
(1933) 12 PAT CK 0019
In the Patna High Court

Dhirnarain Chand and Others

APPELLANT

Vs

Maharajadhiraj Kameshwar Singh Bahadur

RESPONDENT

Date of Decision : 08-12-1933

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 103

Citation : 148 Ind. Cas. 740

Hon'ble Judges : Dhavle, J

Bench : Single 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 mauza in respect of the entry in the Koir Diara Record of Rights that Khewat No. 81 was rent free milik. The other suit was brought under the same section by the tenants in respect of kheiat 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.

2. So far as khewat No. 71 is concerned the Record of Rights was against the tenants' claim that they held the land rent-free. 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 12 years, it should have been held by the lower Courts that they held, by adverse possession, acquired a right, to hold the lands free of rent. In support of this contention Mr. Nandkeolyar has cited Maharaja Birendra Kishore Manikya Bahadur v. Ram Chandra Dey 30 Ind. Cas. 948 : 22 Cr.L.J. 153. He has, however, not failed to appreciate the difficulty caused by the observation of their Lordships of the Judicial Committee in Jugdeo Narain Singh v. Baldeo Singh 71 Ind. Cas. 984 : 3 P.L.T. 605 : AIR 1922 P.C. 272 : 36 Cr.L.J. 499 : 32 M.L.T. 1 : (1923) M.W.N. 361 : 27 C.W.N. 925 : 27 C.W.N. 925 : 45 M.L.J. 460 : 49 I.A. 399 (P.C.):

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 1924-1925 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 agent must have been aware of the rent-free character of the holding of these tenants in respect of the disputed land. 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 agent knew. But it was also 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 findings 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 1924-1925. The tenants appellants are thus without a rent-free claim perfected by 12 years' adverse poisoning, and the second appeal in respect of khewat No. 71 must, therefore, fail.

4. The other second appeal arises as I have already indicated, out of the suit relating to khewat No. 81 under which the land was recorded as the tenants' rent-free milik. In connection with this appeal Mr. Nandkeolyarnas 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 101-H of the Bengal Tenancy 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 did not possess the weight given to the finally published Record of Rights u/s 103-B of the Bengal Tenancy Act. It follows therefore, that the Record of Rights in respect of the disputed lands does not advance the case of the plaintiffs or of the defendant." Mr. Nandkeolyar has been able to find authority to the contrary in *Rajani Kanta Ghost v. Secretary of State for India* 51 Ind. Cas. 226 : 46 C. 90 : 23 C.W.N. 649 : 45 I.A. 190 (P.C.). 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. 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 attacking 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. 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.

5. 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.

6. 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.