

(1938) 01 CAL CK 0036
In the Calcutta High Court

Maharajadhiraj Sir Kameswar Singha

APPELLANT

Vs

Hridoy Nath Sahoo and Others

RESPONDENT

Date of Decision : 26-01-1938

Acts Referred:

Bengal Tenancy Act, 1885 — Section 105

Citation : AIR 1938 Cal 763

Hon'ble Judges : Patterson, J

Bench : Division Bench

Judgement

Patterson, J.—This is an appeal by the plaintiff and arises out of a suit for the assessment of a fair and equitable rent on a certain tank. Both the Courts below have dismissed the suit; hence this appeal. It appears that an application u/s 105, Bengal Tenancy Act, was filed in connexion with the settlement proceedings in the year 1921 but was subsequently with-drawn and one of the defences raised is that this withdrawal operates as a bar u/s 109, Bengal Tenancy Act. The Proviso to that Section, which was enacted in 1928, was intended to remove that bar, but it is contended on behalf of the defendants that the Proviso cannot have the effect of reviving the right to sue which had previously ceased to exist under the provisions of the Section as it originally stood. Reference has been made to the case in *Kandan Majhi v. Kulada Prosad Roy* 39 CWN 1040 in which it was held that Section 109 was a bar, but the facts of that case were different from those of the present case inasmuch as the application had been with-drawn and the suit had been instituted before the amendment. In *Suprabhat Chandra and Others Vs. Bhupati Bhusan Mandal and Others*, both the withdrawal of the application and the institution of the suit took place after the amendment and in those circumstances it was held that Section 109 was not a bar. In the case in *Raja Rishicase Law and Another Vs. Satish Chandra Pal*, the withdrawal took place before the amendment and the suit was instituted after the amendment. In these circumstances too it was held that Section 109 was not a bar. The present case in so far as this particular matter is concerned, is on all fours with the case reported in *Raja Rishicase Law and Another Vs. Satish Chandra Pal*, and for the

reasons given in the judgment of the learned Judges who heard the appeal in that case, (with which I respectfully agree) I am of opinion that Section 109 does not bar the present suit. The Section was amended before the institution of the suit and under the amended Section the withdrawal of the previous application, even though it took place before the amendment, does not operate as a bar.

2. The lower Appellate Court did not record any clear finding on this point, being of opinion that the law applicable to the suit was that embodied in the Transfer of Property Act, and not the Bengal Tenancy Act and although I cannot quite follow the reference made by that Court to a "recur-ring cause of action," the conclusion arrived at is the same, namely that the suit is not barred. I may here remark that the lower Appellate Court was not in my opinion justified in treating the suit as one under the Transfer of Property Act, for both parties came to Court on the footing that the Bengal Tenancy Act was the law to-be applied. If the matter had been in dispute evidence would have had to be gone into with a view to ascertaining whether tenancy had been created for agricultural purposes, and whether the tank was let out for such purposes or for the purpose of rearing fish. No such question was however raised by either party and the suit ought to have to be treated as one under the Bengal Tenancy Act.

3. As regards the merits, the question is whether the property is liable to be assessed with rent as alleged by the plaintiff, or whether it is a nishkar property as alleged by the defendants. Both the Courts below have come to the conclusion, though by different processes of reasoning, that the property is nishkar, but in coming to this conclusion they appear to have overlooked the presumption arising out of the Record of Eights. The entry in the Record of Eights was to the effect that the defendants' rights in the property were those of intermediate permanent tenure-holders and were subject to payment of rent. The onus of proving that the defendants' rights to the property are not subject to payment of rent is therefore on the defendants. In the written statement it was alleged that the property in suit had been held rent-free from the time of the defendants' grandfather's grand father and that the defendants' nishkar rights had been confirmed to their grand-father by a char sanad of the year 1251 B. S. and to the defendants' father by another char sanad of the year 1269 B. S. Defendants also relied on the recitals in a decree of the year 1883 (1290 B. S.) and on the recitals in a series of kobalas dating from 1308 to 1338 B. S. On the side of the plaintiff it is contended that the char sanads are forgeries, and that the recitals in the decrees and the kobalas are inadmissible in evidence or at any rate are not binding on the plaintiff. The trial Court found that the char sanads are genuine, and this finding was not specifically reversed by the lower Appellate Court, the finding of the latter Court on the point being to the effect that it might not be safely said that the char sanads were genuine.

4. In arriving at this half-hearted finding the lower Appellate Court appears to have overlooked the presumption of genuineness attaching to these ancient documents u/s 90, Evidence Act, and also to have misdirected itself with regard

to the previous history of these documents. That Court appears to have been under the impression that the char sanads had never been produced before, not even before the Settlement Officer at the time of the preparation of the Record of Eights or in connexion with the application made by the plaintiff u/s 105. On examining these char sanads I find that they not only have every appearance of genuineness, but they actually bear the seal of the Settlement Officer. In these circumstances it is open to this Court, in fact, in my opinion, the duty of this Court to come to its own opinion as to the existence or non-existence of nishkar rights claimed by the defendants. As regards the char sanads no reference to these sanads was made in the recitals to the decrees and the kobalas relied on by the defendants, but I do not think that this fact alone is sufficient to rebut the presumption of genuineness u/s 90, Evidence Act. As has already been stated, they have every appearance of being genuine, and they were produced before the Settlement Officer so far back as in the year 1921. There is moreover no denial on the part of the plaintiff of the defendants' claim to have been in possession without payment of rent for a great many years. I am therefore of opinion that the trial Court was right in holding the sanads to be genuine and that the lower Appellate Court's finding on the point, even if it be regarded as a finding that the sanads are not genuine, ought not to be allowed to stand.

5. In this view of the matter the question of the admissibility in evidence of the recitals in the decrees and the kobalas relied on by the defendants, loses much of its importance. The decisions of this Court regarding the admissibility in evidence of such recitals appear to be conflicting. The plaintiff relied on the decisions in Brojendra Kishore Roy Chaudhuri Vs. Mohim Chandra Bhattacharji and Others, and Kanta Mohan Mallik v. Basudeb Ghora 39 CWN 311 in order to support his contention that the recitals were inadmissible in evidence as against the landlords while the defendants relied on the decisions in Jnanendra Nath Dutt and Others Vs. Nasea Dasi, and Rasik Lal Mukhuti and Others Vs. Prasanna Kumar Saha and Others, in support of the opposite contention. The general trend of the decisions of this Court appears however to be in favour of the admissibility of such recitals in evidence, but only for certain limited purposes. My own view is that the recitals relied on by the defendants in the present proceedings are admissible as assertions of the rights claimed by them, u/s 13, Evidence Act, and that they may be used for the purpose of proving that the defendants over a long period of years have treated the properties in suit as being their nishkar property. With great respect to the learned Judges who decided the case reported in Brojendra Kishore Roy Chaudhuri Vs. Mohim Chandra Bhattacharji and Others, , I do not agree with them in thinking that the Legislature in enacting IS. 13, Evidence Act, intended to draw a hard and fast distinction between a claim and an assertion, nor between an assertion of rights made by a transaction and an assertion of rights made in a transaction. It is not however necessary to discuss the matter further, in view of the conclusion I have arrived at regarding the genuineness of the char sanads relied on by the defendants. The appeal fails on the merits and is accordingly dismissed with costs. Leave has

been asked for to prefer a further appeal under Clause 15, Letters Patent, but I do not consider this to be a fit case for such appeal. The leave asked for is accordingly refused.