
(1911) 07 CAL CK 0033

In the Calcutta High Court

Case No : Appeal from Appellate Decree No. 1846 of 1909

Gopini Debi and Another

APPELLANT

Vs

Ram Taran Tewary and Others

RESPONDENT

Date of Decision : 24-07-1911

Acts Referred:

Citation : (1911) 07 CAL CK 0033

Final Decision : Dismissed

Judgement

1. The Plaintiffs-Respondents as putnidars of Mauza Harishadihi sued to recover possession of six plots of land alleging that the said lands were the khas lands appertaining to 81/2 annas share of the putni. The defence of the Defendant No. 3 was that plots Nos. 1 to 4 and 6 appertained to her jotes and the defence of the Defendant No. 4 was that plot No. 5 was held by him under one Gour Roy who had not been made a party to the suit and plot No. 6 as a sub-tenant under the Defendant No. 3. Both the Courts below found that the Plaintiffs had failed to prove that the lands were khas lands. The Court of first instance dismissed the suit, but the lower Appellate Court held that Plaintiffs being admittedly the putnidars are entitled to khas possession, as the Defendants had failed to prove any tenancy right in the lands and accordingly decreed the suit.

2. The Defendants Nos. 3 and 4 appealed to this Court. The Defendant No. 4 has however settled the dispute with the Plaintiffs and filed a petition for withdrawing the appeal. The appeal so far as he is concerned is therefore dismissed without costs as the Plaintiffs have agreed to give up costs. The result of this compromise is that it is unnecessary to deal with any question with respect to plot No. 5 or with respect to the tenancy right claimed by the Defendant No. 4 in plot No. 6 under the Defendant No. 3.

3. It is contended on behalf of the Defendant No. 3, first, that the Plaintiff's case that the lands were the khas lands of the 81/2 annas share of the putni having been found to be false the suit ought to have been dismissed; second, that the onus ought to have been placed upon the Plaintiff to prove that the lands were

outside the Defendants' jotes, and, lastly, that the Defendants ought to have been given an opportunity of meeting the new case upon which the lower Appellate Court gave a decree for khas possession to the Plaintiff.

4. As regards the first contention, it is true that the Plaintiffs' case that the lands are khas lands appertaining to the 81/2 annas share of the putni has been found to be false, but that is not sufficient for dismissal of the Plaintiffs' suit. The Plaintiffs' title as putnidars of the mauza being admitted, the Defendant cannot resist Plaintiffs' claim for khas possession unless she can show that she has a tenancy which will entitle her to retain possession of the lands. See Narsingh Narain Singh v. Dharam Thakur 9 C.W.N. 144 (1904). The first contention therefore fails.

5. The second contention raises the question of onus of proof. It was urged that as the Defendants hold two jotes in the mauza the onus is upon the Plaintiffs to prove that the lands in suit are outside those jotes, and in support of this contention reliance was placed upon the cases of Rhidoy Krista Mistri v. Nabin Chandra Sen 12 C. L. R. 457 (1883) and Rajendra Kumar Bose v. Mohim Chandra Ghose 3 C. W. N. 763(1894). It was held in those cases that if the existence of a tenure be admitted or proved, the dispute in regard to any plot of land then becomes a question of parcel or no parcel and the Plaintiff is bound to prove that the lands of which he claims khas possession is out-side the admitted tenure. But as pointed out by Banerjee, J., in Sheodeni Roy v. Chatterbhuj Roy 12 C. L. J. 376 (1894), the case of Rhidoy Krista Mistri v. Nabin Chandra Sen 12 C. L. R. 457 (1883) is clearly distinguishable. "There the Plaintiff sued to recover khas possession of some land which he alleged was outside the howla or tenure held by the Defendant and which the Defendant had encroached upon by extending the boundary of the howla. In the present case there is no admission by the Plaintiffs that the lands in suit are contiguous to the admitted holding of the Defendants or that they have come to the possession of the Defendants by encroachment. The mere fact that the Defendants hold some lands as tenants under the Plaintiffs would not be sufficient to throw upon the Plaintiffs the burden of showing that in respect of any other land in the zamindari which the Defendant may be found to be in possession of, they have no right as tenants. The burden of proof in a case like this lies upon the Defendant and this view is quite in accordance with the rule laid down by this Court in several cases of which we need only refer to two, namely, Raj Kissen Mookherjee v. Pearee Mohan Mookherjee 20 W. R. 421 (1873) and Batai Ahir v. Bhagobatty Koer 11 C. L. R. 476 (1882)." The observations quoted above apply fully to the facts of the present case and I entirely agree with them. In the case of Rajendra Kumar Bose v. Mohim Chandra Ghose 3 C.W.N. 763 (1894) it does not clearly appear from the report whether the lands in dispute in that case were admitted to be contiguous to the holding of the Defendant, but the learned Judges in that case followed the case of Rhidoy Krista Mistri 12 C. L. R. 457 (1883). I am of opinion that the principle there laid down which is the same as that laid down in Rhidoy Krista Mistri's case 12 C. L. R. 457 (1883) should be held applicable to cases

where the lands sought to be recovered are admitted by the Plaintiffs to be contiguous to the holdings of the Defendants or that they have come to the possession of the Defendants by encroachment. A person may hold 10 bighas of land in one corner of a village consisting of thousand bighas of lands and the zamindar should not be called upon to prove that any land in the village which the Defendant may be in possession of, however distant it may be from the Defendant's jote, is outside the jote. I am accordingly of opinion that the onus is upon the Defendants to prove that the lands are included in her jotes.

6. The lower Appellate Court refers to a solenama in which Shiboo, the Defendant's husband and predecessor-in-title, admitted that the lands appertained to the jama of one Ram Kalpa and that he had taken possession of the same from the time of the solenama as purchaser from Ram Kalpa and that Court held that the said admission makes the Defendant's present case that the lands appertain to the ancestral jote of her husband unworthy of credit. The lower Appellate Court relied upon the admission contained in the solenama, disbelieved the evidence for the Defendants and held that they have no tenancy right. The Court of first instance discussed the evidence more fully and found that Ram Kalpa had no right to or possession of the lands, that Ram Kalpa had admittedly no jote, that the admission made in the solenama by Shiboo, the husband of the Defendant No. 3, had been sufficiently explained away by the evidence and that Shiboo was in possession from before the solenama. The learned Munsif however did not come to any definite finding that the lands did appertain to any jote of Shiboo, but dismissed the suit on the ground that the onus was upon the Plaintiff to prove that the lands were outside the jotes of Shiboo, and that they had failed to prove the same. But the lower Appellate Court came to a finding upon the evidence that Defendants had no right of tenancy in the lands. That is a finding which cannot be interfered with in second appeal.

7. The last question is whether the Defendant should not be allowed an opportunity to prove that the lands are included in her jotes, seeing that the original case of the Plaintiffs has been found to be false. It is true, the Plaintiffs claimed khas possession of the lands on the ground that the lands were khas lands of the putni, but they also sought for a declaration that the Defendants had no right to the lands, that they were trespassers, and claimed khas possession by ejecting the Defendants. The Defendant in resisting the admitted putnidars' claim for recovery of khas possession of lands within the putni was bound to show that the lands were part of her jotes. She did adduce evidence on the point; that evidence was considered by the lower Appellate Court which came to a finding that the tenancy was not proved. Under the circumstances it cannot be said that the Appellant was prejudiced in any way. The case cannot of course be sent back for allowing the Defendant No. 3 an opportunity merely to show that the lands are adjacent to her jotes, as prayed for on behalf of the Appellant. The appeal, therefore, fails and is dismissed with costs.