
(1933) 12 CAL CK 0020
In the Calcutta High Court

Benoda Charan Chakravarty and Others	APPELLANT
Vs	
Ramani Kishore Chakravarti and Others	RESPONDENT

Date of Decision : 07-12-1933

Acts Referred:

Evidence Act, 1872 — Section 35

Citation : AIR 1934 Cal 488

Hon'ble Judges : Mallik, J; Jack, J

Bench : Full Bench

Judgement

Jack, J.—This appeal has arisen out of a suit for partition on establishment of the plaintiff's four annas right, title and interest in the Niskar lands described in the plaint. The plaintiff's case is that the disputed property appertains to No. 362 Kharija Taluk Harinarain Chakravarti which was partitioned by the Collector, but that the permanent Niskar tenure Utsarga Raghudeb Chakravarty was left common and undivided and is covered by partition Chitta Dags Nos. 63, 65, 66 and 67 of the year 1899 in which the plaintiff had four annas share and the defendants 12 annas share and it is in respect of these plots that the plaintiff seeks partition on establishment of his title. The plaintiff claims partition of the plots which are covered by nine cadastral survey plots of which four were recorded as appertaining to Niskar Raghudeb Chakravarty in the settlement survey namely, plots Nos. 244, 279/1029, 245 and 246 and the rest as appertaining to the other taluks. Defendants 1, 13 and 14 want partition on the basis of the butwara dags. Defendants 2 to 12 and 15 to 18 contend that the lands of the Niskar tenure are covered by the four cadastral survey plots only and they have no objection to the partition of these plots. They maintain that the other lands alleged by the plaintiff to belong to the tenure do not belong to it and that the plaintiff's right thereto, if any, has been extinguished by adverse possession for over 12 years.

2. The suit was decreed preliminarily in the trial Court with respect to the four survey plots only. The plaintiff's claim to the other plots was dismissed. In the

lower appellate Court the decree of the trial Court was set aside and the case was remanded, the Subordinate Judge declaring the plaintiff's title to one-fourth share in the four butwara dags but remanding the case for consideration by the trial Court and of the report of the Commissioner appointed by the trial Court as to the lands which are actually included in these butwara dags. The learned Subordinate Judge in finding in favour of the plaintiff with respect to all the butwara dags relying on the partition record states that the entries in the khatians are binding upon the parties to the butwara proceeding and that as the contesting defendants were parties to that proceeding they cannot now say that the lands which were included in that butwara proceeding as belonging to the Niskar tenure did not in fact belong to it. He has ignored entirely the presumption arising from the settlement record and even as regards the effect of the butwara record he is also in error inasmuch as the butwara record is not conclusive evidence but merely evidence u/s 35, Evidence Act, as an official record. In support of this contention we had been referred to the ease in Satish Chandra Chatterjee Vs. Kali Charan Choudhury, and also to the case in Gocool Chunder Law and Others Vs. Jamal Biswas and Others, . On the other hand we had been referred to the case of Debilal Sah v. Bam Bebeki Singh (1921) 63 IC 194. But the facts of that case do not apply in the present case. In that case the lands in suit were taken into account as assets of the estate under partition. In the present case the lands in suit were excluded from partition and they were merely referred to as so excluded. The butwara record is therefore very weak evidence of title. Neither of the Courts below referred to any other evidence of title but the record of rights, and though it is urged on behalf of the appellant that there is other evidence on the record our attention has not been drawn to anything which, we think, has been overlooked by the Court below. We therefore think that the Court below was right in relying on the entry in the Record of Eights. There is no dispute as regards the four settlement plots Nos. 244, 245, 246 and 279/1029 and the plaintiff's title to these lands appears to have been established.

3. As regards the other five plots we think the presumption arising from the Record of Rights has not been rebutted and both the Courts below have found that these plots had been in the exclusive possession of the defendants to the knowledge of the plaintiff from the date of the final publication of the Record of Rights. The lower appellate Court erred in thinking that the 27th October 1916 was the date of the final publication of the Record of Rights, it appears that 12th September 1916 was the date of final publication and the suit, having been brought on 16th November 1928, was brought more than 12 years from that date; twelve years would expire on 12th September 1928 and therefore the suit was not within 12 years from the date of the plaintiff's knowledge of adverse possession. But even if the date of knowledge of the plaintiff be taken to be the date of the certification of the final publication of the Record of Rights on 27th October 1916 even then there was adverse possession for over 12 years in as much as the suit was not instituted on the re-opening day after the pujah

vacation, namely 15th November 1928, but on the following day.

4. A preliminary objection was raised with regard to the maintainability of the appeal inasmuch as the heirs of Alauddin, one of the defendants, were not made parties. But we think that there is no force in this objection. Inasmuch as there was no decree in his favour, it was quite open to the other defendants to prefer the appeal without making them parties; there was therefore no defect of parties. We think that the fact that this Court refused to set aside the abatement of the appeal on the application of the appellant for the addition of the heirs as party respondents to the appeal does not affect the matter: vide the case of Midnapore Zamindary Co., Ltd. Vs. Amulya Nath Roy Chowdhury and Others, . This appeal is therefore allowed and the decree of the lower appellate Court is set aside, and that of the Court of first instance restored with costs in this Court and in the lower appellate Court.

Mallik, J.

5. I agree.