
(1910) 07 CAL CK 0033
In the Calcutta High Court

Misri Chowdhry

APPELLANT

Vs

The Hon"ble Sir Maharaja Rameshwar Singh Bahadur

RESPONDENT

Date of Decision : 01-07-1910

Acts Referred:

Bengal Tenancy Act, 1885 — Section 105, 106

Citation : 7 Ind. Cas. 71

Hon'ble Judges : Sharf-ud-din, J;Holmwood, J

Bench : Division Bench

Judgement

1. This appeal arises out of a suit for declaration that a certain land was the millik lakheraj of the plaintiff. It appears that the final publication of the record-of-rights was made on the 24th September 1905 and that the Darbhanga Raj filed a number of cases u/s 105 of the Bengal Tenancy Act for settlement of fair rents on the 24th November 1905. The plaintiff alleges that he purchased this land from one Musammat Ratibatti in January 1906, and he filed his plaint claiming this land as his millik lakheraj on the 31st March 1906. On the 17th May 1906, he filed a written statement before the Settlement Officer in which for the first time he took the point, which ought properly to have formed the basis of a salt u/s 106, that this land was his millik lakheraj and in the judgment of the Settlement Officer in the Section 105 case, which was delivered on the 30th August 1906, that officer directed that the record of September 1905 should be corrected and this land should be entered as the millik lakheraj of the plaintiff.

2. The judgment of the Munsif in this suit was delivered on the 23rd March 1907. It is alleged in the plaint that in the final publication in September 1905 the land in dispute was entered as the Zemindar's mal, but the only record which we have before us seems to indicate that Ratibatti had a holding in three parcels of little over one acre and this is recorded as belagan. It, however, appears, as we shall subsequently have further reason to suppose, that the plaintiff knows very little about the basis on which he brings this suit. In the Section 105 proceeding, the Raj failed to get the rent assessed on the ground that the land was lakheraj.

In the suit the Munsif also held that it was lakheraj. The District Judge has reversed this decision on the ground that the record-of-rights as published in 1905 is correct and that the lands in suit are not identified.

3. The appellant now seeks a curious remedy. He asks leave to withdraw from the suit inasmuch as having regard to the decision in the Section 105 case it was not necessary for him to bring it: when this is refused, he claims that this suit ought to have been dismissed by the Munsif as incompetent u/s 109 of the Bengal Tenancy Act as it stood after 1898 and 1903. The second contention is that the decision in the Section 105 case not having been appealed against is final and the plaintiff is entitled to a decree in the Civil Court.

4. The first question to be decided is whether the defence taken to an application u/s 105 that the land is lakheraj is the subject-matter of an application made u/s 105 or 106 within the meaning of Section 109 as it stood before 1907. We think it is and that the Munsif was right in holding that the suit was not incompetent.

5. But the second question is more difficult The Settlement Officer's order of the 20th August 1903 was admittedly an order u/s 103 and as such appealable. On the authorities, it has always been held that questions u/s 106 arising out of applications u/s 105 could be considered and determined by the Revenue Officer without calling upon the tenants to file a separate suit u/s 105 within three months of the publication of the record. In the latest Full Bench case *Pirithi Chand Lal Chaudhri v. Sheikh Basarat Ali* 3 Ind. Cas. 449 : 13 C.W.N. 1149 : 10 C.L.J. 343 on the sections as they stood before 1907, Chatterji, J., who delivered the judgment of the Court refers to this as the common and accepted practice, although as he points out the distinction between a suit u/s 106 and a proceeding for settlement u/s 105 has not received sufficient attention, Nevertheless if the tenant pleads a bar to the settlement of rent which can properly come under 106 without bringing a suit and the Settlement Officer considers it without any apparent objection by the landlord who is making the application, the decision is a competent one but is open to second appeal. In this case no appeal at all was preferred against the Settlement Officer's order, and the landlord respondent's contention on this point is that the Court of the Settlement Officer was deceived by the tenant falsely stating that he had filed no regular suit and that he himself having filed a very large number of applications u/s 105 at once could not pay special attention to this petition which was already the subject of a regular Civil suit (now before us in appeal) which he was defending with all due diligence. The written statement of the tenant in the Section 105 proceeding does not appear to have been filed till May 1906 and possibly after the written statement of the Raj in the suit which was put in on the 17th May, for we find that the Settlement Officer's order directing the tenants to prove their statement that they had filed a regular suit is dated the 25th May. But if the landlord was before the Settlement Officer and had a copy of the written statement as he must have had, he could have and ought to have told the Court of the Settlement Officer that such a suit had been filed and that ho

had put in a written statement. At that time the tenant appears to have wished to stay proceedings before the Settlement Officer and relied on his suit. The landlord appears to have wanted the Section 105 proceedings to go on.

6. Now the tenant, having won in the Section 105 proceeding and lost in appeal in the suit, desires to support the settlement proceedings while the landlord desires to uphold the appellate decree in the suit. Whichever way we look at it, it appears to us that the decision of the lower appellate Court so far as it depends on the presumption that the record-of-rights published on the 24th September 1905 is correct opens the question whether there is any presumption that the corrected record-of-rights dated 31st August 1906 is correct and if so, whether the finding of fact of the learned District Judge, that the lands are not identified, would displace that presumption, if there be such presumption which we shall consider presently. We do not think it would. The parcel of land which was declared by the Settlement Officer to be lakheraj is a specific plot or plots in the Survey Khatian, and there can be no doubt as to its identity. The learned Judge found that the identity of the land in the lakheraj sanad and those in the kobalas of 1891 and 1906 is not established, but this question would not arise after the Settlement Officer's finding that the lands now in suit are the lakheraj lands of the appellant. It is suggested to us that the present Section 103B is an entirely new section and that there was no presumption before 1907. This is, of course, quite erroneous. Before 1898 even the corresponding section ran: "Every entry in a record-of-rights shall be presumed to be correct until the contrary is proved." The amending Act of 1898 provided that the certificate that a record-of-rights has been finally published is conclusive evidence of such publication and added that the presumption raised by the Act of 1898, should apply to entries "so published."

7. The question, therefore, arises in this case whether the correction in the entry made u/s 106 requires publication and if so, when and how was the correction in this case published? There is no provision for any such publication in the Bengal Tenancy Act but the Revenue Officer's decision has the force and effect of a decree of a Civil Court in a suit between the parties and, subject to revision or appeal, shall be final (Section 107). The provision for a note to be made in the record was added by Act I B.C. of 1907, but even this contains no provision for publication.

8. We are, therefore, of opinion that the question of presumption does not arise as the order if it finally determined the question must operate as res judicata.

9. Then comes the further question, can a decision which can properly form the subject of a suit u/s 106 operate as res judicata if only incidentally raised as a bar to the settlement of rent?

10. It is true that it has been uniformly held that such an order is a competent order and lays the matter open to appeal and second appeal. But is it a final decision of the tenant's status or is it only a finding that in consequence of the

status set up by the tenant as a bar being found to exist the landlord must fail in proceedings u/s 105? We think that this must depend on whether the objection raised by the tenant that his status was that of a lakheraj settlement-holder changed the proceeding u/s 105 into a suit u/s 106 of the Bengal Tenancy Act. We do not think that it can be so held. The suit contemplated by Section 108 must be brought within three months (since the amending Act of 1903) and the plaint must be properly stamped. The right of appeal does not affect the question, for the competence of a Court must be determined irrespective of any provision as to a right of appeal. The objection in this case was not filed till May 1906, eight months after the publication and it cannot, therefore, be held to have turned the proceedings u/s 105 into a suit u/s 106. The Settlement Officer's decision of the question u/s 105, however, undoubtedly, does operate as *res judicata*, and it is, therefore, finally settled that no rent can be settled on the land in dispute and that decision has the force and effect of a decree in the Civil Court. Whether the tenant has a millik lakheraj title is, therefore, still open to decision. He is in any case entitled to hold the land rent free until he is ejected in due course of law. But it is possible that if he does not hold the millik lakheraj title he claims, the landlord might eject him as a trespasser or as a tenant-at-will. It is, therefore, necessary to decide whether he does hold under the millik lakheraj title he sets up. This question is concluded by the finding of the learned Judge in the Court below.

11. The sanad, which is brought into the record in the most mysterious manner, seems to have been filed on behalf of this plaintiff in the Section 105 proceeding before the Settlement Officer. Now in his plaint and in his evidence he says that the sanad is in the possession of Musammat Jonardhan Jha and the plaintiff, therefore, could not obtain it in order to file it in this suit, and that he only saw it on one occasion some two months after his purchase in 1906. The two statements seem to be wholly incompatible with each other, and this is another instance of what we have before pointed out that the plaintiff appears to be wholly ignorant of the foundation of his suit and it must be considered to be purely speculative.

12. The learned District Judge holds that in order to show that the land now in suit is part of the 46 bighas of lakheraj, which was given to one Krishan Jha in the year 1169 fasli, the plaintiff must carry his case lower down than the possession of Bhukhan Mahto. He does not dispute the findings or the allegation of possession in the hand of Bhukhan Mahto. But beyond that he says that the plaintiff has been wholly unable to prove his case. To begin with it is nowhere shown that Musammat Ratibatti was the widow of Bhukhan Mahto, nor what title she had in the property. Presumably it was only a life-interest. It is not even stated whether she is alive or dead, and we are then confronted with the fact that she purported to sell to the plaintiff in January 1906 11 bighas millik land and the Judge finds that there is nothing to identify those lands with the millik lakheraj mentioned in the sanad and in the kobala of Bhukhan Mahto, which is dated 24th August 1891. Whether there is any similarity of boundaries between

the sanad and the kobalas we are unable to determine as the sanad is written in old Hindi. But it appears very doubtful whether the sanad contained any boundaries at all. The Munsif held that the oral evidence proved the identity of the laud, and that must have been so since it is quite impossible that the boundaries, which only recite the names of the neighbouring tenants can conceivably be the same in the year 1169 nearly 150 years ago and at the present time. It could not be that the boundaries would, prima facie on the face of them, be the same, and it was necessary, therefore, that oral evidence should be given to show the identity.

13. It is urged by the learned Vakil for the appellant that even now we should allow the best kind of oral evidence to be procured and produced, namely, that of a local investigation made by a qualified Surveyor. But as none of the parties has ever applied for this before and as the evidence of the plaintiff appears to be altogether worthless, we do not think it either necessary or desirable to further remand this case. Taking it then that the identity has to be established by oral evidence, we are unable to go behind the finding of the learned District Judge when he says "I am unable to accept the plaintiff's evidence as worth anything whatsoever." He shows that the plaintiff's own statement is improbable and we have already referred to the inexplicable confusion about the custody of the sanad, and we, therefore, entirely agree with the learned Judge that the evidence is obviously incredible and requires no comment. Again he says: "The most important objection to the evidence of the plaintiff and the remaining witnesses is that it does not identify the land in suit." This again is a finding of fact behind which we cannot go. The plaintiff, therefore, having failed to trace his title through Musammat Ratibatti to the original holders of the lakheraj under the sanad and having failed to identify the land as part of the lakheraj millik of Krishna Mul Jha, his suit must be dismissed.

14. This appeal, therefore, must be dismissed with costs.

15. We do not desire to come to any decision as to what the present status of the plaintiff may be. That must be left to future litigation.