

(1904) 08 CAL CK 0009

In the Calcutta High Court

Case No : Appeal from Original Decree No. 345 of 1902

Bagdu Majhi and others

APPELLANT

Vs

Raja Sri Sri Durga Prosad Singha

RESPONDENT

Date of Decision : 17-08-1904

Acts Referred:

Citation : (1904) 08 CAL CK 0009

Judgement

1. This is an appeal by the Defendants against a decree of the Subordinate Judge of Purulia in a suit instituted by Raja Durga Prosad Singh for ejectment, for certain declaratory reliefs and for an injunction. The subject matter of the suit is a mouzah called Domgarh within the zamindari of the Plaintiff. It appears to have been at one time in the possession of one Dakhina Majhi and subsequently in that of Muchi Ram and his son. In the year 1878, the zemindar brought a suit against Muchi Ram and his son Bagdu Majhi for recovery of possession of the said mouzah Domgarh. The main question that seems to have been then raised between the parties was whether the Defendants occupied the position of ijaradars in respect of that mouzah or that of a permanent tenure-holder on a rental of Rs. 38 per annum. The Deputy Commissioner who had to deal with the case held that the Defendants held possession of a portion of the lands in question as jotedars, and the rest as ijaradars, and he accordingly gave a decree to the Plaintiff for khas possession of the lands other than those which the Defendants were found entitled to hold as jotedars. This judgment was pronounced on the 3rd July 1878. In the next year, viz., in 1879, the Plaintiff obtained symbolical possession of the property decreed to him; but upon the finding of the Court below, which finding has not been seriously disputed before us in appeal on behalf of the Respondent, the possession of the whole mouzah, notwithstanding the decree and delivery of possession to which we have just referred, continued to remain with Bagdu Majhi and his family.

2. The Plaintiff's case now is that in the year 1880 the mouzah was settled for a term of years with one Bali Sawdagar, and that subsequently on the expiry of the term of Bali Sawdagar's lease, it was settled some time or other before the year

1295=1888, when the Plaintiff's predecessor Raja Rash Behari Lal Singha died, with Basuki Majhini, the wife of Bagdu Majhi, the Defendant No. 1, but that this settlement was really for the benefit of Bagdu himself; that he was in possession under such settlement until the year 1307 when the Plaintiff called upon the Defendants to take a settlement of their jote lands, but they declined to do so upon the plea that the mouzah Domgarh was their Khut Kuti Jungle Torasi Mekarari property, and that thereupon the Plaintiff served upon the Defendants a notice to quit, but that the Defendants did not comply with the requisition of the said notice. And this suit was instituted, as already indicated, for the purpose of obtaining khas possession of the entire mouzah Domgarh, for a declaration that the Defendants have no Khut Kuti Jungle Torsai Mekarari interest in the property in question, that they have no right to take the underground minerals. And the Plaintiff asked for a perpetual injunction upon the Defendants restraining them from taking away any portion of the minerals. The suit, we may here mention, was instituted on the 12th August 1901.

3. In answer to this suit the Defendants, who are Bagdu Majhi and his sons, pleaded that the Plaintiff's claim was barred by the law of limitation, because they had held mouzah Domgarh upon Khut Kuti Jungle Torsai Mekarari title with the knowledge of the Plaintiff for more than 12 years antecedent to the suit. They further pleaded that so far as the relief claimed in respect of sub-soil is concerned, the claim was also barred by the law of limitation, and that the allegation made by the Plaintiff that the settlement of the property was made in the year 1880 with Bali Sawdagar or any possession thereunder, was entirely untrue, as also the statement made by the Plaintiff that the settlement of the land was taken by the Defendant No. 1 in the benami of his wife Basuki Majhini.

4. The Subordinate Judge laid down several issues for trial, one of them being "Who is entitled to the underground rights of mouzah Domgarh? Is Plaintiffs claims in that respect barred by limitation?" Another issue that he framed was "Is Plaintiff entitled to khas possession of the mouzah, with the declaration that the Defendants have no Khut Kuti Junglebari Mekarari title by ejecting the Defendants?" And certain other issues were raised in respect to the decree that was pronounced between the parties in 1878 and delivery of possession that was had under It.

5. The Subordinate Judge in respect to the matter of the ijara settlement for a term of years alleged by the Plaintiff and to which we have already adverted, namely, the settlement with Bali Sawdagar in the year 1880 has held that notwithstanding the execution of a lease in favour of that individual he never went into possession, but that the possession remained with the Defendant and his family. He is, however, of opinion that a verbal lease was granted, such as the Plaintiff alleges, to Basuki Majhini for the benefit of her husband Bagdu Majhi and that Bagdu held under such arrangement.

6. Upon the question of limitation that was raised between the parties, he has held that inasmuch as the Defendants' case was that they held as tenants they

could not claim adverse title to the landlord, and that the issue that was raised between the parties as to limitation was really an issue in regard to the underground rights, and nothing else. He also holds that the Defendants are bound by the decree in the suit of 1878, and that no Junglebari Mokarari title has been made out, but that the Plaintiff is not entitled to recover khas possession, because notice to get was neither proved nor was it sufficient, and that the cause of action as alleged in the plaint as entitling the Plaintiff to recover khas possession, namely, that the Defendants were called upon to take a settlement of the jote lands and that they declined to take such settlement does not entitle the Plaintiff to eject the Defendants.

7. In result the Subordinate Judge has held that the Defendants have no Khut Kuti Jungle Torsai Mokarari right in the mouzah in question, and that they have no right in the coal or other minerals, and that the Plaintiff is entitled to the same. And he has ordered a permanent injunction to be issued against the Defendants, enjoining them not to take such minerals, and so forth.

8. Against this judgment, as already indicated, the Plaintiff has preferred the present appeal. The main question that has been discussed before us is one of limitation, as regards the declaratory relief that the Plaintiff has asked for, viz., that the Defendants have no Khut Kuti Junglebari interest in the property in question; for, as already stated, the claim for recovery of khas possession has been dismissed by the Subordinate Judge and the second question that has been discussed is what may be the effect of the decree of the year 1878 to which we have already referred.

9. Now taking the second question first there can be no doubt that the decree of the 3rd July 1878 is binding between the parties concerned. It was passed in a suit instituted by the then zemindar for khas possession of the lands comprised within the mouzah and it was found as between the zemindar on the one hand and Muchi Ram and his son Bagdu on the other, that they had no Jungle Torsai Khut Kuti Mokarari interest therein. But then, as already stated notwithstanding the writ for delivery of possession that was taken out by the zemindar, he failed to obtain actual possession of the lands decreed to him, and upon the finding of the Court below the possession, notwithstanding the judgment, and the symbolical possession that was delivered, was retained by the Defendants.

10. The Plaintiff's case is, as we have already mentioned, that after the symbolical possession that was thus taken by his predecessor in title he had constructive possession of this land through Bali Sawdagar and subsequently through Bagdu Majhi the Defendant No. 1 himself since he took a settlement of the property in the name of his wife Basuki Majhini. We have already mentioned that in the opinion of the Court below Bali Sawdagar was not in possession, that possession of the property continued to be with the Defendants. Then as regards the so-called settlement with Basuki Majhini, it was according to the Plaintiff's case only a verbal settlement--a settlement which in our opinion has not been satisfactorily proved. On looking into the evidence called by the Plaintiff himself,

it would appear that notwithstanding this alleged verbal settlement, and which is said to have been effected some time or other antecedent to the death of Raja Bash Behari Lal Singh in 1295 (B.S), no rent was ever received by the Plaintiff from Bagdu or any other member of his family, so that we may take it that ever since the decree pronounced in the year 1878 and ever since the symbolical possession said to have been delivered to the Plaintiff's predecessor, possession has been with the Defendants and his family for the last 22 years. And the question is, what might be the effect of such possession.

11. Now, there are two documents or rather three documents, upon which there has been considerable discussion before us as bearing upon the question, to which we have just referred. The first document is a kobala, dated the 10th October 1882, executed by Raghu, Ludhia and Bagdu Majhi to Basuki Majhini. In this document the mouzah in suit is stated to have been conveyed for the consideration of Rs. 197 and the document states it to be the Mourasi Junglebari Khut Kuti property belonging to the executants thereof. And the Plaintiff's case seems to be that it was subsequent to this conveyance that Bagdu Majhi obtained the verbal settlement of the property in the name of his wife Basuki, The Subordinate Judge, we might here mention, has found this to be only a colourable transaction; and we may at once say that we agree with him in the conclusion that he has arrived at. But the fact remains that in this conveyance a distinct assertion was made that the property belonged to the family as their Junglebari Khui Kuti property. We do not know, however, whether this assertion was ever brought to the notice of the landlord, the Plaintiff".

12. The next document is a Challan of Choitra 1287, corresponding to March 1880. Under this Challan Bagdu, Raghu and Ladhia deposited in the Deputy Commissioner's Office rents in respect of the years 1285, 1286 and 1287 at the rate of Rs. 38 per annum to the credit of the zemindar in respect of their alleged Mourasi Khut Kuti Junglebari property, and on the back of this document appears to be an endorsement to the following effect: "The amount of money mentioned in the Challan is received, dated the 28th March 1881;" and this endorsement purports to have been signed by Sita Nath Chatterji, sheristadar. Who this Sita Nath Chatterji was we do not know; but the endorsement does show that the money was withdrawn by somebody or other, apparently on behalf of the zemindar. The other Challan is of the year 1899. This was to the same effect, as the previous Challan of the year 1880 to which we have just referred.

13. Now we have not got upon the record of this case any direct evidence that a notice of the deposits thus made by the Defendants was served upon the landlord. Nor have we any evidence showing what was the exact declaration that was made by the persons who deposited the rent on these two occasions. But we may well presume, having regard to the recitals contained in the two Challans, to which we have referred, that the declarations that were put in on behalf of the persons who deposited the rents were in accordance with those recitals. Act VI of 1862 (B.C.) under which the deposits were made enjoined a declaration being

made on behalf of the depositor of rent, and upon such declaration being made a notice referring to the said declaration was required to be given to the landlord calling upon him to withdraw the deposit if he was so minded. Now referring in this connection to the evidence of the first witness called by the Plaintiff, Tara Charan Thunder, we find him stating as follows:--"When I was the Khajanchi of the Raja, Bagdu Majhi & c., used to make deposits in Court; who used to take them out, I do not know. In my Sherista the total amount which was remitted by the Am-mukhtear at Gobindapore used to be credited, but it was not separately credited by specifying the names, but the whole remittance was as per Challan used to be credited. Durga Charan Sarkar was the Am-mukhtear. Jadu Khowsah was also one. Other people also were the Am-mukhtears from time to time." No doubt this evidence is not quite satisfactory upon the question we have now in view. But taking the fact that moneys were put in by the Challans, with the fact as deposed to by Tara Charan that he knew that Bagdu used to make deposits of rent to Court, we may well infer that the Plaintiff's agents were perfectly aware of the deposits being made, and of the claim which upon those occasions the Defendants distinctly asserted as in respect of the mouzah Domgarh. Referring back once more to the point of time when the decree was passed and symbolical possession delivered to the Plaintiff, the possession of the Defendants, notwithstanding such decree and delivery of possession must, we think, be taken to have been adverse to the Plaintiff. There is nothing to indicate that when they retained possession, notwithstanding the symbolical delivery of possession to the Plaintiff of the mouzah, they did so on the assertion of any tenancy right under the Plaintiff, and had it not been for the three documents, namely, the kobala of the year 1882, and the two Challans to which we have referred, it could not be said that the possession of the Defendants ever since the year 1879 was otherwise than altogether adverse to the Plaintiff. And the question here arises, whether by reason of the statements made in those three documents it could be rightly said that the possession of the Defendants was not adverse, in respect of the right which they asserted in themselves, namely, the right to hold the property as a Junglebari permanent tenure on a rental of Rs. 38 per annum.

14. The learned vakils on both sides have called our attention to various casts as bearing upon this question. We do not propose to discuss all these cases, but it is as well to refer to some of them as elucidating the view that we are inclined to accept in this case. Referring to the cases reported, Beni Pershad v. Dudhnath ILR 27 Cal. 157 (1899), Seshamma Shettati v. Chickaya Hegade ILR 25 Mad. 507 (1902), Ramaswami v. Thayammal ILR 26 Mad. 488 (1902) and Srinivasa Ayyar v. Muthusami Pillai ILR 24 Mad. 246 (1900), the learned vakil for the Respondent has contended that if during the continuance of the tenancy of a person he sets up as against the landlord a higher interest in himself, it cannot operate to create in him by prescription an indefeasible right in respect of such interest. And it has been argued that the principle which underlies these cases equally applies to the facts of this case, because the Defendants have been on their own admission, holding as tenants under the Plaintiff, and that though it may be that they set up

a hostile Junglebari Mokarari right to the Plaintiff, the assertion of such right for more than 12 years could not create in them an indefeasible right so far as such right is concerned. But on the other hand we have cases distinctly laying down that if a Defendant notwithstanding a decree and writ of possession being taken out against him, continues to be in possession of the land comprised in the decree, such possession would be adverse to the Plaintiff decree-holder, and that the latter is bound to bring his suit within 12 years from the date of the commencement of such adverse possession. We refer to the case of Juggo-bundhu v. Ram Chunder ILR 5 Cal. 584 (1880), decided by a Full Bench of this Court, as also to the case of Gopal v. Krishna Rao ILR 25 Bom. 275 (1900). Referring to the case of Seshamma Shettati v. Chickaya Hegade ILR 25 Mad. 507 (1902), which we have already noticed, and which was quoted by the learned vakil for the Respondent, we find the following observations made--ovservations which eminently fit into in this case : "If after the determination of the tenancy the tenant remains in possession as trespasser for the statutory period, he will, by prescription, acquire a right as owner or such limited estate as it might prescribe for. A person coming into possession of land under a lease which is invalid or void as against the person seeking to eject him, is really a trespasser, and as such, after the expiration of the period prescribed by Art. 144 acquires, by prescription, the limited right under the lease, whether it be a lease for a term of years or a lease in perpetuity." The principles underlying the observations, we might here mention, are in accordance with that laid down by the Judicial Committee in what is called the Bhakee Birt case of Maharaja Rajundur Kishwar Singh Bahadur v. Sheo Pursun Misser 10 M.I.A. 438 (1866). There, their Lordships referring to the tenure that was set up by the Defendant in that case observed as follows : "If this tenure be not interposed between the zemindar and the cultivators, the ordinary relations between him and them exists; but if it is interposed the zemindar's general proprietary title to the collection is gone and in lieu of it he is simply entitled to some jama from the mesne proprietors. It is obvious then that the assertion of such a title is a serious prejudice to a zemindar and may materially interfere with his successful management of his zamindari. Such an intermediate tenure cuts off the possession, that is, the zemindar's title to rents and profits immediately derived from the cultivators.

In this sense the term "possession" is used in this plaint. Now this injury, supposing the claim to the Bhakee Birt tenure to be groundless, is not the less a wrong requiring a remedy, when it is put forward by one in possession under a title to an inferior right derived from the zemindar; as for instance, by a farmer of a portion of a zamindari. If such a claim were preferred by a person having such an interest it would be certainly competent to the zemindar, if the claim amounted to a repudiation or worked a forfeiture of the existing interest, to sue for the restoration of possession and the quieting of the claim also; because the limitation of his demand to that of possession would keep alive an adverse claim and would also multiply suits.

15. Applying these observations to the facts of the case before us, we are of

opinion that, even assuming that the Defendants retained possession of the mouzah in suit, notwithstanding the delivery of symbolical possession to the Plaintiff in 1879, as farmer, as we have been asked by the learned vakil for the Respondent to presume, if they set up a higher title in themselves--a title which would operate by way of limitation of the Plaintiff's right to recover khas possession of the land--it would give to the landlord a cause of action; and if he does not bring an action within 12 years from the time when this title was set up as against him, he would be barred by limitation. But in the present case there is nothing to show as we have already stated that when the Defendants retained possession of the land after the delivery of symbolical possession to the Plaintiff that they retained it as a farmer. On the other hand we may well presume that they continued to hold the land as on the title which they had already asserted in the suit of 1878, but which was negatived by the judgment of the Court. As a matter of fact, as we have already stated, their possession ever since the year 1879 was adverse to the Plaintiff; and we do not think that the recitals in the three documents to which we have adverted would entitle the Plaintiff to start, so far as the question of limitation is concerned, from the date or dates when those assertions were made on the documents in question.

16. For these reasons we are of opinion that the Plaintiff's claim so far as it seeks to negative the Junglebari Khut Kuti Mekarari right pleaded by the Defendants is barred by limitation. The decree of the Court below will be modified accordingly.

17. The question has also been raised before us whether the decree for injunction that has been awarded by the Court below is right, in the circumstances that in our judgment, the Defendants have acquired by prescription the right to hold the mouzah in suit on a permanent title. It will, however, be observed that the Defendants have not produced any grant. True it is that there is some evidence showing that the Defendants took out some coal here and there worth very little indeed, but in the judgment of the Court below such acts on their part would not create in them an indefeasible right to get the minerals out of the sub-soil. We agree in the view that is expressed by the Subordinate Judge in this respect. We think that the Defendants have not made out by such acts or user as are in evidence in this case any prescriptive right to hold the sub-soil as against the landlord. In this view of the matter we think that the decree of the Court below as to injunction must be affirmed. There is one other matter to which we think we ought to refer to, and that is in regard to the decree for mesne profits or damages that has been awarded by the Court below in respect to the coal and minerals that had been taken away by the Defendants. In the view that we have already expressed as to the evidence of taking of such coals or minerals we are of opinion that no decree for such mesne profits or damage should be given in this case. The decree of the Court below in this respect will therefore be withdrawn.