

(1937) 02 CAL CK 0029

In the Calcutta High Court

Case No : Appeal from Appellate Decree No. 1868 of 1934

Bejoy Gopal Dey Choudhury and Others

APPELLANT

Vs

Gopidas Roy and Others

RESPONDENT

Date of Decision : 08-02-1937

Acts Referred:

Citation : (1937) 02 CAL CK 0029

Final Decision : Dismissed

Judgement

1. This appeal arises out of a suit for assessment of rent in respect of certain lands which have been recorded in the finally published record-of-rights as being in the possession of the Defendants as a niskar tenure appertaining to Touzi No. 11 of the Burdwan Collector-ate held by the Plaintiffs in patni right. The Courts below have dismissed the suit on the ground that it is barred by limitation. Hence this second appeal by the Plaintiffs.

The only point for determination in this appeal is whether the Courts below are right in holding that the suit is barred by limitation. The facts which are relevant to the question of limitation are these:-

In the year 1842, Government instituted a suit for resumption of these lands under sec. 6 of Regulation XIX of 1793, in the Court of Special Deputy Collector, District Burdwan. That suit was dismissed on the ground that the area of the land was only 36 bighas, 2 1/2 cottas and the Government had no right to resume lands, the area of which did not exceed 100 bighas. In 1862, a suit was instituted by the then proprietors of Touzi No, 11 for resumption of these lands on the ground that they formed part of the mal lands of their Touzi and that the predecessors-in-interest of the Defendants came into possession of these lands after 1790 and were possessing them without any right. The predecessors of Defendants in that suit contended that they were holding these lands as lakheraj from before 1st December, 1790. This suit was decreed on 31st December, 1867. It was held in that case that there had been no lakheraj grant in respect of these lands either before or after 1790 and that it was a part of the mal lands of Touzi

No. 11 and that the Defendants' predecessors who were the former proprietors of this Touzi, were in wrongful possession of the lands as niskar after their title to the Touzi came to an end. Thereafter the proprietors of the Touzi did not take any steps to eject the Defendants' predecessors from the lands or to assess rent on them. In 1905 the predecessors of the Defendants filed a road-cess return, asserting therein their niskar right in the lands to the knowledge of the then putnidar of the village. In the year 1931 in the course of the District Settlement operations the disputed lands were recorded as a niskar tenure of the Defendants within Touzi No. 11 on the basis of the decision in the suit for resumption instituted by Government in the year 1842. The present suit was instituted on February 29th, 1932.

2. It appears from the record-of-rights published in the year 1931 that the revenue authorities recorded these lands as a rent-free tenure on the basis of the decision of the Special Deputy Collector in the year 1842. But the judgment in the suit which was instituted by the proprietors of the Touzi in the year 1862 clearly shows that these lands are mal lands of the Touzi. The presumption arising out of the entries in the record-of-rights in favour of the Defendants is therefore rebutted by this judgment. The contention of Dr. Sen Gupta appealing on behalf of the Appellants is that Art. 130 of the Indian Limitation Act does not apply to this suit as the disputed lands are not rent-free. His contention is that the present suit comes under Art. 131 of the Indian Limitation Act and as there had been no refusal of Plaintiffs' right to get rent from these lands beyond 12 years from the date of the institution of the suit, the Courts below were wrong in dismissing the suit on the ground of limitation. Mr. Gupta appearing on behalf of the Defendants concedes that the present suit does not come under Art. 130. His contention, however, is that Art. 131 is of no assistance to the Appellants as that Article contemplates suits in cases where the Plaintiffs' right to the property has not been already extinguished by adverse possession of the Defendants and in the present case the adverse possession of the predecessors of the Defendants commenced before 1842, at any rate from 31st December, 1867. Dr. Sen Gupta's answer to this contention of Mr. Gupta is that the effect of the decree in the suit of 1862 was to create a relationship of landlord and tenant between the Plaintiffs' predecessor and the Defendants' predecessor and as mere non-payment of rent did not put an end to that relationship, the Plaintiffs' right to the property was not extinguished. In support of his contention Dr. Sen Gupta placed much reliance on the following observations of this Court in the case of *Bir Chunder Manikya V. Raj Mohan Goswami* I. L. R. 16 Cal, 449 (1889):-

It has been held in certain cases by this Court that a decree for resumption of a lakheraj grant before December, 1790, does not by itself create such a relation; (relationship of landlord and tenant between the parties) that it is after the decree has been followed up by a proceeding assessing the revenue payable by the lakherajdar, and when the latter agrees to pay the revenue assessed, that such a relationship is created; while in the case of a grant subsequent to the year 1790, the decree declaring the zamindar's right to assess rent does

establish such a relation-Madhab v. Mahima 12 W.R.442: s. c. 8 B. L. R. App. 83.; Sham Sundari v. Sital 15 W. R. 474: s. c. 8 B. L. R. App 85n (1871).

3. The actual decision however in that case was that no relationship was created between the parties by the resumption decree and the ground of the decision was that there was a lakheraj grant before 1790. No reasons, however, were given in that case in support of the observation that in the case of a grant subsequent to the year 1790 the decree declaring the landlord's right to assess rent establishes the relationship of landlord and tenant. But reference was made to Madhab Chunder's case 12 W.R.442: s. c. 8 B. L. R. App. 83 (1868). and Rani Shama Sundaree's case 15 W. R. 474: s. c. 8 B. L. R. App 85n (1871).. In Madhab Chunder's case 12 W.R.442: s. c. 8 B. L. R. App. 83 (1868)., Dwarka Nath Mitter, J., while dealing with the effect of a decree for the resumption of certain lands alienated as lakheraj subsequent to the 1st of December, 1790, under the provisions of sec. 30 of Regulation II of 1819, observed as follows:-

The revenue assessable upon invalid lakheraj lands below 100 bighas must be fixed by the Collector subject to the confirmation by the Board of Revenue, and it is "only after the proprietor of the lakheraj lands has agreed to pay the revenue thus fixed, that he is to be considered as a dependent talookdar entitled to hold his talook from generation to generation, subject to the payment of that revenue. There can be no doubt that the relation of landlord and tenant cannot come into existence until the lakherajdar has consented to pay the revenue fixed by the Collector, and it is, therefore, clear that the Plaintiff ought to have adopted the course prescribed by the section above quoted, instead of bringing this suit for a kabuliat, under clause 1, sec. 23, Act X of 1859.

It has been argued that the provisions of sec. 9, Regulation XIX of 1793, are not applicable to this case, inasmuch as the Court which passed the decree under sec. 30, Regulation II of 1819, declared that the lands in question were alienated as lakheraj sub. sequent to the 1st of December, 1790. But the answer to this argument is very plain. In the first place, we are bound to take the decree as it stands, and we have nothing to do with the reasons upon which the judgment which led to that decree was based. And in the next place it is perfectly clear that, if the lands in question were alienated as lakheraj subsequent to the 1st December, 1790, the Court which passed that decree had no jurisdiction to pass it under the provision of sec. 30, Regulation II of 1819.

This case therefore is no authority for the proposition that in the case of a grant subsequent to the year 1790 a decree declaring the zemindar's right to assess rent establishes the relationship of landlord and tenant between the parties. The decision in Rane Shama Sundari's case 15 W. R. 474: s. c. 8 B. L R App. 85n (1871) supports the view that a decree in a suit declaring the right of the zemindar to assess rent on lands held under a grant subsequent to the 1st December, 1790 " establishes as between the person in possession of such land and the zemindar the relation of landlord and the person liable to pay rent to such landlord." No reasons are given in that judgment in support of the view.

Ainslie, J., in *Protap Chunder Chowdhry v. Shukhee Soondaree Dasse* 2 C. L. R. 569 (1878) observed as follows :

The effect of the decree in the resumption suit was to declare that the land in the possession of the Defendant had been part of the permanently-settled estate, and had been separated from it by an invalid grant, and thereon to resume the same and re-annex the land to the zemindar's estate. It did not, however, interfere with the grantee's right to continue in possession, if he should be so minded; but it necessarily forced him if he continued in possession to hold as tenant of the zemindar. The words of; sec. 10, Regulation XIX of 1793 and of sec. 28, Act X of 1859, show clearly that it was only in respect of the alleged proprietary right under a grant that there was to be dispossession, and it seem to me that there is nothing in the law which indicates that there was to be an absolute ouster from the land. The position of the grantee after decree is not therefore that of a person holding adversely to the zemindar, but just the reverse; he was holding adversely before the decree, as he was holding on an allegation of title in himself, but, after decree, if he did not vacate the land, he must be taken to hold it, as what it has been declared to be, part of the zemindar's estate, subject to the liability in respect of rent which attaches to all persons holding by license of the zemindar. The decree in the resumption case having left the Defendant in the position of a tenant he cannot, without an intermediate surrender of the land to the landlord, change his position and assert that he holds as squatter or trespasser. The fact that no rent was settled or paid does not alter the character of the holding subsequent to decree in the resumption suit. Where Defendant elected to hold on, notwithstanding the declaration that he could only do so as tenant of the Plaintiff, he elected to hold as such tenant on whatever might be found to be fair and equitable terms. He has had the advantage of Plaintiff's remissness in escaping payment of rent for a number of years, but this cannot be extended into giving him a future right to hold rent-free.

The case of *Srimati Saudamini Debi v. Sarup Chandra Ray* 17 W. R. 363 :s. c. 8 B. L. R. App. 82 (1872) which was cited by the Munsif, gives a considerable body of authority in support of the view therein adopted. A recent case (Special Appeal No. 2858 of 1876) supposed to be inconsistent with this view has been cited by the Appellant, but it seems to me that there was a peculiarity about that case in that the Plaintiff was seeking to eject the Defendant as a trespasser, and falsely alleged the existence of a lakheraj grant. It may very well be that, if the occupation of the Defendant was adverse ab initio, limitation was not to be avoided by the decree of an intermediate suit to cancel as invalid a rent-free grant, the existence of which was in fact denied from the first. A suit under sec. 8, Act X of 1859, presupposes the existence of a grant the efficacy of which is disputed, and I see no reason to suppose that the mere existence of a so-called resumption decree necessarily protects a zemindar from the effect of his own statements in a suit, when such statements by denying the existence at any time of a grant, go to show that his resumption decree was wrongly obtained.

4. In the case before us the existence of a grant at any time whether before or after 1790 was denied by the Plaintiff in the suit of 1862. The predecessors of the Defendants asserted in that suit that they were in possession of these lands on the basis of a lakheraj grant in their favour before 1790. The finding in the suit of 1862 was that there had been no lakheraj grant in favour of the Defendants' predecessors either before or after 1790. It was also found that the Defendants in the suit who were the former proprietors of the estate and were in possession of the lands as proprietors of the estate wrongfully retained possession of these lands after their proprietary right came to an end. The occupation of the Defendants' predecessors which evidently continued from before 1842 was therefore adverse ab initio and the cause of action for ejecting them arose before 1842. Although the suit of 1862 was brought on the ground that the disputed lands formed part of the Plaintiffs' estate and were enjoyed by the Defendants as lakheraj after 1790 without any lakheraj grant, that is, without any right, there was no prayer for ejectment. It purported to be a suit under sec. 30 of Regulation II of 1819 for resumption of lands under sec. 10 of Regulation XIX of 1793 which gives right to the zamindar to dispossess the grantee of the lakheraj grant made since 1st December, 1790. The case of both the parties in the suit of 1862 was that there had been no lakheraj grant in favour of the Defendants since 1st December, 1790. The effect of the decree in that suit therefore cannot be the same as that of a decree passed in a suit for resumption of lakheraj grants since 1st December, 1790, under sec. 10 of Regulation XIX of 1793 or sec. 28 of Act X of 1859. This decree did not and could not convert this adverse possession into permissive possession. No relationship of landlord and tenant between the parties was therefore created by this decree. The rights of the Plaintiffs and their predecessor to recover possession of the property and their right to the property were therefore extinguished by the early part of 3rd Article of Bengal Regulation II of 1805, cl. 12 of sec. 1 of Act XIV of 1859, sec. 29 and Art. 145 of the Limitation Act of 1871 and sec. 28 and Art. 144 of the Limitation Acts of 1877 and 1908. As the Plaintiffs have lost their right to recover possession of the lands from the predecessors of the Defendants who were possessing these lands from before 1842 and were denying the Plaintiffs' proprietary right to the lands all along and were asserting their lakheraj right to the lands on the basis of grants before 1790, no action can be brought now to assess or recover rent in respect of these lands, as rent " is the compensation for the occupation-that occupation having always been of one and the same character, in fact, rent-free""- See Chundra Bullee Debia, v. Lakhce Debya. 5 W.R.P.C. 1: s.c.M.I.A. 214(1865) The Courts below were therefore right in dismissing the suit.

The appeal is accordingly dismissed with costs. The application for acceptance of further evidence in this Court is not pressed and is therefore dismissed.