

(1933) 12 PAT CK 0023

In the Patna High Court

Dhir Narayan Chand and Others

APPELLANT

Vs

(Maharajadhiraj) Kamesahwar Singh Bahadur

RESPONDENT

Date of Decision : 06-12-1933

Acts Referred:

Bengal Tenancy Act, 1885 — Section 103B, 104H
Civil Procedure Code, 1908 (CPC) — Section 103

Citation : AIR 1934 Patna 167

Hon'ble Judges : Dhavle, J

Bench : Division Bench

Judgement

Dhavle, J.—These appeals arise out of two suits which were tried together. One suit was brought u/s 104-H, of the Bengal Tenancy Act, by the landlord of the mouza in respect of the entry in the Kosi Diara record of rights that Khewat 81 was rent free milik. The other suit was brought under the same section by the tenants in respect of Khewat No. 71 which was shown as kabil lagan. The trial Court held against the tenants in both the suits, and appeals by the tenants to the District Judge failed. The tenants now appeal to this Court. So far as Khewat No. 71 is concerned, the record of rights was against the tenant's claim that they held the land rent-free.

2. In the appeal relating to this land all that Mr. Nandkeolyar has been able to urge is that in view of the admitted fact that the tenants were in possession for more than twelve years, it should have been held by the lower Court that they had by adverse possession, acquired a right to hold the lands free of rent. In support of this contention Mr. Nandkeolyar has cited Birendra Kishore v. Ram Chandra Dey AIR 1915 Cal 835; he has however not failed to appreciate the difficulty caused by the observation of their Lordships of the Judicial Committee in Jagdeo Narain Singh v. Baldeo Singh AIR 1922 PC 272 at p. 52, of 2 Pat:

Again mere non-payment of rent or discontinuance of payment of rent has not, by itself, been held in India to create adverse possession.

3. The crux of the matter is that possession cannot be adverse from before the

other side is shown to have become aware of the character of the claim. The express finding of the lower appellate Court is that there is no satisfactory and reliable evidence on the side of the defendants to prove that before the survey settlement proceedings in 1924-25 they ever asserted their milik rent free right to the disputed lands to the knowledge of the plaintiff's local agents or of the plaintiff. It has been urged that as the land in question was surrounded by the mal lands of these appellants and other tenants, the landlord's local agents must have been aware of the rent free character of the holding of these tenants in respect of the the disputed land.

4. That however cannot be called an interference of law. It was possible in the circumstances of the case for the Courts of fact to infer that the landlord's agents knew. But it was possible in law for them to infer that they did not in fact know. The inference, in these circumstances, has been conceded to be an inference of fact, It is therefore impossible in second appeal to go beyond the concurrent finding of fact of the Courts below that the plaintiff or his local agents only came to know of the rent free claim of the tenants appellants in 1924-25.

5. The tenants appellants are thus without a rent free claim perfected by twelve years" adverse possession, and the second appeal in respect of Khewat No. 71 must therefore fail. The other second appeal arises as I have already indicated, out of the suit relating to Khewat No. 81 under which the land is recorded as the tenants" rent free milik. In connection with this appeal Mr. Nandkeolyar has contended that the finding of the lower appellate Court is vitiated by a bad error of law. The learned Additional District Judge says of the record of rights produced in the case:

Again these are cases u/s 104-H, Ben. Ten. Act, and thus the entries in the record of rights in respect of the disputed lands cannot be taken to have become final, and accordingly the said entries do not possess the weight given to finally published record of rights u/s 103-B, Ben. Ten. Act. It follows therefore that the record of rights in respect of the disputed lands does not advance the case of the plaintiff or of the defendants.

6. Mr. Nandkeolyar has been able to find authority to the contrary in *Rajani Kanta v. Secretary of State* AIR 1918 PC 95. In that case their Lordships of the Judicial Committee, dealing with a suit instituted u/s 104-H of the Bengal Tenancy Act, held that it lay on the appellants who had brought the suit to rebut the statutory presumption that the record of rights was correct: (Section 103-B). It has been urged on behalf of the plaintiff-respondent not that the ruling is inapplicable, but that the lower appellate Court has in fact discussed all the evidence and based its conclusion on that evidence and that, therefore, the question of onus is now immaterial.

7. There are cases where the question of onus does become immaterial after the parties have adduced their evidence, but the present suit was of a kind where it was necessary for each Court of fact to begin with the position that the finally

published record of rights is entitled to the statutory presumption of correctness so that the question for decision would be not whether the record of rights was shown to be right, but whether the record of rights was shown by the party attaching it to be wrong. There is force in Mr. Nandkeolyar's contention that the appreciation of the evidence adduced in the case will be materially affected according to the point of view from which that evidence is approached.

8. In this view it seems to me that I have no choice but to allow the appeal, set aside the judgment and decree of the lower appellate Court and remand the case to that Court for a proper hearing in accordance with the law. In my opinion this is not a case of the kind that can be suitably dealt with u/s 103 of the Code of Civil Procedure, regard being had to the fact that there appear to be questions about the credibility of more than one witness speaking of matters that occurred long ago. The result is that appeal No. 1432 is dismissed with costs and that appeal No. 1431 is allowed and the case remanded. The costs of appeal No. 1431 in this Court will abide the event.