

(1934) 08 CAL CK 0031
In the Calcutta High Court

Kanta Mohan Mallik and Others

APPELLANT

Vs

Makhan Santra

RESPONDENT

Date of Decision : 02-08-1934

Acts Referred:

Citation : 164 Ind. Cas. 186

Hon'ble Judges : R.C. Mitter, J

Bench : Single Bench

Judgement

R.C. Mitter, J.—This appeal arises out of Suit No. 190 of 1929 which was instituted by seven persons as plaintiffs" for assessment of rent. The plaintiffs are the zemindars of Mandalhat Mouza Baranan is one of the mouzas which fall within the geographical limits of the plaintiffs" zemindary. Plaintiffs Nos. 1 to 5 have 9 as. 12 gundas share and the Official Trustee of Bengal and Swarnamoyee Dassi the remaining 6 as. 8 gundas. The subject-matter of the suit and appeal are six plots of land, namely Dags Nos. 603) 604, 680, 475, 476 and 479 of the settlement map of the said village. In the Record of Rights prepared under Chap. X of the Bengal Tenancy Act, these Dags have been recorded as not paying rent but liable to pay rent. Accordingly the plaintiffs have instituted this suit for assessment of rent. The defence is that all the plots are niskar, the first three appertaining to a niskar 12 bighas in area and the others to another niskar 2 1/2 bighas in area. Both the lower Courts have found that Dags Nos. 603, 604 and 680 are niskar and the plaintiffs Nos. 1 to 5 who are the appellants to this Court have not pressed their claim with regard to these plots. The decree passed by the lower Appellate Court in respect of these three plots is accordingly maintained.

2. Regarding the other three plots the two Courts have differed, the trial Court holding that the plaintiffs Nos. 1 to 5 are entitled to have rent assessed in their 3-5th share and it has accordingly assessed rent; the lower Appellate Court has, however, dismissed the entire suit on the finding that the said lands are also niskar. Mr. Sen on behalf of the plaintiffs Nos. 1 to 5 contends that this finding is

erroneous inasmuch as it is based on evidence which is not admissible against the persons he represents.

3. It appears that shortly after the final publication of the Record of Rights the defendant in this suit instituted a suit for correction of the entry in the Record of Rights. The suit was numbered 515 of 1923. To this suit the plaintiffs in present suit as well as the Official Trustee and Swarnamoyee Dassi were arrayed as defendants, the last named persons being defendants Nos. 6 and 7 in that suit. There was a compromise between the present defendant and the Official Trustee and Swarnamoyee Dassi and on the basis thereof a decree was passed. Exhibit M is the compromise decree. The suit against plaintiffs Nos. 1-5 of the present suit was withdrawn with liberty to institute another suit. In the solenamah Ex. M, the Official Trustee and Swarnamoyee admitted that they had no "maliki interest" in the lands in suit and that they were niskar lands. The learned Munsif held that Ex. M was admissible in evidence against, and binding on the Official Trustee and Swarnamoyee only but could not be used as evidence against the plaintiffs. He accordingly made his decree in the terms stated above. There were appeals and cross-objections. The learned Subordinate Judge upheld the trial Court's decree with regard to plots Nos. 603, 604 and 680. With regard to the other plots he discussed the question of onus and came to the conclusion that they were also niskar lands. He supported his findings on three grounds, on each one of which he placed considerable importance. He first of all pointed out that the plaintiffs had withheld the China of 1268, though called for. Secondly he observed that no rent had ever been paid or demanded and that the plaintiffs' case of rent being actually realised some years ago was false. Thirdly he remarks that the compromise evidenced by Ex. M was not fraudulent or collusive and that the admission of niskar made therein was not only binding on the Official Assignee and Swarnamoyee but also on the plaintiffs. Mr. Sen on behalf of the appellants contends that Ex. M is inadmissible in evidence against his clients. He also pointed it out to me that the learned Munsif found that apart from Ex. M there was no reliable evidence to prove niskar. He accordingly asks me to restore the decree of the trial Court. Mr. Mukherjee who appears on behalf of the respondents has urged upon me the following points, namely:

(1) that the onus has been misplaced; he says that the landlord does not discharge the initial burden on him by simply showing that the lands claimed as niskar is within the geographical limits of his estate ;

(2) that an admission made by a joint tenant is admissible in evidence against his co-tenant, and

(3) that from the fact that no rent had been demanded or paid at any time within living memory, the Court can infer that the lands are niskar, and inasmuch as the learned Subordinate Judge has made the inference in favour of his client from the said fact, as also from other facts, the finding arrived at by him cannot be said to be based on no evidence and, therefore binding on me in Second Appeal.

4. In support of his first contention Mr. Mukherjee has placed reliance upon the following decisions:

Hurryhur Mookhopadhyaya v. Madhab Chandra Baboo 14 MIA 152 : 20 WR 459 : 8 BLR 560 : 2 Sar 713 : 2 Sut 484 (P.C.), Sashi Bhusan Hazra Vs. Kazi Abdulla and Others, , Makhan Lal Paul Vs. Rup Chand Maji and Others, .

5. In support of his second contention he has referred me to the case of Kowsullah Sunderi v. Mukto Sundari 11 AC 588, Meajan Matbar v. Alimuddi 44 AC 130 : 34 Ind. Cas. 571 : AIR 1917 Cal. 487 : 20 CWN 1217 : 25 CLJ 42 and Ambar Ali v. Lutfe Ali 45 AC 159 : 41 Ind. Cas. 116 : AIR 1918 Cal. 971 : 25 CLJ 619 : 21 CWN 996, and in support of his third contention he has referred me to the case of Bipradas Pal v. Monorama Debi 45 AC 571 : 47 Ind. Cas. 49 : AIR 1919 Cal. 922 : 22 CWN 396.

6. I will first take up. the question about the admissibility of Ex. M. Ordinarily an admission is admissible against the party making it or his privies. To this principle there are important exceptions, namely of admissions made by joint contractors and joint owners. But admissions made by such persons must be limited within legitimate bounds, and cases have defined those limits. They are two in number, namely that the admission must relate to the subject-matter of the suit and that it must be made by the declarant in his character of a person jointly interested with the party against whom evidence is tendered. Reading the terms of the solenamah I am of opinion that the second element is wanting in this case and I hold that on this ground alone Ex. M is not admissible in evidence against the appellants. Over and above his reason the said document is not admissible in evidence because it is an established principle that an admission or a confession of judgment by one of several defendants is no evidence against another defendant. See observation of Sir Barnes Peacock in Brajaballav Ghose and Another Vs. Akhoy Bagdi and Others, . This leads me to consider the other prints raised in the appeal. It is no doubt true that when the landlord proceeds to assess rent on land in respect of which no rent had previously been paid and is met with the defence of niskar, the initial burden is on him and that burden is not discharged by his simply proving that the lands are within the geographical limits of his estate. Some observations of the Judicial Committee of the Privy Council in Jagdeo Narain v. Baldeo Singh 49 IA 399 : 71 Ind. Cas. 981 : AIR 1922 PC 272 : 2 Pat. 38 : 3 PLT 605 : 36 CLJ 499 : 32 MLT 1: (1923) MWN 361 : 27 CWN 925 : 45 MLJ 460 (P.C), led to some controversy but that has been set at rest by the decisions of this Court in the cases reported in Sashi Bhusan Hazra Vs. Kazi Abdulla and Others, and Makhan Lal Paul Vs. Rup Chand Maji and Others, . When, however, the facts of this case are examined, I do not see any point in the first contention raised by Mr. Mukherjee for the respondents. The entry in the Records of Rights is in favour of the plaintiffs and " the initial onus that was on them is accordingly shifted on to the defendant. The defendant can, discharge the onus so shifted on to him by proving a grant of rent-free title or lead such evidence as from which such a grant can be inferred. Long possession

without any demand or payment of rent would be evidence of such a grant. In holding so I am not unmindful of the observations of the Acting Chief Justice in *Girjanandan Vs. Hanumandas*, , but the said observations indicate that the evidence in that case about the period of the defendants' possession was left in a nebulous state. I do not consider that the observations of the learned Acting Chief Justice made in *Girjanandan Vs. Hanumandas*, , militate in any way with the principles formulated in *Dhunput Singh v. Russomoyee Chowdhra* 10 WR 461, *Umesh v. Dakhina* (1863) WR 95 (F.B.), *Khelat Chundur v. Poorno Chunder* 2 WR 258, *Radhagobind v. Prakash Chander* 14 WR 108, *Bipradas Pal v. Monorama Debi* 45 C 571 : 47 Ind. Cas. 49 : AIR 1919 Cal. 922 : 22 CWN 396 and *Kiran Chandra Roy and Others Vs. Srinath Chakravarti and Others*, .

7. The learned Subordinate Judge, as I have already said, based his material findings on three grounds. I have already held that Ex. M is inadmissible. The question is whether I should remand the case or uphold the finding on the ground that excluding Ex. M there is other evidence on the record to support it. On the principle formulated in *Woomesh Chandra v. Chander Churn Roy* 7 AC 293, *Palakdhari v. Manners* 23 C 179, *Ramani v. Mahanth Adiya* 31 AC 380 and *Saraj Kumar Acharji Chowdhury and Others Vs. Umed Ali Howladar and Others* and *Gopal Chandra Saha and Others*, I am of opinion that the case should be remanded to the lower Appellate Court. The said Court should after excluding from consideration the solenamah Ex. M determine the question as to whether the defendant has proved his *niskarrighat* to plots Nos. 475, 476 and 479, as against plaintiffs Nos. 1 to 5.

8. Costs to abide by the result.