

(1926) 07 CAL CK 0020
In the Calcutta High Court

Lakhi Nath Bera and Others

APPELLANT

Vs

Nabadwip Chandra Nandi and Others

RESPONDENT

Date of Decision : 13-07-1926

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 1 Rule 8

Citation : AIR 1927 Cal 268

Judgement

1. This is an appeal on behalf of the defendants. The suit was brought by the plaintiffs against the defendants who were sued under Order 1, Rule 8, Civil P.C., as representing all the residents of Mouza Balpai Bamanbarh. The suit was for a declaration that the defendants had no right to cut down or to appropriate trees on their holdings. A further declaration was asked for to the effect that the plaintiffs as landlords had the right to cut down and appropriate trees on the holdings of the tenants of the mouza. The record of rights is in favour of the defendants and the plaintiffs therefore prayed that it should be declared that the record-of-rights was incorrect.

2. The trial Court made a decree to this effect that the tenants of Balpai Bamanbarh had no right to cut and appropriate trees on their jote without the consent of the plaintiffs landlords and that the record of rights was incorrect. The tenants appealed against that decision and the Additional District Judge has varied the decree of the Munsif and he declared:

that the defendants have got no right to the trees and they cannot cut any tree except on marriage occasions on payment of Re. 1-4-0 for each tree and except for cremation without payment of price but with the landlords' (plaintiffs') permission subsequently obtained and except cutting and appropriating branches of trees for fuel purpose. That the plaintiffs have got right to the trees subject to those aforesaid restrictions and that settlement record is declared erroneous.

2. The defendants appealed against that decree to this Court.

3. A preliminary objection has been taken that the appeal is not properly constituted as pro forma Defendant No. 21, who was one of the landlords has not been properly impleaded in the appeal and the appeal was dismissed as against him. We do not think that the Defendant was one of the necessary parties to the appeal. He was one of the landlords who did not join with the plaintiffs because he had interest in several jotes and his interest was adverse to the claim of the co-sharer landlords. Thereupon he was made a pro forma defendant. As he made no claim and no decree was passed in his favour he was not a necessary party in the appeal which was brought by the tenants-defendants against the plaintiffs-landlords.

4. The main question that has been urged on behalf of the appellants may be stated shortly thus : That the Additional District Judge has erroneously refused to give effect to the presumption of the correctness of the record-of-rights which the law raises u/s 103B, Sub-section (3) of the Bengal Tenancy Act; secondly, that the learned Judge has used certain kabuliyats executed by different tenants for the purpose of using them as establishing a custom as alleged by the plaintiffs; thirdly, that the Additional District Judge has wrongly refused to take into consideration judgments produced as evidence by the defendants in their favour on the ground that they did not appertain to the mouza in question whereas he has taken similar judgments with regard to different monzas into consideration in order to support the plaintiff's claim; and lastly, it is said that there is no finding that the plaintiffs have by custom the right to cut down trees on the holdings of the tenants, it has also been urged that the kabuliyats which the plaintiffs have filed cannot be relied on by the plaintiffs as being in contravention of Section 178(3)(b) of the Bengal Tenancy Act.

5. With regard to the record-of-rights the Additional District Judge states that the plaintiffs challenged the entry as incorrect, the defendants must thereupon show that the record-of-rights is based on a sound basis. This statement is obviously erroneous. It is for the person who challenges an entry in the record-of-rights to show that it is incorrect.

6. The next thing that the learned Judge has done is to take into evidence a decision of the attesting officer which was arrived at before the final publication of the record-of-rights in order to consider the question whether the record-of-rights is erroneous or not. This also in our judgment is wrong. When the record-of-rights has once been finally published it cannot be attacked on the ground that certain procedure adopted by the revenue authorities in arriving at the final conclusion does not support the entry as finally published. If the party aggrieved by that entry takes objection under the provisions of Section 105 or Section 106 they might be considered by the Revenue officer. But when a record-of rights is challenged in a civil Court the party challenging this record must adduce in evidence, in order to rebut the presumption, matters other than what happened during the proceedings prior to the final publication before the revenue officer. It is well known that the settlement authorities may come to certain conclusions at

one time of the proceeding which they may modify during the course of the preparation of the record. But the record which is finally published is that with which the civil Court is concerned. The learned Judge does not refer to any other evidence on which he could hold that the presumption of the correctness of the record-of-rights has been rebutted. On the other hand, he has held that no presumption can be made under it, which is again wrong.

7. The next point is with regard to the kabuliyats. These kabuliyats might be evidence as to the existence of the custom of the defendants' appropriating the trees or of the landlords' cutting down the trees if there had been any mention of such custom in these kabuliyats. Some of them, it is said, do not contain any reference to the custom as claimed by the plaintiffs. If there were such reference to any custom they might be admissible as evidence if they could otherwise be admissible under the law as to existence or non-existence of the custom pleaded. But if they simply, contain a covenant by the tenant not to cut or appropriate trees that covenant does not amount to evidence of any custom. The parties to the kabuliyat may be bound by the terms of it, but it would not be of any effect as regards a third party. Here we may observe, with reference to the argument based on Section 178(3)(b) of the Bengal Tenancy Act that the Additional District Judge does not seem to have been right with regard to his reading of Section 23 of the Bengal Tenancy Act. Section 178(b) provides that

nothing in any contract shall take away or limit the rights of an occupancy raiyat to use land as provided by Section 23.

8. The learned Additional District Judge holds that it does not refer to the question of cutting down trees. We are unable to accept his view. One of the uses of the land is to cut down trees and the last sentence of Section 23 provides that if there is a local custom to the contrary the raiyat shall not be entitled to cut down trees. Section 178(3)(b) refers to the use of the land. If an occupancy raiyat covenants that he will not be entitled to cut down trees, where there is no custom to the contrary, that contract will not take away his right to cut down trees. It is otherwise with regard to the right of appropriating trees. If there is a custom that raiyats can appropriate trees on their holdings, Section 178(3)(b) is no bar to the raiyats entering into a covenant with the landlords that he would not appropriate trees cut down. That is the only effect which can be given to the kabuliyats of the tenants. Our conclusion therefore is that if any tenant has covenanted not to appropriate any trees he would be bound by that covenant even if there be a custom that the tenants on the locality are entitled to appropriate trees.

9. The third point is as regards the rejection of the judgments filed by the defendants. This cannot also be supported. If the judgments filed by the plaintiffs be taken as evidence of the custom the judgments filed by the defendants to disprove any such custom may also be accepted and the question must be decided upon the entire evidence.

10. With regard to the fourth point we do not find that any conclusion has been arrived at by the Additional District Judge. The plaintiffs asked for a declaration that they had the right to cut down trees as will appear from the recital of the plaintiffs' claim in the first paragraph of the judgment. This matter must also be enquired into. The declarations that were given to the plaintiffs were neither asked for by the plaintiffs nor by the defendants. Some of the declarations seemed to be so, vague that they would not be workable, e.g., on marriage occasions the defendants would be entitled to cut down trees on payment of Re. 1-4-0 for each tree. What sort of tree it is not mentioned, nor is it mentioned whether they are entitled to cut down trees for timber or for fuel. It is unnecessary to criticize in detail the declarations made by the Additional District Judge.

11. We, therefore, set aside his judgment and decree and send back the appeal for being re-heard on all the questions that have been stated in our judgment,

12. Costs of this hearing will abide the final result.