
(1935) 08 CAL CK 0046
In the Calcutta High Court

Dinanath Kar and Others

APPELLANT

Vs

Choudhuri Jitendra Nandan Das Mohapatra and Others

RESPONDENT

Date of Decision : 06-08-1935

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 1 Rule 8
Specific Relief Act, 1877 — Section 42

Citation : AIR 1935 Cal 744

Judgement

1. The suit in which this appeal has arisen was instituted by the plaintiffs-appellants in this Court for a declaration that there is a custom of remission of rent of Jal (paddy) land of occupancy raiyats on account of entire or proportionate destruction of crops by drought or inundation. The suit was one contemplated by Order 1, Rule 8, Civil P. C, brought by certain occupancy raiyats of estates Nos. 10, 14 and 60 of the Midnapore Collectorate in Mouza Baruipur. The Court of first instance passed a decree in favour of the plaintiffs granting the relief prayed for in the suit in this form: that the plaintiffs are entitled to and will get a declaration that the occupancy raiyats who hold the holdings in estates Nos. 10, 14 and 60 within Mouza Baruipur directly under the defendants and pay them rent in cash are entitled to get proportionate deduction of rent for their paddy lands within such holdings in years of Haja and Sukha, that is, in proportion to the quantity of paddy destroyed in those lands by such Haja or Sukha.

2. The Court of appeal below reversed the decision of the trial Court on the ground that the relief granted to the plaintiffs in the suit could not be granted to them u/s 42, Specific Relief Act, and on the further ground that the claim in suit was barred by limitation. The learned District Judge in the Court of appeal below did not decide the question as to the existence of custom set up by the plaintiffs in the suit. It is to be noticed that at the stage when the appeal before the lower appellate Court was pending, the defendants landlords of estates Nos. 10 and 60 settled their dispute so far as the present litigation was concerned, with the tenants, and the decision of the appeal was in favour of the landlords of estate

No. 14 only, who are in the position of co-sharer landlords; the lands of the estates Nos. 14 and 60 being Ijmalis between the proprietors in equal shares.

3. The District Judge in the lower appellate Court entered into an elaborate discussion of the question as to whether there was any distinction between "custom" and "rights based on custom" and came to the conclusion that there was a substantial difference between the two. The result of the conclusion so arrived at by the Judge was that the plaintiffs who prayed for a declaration as to the existence of a custom, were held not entitled to get a "declaration that the villagers had the right based on custom. The Judge has in one part of his judgment observed that what the plaintiffs really meant was to ask for a declaration that the villagers had the right based on custom. It has only to be mentioned on this part of the case, that pleadings in the *Moffussil* in this country have never been so strictly construed by the Courts in India or by their Lordships of the Judicial Committee of the Privy Council, as to deny a relief to a party to which he may be held to be entitled for the reason that there was some defect or other in the wording of the prayer made in a plaint. The learned advocate appearing for the defendants-respondents in this appeal has not attached any importance to this part of the case and to the District Judge's discussion on the distinction to be drawn between custom and rights based on custom, in the case before us; and we do not consider it necessary to give any serious consideration to the same. In our judgment the plaintiffs were entitled to get the declaration granted to them by the Court of first instance, if the existence of the custom were established, and if there was no effective bar of limitation to the declaration being granted to them.

4. It appears that the question of limitation and the other question as to whether the plaintiffs were entitled to a declaration u/s 42, Specific Relief Act, were considered by the Court of appeal below, together. The suit was brought by the plaintiffs in their representative capacity; in regard to some of the plaintiffs it was asserted by the defendants that in their case, there was refusal by the landlord to grant remission in the year 1915, and if the right to relief was barred in the case of these tenants, there could not be any declaration as prayed for in the suit, in favour of the tenants of estate No. 14 as claimed in the suit. The decision arrived at by the Court of appeal below was that as a suit for declaration of the existence of a custom was clearly not maintainable u/s 42, Specific Relief Act, even if the suit can be regarded as suit for declaration of the rights of the villagers under the custom, the defendant had shown that in certain cases not clearly defined, but probably quite numerous, some tenants have no longer the right to remission, and that therefore a declaration that all villagers have the right cannot be passed, and no intelligible declaration can be passed, or at any rate none that would show a proper exercise of the discretion required by Section 42, Specific Relief Act.

5. In our judgment there was no such demand based on custom as set up in the present litigation by the tenants of estate No. 14, and no such refusal based on

denial of the existence of such custom on the part of the landlords, which could destroy the right of the villagers in the estate, based on custom. Furthermore an instance of denial of custom by the landlords concerned, would not destroy the customary right, if it had been established. The documents bearing upon this part of the case do not make out a case of demand and refusal as contemplated by Article 131, Schedule 1, Lim. Act, which is the only provision of the law that could be held to be applicable to the case before us, so far as the plea of limitation raised in the case was concerned. The position that a certain co-sharer landlord, denied the existence of custom once, could not and did not destroy the custom. The denial was not also in the case of all tenants, but in the case of some only; and the right if any of the tenants generally could not be held to be barred by limitation, because there might have been refusal to grant remission in the case of some. The conclusion we have arrived at is that the suit brought by the plaintiffs under Order 1, Rule 8, Civil P. C, was not barred by limitation in any way; nor was there any bar to the plaintiffs being granted relief by way of declaration as granted to them by the trial Court, in case the custom set up by the plaintiffs was established on evidence.

6. It is very much to be regretted that the learned District Judge in the Court of appeal below considered it unnecessary to decide the question as to the existence of the custom on which definite findings were arrived at by the trial Court, on what appears to us to be a very careful consideration of the materials placed before the Court. The Court of first instance has given its decision on all the points arising for consideration on this part of the case; it has held that the custom set up by the plaintiffs in the suit was not unreasonable; that the custom has been in existence from before 1293 A.S.: it was in existence in 1911 A.S. On the evidence before the Court; the conclusion was definite that the custom has existed without interruption since the time of its origin.

7. As it stands, in the absence of any decision by the lower appellate Court, the case has to be sent back to that Court for a decision on issue 8 raised in the suit in which this appeal has arisen. A point was raised in support of the decree of the Court of appeal below that the suit was barred by the provision of Order 23, Rule 1, Civil P.C. On this part of the case, on consideration of the materials on the record, the Courts below concurrently arrived at the decision that the defendants failed to prove that the withdrawal of previous Suit No. 81 of 1919 (No. 276 of 1920), with reference to which the bar under Order 23, Rule 1 was attempted to be pleaded, was without permission to bring a fresh suit. We are unable to hold that the decision of the Courts below on this point is in any way erroneous.

8. In the result the appeal is allowed. The decision of the Court of appeal below is set aside, and the case is remanded to that Court for decision of the question raised in issue 8 in the suit in which this appeal has arisen, the other question arising for consideration in the case being decided in favour of the plaintiffs-appellants. The appellants are entitled to get their costs in this Court and in the Courts below from the defendants-respondents, the proprietors of estate No. 14.

Costs after remand will be at the discretion of the Court below.