

(1929) 07 PAT CK 0041
In the Patna High Court

Badrinath Upadhay and Others

APPELLANT

Vs

Bajinath Mandal and Others

RESPONDENT

Date of Decision : 26-07-1929

Acts Referred:

Bengal Tenancy Act, 1885 — Article 3 Schedule III
Limitation Act, 1963 — Article 142

Citation : AIR 1930 Patna 134 : 123 Ind. Cas. 612

Hon'ble Judges : Wort, J

Bench : Single Bench

Judgement

Wort, J.—In this case I have heard the elaborate arguments both of Mr. Susil Madhab Mullick on behalf of the appellants and Mr. Abani Bhusan Mukherji, Government Pleader, on behalf of the respondents.

2. But the only question which arises in this appeal is that of onus and whether in the first place the Court below has wrongly placed the onus or whether in the circumstances of the case that question is a mere academical one.

3. The action in which the plaintiff has succeeded in both Courts was for the recovery of possession of certain lands which became inundated with water and according to the plaintiff emerged therefrom in the year 1329 Fasli. The defendant's case, however, was that they re appeared in fact either in the year 1327 or in the year 1328. The significance of those opposing contentions is apparent when it is stated that both parties to this litigation agree that Article 3, Schedule III, Bengal Tenancy Act, applies on the question of the period of limitation.

4. As I have already indicated the first and most important point in the case is the question of limitation. The other point which as I now understand is abandoned by Mr. Mullick, was one which arose from the fact, that when lands first became covered with water the plaintiff succeeded by an arrangement with his landlord the defendant to receive a reduction in the rent, and it was contended on behalf of the appellant-defendant that in those circumstances it

must be inferred that the plaintiff had abandoned that part of his holding and consequently the landlord was entitled to re-settle the lands, as the case was alleged to be with one of the defendants.

5. It seems to me, quite apart from the fact that that point is not now pressed, there will be a sufficient answer to that on the finding of the Court of first instance, namely, that even after this reduction of rent had been granted to the plaintiff, the rent was still stated to be for the whole area of the holding including the lands which went under water. Now that would seem to me to negative any suggestion that there was any intention on the part of the tenant to abandon that part of the holding and, therefore, at the same time to negative the right which the landlord alleged that he had to settle the lands when they re-appeared. That point, in my judgment, is disposed of by that finding of the Court below.

6. Now to deal with the question of onus. It is necessary in this connexion to consider the judgment of the learned Munsif as also the judgment of the Additional District Judge. It is necessary by reason of the fact that after a careful consideration of the case towards the end of the judgment of the learned Additional District Judge there appears this statement:

The onus was clearly on the defendants to show that they had acquired a title to this land by having been in continuous and exclusive possession of it at least two years prior to the institution of the suit and this onus they have failed to discharge.

7. According to the argument addressed to me on behalf of the appellant, the onus was clearly upon the plaintiff and, therefore, the learned Additional District Judge was wrong in making that statement to which I have referred. But it is contended, as I have indicated already, that whatever the view, erroneous or not, taken by the learned Additional District Judge on this point, the question was in fact an academical one by reason of the fact that the evidence had been considered and a decision on the main question arrived at therefrom.

8. I have already stated sufficient facts to show that the real point in this case was whether the lands emerged in the year 1327 or in the year 1329. That was the point upon which the learned District Judge decided that the defendant had failed to discharge the onus which was, upon him. Before making that statement, however, the learned Judge had said that on this question of the date when the lands emerged from the water he concurred with the finding of the learned Munsif. It is, therefore, necessary to see what the trial Court Judge decided in this regard. In the course of his judgment he states that the lands having admittedly gone under water it would be upon the defendants to show that the lands came out in 1327 or 1328 and that the plaintiffs were out of possession for two long years which extinguishes their right to recover them. He then proceeds to discuss the evidence of the defendant and in conclusion states that there can be no doubt that the witnesses of the defendant state that the lands came out in

the year 1327 and 1328; but on the side of the plaintiffs their witnesses state that the lands came out in 1329 and 1330 and that, under those circumstances he could not hold that the lands were re formed in 1327 and 1323. That passage in the judgment is very difficult to construe; but the only conclusion that I can come to is the one which was suggested by Mr. Mullick, namely, that the learned Judge came to the conclusion that the evidence was contradictory or conflicting and that the onus being upon the defendant he must necessarily fail. That seems to me to apply an entirely new test to the proposition of law relating to onus. I have yet to hear that where the evidence is conflicting the party upon whom the onus lies must necessarily fail. The true view of the law is; as has been laid down so many times; that where there is no evidence on one side or the other then the person upon whom the onus lies must necessarily fail. In that state of circumstances the learned Additional District Judge makes the statement that he concurs with the finding of the trial Court. It seems to me, therefore, quite conclusively shown that in spite of certain discussion of the evidence the Additional District Judge was of the opinion that this was a case which had to be decided in the circumstances according to the party upon whom the onus was to lie. The onus being placed on the defendant by him in the circumstances he was in the opinion that so far as his allegations were concerned on this point he must fail. In my judgment, therefore, assuming that he has wrongly placed the onus upon the defendant, it would necessarily result in remanding the case to the learned Additional District Judge for him to hear and determine it according to law.

9. The real question, therefore, remains as to whether the onus was wrongly placed on the defendant or not. The learned Government Pleader has relied upon two authorities for the contention that the onus in this case was rightly placed upon the defendant, the one being the case of *Radha Gobind Roy Saheb v. Inglis* 7 C.L.R. 364 : 3 Suth. P.C.J. 809 : Bald 377 (P.C.) and other being the case of *Secretary of State for India v. Chelikani Rama Rao* 35 Ind. Cas. 902 : 39 M. 617 : 31 M.L.J 324 : 20 C.W.N. 1311 : (1916) 2 M.W.N. 224 : 14 A.L.J. 1114 : 20 M.L.T. 435 : 4 L.W. 486 : 18 B.L.R. 1007 : 25 C.L.J. 69 : 43 I.A. 192 (P.C.).

10. Before dealing with those cases I think it is necessary to state that Article 3, Schedule III, Bengal Tenancy Act, is in precisely the same language as Article 142, Limitation Act, with this difference that whereas Article 3, Schedule III, Bengal Tenancy Act, states that the time from which the period beings to run is the date of dispossession, Article 142 is to the effect "from the date of dispossession or discontinuance." But, in my opinion, the additional word "discontinuance" makes no difference in this respect.

11. Now to deal with the cases which are relied upon by the respondent, the first being the case of *Radha Gobind Roy Saheb v. Inglis* 7 C.L.R. 364 : 3 Suth. P.C.J. 809 : Bald 377 (P.C.). It is there laid down by the Judicial Committee of the Privy Council that the plaintiff having established his title to the land the burden of proving that the plaintiff had lost that title by reason of adverse possession of

the defendant is upon the defendant. And again in the case of Secretary of State for India v. Chelikani Rama Rao 35 Ind. Cas. 902 : 39 M. 617 : 31 M.L.J 324 : 20 C.W.N. 1311 : (1916) 2 M.W.N. 224 : 14 A.L.J. 1114 : 20 M.L.T. 435 : 4 L.W. 486 : 18 B.L.R. 1007 : 25 C.L.J. 69 : 43 I.A. 192 (P.C.) in a long discussion of the facts and the various judgments given in the case the Judicial Committee state the law as was laid down in the case to which I have just made reference. It is argued by the learned Government Pleader on behalf of the respondent that that was a case which is on all fours, that is to say, the facts of this case are the same as the facts in the case relied upon and that, therefore, in spite of the language of Article 3, Schedule III, Bengals Tenancy Act, the onus was upon the defendant. The case of Radha Gobind Roy Saheb v. Inglis 7 C.L.R. 364 : 3 Suth. P.C.J. 809 : Bald 377 (P.C.) was discussed in a Full Bench decision of this Court in the case of Shiva Prasad Singh v. Hira Singh 62 Ind. Cas. 1 : 6 P.L.J. 478 : (1921) Pat. 305 : 2 P.L.T. 487 : 3 U.P.L.R. (Pat.) 81 (F.B.) and the learned Chief Justice there points out that in his opinion the case referred to can hardly be assumed to have been intended to modify the earlier decision of the Privy Council in the case of Maharajah Koowar Baboo Nitrasur Singh v. Baboo Nund Loll Singh 8 M.I.A. 199 : 1 Suth.P.C.J. 420 : 1 Sar. P.C.J. 744 : 1 W.R.P.C. 51 : 19 E.R. 506 which decided that in a suit for ejectment based upon possession and dispossession within 12 years the onus lay upon the plaintiff to prove that the dispossession took place within 12 years and that he did not discharge that burden by merely proving title coupled with enjoyment at some earlier period.

12. In my judgment there can be no manner of doubt that at this time of day in a suit to which Article 142, Limitation Act, applied the onus is undoubtedly upon the plaintiffs, and the learned Government Pleader in spite of his able argument has failed to give me any case in which it has been held that in spite of the fact that Article 142 applied yet the onus was on the defendant. As I have already indicated, it is well-established that in all cases under Article 142 the onus is undoubtedly on the plaintiff. The language, as I have already pointed out, of Article 3, Schedule III, Bengal Tenancy Act, is precisely the same. Can there be any doubt, therefore, that in this case to which that Article applies the onus was upon the plaintiff? In my judgment there can be no doubt of that fact, and when the learned Additional District Judge placed the onus on the defendant he was committing an error of law.

13. I have already stated what, in my judgment, is the effect of the decision at which the learned Additional District Judge has arrived, and that being so, there seems to me to be no other course to pursue in this case than to remand the case to the District Judge for the purpose of determining the issue between the parties, placing the onus as it undoubtedly was upon the plaintiff.

14. The judgment and decree of the learned Additional District Judge will be set aside and the case will be remanded to him to hear and determine it according to law. The costs of this appeal will abide the result.

15. There remains one small question which is urged on behalf of the appellant

that in this case in drafting the decree the lands in dispute have not been sufficiently identified. Assuming for the moment that the plaintiff succeed and a decree prepared, I would call the attention of the Court below to Order XX, Rule 9, Civil Procedure Code.