

APPELLATE CIVIL.

Before Mukerji J.

1932

July 13, 20.

KULACHANDRA GHOSH

v.

JOGENDRACHANDRA GHOSH.*

Sale—Delivery of possession, character of—Permissive possession, sufficiency of—Transfer of Property Act (IV of 1882), s. 54.

In the case of a sale by delivery of possession, though the essence of delivery no doubt is that possession should change, it is enough if the *character* of possession changes: in other words, if the vendor converts, by appropriate declarations or acts, the previous permissive possession of the vendee into plenary possession as that of a vendee, there is sufficient delivery of possession within the meaning of section 54, Transfer of Property Act, whatever is necessary and possible in the circumstances to effect a delivery of possession being done.

Sibendrapada Banerjee v. Secretary of State for India in Council (1) doubted and distinguished.

Gunga Narain Gope v. Kali Churn Goala (2), *Muthukaruppan Samban v. Muthu Samban* (3), *Dawood v. Moideen Batcha* (4), *Mitarjit Mahton v. Leakut Hosain* (5), *Hushmat v. Jamir* (6) and *Fatik Karikar v. Rajendra Nath Chaudhuri* (7) followed.

Bhaskar Gopal v. Padman Hira Chowdhari (8) and *Sonai Chutia v. Sonaram Chutia* (9) referred to.

SECOND APPEAL by the defendants.

The relevant facts of the appeal and the arguments advanced at the hearing thereof appear fully in the judgment.

Hemendrakumar Das for appellants.

Priyanath Datta for respondents.

Cur. adv. vult.

*Appeal from Appellate Decree, No. 1010 of 1930, against the decree of Shreeshchandra Ray, Second Subordinate Judge of Sylhet, dated Nov. 18, 1929, affirming the decree of Santoshkumar Niyogi, Addl. Munsif of Moulvibazar, dated Aug. 20, 1928.

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| (1) (1907) I. L. R. 34 Calc. 207. | (5) (1914) 18 C. W. N. 858. |
| (2) (1894) I. L. R. 22 Calc. 179. | (6) (1918) 23 C. W. N. 513. |
| (3) (1914) I. L. R. 38 Mad. 1158. | (7) (1900) 4 C. W. N. cxlii. |
| (4) (1924) 48 Mad. L. J. 264. | (8) (1915) I. L. R. 40 Bom. 313. |
| (9) (1915) 20 C. W. N. 195. | |

MUKERJI J. The plaintiffs' case was that they, as heirs of their father Bangshiram, were entitled to recover possession from the defendants of certain lands. The defendant No. 1 is the son of one Chandrakala, who is a daughter of Bangshiram and is the defendant No. 5. The defendant No. 5 was married to one Golak, who had a brother Neel. Plaintiffs' case was that Golak and Neel were the former owners of the land and that they sold the land to Bangshiram in 1286 B. S. and that they were dispossessed by the defendants in 1334 B. S.

The defence was that, under an arrangement between Bangshiram on the one hand and Golak and Neel on the other, the latter two remained in possession in spite of the sale to the former; that, in 1295, Bangshiram sold the land to the defendant No. 5 and the latter thus came into possession after Golak's death.

The courts below have allowed the plaintiffs a decree. They were of opinion that, when the land was in the possession of Golak and Neel and so of the defendant No. 5 at the time of Bangshiram's sale to her, there could be no delivery of possession of it to her; and, as the *kabala* evidencing the sale was an unregistered one, there was no valid sale. The trial court held that the possession of the defendants originated in an arrangement with, and so permission from Bangshiram, and there was no evidence to show that such possession ever became hostile or adverse. The Subordinate Judge held that such possession, though originally permissive, could become adverse to Bangshiram since the sale by the latter to her, but that, in point of fact, the defendant No. 5 had no possession, and that the defendants had failed to prove that they had possessed the land for more than 12 years before suit. He held, therefore, that the defendants acquired no title by adverse possession.

The defendants Nos. 1 and 5 have appealed.

On the question of validity of the sale, as effected by delivery of possession, the courts below have relied

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on *Sibendrapada Banerjee v. Secretary of State for India in Council* (1), which is an authority for the proposition that, if at the time of the intended sale the vendee is already in possession, there can be no sale by delivery of possession. In the case of *Gunga Narain Gope v. Kali Churn Goala* (2), it had been held that, if on the date of the sale the vendee gets into possession with the assent, express or implied, of the vendor, it may be held that there has been delivery of possession. The learned Judges, who decided *Sibendrapada's* case (1), distinguished *Gunga Narain Gope's* case (2) on the ground that in the case before them the vendee had been in possession from before. They were of opinion that, as delivery is the essence of the transaction, there could be no delivery in the circumstances and so there was no valid sale. They were of opinion that no loose construction should be put upon section 54, as the consequences of such a construction may be far reaching and injurious in many instances.

It is very difficult to agree with all that has been said in *Sibendrapada Banerjee's* case (1) (*supra*). It has been dissented from in *Muthukaruppan Samban v. Muthu Samban* (3) and in *Dauood v. Moideen Batcha* (4), and has been very guardedly referred to and not expressly approved in *Bhaskar Gopal v. Padman Hira Chowdhari* (5). In *Fatik Karikar v. Rajendra Nath Chaudhuri* (6), it was held that, where the property was in the possession of an usufructuary mortgagee, the process of making over of the property by the mortgagee to the mortgagor and redelivery by the latter to the former was not necessary to bring about a sale in favour of the former under section 54 of the Transfer of Property Act, but that it would be enough, if the mortgagee took the property as purchaser and the mortgagor admitted that from that moment the purchaser held the property as purchaser and not as mortgagee. In

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(6) (1900) 4 C. W. N. cxlii.

Mitarjit Mahton v. Leakut Hosain (1), the learned Judges were not inclined to hold that such a strict interpretation of section 54, as was suggested in *Sibendrapada's* case (2), was justified. In *Sonai Chutia v. Sonaram Chutia* (3), no express dissent was expressed, but it was said that the sale in that case was valid, as there was in fact a delivery of possession, because the boundaries of the land had been pointed out and everything that was possible to do for such delivery was done; formal possession being delivered and endorsement of satisfaction being made on the mortgage bond, under which the vendee had been holding possession from before as mortgagee. In a later case, namely, *Hushmat v. Jamir* (4), both *Sibendrapada's* case (2) and *Fatik Karikar's* case (5) were referred to, as if the two were not in conflict with each other; and Walmsley J. observed that, if of two plots mortgaged to a person one is subsequently sold to him and the said person restores possession of the plot, which is not sold, to the mortgagor and retains possession of the one that is sold, that would be good evidence of delivery of possession.

The present case is distinguishable from *Sibendrapada's* case (2), in that the defendant No. 5 was at the date of the sale in permissive possession under an arrangement with Bangshiram. I am not, therefore, obliged to apply that ruling to this case. The evidence on the record satisfies me that whatever was necessary and possible in the circumstances to effect a delivery of possession was done. The details spoken to by defendant No. 5 amply make out that Bangshiram "made over the land of the *kabala* to "her satisfaction", and that, after the sale, she made over the rest of the land in her possession to her father. The essence of delivery no doubt is that possession should change, but I think it is enough if the character of possession changed; in other words, if the vendor converted by appropriate declarations or

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acts the previous possession of the vendee, which in this case was permissive possession, into possession as that of a vendee. I hold, therefore, that there was sufficient delivery of possession within the meaning of section 54 of the Transfer of Property Act.

On this finding, for the plaintiffs to succeed, they must show that they have acquired a title by adverse possession. The case has not been looked into from this point of view. This will have to be done now and for this purpose I send it down, so that the lower appellate court may determine the question of adverse possession and then finally dispose of the appeal before it.

The appeal is allowed and the case will be remanded with the aforesaid directions. The costs of this appeal will abide the result of the remand.

Appeal allowed: case remanded.

G. S.