

(1915) 01 CAL CK 0029
In the Calcutta High Court

Baid Nath Sahay	Vs	APPELLANT
Nanku Mahton and Another and Dubri Mahton and Another		RESPONDENT

Date of Decision : 04-01-1915

Acts Referred:

Evidence Act, 1872 — Section 32(2)

Citation : AIR 1915 Cal 801 : 29 Ind. Cas. 219

Hon'ble Judges : Mullick, J;Holmwood, J

Bench : Division Bench

Judgement

1. This second appeal arises out of a claim for recovery of arrears of rent and cesses. The only portion of the claim which is in dispute before us is the bhowli rent, and that is disputed both as regards the method of collection, namely, whether it is bhowli danabandi or bhowli batai, and as regards the share of the landlord.

2. With regard to the first point, it is urged before us in appeal that the lower Court was wrong in excluding the dibi papers, which were admitted in the first Court without objection and which were proved to be in the handwriting of the deceased patwari, whose duty it certainly was to keep the dibi papers. We think that the learned Subordinate Judge was wrong in excluding those papers. There is nothing in Section 32, Clause (2), which requires any formal proof that the papers are kept as a fact in the ordinary course of business. He appears to have confused Section 32, Clause (2), with Section 34 with which we have nothing to do in this case. The case will, therefore, have to go back on this ground alone for the learned Judge to re-decide the question of danabandi or batai on a consideration of those dibi papers as evidence in the case.

3. Then, again, we are of opinion that he is wrong in having admitted the Settlement papers after the Murisif's decision in the case. His action appears to be contrary to the principle laid down by their Lordships of the Judicial Committee in the case of Kessowji Issur v. Great Indian Peninsular Railway Company and the authority which the learned Subordinate Judge cites,

MacDonald v. Babu Lal Purbi is clearly distinguishable, the record having there been filed after the institution of the suit but before the case had been decided in the first Court, while it was still open to the parties to use the record as evidence in the case. But it is obvious that such evidence cannot be admitted in appeal, so as to induce the learned Subordinate Judge to shift the onus in appeal to the plaintiff without remanding the case and to hold that the Munsif was wrong in not deciding the case differently upon evidence which was not before him. We, therefore, must direct that the Settlement record be excluded from the purview of the Judge in appeal.

4. As regards the question of the rate of division, we find that this is concluded by the finding of fact in the judgment with regard to Exhibit A. This is a finding which sets aside the Munsif's finding on a pure ground of fact and we cannot go behind it. It must be taken for the purpose of this case that the hakimi share is half the produce.

5. The result is that so much of the decree of the learned Subordinate Judge which decides the land as held bhowli batai must be set aside, and the case remanded to him for a fresh decision on the point in accordance with the directions contained in this judgment.

6. Costs will abide the result.

7. This judgment will also govern Second Appeal No. 1524 of 1911.