

(1924) 02 CAL CK 0035
In the Calcutta High Court

Chandra Mohan Maiti and Others

APPELLANT

Vs

Kinaram Maiti and Others

RESPONDENT

Date of Decision : 05-02-1924

Acts Referred:

Bengal Cess Act, 1880 — Section 95, 96
Evidence Act, 1872 — Section 21, 32

Citation : AIR 1925 Cal 408 : 79 Ind. Cas. 412

Judgement

1. The defendants are the appellants. The plaintiffs brought a suit for Khas possession of two plots of land " Ka " and "Kha" on the allegation that they were the debutter property of Thakur Chandaneswar Mahadeva. With regard to their claim in respect of the land marked " Kha" both the Courts below have agreed in dismissing the plaintiffs' suit. With regard to plot "Ka" the defendants' case was that they were holding this land as tenants for a long time under an idol named Banabir Thankurani and under Thakur Chandaneswar Mahadev.

2. The first Court found that the land belonged to Thakur Mahadev but refused to give the plaintiffs Khas possession of the land, holding that the defendants were tenants in respect of it and could not be ejected therefrom. The plaintiffs appealed and the lower Appellate Court found with respect to this plot that the plaintiffs were entitled to Khas possession on the ground that the defendants failed to prove that they were the tenants on the land. Against this decree of the lower Appellate Court with respect of plot "Ka" the defendants have preferred this appeal.

3. The findings of the first Court with regard to this plot are that the defendants have been holding it for the last 37 years and that they are in possession of this land as mentioned in a document executed by defendant No. 5 who is a recorded shebait of the idol Mahidev. There are other considerations also which led that Court to find for the defendants. The lower Appellate Court has upset that finding with the remark that the evidence on this point, namely, the possession of the defendants as tenants, is very meagre and cannot be relied upon. Then the learned Judge goes on to rely upon a certain items of evidence adduced by the

plaintiffs in respect of their ease. One of these pieces of evidence is certain Road Cess Returns filed by the Shebait of the idols in 1890 and 1906. It is argued by the appellants that these "Returns are not admissible in evidence u/s 95 of the Bengal Cess Act. The facts are somewhat peculiar. The plaintiff's are the shebait of both the idols Chandaneswar Thakur and Banbir Thakurani and they have been holding possession of the land belonging to these two idols as she-bait of both of them. The Road Cess Returns were filed on behalf of both the idols together. The plaintiffs attempted to use these Returns in order to show that the land in dispute did not belong to one idol but to the other. Both Courts have apparently admitted these documents; and the Court of Appeal below is of opinion that Road Cess Returns could be used in evidence in spite of Section 95 of the Cess Act, but he does not give his reasons for this view. He, however, relies upon two reported cases. The first case the learned Judge refers to is the case of Ram Prasad Roy v. Sham Narain (1907) 6 C.L.J. 22. That case does not support the respondent's contention. In that case the plaintiff, alleging himself to be an occupancy raiyat, sued the defendants for possession of the land on the ground that they were in occupation without any right and in proof of his title he produced the Road Cess Return filed by the Zamindar. It was held in that case that Section 95 of the Cess Act has no application to a case where the parties were not persons who filed them in pursuance of the provisions of the Act. If anything, this case is an authority for a view opposite to that taken by the learned Judge. The next case referred to is the case of Lachmi Prasad v. Jag Mogan Lal (1913) 18 C.L.J. 633. There the suit was brought by a reversioner who in support of his case filed Road Cess Returns submitted by the widow who was in possession of the estate. It was held in that case that the Road Cess Return is admissible in evidence in favour of not only the person who filed it but also any person who claims through him or may be deemed to be his representative-in-interest; a reversioner is not a person who claims through a widow or may be deemed to be her representative-in-interest. This case also does not support the view taken by the learned Judge. These cases lay down the principle which has been enunciated by the Judicial Committee of the Privy Council in Hem Chandra Chaudhury v. Kali Prosanna Bhaduri (1903) 30 Cal. 1033 and followed in the case of Chahho Singh v. Jharo Singh (1912) 39 Cal 995 and Mohendra Narayan Singh v. Ajodhya Prasad Singh (1912) 39 Cal. 1005. The result of these decisions is that Section 95 of the Cess Act restricts the provisions of Section 21 of the Evidence Act and makes the exceptions to that section inapplicable to the case of those Returns. The conclusion which is derivable from those cases is that a Return cannot be used under any circumstances in favour of the person making it but it can be used by others for a purpose not directly connected with the statements made in the Return. In the present case the Returns were filed by the shebait of the idols. They show that the disputed plot is in the Khas possession of the idol Mahadev. The genesis of Section 95 of the Cess Act is traceable to a tendency on the part of landlords to describe lands, though in the occupation of tenants, as in their Khas possession for some possible ulterior purpose. A statement, therefore, that certain land is in the Khas possession of the landlord

is of doubtful accuracy and ought not to be used in his favour when made in a Return by invoking the aid of: Section 32 of the Evidence Act or some other adjective law.

4. It has been very ingeniously argued by the learned Vakil for the respondents that the Returns were filed on behalf of the two idols and any entry in the Returns in favour of one idol must necessarily be against the interest of the other idol, they are therefore, admissible u/s 95. We regret that we cannot accede to this proposition. If they are used against one of the idols they are also used in favour of the other idol which has submitted the Return, thus contravening the provisions of Section 95 of the Cess Act. Moreover, if this view be adopted it would be easy to defeat the provisions of Section 95 by making joint Returns by co-sharer landlords. We are, therefore, of opinion that the learned Judge is wrong in admitting in evidence those Road Cess Returns.

5. The next piece of evidence to which the learned Judge has adverted is the Record-of-Rights. The entry in the Record-of-Rights is to the effect that the defendants are occupancy raiyats in respect of the disputed land under the idol Mahadev. The learned Judge seems to think that if the defendants fail to prove that they are holding their tenancy under the idol Banabir they cannot avail themselves of that entry in the Record-of-Rights. Though he does not say so, probably he means that when both parties impugn the correctness of an entry in the Record-of-Rights the legal presumption ought not to be raised in favour of the defendants. But the learned Judge has not taken into consideration the peculiar facts of this case. The record shows that the land has been held by the tenants as occupancy raiyats under the same man Naba Kumar Samanta, defendant No. 5, who happens to be the shebait of both the idols. The entry, namely, the defendants are holding this land in occupancy right under Naba Kumar, so far as it goes, certainly raises a presumption, in favor of the defendants' tenancy. With regard to the idol being Mahadev or Banabir it must be borne in mind that it is the same person who represents both the idols and it is not unlikely to make a mistake as regards the name of the idol which is the real owner. The learned Judge, in our opinion, is not correct in rejecting the Record-of-Rights merely on the ground that the name of Mahadev appears in the entry instead of the name of the other idol.

6. It has been strenuously urged before us that, as the finding of the learned Judge is a finding of fact, we are not entitled to interfere with it in Second Appeal. The learned Judge says, as we have observed, that the evidence of the defendant's tenancy is very meagre and cannot be relied upon. He has not discussed the evidence and he does not say why it is meagre. It must be remembered it is a judgment of reversal, that the learned Judge was upsetting the findings arrived at after detailed consideration of the whole evidence on the record by another Court. We do not think that it is enough to say that, in the opinion of the Appellate Court the evidence is meagre and could not be relied on without giving any reason in support of that view.

7. In the result we are of opinion that the learned Judge has not approached this case from the correct point of view and has not given that attention to it which it requires. Under the circumstances, we think that it would be proper that the appeal should be reheard by the Court of Appeal below.

8. There is a cross-objection preferred by the respondents in respect of plot "Kha." Both the Courts below have found that the plaintiffs have failed to prove their title or the title of the deity Mahadev to this plot. The learned Judge says "There is absolutely no evidence to show that plot "Kha" belongs to Chandaneswar. The public road separates this plot from Mahadev's temple compound. I also agree with the lower Court that plaintiffs have failed to establish that plot "Kha" is Debutter property of the idol Mahadev. We do not see how, on this finding it is possible for us to interfere in Second Appeal.

9. The order, therefore, which we propose to pass in this case is that the decree of the lower Appellate Court, so far as it relates to plot "Kha" would be set aside and the case remitted to that Court for a rehearing of the appeal as regards that plot in accordance with the observations contained in the judgment. Costs of the appeal will abide the result.

10. The cross-objections are dismissed with costs.