

(1917) 07 CAL CK 0011
In the Calcutta High Court

Abdul Rahman Kazi and Others

APPELLANT

Vs

Baikunta Nath Roy Chowdhury and Others

RESPONDENT

Date of Decision : 04-07-1917

Acts Referred:

Citation : 41 Ind. Cas. 757

Hon'ble Judges : Walmsley, J; Asutosh Moookerjee, J

Bench : Division Bench

Judgement

1. This is an appeal under Clause 15 of the Letters Patent, from a judgment of Mr. Justice Mullick, in a suit for recovery of possession of land, upon declaration of title, by purchase of an entire estate sold for arrears of revenue. The case for the plaintiffs is that on the 25th March 1897, they purchased the estate at a sale for arrears for revenue, and that the disputed lands, though comprised therein, have been wrongfully retained by the defendants. The contending defendants disclaim title and possession in a large number of parcels set out in the ninth paragraph of their written statement filed on the 10th February 1909: the other plots, they allege, never constituted the mal lands of the estate purchased by the plaintiffs. They assert, on the other hand, that they have been in possession of those lands under a revenue free grant made in the year 1731. The suit was decreed in the Court of first instance, in respect of all lands other than 34 bighas, in which, it was held, the defendants had established their revenue free title. The Court, however, found it impossible to locate the exact situation of these 34 bighas and directed that the question be determined in the execution department. The Subordinate Judge confirmed this decree, and added that he could not find fault with the lower Court for leaving the question about the site of those 34 bighas undetermined till the execution of the decree, when each party would have the right to represent his case. The decree of the Subordinate Judge has been confirmed on appeal by Mr. Justice Mullick.

2. On the present appeal, the defendants have contended that the burden lay upon the plaintiffs to establish that the lands in dispute constituted the mal lands

of the estate purchased by them, that there is no evidence on the record to show that the plaintiffs had discharged the burden which lay upon them, and, that, consequently the suit should have been dismissed. In support of this proposition, reference has been made to the decision of the Judicial Committee in *Hurryhur Mookhopadhya v. Madhub Chunder Baboo* (3) which was applied in the cases of *Arfunnessa v. Peary Mohun Mookerjee* (1) and *Koylashbashiny Dossee v. Gocoolmoni Dossee* (2) to reach the conclusion that in resumption suits, the zemindar must prove the mal character of the lands claimed by him. It is not necessary for our present purpose to enter into a discussion of the abstract question of onus of proof in suits for resumption of revenue-free lands. It is sufficient to observe that in the present instance the lands are described in the Record of Rights as revenue-free lands. The burden, consequently, lies primarily upon the plaintiffs to establish that the entry in the Record of Rights is erroneous. The question thus arises whether the plaintiffs have adduced evidence to show that the disputed lands are mal lands of the estate purchased by them. It is conceded that there is no evidence on the record to show that rent had ever been claimed or realised by the proprietor of the estate in respect of the lands now in controversy. On the other hand, the defendants have produced a grant of 1731 which shows that an area of 63 bighas was granted to their predecessors to enable them to burn lamps at the Durgah of Shah Amirullah". 34 bighas are said to have been situated in Kismat Sahangal, but as the document is in a tattered condition, it is impossible to state at this distance of time where the remaining 29 bighas were situated. The plaintiffs, it may be observed, claim in this suit lands situated in two villages, namely, Sahangal and Latimshah and the case for the defendants was that the lands in their possession were situated in those two villages and were held by them revenue-free. In these circumstances, it is plain that there was a grant of 63 bighas of land, a portion whereof, at any rate, was situated in village Sahangal. It is also clear that this grant was anterior not merely to the Permanent Settlement, but to the grant of the Dewany on the 12th August 1765. There is, on the other hand, no evidence to show that the plaintiffs or any previous proprietor ever claimed or realised rent in respect of those lands. In these circumstances, it is difficult to appreciate how the plaintiffs can possibly succeed. They are no doubt entitled to the privileges of a purchaser of an entire estate at a sale for arrears of revenue. But what are those privileges? Concisely stated (omitting well-known qualifications), the Rule is that the purchaser takes the estate as created at the time of the Permanent Settlement. The question, accordingly, reduces to this;---Have the plaintiffs established that these lands were included in the estate at the time of the Permanent Settlement, in other words, was the revenue assessed on the basis of the assets of these lands? The answer must be in the negative. If there had been any indication that rent had been realised in respect of these lands, that would have furnished evidence that the lands were impressed with a mal character. In the total absence of such evidence, it is impossible to say that merely because the lands are situated within the geographical limits of the estate purchased by the plaintiffs, they were mal lands and formed part of the

zemindari at the time of the Permanent Settlement. We are clearly of opinion that the decree made by the Courts below cannot be sustained.

3. The result is that this appeal is allowed, and the decrees of the Courts below set aside subject to the qualification presently to be stated. Our order will not affect the title of the plaintiffs to the parcels set out in the ninth paragraph of the written statement. The decree will declare the title of the plaintiffs to those plots and they will be placed in possession in execution of the decree of this Court. Subject to this reservation the suit will stand dismissed with costs in all the Courts.