

(1950) 07 CAL CK 0001

In the Calcutta High Court

Case No : Appeals from Appellate Decree No's. 2036 to 2046 of 1946

Moslema Khatun

APPELLANT

Vs

Rai Bahadur Fanindra Lal Sen

RESPONDENT

Date of Decision : 21-07-1950

Acts Referred:

Bengal Patni Taluks Regulation, 1819 — Section 11

Citation : 55 CWN 21

Hon'ble Judges : Roxburgh, J

Bench : Single Bench

Advocate : Manindra N. Ghose, Anil Kumar Sen and Sivadas Ghose, for the Appellant; Sitaram Banerjee and Byomkesh Basu, for the Respondent

Final Decision : Dismissed

Judgement

Roxburgh, J.—These are eleven appeals against eleven decrees made in suits tried analogously. The Plaintiff is a purchaser of a putni taluq known as Lot Simhali under Touzi No. 1 of the Burdwan Collectorate. The purchase was made on the 17th November, 1932. He sued in each case for assessment of rent. The Defendants in each case denied that the lands were mal lands of Touzi No. 1 and claimed that they had been holding the lands in lakheraj and nishkar right and also that the record showing the lands to be nishkar was not correct. The Munsif, 3rd Court, Burdwan, decreed all the suits and assessed rent. On appeal the Subordinate Judge, Burdwan, affirmed the decrees and dismissed the appeals. Before me there are also cross-objections by the landlord in regard to the assessment of rent.

2. The brief history of the putni is that there was a putni kabuliyat, Exht. 1, in 1210 B. S. in respect of the lands of Mouza Simdali and other Mouzas executed by one Jagat Narayan Roy in favour of the Maharaja of Burdwan. Next, there is another kabuliyat by one Muktaram Roy in 1212 B. S. in respect of the lands of Simdali and other Mouzas; next, a kabuliyat by Bhairabsingh in 1221 B. S. in respect of the lands of Simdali only.

3. After this we have some evidence of sales of the putni under the Putni Regulation. Ext. 3 is one sale certificate for a sale in 1235 B. S. Ext. 3A is another kabuliyat showing a purchase by one Bakkeswar at a sale in May, 1893. Next, there was the sale on the 17th November, 1932, at which the present Plaintiff purchased.

4. As the learned Munsif has pointed out and as the learned Judge has also noted, an important feature of this case is the fact that the interest in question is claimed as being held under a putni and in view of the provisions of sec. 11 of the Putni Regulation it is not sufficient for the Defendants to show that they may have had a grant from one of the putnidars. The case, in fact, involves consideration of three possible types of title of the Defendants,-- (A) what may be called a lakheraj title based on the fact that there was a valid or invalid revenue free grant made prior to the permanent settlement so that the lands in question never formed part of the mal assets of Touzi No. 1. If they did not equally they could not form part of the assets of the putni; (B) A nishkar title or rent-free title based on a grant by the Maharaja of 1 Burdwan before the first putni settlement in 1210 B. S.; and (C) A nishkar title acquired under one of the putnidars.

5. The record-of-rights shows these interests as apparently under the putni and described as "Bhog dakhal sutra raiyati nishkar" (rent-free title). It will be seen that the Defendants claimed both lakheraj and nishkar title and also alleged that the description of their title as nishkar in the record-of-rights was incorrect.

6. The Plaintiff has failed to show that any rent was ever paid in respect of any of the lauds in suit. The Defendants produced some documents, in which their title was asserted but these have rightly been treated as of no value as against the Plaintiff or even as against any previous putnidar.

7. It is clear, according to the long line of decisions on this question, that in a case such as the present the onus first lies on the Plaintiff to establish that the lands in suit formed part of the mal assets of the estate. This is for decision in the case. Once the Plaintiff has discharged this onus, then it is for the Defendant to show that he is not liable to pay any rent for the lands which formed part of those mal assets. This is the first question for decision.

8. The trial Court carefully separated the two questions and arrived at a decision favourable to the Plaintiff on the first question and one adverse to the Defendants as regards the discharge of their onus on the second. In support of his view on the first question the Munsif went into a discussion of some evidence as to the thakbast statement, also of extracts from the registers kept under the Land Registration Act, 1876, and some calculations of areas. I may at once say that in my opinion, even accepting that the arguments adduced are otherwise valid (which I doubt), it has been clearly settled in the case of Bipradas Pal Choudhury v. Monorama Choudhury (22 O. W. N.396 (sic)) that this sort of evidence based on the thakbast statements and the registers kept under the

Land Registration Act is of no value for this purpose. Briefly, the reason is, as pointed out by Teunon, J., by reference to thakbast and khasrah rules and other authorities, that in regard to small areas of below 50 bighas the Government did not attempt to proceed with resumption proceedings and as it were, so far as the Government was concerned, made a present of them to the Zemindar, leaving it to the Zemindar and any person claiming a lakheraj or rent-free interest to light it out, and thereafter, so far as Government is concerned, the land in question were treated as part of the appropriate Touzi according to the rules. In other words, such inclusion did not settle the question as to whether in the case of small areas such a lakheraj interest existed or not, or rather the first question here, whether the lands formed part of the mal assets of the estate so far and it is to be decided in a dispute between Zemindar (Or patnidar) and actual possessor. The learned Subordinate Judge in this connection referred to the later case of Nibarm Chandra Mukherji v. Rai Harendra Lal Bahadur (36 C. W. N. 215 (1982)) as disposing of the matter. That case is mainly taken up with a discussion of the supposed difficulty created by some remarks in Jagdeo Narayan's case (L. R 49 I. A. 399 : 27 O. W. N. 925 (1922)) with reference to the earlier decision in Harihar Mukherjee's case (14 M.I.A. 152 (1871)). Then, very briefly at the end of the judgment it is pointed out that there was some evidence from the general register kept under the Land Registration Act and also from the landlord's portion of the settlement khatian in respect of the lands in suit, but precisely what the evidence was is not stated. No reference is made to the earlier case, and I do not think that it can be said that there was any intention to take different view.

9. On the second question in this case the learned Munsif gave his reasons seriatim for holding that the presumption arising in favour of the Defendants from the record-of-rights which was the only real evidence in support of their claim had been rebutted by the other evidence in the case.

10. The judgment of the learned District Judge is not satisfactory, for he has mixed up the two questions. He begins by stating that it was not disputed before him that the lands in suit appertained to the mahal of the Maharaja, He then, after setting out the history of the putni title, states that the pleaders for the Appellants contended that the Respondent had not attempted to prove by relaying the thak survey map that the interests were within the ambit of the estate and of the putni. A few lines later, however, he says, "Here the Appellants do not dispute that the lands appertain to Touzi No. 1 and claim only Nishkar and not lakherji right therein." He then proceeds to discuss at length the evidence based on the thakbast and calculation of areas referred to above which was used by the Munsif in connection, solely, of course, with the question as to whether the lands appertained to the mal assets of the Touzi or not. He concludes by saying that he agrees with the Munsif in his finding that the Respondent has been able to prove that the lands of the tenancy are within the ambit of the estate No. 1 for which the putni tenure was created and was within the mal assets of the estate and the putni. Then, without any further discussion he says:

"It follows, therefore, that there was no basis for the recording of the interests of the Appellant as nishkar. The settlement records must, therefore, be deemed to have been rebutted and the Respondent is not entitled to claim assessment of rent for these tenancies." Indeed, it would seem that the learned Judge having stated that the first question as to whether the lands appertained to the mal assets of the estate or not was not in dispute proceeded to use the arguments to show that the Plaintiff had discharged the onus on him to establish that point in order to come to a finding on the second point, namely, the question of the onus lying on the Defendants to show that if the lands did form part of the mal assets of the estate they were not liable to pay rent. It is quite impossible, therefore, to support the finding on the second question of the learned Subordinate Judge on the reasoning given by him.

11. As I have pointed out there are two main questions in the case: (1) whether the lands in suit formed part of the mal assets of Touzi No. 1 and whether the Plaintiff has discharged the onus of showing that the lands in suit formed part of the mal assets of Touzi No. 1; and (2) if he has done so whether the Defendants have discharged the onus lying on them of showing that they are not liable to pay rent. I have already pointed out that there are three types of title, namely, A, B and C referred to above, on which the Defendants could rely. On the first question I have been referred to a recent judgment of Sen and Chunder, JJ., in the case of Bibhuti Bhusan Kar v. Rai Fanindra Lal Sen Bahadur (Unreported; S.A. Nos. 1918 to 1980 of 1944) and the present Plaintiff was a party to those appeals. All the entries in the record-of-rights there are the same as here. The learned Judges have disposed of all the points for decision by saying: "Now the lands having been described as raiyati it necessarily follows that they are assessable to rent. No argument is necessary to support this view. A raiyati interest is assessable to rent, the word "nishkar"" does not take away from this liability. It only shows that this raiyati interest had been enjoyed by the tenants without paying rent, but it does not show that the lands are not assessable to rent." Mr. Sitaram Banerjee is content here to contend that the description of the interest as "raiya nishkar" in the khatian and the presumption arising from its correctness discharge the onus which lies on him on the first point to establish that the suit lands formed part of the mal assets of the estate. He does not contend further that the entry disposes of the second question in which the onus lies on the Defendants to show that they are not liable to pay rent. On the contrary, he concedes that the entry, as it stands, is, on that point, in favour of the Defendants and is, therefore, a matter for him to meet.

12. On the first question as to whether the entry in the record-of-rights favours the Plaintiff and helps him to discharge the onus which lies on him, the important cases are those of Kanta Mohan Mallik v. Makhan Santra (89 C. W. N. 277 (1935)) and Kamala Ranjan Roy Vs. Ifran Sheikh and Others, .

13. In the earlier case R.C. Mitter, J., held that where the record-of-rights showed that the tenancy was liable to assessment of rent, this was evidence that

the lands necessarily formed part of the estate, In the later case, sitting with Akram, J., he held that an entry "nishkar bhog dakhil sutre" was not sufficient to enable the landlord to discharge the onus, and for this purpose he referred to the technical rules of the Settlement Department showing that the entry of "nishkar" in the khalians was somewhat loosely used and might also cover cases of lakheraj. In the present case, Mr. Banerjee places reliance on the fact that the interest is not described simply as "nishkar" but as "raiyaati nishkar" and contends,--I think rightly,--that this shows that the description in the khatian is blended to mean that the interest is what may be called pure "nishkar" and not a lakheraj interest. The entry, in other words, shows not, as is stated in the case cited above, that the land is assessable to rent but that the land would be assessable to rent but for the fact that the raiyat has by long enjoyment and possession a right to hold the land as a raiyat free from the obligation to pay rent. The Defendants themselves were aware of some difficulty in this matter and hence they had to allege in their written statement that in so far as the record referred to the holding as a nishkar holding it was incorrect.

14. Thus, though I cannot agree with all the reasons given by the trial Court for holding that the Plaintiff has discharged the onus which lies on him upon the first question in this case and although the judgment of the learned Judge on the point is, to say the least, unsatisfactory, I hold that it has been shown that the record-of-rights on this point is in favour of the Plaintiff and, therefore, he has discharged the onus which lies on him and has shown that the lands formed part of the mal assets of the estate. The entry also shows that whatever right the tenants may have, it is not a lakheraj right.

15. I have next to consider the second question whether the Defendants have established that they are not liable to pay rent to the Plaintiff. On this point the record-of-rights up to a point is in their favour but unfortunately for them it is not. I think, sufficiently in their favour, in other words, it is not sufficiently explicit to show that they have the title which I have described as B, namely, that their rent-free title is based on a grant made prior to the creation of the putni. Manifestly, on the face of it, the record does not establish this. The onus is on the Defendants to show that this is the origin of their rent-free title. As pointed out very clearly in the trial Court's judgment, the Defendants have no evidence to show this. Even their documents which they produced showing assertion of rent-free title date after the creation of the putni. On their behalf some attempt was made before me to argue that the putni pattas themselves showed some reservation indicating a possibility of such a grant having been made by the Zemindar which had been included in the putni but in fact all that is stated is that certain tanks and ditches had been excluded and were not at all included in the putni. Moreover, even if the putni kabuliyat showed that some rent-free interests were included in the lands which were the subject-matter of the putni it would still be for the Defendants to show that the present suit lands were included amongst those.

16. In other words, so far as the Defendants are concerned, the record-of-rights is at best ambiguous and consistent with their right having arisen either as of class B by a grant from the Zemindar, or as of class C by a grant from one of the putnidars. If their right is of class C, then it is of no avail as against the present Plaintiff who purchased the putni in 1932 and has brought his suit within 12 years of his purchase. Therefore, in my opinion, the lower Courts are correct in their decision in holding that the Defendants have not discharged the onus which lies upon them to show that they are not liable to pay rent for the holding in question.

17. The question of limitation was raised and considered by both the lower Courts and decided in favour of the Plaintiff. Before me it is again urged and reliance is placed on the decision in the case of *Saroj Basini Debi v. Kumar Kamal Ranjan Roy* (45 C. W. N. 126 (1941)), where it was held that in a case of lakheraj Art. 144 applies, in that case there had been resumption proceedings in 1844 and, therefore, there was evidence that after that the predecessors of the Defendants had been contending for their title to the lands on the basis of the grant supposed to have been resumed contrary to the result of the proceedings. It was, therefore, held that Art. 144 applied and the Appeal Court, therefore, held that some investigation of the matter was necessary. Here, it is true that the issue of limitation was raised. It is also true that in one form the Defendants' case was that their interest was a lakheraj interest, but it does not seem to me that the question of their having acquired a title by adverse possession was ever clearly raised so that it could be properly investigated. Even in this Court, in so far as their case on this point rested on the date of final publication of the record-of-rights, no one was in a position to show exactly what that date was (It was certainly some date prior to the 17th March, 1932, a date which appears on the certified copies of the khatians established.) For example, it was urged here that it was the Plaintiff's own case that incorrect entries had been made in the record-of-rights fraudulently by conspiracy between the tenants and the officers of the former putnidar. Obviously, such a conspiracy would not bind the putnidar himself and certainly there can be no question of it being said on that basis that there was any claim of an adverse title prior to the date of the final publication which apparently was within 12 years of the date of the suit. But the real significance of these comments is, as I have already noted, that a clear case of a title by adverse possession on a claim of lakheraj title has never been sought to be established in my opinion. A mere vague raising of the question of limitation, when the determination of that question depends first, on a decision as to what Article of the Act applies and secondly, on some decision on some facts in relation to the particular Article, was not sufficient for the Defendants now to be allowed to contend that they have such a title by adverse possession. I would further point out that the fact that I have held that the entry in the record-of-rights is itself ambiguous on the question as to whether it shows a title of what I have called class B or a title of class C, is itself sufficient to dispose of any claim by adverse possession in so far as it rests on the record-of-rights. Unless the re-

cord-of-rights clearly shows that there was a claim of a title of class B (or of class A) no basis for a claim of both by adverse possession exists. A claim of class C would be of no value to the Defendants, that is to say, a claim of a grant by one of the putnidars. Of course, the contention here is, and must be, not that the case rests on the actual record-of-rights, for, that was apparently published within the period of limitation, but it is sought to add to that further time by contending that the claim must have been made at the time the record-of-rights was being prepared in the locality, some years before the date of final publication, but it was for the Defendants to show exactly what the claim then raised was and when it was raised. It certainly cannot be presumed from the record, as it stands, even taking everything in their favour, that they raised any claim of title either of class A or of class B, and to establish such a case it would be necessary for them to make clear what were the facts on which they based their claim and to establish the facts. They made no attempt to do so. In my opinion, the question of limitation is of no assistance to them at this stage.

18. As regards the cross-objection, I have perused the judgment on the question of the assessment of rent and nothing has been said before me to suggest that I should differ from the views of the lower Courts, still less that I should hold that they committed any error of law in arriving at the rates determined.

19. The result is that these appeals and the cross-objection are dismissed. There will be no order for costs either in the appeals or in the cross-objection. Leave to appeal under cl. 15 of the Letters Patent is asked for and is granted.