

**IN THE HIGH COURT AT CALCUTTA
CIVIL APPELLATE JURISDICTION
APPELLATE SIDE**

Present:

The Hon'ble Justice Sugato Majumdar

SA/773/1987

**IA NO: CAN/1/2001(Old No: CAN/1091/2001),
CAN/2/2001(Old No: CAN/1093/2001),
CAN/3/2021, CAN/4/2021,
CAN/5/2021, CAN/7/2024**

Gobinda Middy & Ors.

Vs.

Sudhir Kumar Dey & Ors.

For the Appellants : Mr. Dilip Kr. Maity, Adv.

For the Respondents : Mr. Dyutiman Banerjee, Adv.
Mr. Salil Kr. Maity, Adv.

Hearing concluded on : 12.02.2026

Judgment on : 24.02.2026

Sugato Majumdar, J :

The instant Second Appeal is preferred against the judgment and decree dated 18/08/1986 passed by the 2nd Assistant District Judge, Midnapore in Title Appellate No. 29 of 1986.

Before advertng to the decisions of the two Courts, it is apt to look into the plaint case. The plaint case, in summary, is that:

- a) The suit tank measuring about 20 decimals appertaining to Plot no. 235 previously belonged to one Upendra Nath Bera who on 29/11/1927

transferred by way of sale to one Gandra Dey on executing a registered deed of sale. Subsequently, on 07/04/1931, the said Gandra Nath Dey by a registered deed of *Arpannama* dedicated the property to the Plaintiff deity. In terms of the aforesaid *Arpannama*, Plaintiff Nos. 1 & 2 were appointed as *shebait* to the deity for regular *seba puja*. Since then the Plaintiffs had been performing *seba puja* as *shebait*.

- b) According to the Respondent/Plaintiffs, one Giribala, since deceased, was in permissive possession of the suit tank. On the death of the said Giribala, the Defendant No. 1 being the Appellant No. 1 herein and Defendant No. 2 being the Appellant No. 2 herein continued the possession being the son and daughter of said Giribala respectively.
- c) On 01/06/1978, the Respondent/Plaintiffs asked the Appellant No. 1 to deliver *khas* possession of the suit tank in their favour. They refused to deliver so and also denied the title of the deity in respect of the said tank which is a *debutter* property. On the one hand, the Appellant No. 1/Defendant No. 1 asserted that he is the legal heir of Giribala who inherited the aforesaid suit tank which had been recorded in the name of Giribala.
- d) The original Plaintiff No. 1 stated that he obtained the copies of the records of rights and came to know that the suit Plot No. 235 erroneously recorded in the name of Gandra Nath Dey though, being a *debutter* property, should be in the name of the deity. It is the case of the Appellant/Plaintiffs that on denial of the title licence granted to the Respondent/Defendants stood revoked. Accordingly, the original

suit was filed, praying for recovery of possession. The Appellant/Defendants contested the suit by filing written statement denying all material allegations.

- i) According to the Appellant/Defendants, Giribala was concubine of Gnandra Nath Dey and they were procreated through Gnandra Nath Dey. Out of love and affection, the said Gnandra Nath Dey, on 11/07/1928 transferred by way of gift, the non-suit plot bearing no. 239 with the suit tank in Plot No. 235 in favour of the said Giribala by a registered deed of gift. But due to inadvertence, Plot No. 235 was not inserted in the said deed.
- ii) It was the case of Appellant/Defendants that the said Gnandra Nath Dey transferred by way of gift, the aforesaid two plots to the said Giribala along with delivery of possession. It is denied that the suit tank is a *debutter* property but asserted that it belonged to Gnandra Nath Dey in his private capacity. Subsequently, the said Gnandra Nath Dey as *sebait* to the deity filed a series of suits against Giribala from the year 1953 but lost. In all these litigations, the said Giribala asserted her hostile title in respect of the suit tank together with other lands.
- iii) According to the Appellant/Defendants, the name of the Defendant's mother was wrongly recorded in R.S.R.O.R as permissive possession which would have been recorded as right of tenancy. According to the Appellant/Defendants, their mother never obtained permissive possession either from Gnandra Nath Dey or from the present Respondent/Plaintiffs; in other words, their possession is not based on

any permission but by ascertaining hostile title against the Respondent/Plaintiffs which matured into a right by way of adverse possession on laps of 12 years.

On the basis of rival pleadings, following issues were framed:

1. Is the suit maintainable in law?
2. Is the suit property valued?
3. Is the suit barred by limitation?
4. Whether the Plaintiffs have any right, title and interest in respect of the suit land?
5. Whether the Defendants 1 & 2 acquired any right, title and interest in respect of the suit lands by way of adverse possession as alleged?
6. Whether the Plaintiffs are entitled to get any decree as prayed for?
7. To what other relief, if any, the Plaintiffs are entitled to get?

The Trial Court dismissed the suit. According to the Trial Court, the possession of Giribala in respect of the suit tank together with other land clearly revealed that she was in possession with full knowledge of the *sebait* of the deity. She had been in possession of the suit tank. The Respondent/Plaintiffs thus failed to prove that Gandra Nath Dey permitted Giribala to use the suit tank as licensee. It was also observed that the Appellant/Defendant No. 1 was not acquainted with the Respondent/Plaintiffs, so there cannot be any question of giving permission. The Trial Court came to the conclusion that the Appellant/Defendants are in possession

of the suit tank, continuously, publicly, in assertion of their own right against the real owner that is the Plaintiff deity; the aforesaid possession is overt and without any concealment for more than twenty five years. It was concluded by the Trial Court that possession of the Appellant/Defendants matured into adverse possession. On these grounds, the Trial Court dismissed the suit.

The First Appellate Court reversed the decision. The Trial Court observed that the Appellant/Defendant No.1 stated in cross-examination that in the year 1953 Giribala told him that Gnandra Nath Dey did not insert the Plot No.235 in the deed of gift; Giribala was in possession forcibly. The First Appellate Court observed also that if permissive possession was recorded in the year 1957, as evidenced by Ext. 4 and the same accepted as a correct then the assertion as to forcible possession since 1953 or prior thereto cannot stand. In fact, it was further observed that by simple assertion of adverse possession the same cannot be proved in fact as well as in law. Record an evidence according to Appellate Court showed that the Appellant/Defendants are licensee in respect of the suit tank and Giribala was in permissive possession and also that the suit tank was an absolute *debutter* property. It was further observed by the Appellate Court that hostile title was set up against Gnandra Nath Dey but not against the actual owner, namely, the deity; so there cannot be assertion of adverse title against the true owner. Unless there is some positive overt act, indicating that the possession is adverse, a permissive possession does not become an adverse possession. This line of argument led the Appellate Court to reverse the judgment passed by the Trial Court.

On being dissatisfied, the instant appeal was filed and on the basis of the order passed by the Division Bench, the following grounds of appeal were to be heard as a substantial question of law:

- XIII. For that the Learned Judge has erred in holding that right to occupy as permissive occupier is heritable.
- XV. For that the Learned Judge out to have held that the permission for occupation expires automatically on the death of person occupying under permission.
- XVI. For that the Learned Court below should have found that one the death of permissive occupier, if any, his heirs and heiress, the applicants herein, became trespasser into the suit property.
- XXXIV. For that the Learned Judge has left out the argument of the Appellants that the Plaintiffs have not filed the suit within the period of 12 years form the date of adverse possession.
- XLIII. For that the Learned Court below has arbitrarily held that the DW-1 has admitted that his mother was given permission to occupy the suit tank and that she was a mere permissive occupier.
- L. For that the Learned Court below should have held that possession of Giribala had become adverse in respect of the suit tank as she came to know about non-inclusion of the said property in the deed of gift.

The Learned Counsel for the Appellant argued that the First Appellate Court erred in law as well as in fact in understanding what is adverse possession. It was argued that the Trial Court correctly decided on the nature of possession of Giribala as well as of the Appellant/Defendants. The Learned Counsel for the Appellant relied

upon **State of Rajasthan & Ors. Vs. Shiv Dayal & Anr. [(2019) 8 SCC 637]** and **Hadibandhu Ho & Ors. Vs. Luchia Ho & Ors. [AIR 1982 Orissa 73]**.

Per contra, the Learned Counsel for the Respondents supported the decision passed by the First Appellate Court. According to the Learned Counsel for the Respondent/Plaintiffs, documentary as well as oral evidences negate the plea of adverse possession. Giribala had never been in forceful possession. The Appellate Court, according to the Learned Counsel correctly decided the issues.

The Appellant/Defendants asserted that possession of Giribala was forceful, continuous and adverse. Ext. H(1) being plaint of SCC Suit No. 122 of 1956 was filed by Gandra Nath Dey against Giribala, praying for compensation on account of use and occupation of the properties. These properties include CS Plot No. 235. In the plaint itself Giribala was mentioned as maid servant. It was further stated that Defendant was allowed to occupy CS Plot No. 239. Clearly, plaint shows that Giribala was in permissive occupation of Plot No. 239 to look after Plot No. 235. Even it is mentioned that Plot No. 235 was in occupation of said Giribala. The Appellant/Defendants did not produce the written statement which Giribala might have been filed in that suit. Had this been produced, the stand of the Appellant/Defendants could have been clarified. Ext. No. H was the plaint in Title Suit No. 16 of 1958 filed on behalf of the deity against Giribala as well as the present Appellant/Defendants. In this plaint, it was averred that Giribala was allowed shelter as a maid servant but subsequently was driven out in Bengali month of *Aashar* of the Bengali year 1334. It was further pleaded that in the year BS 1351, constructions were made by the Plaintiff therein being the deity on the bank of Plot No. 235. What is pleaded was that the Defendants therein occupied Plot No. 239, 237 & 238. In this suit, the Plaintiff being the deity prayed for recovery of possession from the Defendants being the said Giribala as well as the present

Appellant/Defendants. Suit property included CS Plot No. 235. The Appellant/Defendants did not produce the written statement filed in that case. Had the aforesaid written statements been produced stand and plea of the Appellant/Defendants could have been understood and considered.

At least, Ext. H and H/1 shows that legal step was taken for recovery of possession from the Giribala as well as the present Appellant/Defendants which negate the claim of adverse possession by Giribala.

Appellant/Defendant No. 1 stated in course of cross-examination that Giribala used to possess the tank forcibly against Gandra Nath Dey but not against the deity. He stated that his mother began to possess the suit tank forcibly two years after the deed of gift. The deed of gift bears dated 11/07/1928 but Ext. H and H/1 negates that plea.

The First Appellate Court considered the principal of adverse possession in its right purport. The hostile title is to be exerted against the owner of the property. In this case, the Appellant/Defendant No. 1 stated in course of cross-examination that hostile title was exerted against Gandra Nath Dey, not against the deity being owner of the property. Therefore, even though adverse possession was pleaded that was not exerted against the true owner. Appellant/Defendant No. 1 was aware that Arpan Nama was made in favour of the deity by the said Gandra Nath Dey. This was noted by the First Appellate Court in deciding the suit in favour of the Respondent/Plaintiffs.

On appreciation of evidence, certain things are clear. Even though forceful possession was asserted, that could not have been matured into adverse possession. Firstly, because suit for recovery of possession was instituted against Giribala as well as the Appellant/Plaintiffs. Secondly, title was exerted hostile not against the true

owner. Nothing is there in the record to show that they have been paying rent, therefore, the position is nothing akin to gratuitous licensee who are liable to be evicted in due process of law. The Trial Court for a queer reason failed to understand the legal position and failed to apply the same.

For reasons stated and in view of discussions made above, this Court concur with the judgment and decree passed by the First Appellate Court and uphold the same. The instant Appeal is dismissed without cost.

The Appellants are directed to deliver the possession within sixty days from passing off this appellate decree, in case of default of which, execution proceeding before the Trial Court may be initiated and the Appellant/Defendants shall be liable to pay mesne-profit, for which liberty is given to the Respondent/Plaintiffs to institute the separate suit.

The instant appeal is accordingly disposed of along with all pending applications.

Trial Court Records may be returned.

(Sugato Majumdar, J.)