

(1939) 11 CAL CK 0011
In the Calcutta High Court

Mahammed Rahul Amin and Others

APPELLANT

Vs

Dinabandhu Barnik and Others

RESPONDENT

Date of Decision : 22-11-1939

Acts Referred:

Bengal Tenancy Act, 1885 — Section 105, 107, 109

Citation : AIR 1940 Cal 235

Hon'ble Judges : Roxburgh, J

Bench : Division Bench

Judgement

Roxburgh, J.—The plaintiffs sued in this case for a declaration of their niskar right in the suit lands and for a declaration that they were not bound by certain decrees in cases relating to the lands u/s 105, Ben. Ten. Act, in which fair and equitable rents were fixed for them. The trial Court decreed the suit in full. On appeal, the suit was dismissed except in so far as there was a declaration that plaintiff 3 was not bound by the decrees in the Section 105 cases. The plaintiffs appeal, and there is a cross-objection by the defendant. The plaintiffs rely mainly on the following pieces of evidence. First that no rent has ever been paid for the lands; secondly on a judgment (Ex. 6) in a suit of 1847 in which there was a claim by the predecessors of the plaintiffs that they held two niskar grants, one of 1 drone 10 kanis and 3 gandas from one Md. Ali, and another of 2 drones 3 kanis 5 gandas from Ramballv, predecessor of present defendant 1; thirdly on a judgment Ex. 11, and decree Ex. 12, in a suit of 1868 in which the predecessors of the plaintiffs claimed successfully against a cosharer of Bamballav a niskar right in 5 kanis and 2 karas of lands in certain cadastral survey plots, the decree being upheld on appeal to this Court as shown by Ex. 7 and Ex. 7(a); fourthly on two mortgage deeds, Exs. 1 and 2; and fifthly on entries in cadastral survey khatians, in particular khatian No. 1916/1976, in which last khatian there is a mention of the niskar claim of the plaintiffs based on a High Court decree. The main defence is that fair and equitable rents have been settled in respect of the suit lands in certain ex parte Section 105 proceedings based on the R.S. Khatians in which the lands are shown as liable to payment of rent. It is contended that

the presumption of correctness of these records has not been rebutted, and it is further contended that Sections 107 and 109, Ben. Ten. Act, operate as a bar to the present suit.

2. We may first dispose of the point of law raised as to the bar created by the Section 105 proceedings. It is conceded that the bar does not operate as far as plaintiff 3 is concerned, as he was a minor at the time of the suits, though described as a major. The plaintiffs rely on the decisions in *Bhabadeb Chatterjee Vs. Hemanta Kumari Debi and Another*, and *Priyambada Devi v. Priya Nath Banerjee* (1926) 13 AIR Cal 822 while my attention has been drawn to a contrary decision in *Dharani Mohan Roy and Others Vs. Ashutosh Mookerjee and Amrita Lal Mookerjee*, . My attention has also been drawn to a decision on an allied point in *Khetra Lal v. Mohammad Zikaria* (1933) 60 C.L.J. 13 to the effect that assessment of a fair and equitable rent proceeds on the basis that there is a relationship of landlord and tenant, and that an order of a revenue officer assessing a fair and equitable rent u/s 105 operates as *res judicata* on the question of the relationship of landlord and tenant in a subsequent suit for rent. Though the distinction appears to me to be a fine one between on the one hand the case where the assessment of fair and equitable rent is held to include a decision on the relationship of landlord and tenant, and on the other hand the case where it is held not to include a decision that the tenant is liable to pay rent and that he cannot set up a claim of *niskar* right, nevertheless I think I must follow the later decisions and hold that Section 109 does not operate as a bar to the present suit.

3. Turning then to the merits, the question is whether the plaintiffs have discharged the onus of rebutting the presumption of correctness of the R.S. Khatians and of establishing their *niskar* right in the suit lands, admittedly held under the defendants. The trial Court traced the identity of the lands in the R.S. Khatians and in the relevant C.S. Khatians, and appeared to conclude that as the plaintiffs had shown from the judgments in the cases of 1847 and 1868 that their predecessors held some *niskar* lands under the predecessors of defendant 1 this was sufficient to establish their case. The learned Subordinate Judge in a judgment which is not always easy to follow has come to the finding that the plaintiffs have failed to identify the suit lands with those which were the subject-matter of the former litigation. I agree with that view except as regards the lands mentioned in C.S. khatian No. 1916/1976 amounting to 18.41 kanis (wrongly referred to by the lower Appellate Court as containing 5.36 kanis, this figure being the total for the first page only of the khatian). In this khatian there is a clear recital of the circumstances under which these lands were being held to the effect that the predecessors of the raiyats were the proprietors who had sold the *taraf* keeping a part for their own use, contracting with the purchaser to enjoy it free of rent, but that when the purchaser transferred the lands the new purchaser endeavoured to have rent assessed, and that there was litigation "up to the High Court" resulting in a decree to the effect that the tenant would be entitled to hold the land free of rent, that therefore the tenant had been recorded

as such, and paid no rent but was holding the lands of the khatian in niskar right. This apparently has some reference to the previous litigation, though it is not possible to reconcile it with the proceedings in the suit of 1868 which resulted in a decree in respect of 5 kanis 2 karas only of taraf Ramballav. I do not think that the learned Subordinate Judge has dealt properly with the case in respect of this khatian. I think the evidence supplied thereby is sufficient to rebut the R.S. khatian and to discharge the plaintiff's onus so far as respects the lands covered by it in the absence of anything to show why a change was made and coupled with the fact that rent has certainly not been paid in respect of these lands. I think therefore the plaintiffs are entitled to succeed in regard to these lands.

4. As regards the evidence of the mortgage recitals (Exs. 1 and 2) I agree that even assuming that they are evidence, their value in this case is negligible. It was held in *Srimati Priyambada Debi Vs. Priya Nath Banerjee and Others*, that the plaintiffs were not entitled to a declaration that the order passed u/s 105 was not binding upon the plaintiffs, as that was a matter which was the subject of the application before the revenue officer. Following this decision the cross-objection as regards the declaration given for plaintiff 3 must succeed and for similar reasons no such declaration will be given now on the basis of my finding above. The trial Court held that the proper court-fee for the suit was Rs. 60. I agree with that finding for the reasons given. In appeal to this Court only Rs. 22-8-0 was paid and for similar reasons I hold that the proper court-fee is Rs. 60; the balance must be paid by the plaintiffs. The result is that the appeal is allowed in part; the plaintiff's niskar right in the lands of Cadastral Survey khatian No. 1916/1976 is declared. Each side will bear its own costs throughout. The plaintiffs shall pay additional court-fees of Rs. 37-8-0 within fifteen days from this date, failing which the appeal will stand dismissed with costs.