Debendra Narayan Singh Vs. Narendra Narayan Singh and ors.

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Court : Kolkata

Decided On : Apr-23-1919

Reported in : 51Ind.Cas.976

Judge : Asutosh Mookerjee and ;Walmsley, JJ.

Appellant : Debendra Narayan Singh

Respondent : Narendra Narayan Singh and ors.

Judgement :

1. This is an appeal by the plaintiff in a suit for recovery of damages and of possession of immoveable properties and of a money-lending busine Sections. The father of the plaintiff died on the 5th November 1899. He had made a testamentary disposition of his properties (now in suit) on the 4th March 1881. On the 27th April 1901 his widow, the mother of the plaintiff, obtained a Probate of the Will and took possession of the estate as executrix. Differences arose, however, amongst the members of the family, and in 1903 the plaintiff instituted a suit for construction of the Will and for administration of the estate, joining as defendants his brother and his nephews (the sons of a deceased brother). On the 13th March 1906 a consent decree was made in that litigation which had been brought up to this Court by way of appeal. Under that decree, the plaintiff became entitled to recover a sum of Rs. 15,000 from the estate and for that purpose to be placed in possession for a period of five years. The decree further directed that, upon the expiry of this period, the estate would be held in equal shares by the plaintiff, his

brother, and the sons of his deceased brother. The plaintiff took possession on the 29th October 1906. On the 11th March 1909 the brother of the plaintiff commenced a suit for recovery of possession of his one-third share, on the allegation that the plaintiff had already realised more than his dues under the decree. The suit was decreed on the 12th April 1911. The decree directed that the then plaintiff do take possession within 15 days and that on failure to do so, he do forfeit his right to take an account of the sums received by his brother. The decree was accordingly forthwith executed on the 21st, 22nd and 23rd April 1911. The writ for delivery of possession directed that possession be delivered to the decree-holder by removal of any person who, though bound by the decree, refused to give up possession. Possession was delivered in the usual manner; bamboos were posted, drum was beaten and the purport of the decree and the writ was proclaimed. It was found that the plaintiff had looked up the granaries, ware-houses and store-rooms. The decree-holder and his nephews accordingly put on additional looks. The result was that it became impossible for any of the parties to obtain access to the ware-houses or store-rooms by removal of the look put on by himself; they must act in concert and remove all the locks before any one could enter. Objection to the mode in which possession had been delivered was taken before the Execution Court, but was overruled on the 9th May 1911. An appeal was preferred to the High Court, but was ultimately abandoned on the 19th May 1913, Meanwhile, correspondence passed between the legal advisers of the parties with a view to arrange matters amicably so that the goods and papers looked up might be dealt with in due course. The attempt proved fruitle Sections. The present plaintiff appears to have acted most unreasonably. He would not agree to the appointment of a common manager and also had the proceedings stayed by order of this Court. Ultimately, after the dismissal of the appeal to the High Court the Subordinate Judge directed a Commissioner, on the 15th January 1914, to unlock the doors. This order was carried out and on the 21st February 1914 the Commissioner submitted a report. He found that many of the granaries were empty and the papers were in disorder. On the 20th April 1917 the plaintiff commenced this action for damages on the allegation that the pad-looks placed by him had been broken open at the time of delivery of possession and that the defendants had placed their own padlocks, with the result that the plaintiff had

been ousted and had suffered heavy damages by the destruction and deterioration of the properties. The Subordinate Judge has held that the story set out by the plaintiff, namely, that the padlocks placed by him had been removed, was untrue. What happened was that when the defendant and his nephews found that the doors had been looked up by the plaintiff, they placed additional padlocks to make it impossible for the plaintiff to enter without their concurrence. We feel no doubt on the evidence that the Subordinate Judge has correctly found what actually took place. The question now arises, whether the conduct of the defendants was such as to amount in law to ouster of the plaintiff and thus to entitle him to claim damages.

2. The principles applicable to cases of this character are well settled. Each joint owner has the right to the possession of all the property held in common, equal to the right of each of his companions in interest and superior to that of all other persons. He has the same right to the use and enjoy ment of the common property that he has to his sole property, except in so far as it is limited by the equal right of his co-sharers. Accordingly, each co-owner may, at all times, reasonably enjoy every part of the common property, that is, he is entitled to such enjoyment as will not interfere with the like rights of the co-owners. It necessarily follows that one co-owner has no right to the exclusive possession and use of any particular portion of the joint property; and if he exercises such rights and excludes his co-sharer from participation in the possession, he must account to his co sharer for his interest in the part from which he is ousted, even though he takes no more than his just share, But the co-sharer out of possession cannot complain of the mere possession of the co-owner, so long as he refrains from setting up any claim to share in that possession. Hence in order to give rise to a cause of action against the co-sharer, it must be proved that his act has amounted to ouster or disseisin. It is not easy to frame a formula which will cover all cases of ouster, but it may generally be stated that where there is an actual turning out or keeping excluded the party entitled to the possession, there is an ouster. Any resistance preventing a co-sharer from obtaining effective possession is an actual ouster. Such resistance must be clearly and affirmatively shown and is not presumed from equivocal facts which may or may not have been designed to operate as an exclusion. Thus, it was ruled in Jacobs v. Seward (1872) 5 H.L. 464 ; 41 L.J.C.P.

221 ; 27 L. 185 that a finding that the gate of the premises was kept looked did not establish an ouster, because it did not show that plaintiff was excluded by the looking or that at some time he applied to have it unlocked and was refused. In the case before us, the defendants placed locks on the doors after the plaintiff had taken a similar measure. It was not their intention to exclude the plaintiff; they only desired to prevent the plaintiff from enjoying exclusive possession and were ready to remove the looks as soon as the plaintiff would do so and allow them to exercise their rights as joint owners. It was the plaintiff who acted unreasonably and in defiance of the rights of the defendants. He persisted in his obstructive attitude even after the title of the defendants had been judicially established and possession had been delivered by the Court. It is impossible to hold that there was ouster of the plaintiff by the defendants whose aim throughout has been, not to exclude the plaintiff, but to obtain joint possession with him. The principal ground set out in the plaint in support of the claim is consequently unsustainable.

3. In this Court, however, strenuous endeavour has been made to support the claim on a somewhat different ground. Our attention has been drawn to portions of the evidence to show that the 1st defendant has taken possession of some of the granaries and possibly carried off some of the crops stored there. No such allegation was made in the plaint, but even if it be established, the act could not constitute ouster or trespass on joint property. A tenant-in common, as was explained in Mahesh Narain v. Nowbat Pathak 32 C. 837 ; 1 C.L.J. 437 cannot be held liable to his co-tenant for damages for use and occupation of the joint property, unless there has been waste or ouster. Where one tenant in-common occupies part of the joint property without assertion of hostile or exclusive title and without claim by his co-tenant to be admitted into possession, he is under no obligation even to account, for he has a right to such occupancy. In the case before us, the embarrassment in which the parties now find themselves is due to the persistent attempt of the plaintiff to frustrate the decree obtained by the defendants against him for the enforcement of their undoubted rights in joint property.

4. The result is that the decree of the Subordinate Judge is affirmed and this appeal dismissed with costs.