

(1918) 08 CAL CK 0057
In the Calcutta High Court

Dinanath Chanda, and on his, death his heirs and legal
representatives Umesh Chandra Chanda and Others

APPELLANT

Vs

Sheikh Nawabali and Others

RESPONDENT

Date of Decision : 15-08-1918

Acts Referred:

Bengal Estates Partition Act, 1876 — Section 54
Evidence Act, 1872 — Section 35

Citation : 49 Ind. Cas. 984

Hon'ble Judges : Teunon, J;Cuming, J

Bench : Division Bench

Judgement

1. These five appeals arise out of as many suits for recovery of possession of certain plots of land on establishment of title.
2. The lands are situated in Mouzah Fazilabari, which originally appertained in equal shares to two revenue paying Estates Nos. 4357 and 265 on the revenue roll of the Dacca Collectorate. In the year 1888 as the result of a partition effected under the Estates Partition Act, 1876, the lands in question fell to Estate No. 265.
3. The general case for the plaintiffs was that they had obtained settlement from the landlords in 1292, i.e., 3 years before the partition, that the lands diluviated in 1293, and re-appeared in 1316, Thereafter, it is said, the plaintiffs were dispossessed by the principal defendants acting on the strength of settlements taken from some of the co-sharer landlords.
4. In Suit No. 2355 out of which Appeal No. 2903 arises, the special case of the plaintiff was that he and his co-sharers, the sons of one Lal Behari, held 4 annas under a Miras lease granted by one of the co-sharers Basanta Kumar Roy and the remaining twelve as raiyats. As his co-sharers did not join him in the suit-his claim was to the extent of an 8 annas share only, namely, 2 annas in Miras right and 6 annas as a raiyat.

5. In the Court of first instance it was held that the lands in dispute were settled with or leased to the plaintiffs or their predecessor " in 1292, that the lessees were then non-occupancy raiyats and that in 4 cases by continuous payment of rent the plaintiffs or their predecessors-in- interest had acquired occupancy rights. In Suit No. 2355, however, it was found that the plaintiffs' Miras interest was to the extent of one anna only. In the result this suit was decreed to the extent of 7 annas instead of 8 annas while in the other three (Nos. 2357, 2358 and 2359) the claim of the plaintiffs was decreed in full. In the remaining Suit No. 2357, it was held that the original tenant had died before he had acquired occupancy rights and that his heirs the plaintiffs were, therefore, entitled only to a share, namely, 6 annas, corresponding to the share of the landlords from whom they secured recognition after the lands reformed in 1316.

6. On appeal the learned Subordinate Judge disbelieved the evidence adduced to show that after diluviation the plaintiffs had continued to pay rent and he, therefore, held that the rights acquired by the settlement of 1292, if any, had been lost. He agreed with the Munsif in thinking that the rights of non-occupancy raiyats are not heritable, and held that for this reason also the plaintiffs in Suits Nos. 2357, 2358 and 2359 could claim nothing on the basis of the alleged settlement of 1292. He next found that the plaintiffs had failed to establish the identity "of the lands in suit with the lands of which in 1292 settlement, was said to have been taken. Lastly he found that the right obtained by Dinanath Chandra (plaintiff in Suit No. 2355) and his co-sharer Lal Behari Shaha by their Miras Patta was to a 2 annas and not to a 4-annas share in Estate No. 265, and that plaintiff Dinanath's share therein was only 10 gandas and not one anna. The plaintiffs having in all cases secured recognition from one Kale Narain Rai, a landlord to the extent of 2 annas 6 gandas 2 haras and 2 krants, and in all but 2355 from the Mirasdars also, he, therefore, decreed the 4 suits (Nos. 2366, 2367, 2368 and 2369) to the extent of 4 annas 6 gandas 2 haras 2 krants and Suit No. 2355 to the extent of 1 anna 13 gandas 1 kara 1 krant, i. e., 10 gandas in plaintiffs' Miras right and as a tenant under Kale Narain to the extent of half Kale Narain's share.

7. In holding that the rights of non-occupancy raiyats are not heritable both Courts have fallen into error. On this point it is sufficient to refer to the Full Bench decision reported as *Midnapore Zemindari Company Ltd. v. Hrishikesh Ghosh* 25 Ind. Cas. 562 : 41 C. 1108 : 18 C.W.N. 828 : 19 C.L.J. 505 : (F.B.).

8. In order to prove the settlements made with them in No. 1292 and also the identity of the lands claimed in these suits with the lands so settled, the plaintiffs put in evidence the map and Chitta prepared by the partition Amin in 1888=1295 under the provisions of Section 54 of the Estates Partition Act, 1876. The Court of first instance admitted and relied upon these documents. On the authority of the decision reported as *Perma Roy v. Kishen Roy* " the Subordinate Judge ruled that they were inadmissible and must be excluded from consideration. Now in *Perma Roy Kishen Roy* 25 C. 90 : 13 Ind. Dec. (N.S.) 61 and also in *Nanda Lal*

Pathah v. Chanurpat 18 Ind. Cas. 143 : 17 C.W.N. 779 : 17 C.L.J. 462 it was held that it was no part of the duty of the partition Amin to record the names of tenants. If the matter were res integra, we might be disposed to take a different view of what is involved in the preparation of a rent roll and of measurement papers in connection therewith, but as the present Act, Bengal Act V of 1897, has set the matter at rest, we need not consider it farther. These decisions, however, dealt only with the admissibility of the papers in question under the provisions of Section 35 of the Evidence Act. But in the present case as in Bhola Roy v. Jung Bahadur Singh 22 Ind. Cas. 798 : 19 C.L.J. 5, independent evidence has been given of the preparation of the map and Chitta and the Munsif found that they had been proved. The learned Subordinate Judge has not adverted to that evidence and in this respect also he has erred. If it has been proved that they were accurately prepared, or if it be found that they were accepted and acted upon by the landlords, they are clearly admissible, if only as admission, against the landlords and those claiming under the landlords by a subsequently derived title. No doubt, the Sub-ordinate Judge has considered the other evidence on these points but how far his view of that evidence, whether oral or in the shape of dakhilas, has been affected by the exclusion of the partition papers it is impossible for us to say.

9. Even, however, if on a consideration of the whole evidence, it be found that after submergence and until re-appearance no rent was paid on the submerged lands, it does not necessarily follow that the tenant's title was thereby lost. After submergence possession must be presumed to be with the person having title, and the landlord taking no steps to put an end to the tenancy, whether from nonpayment of rent or the conduct of the tenant, abandonment or surrender should be inferred becomes a question of intention: vide Arun Chandra Singh v. Kamini Kumar 22 Ind. Cas. 317 : 41 C. 683 : 26 M.L.J. 251 : 18 C.W.N. 369 : 15 M.L.T. 182 : 19 C.L.J. 172 : (1914) M.W.N. 175 : 16 Bom. L.R. 323 : 12 A.L.J. 343 : 41 I.A. 32 (P.C.). Thus the question whether on the re-appearance of the lands in suit the tenancy, be it that of an occupancy raiyat or that of a non-occupancy raiyat, still subsisted, has also not been properly dealt with by the Subordinate Judge.

10. Lastly there is the question of the Miras lease Exhibit ?. No doubt in the recital the share of the lessor in the Estate No. 265 is described as a 2 annas share. But the demise appears to be a demise of a 2 annas share in the village Fazilabari. Now as Fazilabari at that time appertained to the two Estates Nos. 265 and 4351 in equal moieties, it follows that if the lessor had a 2-annas share in the Mouzi he had a 4-annas share in No. 265. The document is thus ambiguous and the description of the share given in the recitals of the document does not, we think, exclude other evidence to show that the description of the share is a mistake, that the lessor's share was really 2 annas in Fazilabari and, therefore, 4 annas in Estate No. 265, and that the whole of his interest passed to the lessees. The Sub-Judge, no doubt, refers to the oral evidence of the plaintiff Dinanath, but he in effect excludes that evidence and the other evidence on the point dealt

with by the Munsif. For these reasons we must set aside the decrees of the Subordinate Judge and return the oases to him in order that they may be heard and determined in accordance with "law.

11. Costs of this Court will be costs in the several cases.