of title. The effect of the order of remand was that so far as H plaintiff's case that he had acquired title by prescription was concerned, it was finally decided against him. After remand, the Additional

A Judicial Commissioner held that the municipality had proved its title to the land in dispute and accordingly dismissed the plaintiff's suit. The plaintiff then went up in appeal to the High Court which affirmed the finding of the Additional Judicial Commissioner and dismissed the appeal by its judgment of 30-9-1967 (hereinafter referred to as the second judgment). Hence, this appeal by special leave.

B

Appearing for the appellant, Mr. V. S. Desai, submitted two points before us. In the first place, he urged that the first judgment of the High Court by which it remanded the matter to the trial court for a finding on the question of title was legally erroneous inasmuch as the High Court exceeded its jurisdiction under s. 100 of the Code of C Civil Procedure by reversing pure finding of fact given by the two courts below on the question of adverse possession as also on the question of title.

Secondly, it was contended that even so the finding of the High Court on the question of adverse possession was given without at all D considering the materials and evidence on the basis of which the two courts had concurrently found that the plaintiff had acquired title by adverse possession. It is true that the plaintiff did not come up in appeal before this Court against the first judgment of the High Court obviously because the order passed by the High Court was not a final one but was in the nature of an interlocutory order as the case had E been remanded to the Additional Judicial Commissioner and if the said Court had affirmed the finding of the trial Court, no question of filing a further appeal to the High Court could have arisen. Thus, the appellant could not be debarred from challenging the validity of the first judgment of the High Court even after the second judgment by the High Court was passed in appeal against the order of remand. In F support of this contention, the counsel for the appellant relied on a decision of this Court in the case of *Satyadhyan Ghosal & Ors.* v. *Smt. Deorajin Debi & Anr.*(1), where under similar circumstances this Court observed as follows :

> "In our opinion the order of remand was an interlocu- G tory judgment which did not terminate the proceedings and so the correctness thereof can be challenged in an appeal from the final orders."

In coming to this decision this Court relied on an earlier decision in the case of *Keshardeo Chamria* v. *Radha Kissen Chamria & Ors. and* H *vice versa*(2) where the same view was taken.

(1) [1960] 3 S.C.R. 590

(2) [1953] S.C.R. 136

Mr. Sinha appearing for the respondent was unable to cite any authority of this Court taking a contrary view or overriding the decisions referred to above. In this view of the matter we are of the opinion that it is open to the appellant to assail even the first judgment of the High Court and if we hold that this judgment was legally erroneous then all the subsequent proceedings, namely, the order of remand, the order passed after remand, the appeal and the second judgment given by the High Court in appeal against the order of remand would become *non-est.*

We have gone through the judgment of the High Court dated 17th February, 1967 and we find that the High Court has reversed the findings of fact recorded by the two courts below on the question of adverse possession without at all displacing the reasons given by the courts below or considering the important circumstances proved and relied on by them. The High Court based its decision on three circumstances: In the first place it was of the opinion that no clear case of adverse possession was put forward by the plaintiff in his plaint, and all that had been pleaded was that certain building materials were placed on the land in dispute for some time. Here, with due respect, we are constrained to observe that the High Court committed a serious error of record. The allegations in paras 6, 7, 8, 9, 15, 17 and 19 are clear and specific to show the nature of the overt acts committed by the appellant to the knowledge and notice of the defendant. It was not a question of a stray or sporadic act of possession exercised by the plaintiff but the plaint shows that there was a consistent course of conduct by which the plaintiff asserted his hostile title against municipality ever since 1912. It has also been clearly alleged in the plaint that in spite of the objection taken by the municipality the plaintiff had asserted his hostile title by giving notice to the municipal authorities and in the year 1953 even in a criminal case started between the parties it was found that the plaintiff was in possession. The High Court has not at all adverted to any of the circumstances which have been considered by the courts below. For instance, one of the most important facts which clearly proved adverse possession was that the plaintiff had let out the land for cultivatory purposes and used it himself from time to time without any protest from the defendant. During the period of 45 years no serious attempt was made by the municipality to evict the plaintiff knowing full well that he was asserting hostile title against the municipality in respect of the land. For these reasons, therefore, the first ground on which the High Court based its finding cannot be supported.

It was then observed by the High Court that mere sporadic acts of possession exercised from time to time would not be sufficient for the

A acquisition of title by adverse possession. As discussed above, the High Court has not at all cared even to go through the evidence regarding the nature of the acts said to have been committed by the appellant nor to find out whether they were merely sporadic or incidental. Another reason given by the High Court was that the adverse possession should have been effective and adequate in continuity and in
B publicity. Here, the High Court has gone wrong on a point of law. All that the law requires is that the possession must be open and without any attempt at concealment. It is not necessary that the possession must be so effective so as to bring it to the specific knowledge of the owner. Such a requirement may be insisted on where an ouster of
C title is pleaded but that is not the case here. The findings, however, clearly show that the possession of the plaintiff was hostile to the full knowledge of the municipality. In this connection we might extract below the well considered findings recorded by the trial court and Additional Judicial Commissioner both on the question of title and that of adverse possession.

D *Trial Court (Re-Title) :*

> "I have, therefore no doubt that these receipts relate to the suit land and, therefore, they show payment of rent by the plaintiff or his father.
>
> Thus, it has got to be held that the land belonged to the
E landlords within whose zamindari it lay. The plaintiff's father, therefore, obtained a valid title by the settlement from them."
>
> (*Re-Adverse possession*)
>
> "I, therefore, find that the plaintiff has also obtained title by adverse possession inasmuch as he and his father before him
F had been in continuous possession of this land from 1912 till 1957 when they were dispossessed by the order of the magistrate in the case under section 145 Cr.P.C."
>
> Considering all these, I hold that the plaintiff has subsisting title to the suit land and he is entitled to khas possession of
G the same."

Additional Judicial Commissioner (Re-Title)

> "There can be no doubt that Exts. 5 to 5(g) relate to the same lands for which the Hukumnama (Ext. 18) was granted as they are for the same area as given in the Hukumnama and
H the first of these namely, Ext. 5 is for the very first year after the settlement and is dated 20-5-1913. Certainly by the Hukumnama (Ext. 18), which is unregistered document the

land in suit could be settled and it could create good title in favour of the settlee as the settlement was for agricultural purpose and was accompanied by the delivery of possession and grant of rent receipts.....P.Ws. 1, 2, 6, 9 and 8 (Plaintiff) have stated about the constant possession of the plaintiff and his father."

(*Re-Adverse possession*)

"Thus from the facts stated above it is quite clear that the plaintiff and his father were coming in possession of the land in suit since 1912 till the year 1954-55. The Municipality made several attempts to prevent the plaintiff and his father from storing building materials on the suit land from 1924 till 1954-55.

Thus the plaintiff's father is proved to have been in possession of the suit land both before and after the Municipal Survey of 1928-29. The oral evidence of P.Ws. 1, 6, 5, 8 and 9 also prove the plaintiff and his father were in actual possession of the suit land at all times after the settlement by the landlord in 1912. Hence, the presumption of correctness of the Municipal Survey entry has been successfully reputted in this case by the plaintiff.

The High Court was clearly in error in interfering with the aforesaid findings of fact.

Lastly, the High Court thought that as the land in question consisted of a portion of the tank or a land appurtenant thereto, adverse possession could not be proved. This view also seems to be wrong. If a person asserts a hostile title even to a tank which, as claimed by the municipality, belonged to it and despite the hostile assertion of title no steps were taken by the owner, (namely, the municipality in this case), to evict the trespasser, his title by prescription would be complete after thirty years.

On a perusal of the first judgment of the High Court we are satisfied that the High Court clearly exceeded its jurisdiction under s. 100 in reversing pure concurrent findings of fact given by the trial court and the then appellate court both on the question of title and that of adverse possession. In the case of *Mst. Kharbuja Kuer* v. *Jangbahadur Rai*[1] this Court held that the High Court had no jurisdiction to entertain

(1) [1963] 1 S.C.R. 456

A second appeal on findings of fact even if it was erroneous. In this connection this Court observed as follows :

> "It is settled law that the High Court has no jurisdiction to entertain a second appeal on the ground of erroneous finding of fact.
>
> B As the two courts approached the evidence from a correct perspective and gave a concurrent finding of fact, the High Court had no jurisdiction to interfere with the said finding."

To the same effect is another decision of this Court in the case of *R. Ramachandran Ayyar* v. *Ramalingam Chettiar*(1) where the Court observed as follows :—

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> "But the High Court cannot interfere with the conclusions of fact recorded by the lower appellate court, however, erroneous the said conclusions may appear to be to the High Court, because, as the Privy Council observed, however, gross or inexcusable the error may seem to be there is no jurisdiction
>
> D under section 100 to correct that error."

The same view was taken in two earlier decisions of this Court in the cases of *Pattabhiramaswamy* v. *Hanumayya*(2) and *Raruha Singh* v. *Achal Singh.*(3)

Thus, the High Court in this case had no jurisdiction after reversing
E the concurrent findings of fact of the Courts below on the question of adverse possession to remand the case to the Additional Judicial Commissioner on the question of title which also was concluded by the concurrent findings of fact arrived at by the two courts as indicated above.

The conclusion, therefore, is inescapable that the first judgment of
F the High Court remanding the case to the Additional Judicial Commissioner was clearly without jurisdiction and as a logical result thereof the order of remand and all proceedings taken thereafter would become void *ab initio.*

For these reasons, therefore, we allow this appeal, set aside the
G judgment of the High Court under appeal as also the judgment of the High Court dated 17th February, 1967 and decree the plaintiff's suit.

In the peculiar circumstances of the case, there will be no order as to costs.

S.R. *Appeal allowed.*

(1) [1963] 3 S.C.R. 604.
(2) AIR 1959 S.C. 57.
(3) A IR 1961 S.C. 1097.