

(1887) 01 CAL CK 0002
In the Calcutta High Court

C.T. Davis and Others

APPELLANT

Vs

Drobomoyi Gupta and Others

RESPONDENT

Date of Decision : 24-01-1887

Acts Referred:

Citation : (1887) ILR (Cal) 323

Hon'ble Judges : Tottenham, J; Ghose, J

Bench : Division Bench

Judgement

Tottenham and Ghose, JJ.—This is an appeal from a decree of the District Judge of Furreedpore in favour of the plaintiffs in a suit brought by Mr. C.T. Davis as receiver to the estate of the late Raj Chunder Dass in the names of himself and the proprietors of the estate against the appellants Permanund Sen and others to set aside a permanent settlement granted to them by Rashmoni Dasi, the widow of the said Raj Chunder Das, in respect of a chur named Gobra, which was an accretion to the mouzah of that name. Rashmoni granted the settlement of this chur in perpetuity to the defendants in the year 1260, the chur being then, as it is stated, mainly covered with jungle; the lessees were to hold it rent-free for the first three years, and subsequently at a progressive jumma until the year 1267, from which year they were to hold it in perpetuity at 10 annas per bigha. Rashmoni Dasi died in 1861, and after her death the estate was held during their lifetime by two of her daughters, Padmamoni and Jagadumba, the last of whom died in Pous 1287, that is, the 31st December, 1880. Upon the death of the last-named lady the sons of herself and sisters as reversioners came into possession of their grandfather's estate. A partition suit was brought for the division of the estate, and in the course of that suit Mr. C.T. Davis was appointed by the High Court as receiver. It is stated that a notice to quit was served upon the defendants, their lease not being valid as against the reversioners, and the present suit to eject the defendants was brought, because they refused to give up possession. There was an alternative prayer for enhancement of the rent of the defendants should they be found entitled to remain tenants.

2. Various pleas were raised in the written statement of the defendants, and twenty issues were laid down by the Subordinate Judge, in whose Court the plaint was filed. The suit was afterwards transferred to the file of the District Judge, who made a decree in the plaintiff's favour for the ejectment of the defendants and for mesne profits for three years, with costs of the suit.

3. The grounds argued before us in appeal on behalf of the defendants were, that Mr. Davis as receiver had no power either to serve a notice to quit or to bring this suit to eject, and that there was no proof that the notice said to have been served was actually signed by Mr. Davis. The finding of the lower Court that the notice was actually served was impugned as not being supported by credible evidence. The finding by the Judge that it was unnecessary to serve any notice, he having held the defendants to be mere trespassers as against the plaintiffs, was impugned as contrary to law. The next contention was that the suit was barred as *res judicata* in consequence of the decision of the High Court in a suit brought by the daughters of Rashmoni, who were in possession of the estate, to set aside the settlement in question and to enhance the rent of the holding. The next objection was that the suit was barred by limitation. Next it was urged that the plaintiffs ratified the settlement made by Rashmoni by receiving rents from the defendants for the period subsequent to the death of the last surviving daughter. And, lastly, it was contended that, regard being had to the true condition of the land, Rashmoni was justified in granting the settlement, and that, at the very least, the defendants were entitled to retain possession as being tenants with right of occupancy.

4. Another question was raised by the plaintiffs respondents in the Court below, but which has not been dealt with by the Judge, viz., whether, supposing the dowl, which forms the basis of the defendant's title, to be valid as against the reversioners, the plaintiffs are still not entitled to assess rent upon all land held in excess of the area specified in that dowl. The area specified in the dowl is 1600 bighas. According to the plaintiffs' case the area of the chur in their possession is nearly 3,000 bighas, and according to the evidence of the defendant Permanund himself is 2,500 or 2,600 bighas.

5. These are the points which we have to decide in this case.

6. The first point, touching the authority of the receiver to issue a notice to quit and to bring this suit to eject, was not raised in the written statement, and was not the subject of any of the issues laid down in the lower Courts; but it appears from the order sheet that on the 17th of March 1885, before any witnesses were examined, the objection to Mr. Davis' action was urged before the lower Court upon the strength of a decision of this Court in the case of *Miller v. Ram Ranjan Chakravarti* 10 C. 1014 in which it was held that the receiver could not sue or be sued without the consent of the Court, that is, of the High Court. The lower Court, however, upon the construction which it put upon the order appointing Mr. Davis as receiver, held that he was entitled to maintain the suit; and accordingly the objection was overruled.

7. The objection taken in the first issue in the lower Court was that the plaint had not been signed and verified by a competent person. It was verified and signed by Kali Churn Singh, a mukhtear of the receiver. If the receiver had, as held by the District Judge, authority to bring this suit, then the verification by his authorised mukhtear would probably be sufficient, otherwise of course it would have no effect. We may here observe that though the owners of the estate were joined with Mr. Davis as plaintiffs in the case, none of them took any part in it nor did they put in any appearance or authorise anybody to verify the plaint on their behalf. This would probably be immaterial if Mr. Davis, as receiver, had power and authority to bring the suit; for according to the rules of practice and the wording of the order of appointment, the receiver, in suits which he is authorised to bring, is permitted to use the names of the plaintiffs and defendants, and no action on their part appears to be necessary in such suits. The question therefore is whether, by the terms of the order of the High Court, dated the 11th August, 1881, appointing Mr. Davis as receiver, he was authorised either to issue a notice to quit, the tenants holding under a permanent lease, or to follow up that notice by an action for ejectment without further special permission from the Court. With reference to this point we may observe that, when the learned Counsel for the appellants first opened it, we heard the counsel for the respondents before going further into the case; and we then decided to bear the appeal on all the points raised, upon the express understanding that before the close of the case an application should be made on behalf of all the plaintiffs-owners, adopting the action of the receiver, and agreeing to be bound by the result of the trial. But no such application has been made. Some days after the hearing had terminated a petition was tendered signed by some of the owners-plaintiffs, but not by all. It is obvious that an action for ejectment cannot be maintained by some only of the owners of an undivided estate. We were therefore unable to take cognizance of that petition. And the question already stated must be decided. We have been referred to English cases as showing what a receiver may do of his own authority and what he may not do without the permission of the Court. The order of appointment, which is printed at pages 55 and 56 of the paper book, authorizes the receiver to take possession of the property, moveable and immoveable, of the estate, and, amongst other things, authorizes him to let and set the said Immovable property or any part thereof as he should think fit. Mr. Evans for the respondent referred us to Kerr on Receivers, and pointed out a passage at page 151, showing that a receiver appointed by the Court with general authority to let the lands from year to year has thereby also an implied authority to determine such tenancy by a regular notice to quit. He referred us to the cases mentioned in the footnote to page 151 as authority for this doctrine. Those cases, however, appear to us to refer only to tenancies of the nature there described, namely, tenancies from year to year, or other tenancies, the periods of which expire during the incumbency of the receiver. The words "to let and set" in Mr. Davis' appointment order cannot, we think, give him as receiver any implied authority to interfere with tenures which, upon the face of them, are permanent. We think that to authorize him to issue such notice

special consent of the Court would be necessary. Mr. Davis must have been appointed receiver under the provisions of Section 503 of the Code of Civil Procedure; and no doubt the Court could have, had it seen fit, granted to him under that section all such powers as to bringing and defending suits, and for the realization, management, &c., of the property as the owner himself had, or such of those powers as the Court thought fit. And if the order of his appointment had been drawn up in the form prescribed in the fourth schedule to the Code, that is, in the Form No. 168 of that schedule, there would have been no difficulty in the receiver's way in the present suit, for the form in question gives a receiver full powers under the provisions of Section 503. But the order was not drawn up in that form ; it was drawn up in the old form which prevailed at the time of the Supreme Court, and which, as we are informed, has ever since been in use. Instead of having full powers u/s 503, the receiver has the limited powers expressly given by the order of appointment. And we find in that order no words upon which we could hold that he was authorised to serve upon the defendants a notice to quit the tenure which they obtained from Rashmoni.

8. Then it was contended by Mr. Evans for the respondents that the words of the order are sufficiently large to give the receiver power to bring this suit to eject, for the order authorises the receiver to enforce claims by action, suit, or otherwise. He submitted that the word "claims" is sufficient to cover the present suit, the matter in dispute being a claim to a portion of the landed property. We are, however, unable to adopt this construction. The passage in which this word occurs is as follows : "And to take and use all such lawful and equitable means and remedies for recovering, realising and obtaining payment of the said rents, issues, and profits of the said Immovable property, and of the outstanding debts and claims by action, suit, or otherwise." These are the objects for which he is authorised to bring suits ; and a suit to eject tenants and to take possession of land is not a suit for obtaining payment of a claim. That being so, it appears to us clear that the proceedings of the receiver in this matter, both as to the notice to quit and as to the bringing of this suit for ejectment, were unauthorized and of no effect against the defendants. This finding would of itself be sufficient to dispose of the suit; but as this is a case appealable to Her Majesty in Council, we think it our duty to express our opinion upon the other points raised.

9. As to the notice not being proved to have been signed by Mr. Davis, we find it undoubtedly true that there is no proof of this fact upon the record. But no question of this kind was raised in the Court below, nor is it raised in the petition of appeal to this Court. We think that the defendants-appellants may be held to have tacitly admitted that the notice was signed by Mr. Davis, and if they had raised the question at the proper time, no doubt evidence would have been forthcoming to establish the fact. We should not, therefore, be prepared to dismiss the suit on the ground that this signature was not proved. It was contended on behalf of the respondents that no notice to quit was necessary. We are of opinion that there can be no doubt in the circumstances of this case that the defendants were entitled to notice. They were acknowledged to be tenants by

the receiver upon the notice he served upon them for enhancement of rent, and also by receipt of rent from them, although it was for a period antecedent to the death of Jagadumba ; and we think that upon the authorities the matter is perfectly clear. We may refer to two cases--Chaturi Sing v. Makund Lal 7 C.710 and Kali Krishna Tagore v. Golam Ali 18 C. 248 as also to the case of Ram Khelawun Sing v. Mussamut Soondra 7 W. R. 152. It cannot be said that at the time when the reversioners came into possession the defendants were trespassers.

10. Then as to the evidence of service of the notice to quit we think that it is not wholly satisfactory, for there are discrepancies in the statements of the two witnesses who were called to prove it, which discrepancies we think ought not to have existed. Still the Judge below, before whom the witnesses were examined, believed them substantially, and we should hesitate to come to an opposite finding upon the evidence which satisfied him. If the plaintiffs recognized the necessity for issuing a notice, or recognised the fact, as they probably would, that the defendants would certainly claim to be entitled to such notice if any suit were brought to eject them, it seems very unlikely that the plaintiffs should neglect to serve one. And we think, therefore, that the evidence in support of the service may be accepted as sufficient, even though somewhat unsatisfactory. Upon this point therefore we would confirm the finding of the lower Court.

11. As to the contention with regard to res judicata, we think that it-cannot be sustained, It appears that after the death of Rashmoni, her daughters Padmamoni and Jagadumba sued the defendants for enhanced rent in respect of the lands now in dispute. They alleged that the dowl, under which the defendants held, and the amulnama were forgeries, and that even if genuine they were not valid as against themselves, Rashmoni, their mother, having no power to grant such a settlement to enure beyond the period of her own life. Those cases were finally decided in this Court on the 13th April, 1877. The suits were then dismissed. The Court, having noticed the objections raised in appeal, to the effect that the documents, even if executed by Rashmoni, were unauthorised, and that if they could bind Rashmoni, they were not binding upon the reversioners, as she could not create a permanent lease, observed as follows:

"What would have been the effect of these objections had they been raised by the appellants immediately on or within a reasonable time after the death of Rashmoni we need not now consider. But we agree with the lower appellate Court in holding that the objections cannot now be raised in these suits." The Courts then having observed that the documents in question had been found not to be forgeries, said : "It is too late after the lapse of more than twelve years since the death of Rashmoni, during all which years the appellants have been receiving rent from the defendants at the rates mentioned in this dowl kabulyat, to raise questions as to whether teuures created by her are binding on those who have taken the estate in reversion." No doubt Padmamoni and Jagadumba fully represented the estate of Raj Chunder Dass, and if it was really decided by the

Court as against chat estate, that the dowl kabulyat executed in favour of Rashmoni, and the tenure created by her were binding on the reversioners, we have no doubt that that matter would be res judicata in the present suit. But reading the judgment of the High Court printed at pages 100 and the following of the paper book, we find, as pointed out above, that the Court refused to consider the question at all, and therefore there was no adjudication of it. That being so, we think that we cannot say that the matter is really res judicata. We see no reason, therefore, why the plaintiffs may not raise the question in the present suit if it be not otherwise barred. This brings us to the question of limitation, and this we are compelled to hold is a bar to the present suit.

12. It appears to us that the title of the defendants had become perfect by efflux of time before Act IX of 1871 came into effect in the place of Act XIV of 1859. Act IX of 1871 came into effect in April 1873, more than twelve years after the death of Rashmoni, which took place in January 1861. The possession of the defendants was of course not adverse to Rashmoni ; and, if it be shown that her daughters, while in possession, had ratified the settlement in question, the defendants' possession could not have been adverse to them also. But we find in fact that the daughters, so far from ratifying their mother's settlement, did all they could to get rid of it. True it is that, as found by this Court in 1877, they received rent from the defendants at the rates mentioned in the dowl, but this was no ratification of the grant. On the contrary, they impugned the documents as forgeries, and denied that they were bound by them even if they were genuine.

13. Therefore adverse possession no doubt commenced during the lifetime of the daughters of Rashmoni. They fully represented the estate; and, if limitation barred them under Act XIV of 1859, it follows that it would bar the reversioners also--see the Full Bench decision in Nobin Chunder Chukerbutty v. Issur Chunder Chukerbutty BomLR Sup. Vol. 1008 : 9 W.R. 505. We find from the decision of the Court to which we have already referred that the daughters (who were the appellants) knew all along that the defendants had set up the claims which they attempted to defeat. This must, we think, refer to the time when the daughters came into possession upon Rashmoni's death ; and it must be presumed that they then came into possession of all the records belonging to her zemindari; and that the documents relating to this settlement were there, was admitted by Jugadumba in a written statement, filed by her in the suit of 1865, which is printed at page 97 of the paper book; and the presumption follows that "she and her sister had notice of the title claimed by the defendants. In this view of the matter it would appear that adverse possession commenced to run from the time of Rashmoni's death, from which more than twelve years had elapsed when Act IX of 1871 came into force, so that the defendants' title would be perfected by limitation under the provisions of Act XIV of 1859. There can be no doubt that the law in this respect was altered by Act IX of 1871 and Act XV of 1877. But it is obvious that if the defendants had acquired a title by prescription under Act XIV of 1859, that title could not be defeated by either of the Acts subsequently

passed.

14. In deciding a question of this kind the point to be looked to is, when did the plaintiffs or their predecessors first obtain knowledge of the title claimed adversely to them. There are many cases which afford authority for this, the latest of which is *Ram Chunder Singh v. Madho Kumari* 12 C. 484 : 12 I.A. 188. As to what constitutes an adverse claim and adverse possession as between a tenant and his landlord, we would refer to *Maiden Saiba v. Nagapa* 7 B. 96. *Tekaetni Gowra Kumary v. The Bengal Coal Company* 12 B.L.R. 282 (note). *Ogra Kant Chowdhry v. Mohesh Chunder Sickdar* 4 C.L.R. 40 and to the case of *Maharaja Rajundra Kishwur Sing Bahadur v. Sheopursun Misser* 10 M I A 438 in which their Lordships of the Privy Council at page 449 observe as follows : "If this tenure be not interposed between the zemindar and the cultivators, the ordinary relation between him and them exists, but if it be interposed, the zemindar's general proprietary title to the collections is gone, and in lieu of it be is simply entitled to some jumma from the mesne proprietors. It is obvious then that the assertion of such a title is a serious prejudice to a zemindar, and may materially interfere with his successful management of his zemindari. Such an intermediate tenure cuts off the possession, that is, the zemindar's title to the rents and profits immediately derived from the cultivators."

In this sense, the term "possession" is used in this plaint. Now this injury, supposing the claim to the bhakee birt tenure to be groundless, is not the less a wrong requiring a remedy when it is put forward by one in possession under a title to an inferior right derived from the zemindar, as for instance by a farmer of a portion of the zemindari. If such a claim were preferred by a person having such an interest, it would certainly be competent to the zemindar, if the claim amounted to a repudiation or worked a forfeiture of the existing interest, to sue for the restoration of possession, and the quieting of the claim also, because the limitation of his demand to that of possession would keep alive an adverse claim, and would also multiply suits.

15. We think therefore that in this case there was adverse possession by the defendants since the death of Rashmoni, and that upon the ground of limitation also this suit must fail, so far as it seeks to recover khas possession of the lands in suit.

16. The appellants have contended that the reversioners ratified the settlement granted to them by accepting rent for a period subsequent to the death of the last surviving daughter of Rashmoni. We think that the judgment of the lower Court in overruling this plea is correct. We think that the evidence as to the receipt of such rent is inconclusive, and that it has been shown that there was no intention to ratify the settlement. This point, therefore, we should decide in favour of the plaintiffs.

17. Then as to the right of occupancy pleaded in this case by the defendants, we think that that plea cannot be maintained upon their own showing. Their

possession is that of middlemen and not of tenants who can claim a right of occupancy. That was their own contention in the cases brought against them for enhancement of rent after notice, and we think that there is no foundation for their present plea. We have, therefore, no hesitation in overruling it.

18. Next, as to the power of Rashmoni, a Hindu widow, to make a settlement of this nature, it has been contended that it was a settlement necessary for the improvement of the estate, that without it the jungle lands would never have been brought into cultivation at all. The question depends, in our opinion, upon the circumstances of the land. It has been complained that the District Judge excluded evidence tendered to show what the condition of the chur was when the settlement was made, and what was the custom followed by Rashmoni and other landlords in the same part of the country in respect of similar lands. As to the former point, we think that the Judge was wrong to exclude any evidence tendered, and had our decision been otherwise on the points already mentioned, we should probably have found it necessary to send the case back for the reception of further evidence on this point. But upon the evidence as it stands we certainly should not be prepared to differ from the conclusion arrived at by the Judge, and hold that the settlement made by Rashmoni was really necessary for the improvement of the estate. The land appears to have been a chur thrown up in a large river as an accretion to an existing mouzah of the estate, and as such it is almost impossible to believe that ryots could not be found to bring it under cultivation upon less exceptional terms. Had the land been a portion of a tract of forest or other land difficult of access and difficult of cultivation without considerable outlay, there might have been some reasonable ground to urge in favour of this settlement; but so far as the evidence goes, we are disposed to hold that Rashmoni was under no necessity to grant a permanent lease at a very low rate of rent, bearing in mind that she was a wealthy zemindar and could have easily laid out the nine or ten thousand rupees said to have been expended by the defendants in bringing the property under cultivation.

19. Upon the whole, therefore, we are of opinion that the suit must fail both upon the ground that the receiver acted ultra vires in instituting it, and that so far as it seeks to recover khas possession it is barred by limitation so far as regards the area covered by the dowl upon which the defendant's title rest. If the suit had been maintainable by the receiver, we should be prepared to hold that the plaintiffs would be entitled to an assessment of all the lands held by the defendants in excess of the area covered by their dowl.

20. The result is that the appeal must be allowed, the decree of the lower Court set aside, and the plaintiff's suit dismissed with costs against the receiver, Mr. Davis.