(1932) 08 PAT CK 0019

In the Patna High Court

Mt. Dharichhna Kuari and Others — APPELLANT

Vs

Ramyad Kuari and Others — RESPONDENT

Date of Decision : 19-08-1932

Acts Referred:

Bengal Tenancy Act, 1885 — Section 60
Land Registration Act, 1876 — Section 78

Citation : AIR 1934 Patna 485

Hon'ble Judges : Rowland, J;Kulwant Sahay, J

Bench : Full Bench

Judgement

Rowland, J.—These appeals which have been made analogous arise out of two judgments dated 20th September 1927 and 14th January 1928 respectively of the District Judge of Shahabad on appeal from decisions of two successive Munsifs of Buxar in batches of rent suits tried analogously. It will be convenient to begin by stating particulars of the suits and appeals. Mt. Dharichhna Kuari, brought 53 rent suits claiming rent from cultivating tenants to the extent of her share which was said to be 5 annas 16 karants in Sheo Bux Singh putti and 3 annas 2 pies 8 karants in Naunidh Singh putti in respect of the holding occupied by them alleged by her to fall in her estate of Gangbarar Sheo Bux Putty and Gangbarar Naunidh Singh putti. She impleaded the Maharaja of Dumraon on the ground that he claimed to be proprietor of the holdings as part of his estate Naubarar and she prayed for declaration of title as against him and recovery of rent as against the tenants.

2. The Munsif dismissed the suits and the District Judge modified that decision giving the plaintiff a declaration of title as against the Maharaja, but refusing her decrees for rent as against the tenants. Out of this decision appeals bearing Nos. between 440 and 492 are presented by the plaintiff and appeals bearing numbers between 877 and 1029 are by the Maharaja. In the other batch 31 suits were instituted by Raghunath Prashad Sahu and others claiming similarly that the holdings are in their estate Gangbarar Janubi putti Sheo Bux Singh and not in the Maharaja''s estate of Naubarar and praying to realise rent from the tenants

to the extent of the share of the plaintiffs, namely, 2 annas 8 pies in putti Sheo Bux Singh. As in the other batch the Munsif dismissed the suit and the District Judge modified that decision giving the plaintiffs a declaration of title, but refusing them decrees for rent. From this decision, appeals are preferred by Maharaja bearing numbers between 774 and 804 and appeals are preferred by the plaintiff bearing numbers between 1418 and 1448.

3. The general nature of the dispute which has been going on for some years is disclosed in the judgment of the District Judge who has summarised the history of the movements of the river Ganges and of the consequent successive formations of new estates in the earlier portion of his judgment. It is not necessary to go over all this ground again, but it should be noted that the estate Sheopur Diar Gangbarar was surveyed in 1839 and 1840 and the plots of land measured and numbered, the last plot at the southern extremity of the estate being plot No. 920 and the District Judge has held that in some of the suits all of the lands and the rest of the suits some of the lands lie outside the boundary of the estate Gangbarar as surveyed and fixed in 1840. Subsequent to 1840 several thousand bighas accreted on the south of this boundary and in 1862 a new estate was formed bearing the name Sheopur Diar Naubarar with a revenue of Rs. 1,104 and was settled with the proprietors of the existing estate Gangbarar. The accretion was measured and reported to be 2877 bighas and 10 kathas.

4. The first point for consideration is whether this estate comprised, as contended by the Maharaja, the whole of what had accreted south of plot No. 920 or, as maintained by the plaintiffs, was something unascertained and unidentifiable. The District Judge thought that the total area of 2877 and half bighas was dealt with by augmenting the estate Gangbarar to the extent of 1923 bighas and setting as estate Naubarar 569 bighas 12 kathas, both these areas being undefined and not specific. This finding of the District Judge does not account for 384 bighas of sand and water.

5. The District Judge''s finding rests on the construction which he placed on the robakar of 13th June 1862. This robakar was construed in a different sense in Tilakdhari Singh v. Kesho Prasad Singh 1925 PC 122, a litigation which came before the Privy Council, but, was not inter partes, the construction there adopted being that the new estate of Naubarar comprised all that had accreted to the south of plot No. 920. The District Judge on examining the robakar found that the English translation which had been before the Court in the previous litigation was in one passage incorrect. Accordingly he considered it his duty to make his own independent reading and Construction of the document.

6. His reading of it led him to the finding which I have just stated. The relevant portion of the robakar is translated by the District Judge as follows:

Accordingly from the measurement of the tahsildar and the kanungo of the pargana it is evident that after making allowance for the surveyed area of 13,977 bighas 15 kathas land of an area of 2,877 bighas has been found in excess. Out of the surveyed area the river Ganges has destroyed an area of 1,923 bighas of cultivated land, etc., and is still flowing over it, and there is 384 bighas 15 kathas of uncultivated bhagar land (sand and water) situated to the south below the karar) 569 bighas 12 kathas of cultivated land is found suitable for settlement and assessment of revenue and the present produce of it calculated at the rate of Rs. 4 a bigha is Rs. 2,278-6 annas. Out of this after deducting Rs. 70-14 annas on account of patwari''s dues there remains Rupees 2,207-8 annas of which Government is entitled to Rs. 1,104.

At the hearing of the appeals before us a certified copy of the Persian document was read and we are satisfied that the translation adopted by the District Judge is correct in so far as it describes 569 bighas 12 kathas of cultivated land as found "suitable for settlement and assessment" (Laiq bandobast wo takarrurkherajke), That being so, the documents creating the estate have to be construed afresh. In so doing we must bear in mind the history of the Mahal, and shall have to examine other documents besides this robakar itself.

7. Referring to the previous history of the Mahal it is to be noticed that on each occasion on which new land had accreted to Sheopur the accretion was formed into a new estate without altering the boundaries of the old estate. This was the procedure followed in creating a new estate Mahal Nambari about 1801 when 6001 bighas had accreted to the village Sheopur. The same procedure was followed in 1825 in settling the further accretion of 13977 bighas 15 kathas as Mahal Sheopur Diar Gangbarar. If therefore the settlement of Naubarar involved as its accompaniment an alteration of the boundaries of Gangbarar this would be an event without precedent. We should not readily suppose that this was done by the revenue authorities in the absence of a definite order to that effect and there is no trace of such an order.

8. Again, the District Judge supposed that the settlement was made only of the culturable area and that the waste land was left unsettled.

Such a procedure also would be contrary to all the previous precedents in which settlement was always made of an entire block though revenue was assessed on its estimated assets and in computing assets account was only taken of the culturable area; for instance Sheopur Diar Gangbarar had a total area of nearly 14000, bighas, but the revenue assessed on it was based on the cultivated area of about 3000 bighas within the block. Then we have in Ex. 54 the robakar under consideration a recital of the orders of Mr. Moore dated 8th April 1862.

The tahsildar should fix the northern, southern, eastern and western boundaries with reference to the survey compass map. There can be no question about the northern boundary as the river Ganges has not yet reached that point. Then he should measure any increase to the survey area as a new estate.

From this it is clear that what was contemplated was the settlement of an entire block though the cultivated area 569 bighas 12 kathas alone was taken as the basis of assessment. Then we have the Ballia tahsildar''s report, Ex. D. 1, giving particulars for the assessment of revenue in tabular form:

B. k. c Entire area ... 2,877 10 0 Less river, Bhagar and Nallas ... 2,307 18 0 (River 1923, Bhagar and Nallas 384-13-0) Balance culturable ... 569 12 0

Rs. a. p. Rate ... 4 0 0 Revenue ... 2,278 6 0 Deduct Patwari''s fee ... 70 14 0 Balance ... 2,207 8 0 Deduct one half ... 1,103 12 0 Balance payable to Government ... 1,103 12 0

9. Then we have the jamabandis. That of Naubarar for 1270 Fasli shows its total area as 2877 bighas, and contains specification of particular blocks, numbered and named and with specified areas stated against each. Then there is the ekbalnama of Meghbaran Singh and others dated 13th June 1862 which is their acknowledgment and undertaking of liability of the revenue. The ekbalnama recites thus:

At the time of inquiry held in 1861 in the vicinity of mahal Sheopur Diar Gangbarar, pargana Ballia, 2877 bighas 10 kathas of land was found in excess by the measurement of tahsildar, peshkar and kanungo of the pargana excluding the area exempted by Act 9 of 1833 out of which 1923 bighas of land which is the area of the new course of the Ganges and 384 bighas 8 kathas, the area of Gair Mazrua lying under water being deducted the remainder 569 bighas 12 kathas was established as Masrua, (cultivable) and the rate of produce at Rs. 4 per bigha was fixed at Rs. 2,278-6 annas.

10. Then follows the undertaking of the executants to pay the revenue.

The above documents are referred to in the judgments of the trial Courts, but the District Judge seems to proceed only on the robakar, Ex. 54 Reading the documents their intention at first sight seems so clear and unambiguous that it may be Surprising that any dispute should arise. The difficulty arises from this that the Ganges was not in fact flowing through the new estate Naubarar at all and the river did not occupy 1923 bighas of the new estate Naubarar. It had changed its course about 1860 and was flowing through the estate Gangbarar destroying an area of 1923 bighas of cultivated land in that estate. The proprietors of Gangbarar wanted an abatement of revenue for the 1923 bighas diluviated. No papers referring to such a claim have been placed before us. It appears however that what happened was that instead of revising the revenue payable in respect of Gangbarar the authorities fixed a reduced jama for the Naubarar estate. This does not involve as a consequence that the estates of Gangbarar and Naubarar were indistinguishable.

11. The 1863 documents taken as a whole clearly indicate the intention of the revenue authorities to make a settlement with reference to actual boundaries. It is true, a demarcation did not follow. The fact, however that one sum of revenue was assessed on Gangbarar and a different sum separately assessed on Naubarar is itself an indication of the intention of revenue authorities to keep the latter as a separate property separately liable for its own arrears. Had it been

otherwise, a lump sum of revenue would have been fixed for the entire combined estate and in case of default the entire estate would have been liable to sale. In my opinion the new estate comprised the area of 2877 and half bighas bounded on the north by plot No. 920 and this definite block of land was the security charged with the payment of the revenue of Rs. 1104.

12. Now, the persons who obtained the settlement were the same as the proprietors of Gangbarar and in their dealings with the property it must be conceded that they have treated the two estates as if they had been one estate. But if we regard the Government as a mortgagee holding a charge on estate Naubarar for its recurring dues and if we regard the proprietors as the mortgagors it is manifest that no dealings by the mortgagors or their assignees with the property hypothecated can affect the lien upon it of the mortgagee. Nor can there be any question of adverse possession arising between mortgagor and mortgagee. The robakar of 1884 contains two passages relied on by the plaintiffs as indicating that Naubarar was not an ascertained block of land, the first being:

Mahal Naubarar is not such a portion as it might have been demarcated separately

and the second is:

from Mahal Naubarar it only appears that out of the culturable area south of the river Ganges the revenue payable for 570 bighas of land is Rs. 1,104.

13. Those passages do not, in my opinion, override the conclusion to which the documents of 1863 clearly point that what was settled as Naubarar was an ascertained block of 2877 and half bighas within known boundaries.

When we have before us the documents by which the estate came into existence, then in the words of Lord Sumner in Satya Narayan Singh v. Satya Niranjan Chakraverty 1924 PC 5:

"the nature of the estate rests on their true construction and import and not upon the notions entertained about them in later generations."

14. On this view we can determine the effect of the revenue sale of 1903. The effect of that sale was to make the purchaser absolute proprietor of estate Naubarar, an ascertained block of land as above stated, and to extinguish the title of all other persons claiming to be proprietors.

The plaintiffs made it their first allegation that they were entitled to the rents as proprietors of certain shares in puttis within Sheopur Diar Gangbarar and this case has now failed completely. The District Judge however held that by remaining in possession from 1903 to 1916 a period exceeding 12 years the plaintiffs had in any case acquired title by adverse possession and this aspect of the case is to be examined next.

15. The plaintiffs began to hold adversely to the purchaser from the date of the revenue sale, 24th March 1903. The purchaser was Maharani Beniprasad Kuari

who was the holder for her life of the Dumraon Raj Estate. She died on 6th November 1907 and thereafter the estate came to the present defendant 1, Maharaja Kesho Prasad Singh, as heir of the last full owner. He brought his suit against Tilakdhari Singh and others in 1911 and after obtaining decree took delivery of possession in 1916. The suits out of which these appeals arise were instituted by Dharichhna Kuari on 5th October 1925 and by Raghunath Prasad Sahu and others on 25th November 1925.

16. Mr. Mullick for the Maharaja sought to invoke the aid of the principle that as between co-sharers possession of one is not adverse to another and that the possession of the plaintiffs could not be adverse to the Maharani and thereafter to the Maharaja, but the principle does not seem applicable to the case before us. The fact that the plaintiffs claim to be fractional landlords will not make them co-sharers with defendant 1 who alleges them not to be his co-sharers but to be trespassers.

17. There is more force in the contention that as against the Maharaja limitation could not run until he succeeded to the estate on the death of Maharani Beniprasad Kuari. The relevant article of the Limitation Act is Article 141. The conditions of the article appears to be fully satisfied. The conditions under which the article applies have been explained by their Lordships of the Judicial Committee in Runchordas v. Parvatibai, (1899) 23 Bom 725, and whatever doubts may have been raised by the decision in Vaithialenga Mudaliar v. Srirangnath Anni. 1925 PC 249, have been resolved by the more recent decision in Jaggo Bai v. Utsava Lal 1929 PC 166. Therefore the plaintiffs cannot establish an absolute title by adverse possession unless they can prove continuous possession for an uninterrupted period of 12 years subsequent to 6th November 1907. It is essential that possession should be continuous and uninterrupted. Any break in the continuity would destroy the effect of previous adverse possession and give a fresh start to the period of limitation: Udit Narain Singh v. Golabchand Sahu, (1899) 27 Cal 221.

18. If within the period of 12 years the rightful owner re-enters and obtains possession of the property for any period however short, the running of time under the statute will be interrupted and if the trespasser re-enters, time will begin to run afresh, Randall v. Stevens, (1853) 2 E & B 641. Now the District Judge in coming to his finding of title by adverse possession has failed to consider whether there was a re-entry of the Maharaja on the property when he took delivery of possession in 1916. No doubt on the view taken by the District Judge that the plaintiffs by holding possession 1903 to 1916 had already acquired an absolute title any such entry of the Maharaja would have been ineffective. An entry by the original owner after he has lost title by 12 years'' adverse possession will not avail to revive his title, unless he in his turn holds possession adversely for 12 years.

19. But if the re-entry is made before the trespasser by lapse of 12 years has acquired an absolute title, the position is different, and on the view that I take

that limitation only began to run against the Maharaja in 1907 his title was still alive in 1916, and if he re-entered on the property then, the plaintiffs to acquire title must hold possession for a fresh period of 12 years.

The District Judge has not examined the events of 1916 and after to see whether there was an entry by the Maharaja in 1916 or whether the possession of the plaintiffs continued to be uninterrupted and exclusive down to the latter part of 1919, i.e., to the expiry of 12 years from November 1907.

20. Admittedly the Maharaja took delivery of possession in 1916 and that in itself was sufficient to operate as an entry on the property as against the parties against whom he held a decree, Sri Radha Krishna Chanderji v. Ram Bahadur, 1917 PC 197, but not against third parties, though the delivery purported to be of 16 annas of the property. To establish an entry the Maharaja must show something further. He must show that be has exercised acts of possession over the property. On the other hand if the plaintiffs should wish the Court to hold that they acquired a title by adverse possession they must show that such possession was adequate in continuity, in publicity and in extent and continued so right down to the expiry of the period required to extinguish the right of the Maharaja to the property within the terms of Section 28, Lim. Act.

21. The point of view from which the question requires to be examined is that set forth by the Judicial Committee of the Privy Council in K. Moothavar v. P. Kunharankutty 1922 PC 181. In that case the appellant having satisfied their Lordships of his antecedent title to the disputed land, the contention for the respondent was that,

the evidence showed that the respondent has legally effective possession from 1870 and that after that date the appellant had no effective possession.

The observations of their Lordships on this contention deserve careful attention. Their Lordships said:

Standing a title in ''A'' the alleged adverse possession of ''B'' must have all the qualities of adequacy, continuity and exclusiveness which should quality such adverse possession. But the onus of establishing these things is on the adverse possessor. Accordingly when the holder of the title proves that he too has been exercising during the currency of his title various acts of possession, then the quality of these acts, even though they might have failed to constitute adverse possession as against another, may be abundantly sufficient to destroy that adequacy and interrupt that exclusiveness and continuity which is demanded from any person challenging by possession the title which he holds.

22. The case before us have therefore to be examined from this point of view. We have considered whether the appeals should be remanded to the lower appellate Court for a finding, but the present suits were instituted in 1925 and it is manifestly undesirable that the litigation should be further protracted when all the materials for a decision are before us, as they are. The plaintiffs have stated

in the plaint, para. 18:

the tenant defendants are not paying rent now to the plaintiff.

In some of the plaints the plaintiffs have stated:

the Maharaja Bahadur defendant 1 realised rent from the tenant-defendants in respect of the said land.

In others the plaintiffs have stated:

the Maharaja Bahadur also obtained a decree against tenant-defendants.

23. The Maharaja in his written statement alleged that he had got boundary pillars constructed and this does not appear to be controverted. He alleged that he was in possession of the entire mahal and it appears to be not disputed that he is in possession to the extent of the shares of the former proprietors other than the plaintiffs. The District Judge has stated in one judgment:

after defendant 1 obtained his decree in 1916 he then began to assert a claim; he began to attempt to realize rent from the tenants,

and in the other judgment he has said:

after the year 1916 the dispute between the plaintiffs and defendants started and defendant 1 began to try to realize rent.

24. There is evidence of acts of possession on both sides, the plaintiffs have filed village papers up to 1326; the Maharaja has also filed village papers for 1918-1924. Each side has produced certified copies of decrees for rent and on each side there is oral evidence as to realisation. It appears on the face of the decrees filed by the plaintiffs that from the majority of the tenants they could not realise rent peacefully or amicably. Their collection papers show however that from some tenants occasional realisations were made and the oral evidence is that only a small number of tenants paid rent amicably the collection from others has to be made by suits. The Maharaja has also obtained decrees from a number of the tenants and his collection papers show some realisations; he got his name entered in the khewat in the United Provinces. It has been found by the Munsif that both parties realised the entire rent from some tenants. Such being the facts, in my opinion, it is impossible to hold that the possession of the plaintiffs was adequate and exclusive after 1916. The result is that the plaintiffs have failed to establish title by adverse possession.

25. The District Judge has held that the question of title is res judicata against the Maharaja in some of the suits of each batch by virtue of a decision dated 13th July 1926, of this Court. In the litigation in question the Maharaja after obtaining his decree against Tilakdhari Singh v. Kesho Prasad Singh 1925 PC 122 had sued for rent of certain tenants impleading the present plaintiffs as proforma defendants. His title was challenged and in proof of it ho thought it sufficient to put in evidence the judgment given in the earlier litigation. That decision not

being inter partes it was found that it did not sufficiently establish the title of the Maharaja. The District Judge has held that this decision concludes the Maharaja who was then plaintiff from pleading and establishing his title to the property in these suits in which he is defendant observing that:

in a suit between A and B in which each pleads title and the finding is that A has not proved his title that finding is as between A and B a decision that the title is with B.

26. The District Judge has not referred to the issues framed in the former litigation or to the issues framed in these suits. The material issues in the litigation before us are Nos. 7 and 8 which run as follows:

(7) Does the whole or any portion of the jote lie in Gangbarar or Naubarar? Have the plaintiffs any interest in Naubarar?

(8) Are the plaintiffs maliks of the disputed jotes? Have they acquired any right as maliks of the same through adverse possession and if so does it subsist now?

Referring to the High Court judgment neither of these issues appears to have been decided in the previous litigation. I am therefore of opinion that no question of res judicata arises.

27. In my opinion the appeals of the Maharaja ought to be allowed and the suits dismissed with costs. The appeals by the plaintiffs are against the finding of the District Judge that the plaintiffs not being recorded as proprietors in respect of Naubarar cannot recover rent by a suit. When it has been held that the lands in suit appertain to the estate Naubarar, then on a reading of Section 60, Ben. Ten. Act, 1885 with Section 78, Land Registration Act (Bengal Act 7 of 1876), it seems clear that the case falls within the terms of the latter section and the plaintiffs not being registered are barred by the Statute from obtaining a decree for rent. Portions of some of the holdings no doubt are in Gangbarar, but the plaintiffs cannot get decrees for rent of these without first suing for apportionment. The appeals of the plaintiffs should therefore be dismissed with costs.

Kulwant Sahay, J.

28. I agree.