
(1915) 06 CAL CK 0023
In the Calcutta High Court

Basi Nath Pal and Others

APPELLANT

Vs

Raja Jagat Kisore Acharjee Chowdhury and Others

RESPONDENT

Date of Decision : 02-06-1915

Acts Referred:

Evidence Act, 1872 — Section 90

Citation : 35 Ind. Cas. 298

Hon'ble Judges : Roe, J;Asutosh Mookerjee, J

Bench : Division Bench

Judgement

1. This is an appeal by the plaintiffs in a suit for recovery of possession of a share of land on declaration of shikmi taluki right (hereto. The subject-matter of the litigation is waste land in Mauza Gurai included in estates Nos. 51 and 80 of the Collectorate of the District of Mymensingh. The estates were sold in 1533 for arrears of revenue and passed into the hands of one Bhawani Kishore Acharyya Choudbury, the predecessor-in-interest of the first defendant. According to the plaintiff the defaulting proprietor, or his predecessor, had created six shikmi taluks, which comprised the whole village, excluding 2 kanis of private land held in the possession of the proprietor and some specific lands comprised in two other taluks Chand Ram and Sova Ram. The plaintiffs set out their title by transfer and succession from the tenure-holders and allege that they have been wrongfully kept out of possession by the first defendant. The first defendant defended the suit mainly on the ground that the six shikmi taluks did not cover all the lands of the village to the exclusion of 2 kanis of the proprietor's private lands and the specific lands of the two other taluks already mentioned; he also contended that the six taluks did not exist from before the Permanent Settlement and that the plaintiffs had no right to the specific lands claimed by them. The Subordinate Judge in a careful judgment decided all the points in favour of the plaintiffs and made a decree in their favour. Upon appeal the District Judge, in an elaborate judgment, has differed from the conclusions of the Subordinate Judge and has dismissed the suit. On the present appeal, the decision of the District Judge has been assailed substantially upon two grounds of law; first, that

reliance should not have been placed upon the facts stated in the report of the decision of the Judicial Committee in the case of *Wise v. Bhooban Moyee Debia Chowdrainee* (1) which related to the same estate although not to the lands now in controversy; and secondly, that the District Judge has allowed the defendant to succeed on a case not specifically made in the Court of first instance.

2. As regards the first, ground, it is plain that, in the Court of first instance, reference was made to the judgment of the Judicial Committee in *Wise v. Bhooban Moyee Debia Chowdrainee* 10 M.I.A. 165 : 3 W.R. 5 (P.C.) : 1 S. P.C.J. 863 : 2 S. P.C.J. 91 : 19 E.R. 934 in order to meet the objection that the shikmi taluks were not mentioned in the quinquennial papers of 1302. What happened in the lower Appellate Court was that the defendant relied upon facts in the history of the title to this property stated in the judgment of the Judicial Committee, and the District Judge has made such facts the basis of his judgment. The result has been that he has come to the conclusion that the plaintiffs had failed to explain how two of their predecessors Ibrahim and Mosan could grant a valid sanad in 1807 and Asan Bibi another valid sanad in 1809. In our opinion the judgment of the Judicial Committee in a suit not inter partes could not be used for the purpose for which it was used by the defendant in the Court below. It is well settled that although a judgment not inter partes may be used in evidence in -certain circumstances as a fact in issue, or as a relevant fact, or possibly as a transaction *Ram Ranjan Chakerbati v. Ram Narain Singh* 22 C. 533 : 22 I.A. 60; *Bitto Kunwar v. Kesho Prasad Misr* 24 I.A. 10 : 19 A. 277 : 7 S. P.C. J. 131 : 1 C.W.N. 265; *Dinomoni Chowdhrani v. Brojo Mohini Chowdhrani* 29 I.A. 24 : 6 C.W.N. 386 : 29 C. 187; *Tepu Khan v. Rajani Mohun Das* 25 C. 522 : 2 C.W.N. 501; *Mulcomson v. O'Dea* (1861) 10 H.L.C. 593 : 9 Jur. (N.S.) 1135 : 9 L.T. 93 : 12 W.R. 178 : 11 E.R. 1155 : 138 R.R. 317; *Bristow v. Cormican* (1878) 3 App. Cas. 641 the recitals in the judgment cannot be used as evidence in a litigation between the parties. The principle is that all judgments are conclusive of their existence as distinguished from their truth; judgments as public transactions of a solemn nature are presumed to be faithfully recorded. Every judgment is, therefore, conclusive evidence, for or against all persons, whether parties, privies, or strangers, of its own existence, date and legal effect, as distinguished from the accuracy of the decision rendered; in other words, the law attributes unerring verity to the substantive as opposed to the judicial portions of the record. We hold accordingly that the judgment of the Judicial Committee could not be used in proof of the facts stated therein, and the first ground must prevail,

3. As regards the second ground, namely, that the plaintiffs were taken by surprise by the argument which was advanced on behalf of the defendants in the lower Appellate Court, we may observe that it is in a sense closely connected with the first objection. The plaintiffs relied upon three old sanads whose genuineness was questioned by the defendant in both the Courts below. The Subordinate Judge as also the District Judge, however, have concurrently found in favour of the plaintiffs. This, no doubt, did not necessarily show that the

grantors of the sanads were competent to carve out the interest which they really intended to create. It is well settled that Section 90 of the Indian Evidence Act does not prove the authority of the person who has made the grant, the genuineness whereof is presumed by the Court under the provisions of that section. If it were necessary to rely upon authority in support of this position, reference may be made to the decisions in *Thakoor Pershad v. Musammatt Bashmutty Kooer* 24 W.R. 428 and *Ubilach Rai v. Dallial Rai* 3 C. 557 and *Uggrahant Chowdhry v. Huro Chunder Shickdar* 6 C. 209. A similar view has been taken in respect of ancient documents under the English Law *Airey, In re, Airey v. Stapleton* (1897) 1 Ch. 164 : 66 L.J. Ch. 152 : 76 L.T. 151 : 45 W.R. 286. But the point here is that this objection to, the validity of the sanads was not specifically raised in the Trial Court; when taken, and for the first time, in the Court of Appeal below, it was rested on facts recited in the judgment of the Judicial Committee already mentioned, but not proved in this suit. The plaintiffs were taken by surprise and have, we think, a legitimate grievance; if the objection had been taken, as it might have been, in the Primary Court, the plaintiffs might have adduced evidence to explain away the circumstances apparently adverse to their case. Indeed, this is more than probable, for they have, in this Court, actually referred to two ancient documents, namely, applications in Court dated 16th December 1804 and 1st February 1805, which, as alleged in a petition presented to us, they have discovered since the date of the decision of the District Judge, and which, they contend, fully explain how the predecessors of the plaintiffs were competent to carve out the interest which they actually created by the sanads mentioned. The appellants have invited us to receive these documents in evidence; we are of opinion that the application should be granted in the interests of justice. But in view of the course we intend to adopt, we must decline to accede to the prayer of the appellants that we should discuss in detail the, legal effect" of the facts found by the District Judge. If we were to adopt that course, we might influence the decision of the District Judge after remand, which would be obviously unfair, as the facts must be re-investigated by him in the light of the documents now produced by the appellants. But we desire to add that a perusal of the judgment of the Subordinate Judge shows that the arguments which he adduced in support of his view, require serious consideration, and that till those reasons have been successfully met, his decision should not be reversed.

4. The result is that this appeal is allowed, the decree of the District Judge set aside and the case remanded to him in order that the appeal may be re-heard. The documents which have been produced before us will be sent down to the District Judge to be considered along with the other evidence in the case. The parties will be at liberty to adduce evidence to elucidate the question of the competence of the grantors of the sanads to create the interest actually created by those instruments. The costs of this appeal will abide the result.