

(1904) 07 CAL CK 0004
In the Calcutta High Court
Case No : Appeals Nos. 2334 to 2337 of 1901

Narsing Narain Singh and Others

APPELLANT

Vs

Dharam Thakur and Others

RESPONDENT

Date of Decision : 29-07-1904

Acts Referred:

Citation : (1904) 07 CAL CK 0004

Final Decision : Allowed

Judgement

1. These four appeals arise out of as many suits instituted by four sets of Plaintiffs who are proprietors of mouzah Bhada against the same set of principal Defendants for recovery of possession of about 265 bighas of land. The Plaintiffs allege that the zamindari had been partitioned into four equal shares, that the lands in suit were all zerait, that in respect of a portion thereof the Defendants were originally tenants whose interests had vested in the Plaintiffs either by transfer or by surrender and that in February 1899 the Defendants without any right had trespassed upon the land and had dispossessed the Plaintiffs. The Plaintiffs accordingly prayed for a declaration that the lands were their zerait and asked for a decree of ejectment of the Defendants as trespassers. The Defendants in their written statements admitted the Plaintiffs' right as zemindars but pleaded that the lands were not zerait and claimed to be in possession thereof as raiyat under the Plaintiffs. The Court of first instance found that the lands in suit had been proved by the Plaintiffs to be their zerait and that the Defendants had failed to establish the tenancy set up by them. The learned Subordinate Judge accordingly made a decree for ejectment with mesne profits. The Defendants thereupon appealed to the learned District Judge who has dismissed the suit on the ground that the Plaintiffs had failed to prove that any portion of the lands except 40 bighas was zerait and it was impossible to say upon the evidence where these 40 bighas proved to be zerait were situated and what portion thereof had been allotted to each set of Plaintiffs upon the partition of the zamindari. The Plaintiffs have appealed to this Court and on their behalf the decision of the Court below has been assailed on two grounds, namely, first,

that the judgment of the learned District Judge is defective inasmuch as the Plaintiffs' claim could not be rightly dismissed when their right as zemindars is admitted, even though the lands be not proved to be zerait, unless and until the Defendants establish the tenancy upon which they relied and, secondly, that in any event, steps ought to have been taken to determine the situation of 40 bighas proved to be zerait, and what portion thereof is included in each suit. We are of opinion that each of these contentions is well founded and must prevail. In support of the first contention advanced on behalf of the Appellants, the learned Advocate-General has relied upon the cases of *Raj Kissen Mookerjee v. Pearee Mohan Mookerjee* 20 W. R. 421 (1873), *Huree Mohan Podclat V. Geereebulla Mullick* 22 W. R. 417 (1874), *Beharee Sahoo v. Puryag Mahtoon* 23 W. R. 291(1875), *Batai Ahir v. Bhugwatee Koer* 11 C. L. R. 476(1882). The learned vakil for the Respondents on the other hand has argued that these cases were decided before the Bengal Tenancy Act came into force and that assuming that the case of *Batai Ahir v. Bhugwatee Koer* 11 C. L. R. 476(1882) was correctly decided, it can no longer be regarded as good law. He has further contended that there is a well founded distinction between the case of a zemindar seeking to eject an intermediate tenure-holder and a zemindar seeking to eject a raiyat and that in the one case the onus would be upon the Defendant to prove that he was entitled to intercept any portion of the gross collections to which the zemindar is entitled as the rent receiver, but that, in the other case, the onus would be upon the Plaintiff to prove that though a mere rent receiver, he was entitled to khas possession. In support of this position, reliance has been placed upon the decision of this Court in the case of *Lulla Joynath Sahee Deo v. Lutchun Christian* 16 W. R. 158 (1871), in which the learned Judges observed that "as against a middleman, the right of the zemindar, which no doubt follows as a matter of course, unless the middleman makes out his case, is the right to receive the gross rents of the village composing his estate; as against a raiyat on the other hand, the right of the zemindar is not to receive the gross produce of that raiyat's land, but a right to receive that raiyat's rent." It has further been suggested that this distinction was lost sight of in the case of *Batai Ahir v. Bhugwatee Koer* 11C. L.R. 476(1882) and that the decision in that case is not really supported by the principles laid down by the Judicial Committee in *Rajah Sahib Perlhad Sein v. Doorga Prasad Tewary* 12 M. I. A. 286(1869), upon which the learned Judges placed reliance. It is unnecessary to decide whether the distinction suggested is well-founded--a distinction based upon the assumption that the position of a zemindar is strictly that of a mere rent receiver. But assuming that the distinction may be established upon reason and authority, it appears to us to be clear that it is of no avail to the Respondents, for here the zemindars seek to eject not a tenuro-holder or a raiyat but a trespasser. As pointed out by Couch, C. J., in *Raj Kissen Mookerjee v. Pearee Mohun Mookerjee* 20 W. R. 421 (1873) where a Plaintiff's title to the land is admitted, it is not necessary that he should give evidence of actual possession and forcible dispossession in order to enable him to recover it from a person who had no title to the possession. Again as was laid down by Jackson, J., in *Huree Mohan Poddar*

v. Geeree-bulla Mullick 22 W. R 417 (1874), in a case in which the Defendants admit the ownership of the land to be with the Plaintiffs but claim to hold possession of it as tenants, the burden of proof clearly lies upon them. The same principle is deducible from the other cases relied upon by the Appellant, as also from the case of Kripamayi Dabia v. Durga Govind Sirkar I. L. R. 15 Cal. 89 (1887) in which Mitter, C. J., pointed out that the conclusion follows from the application of the test, who would win if no evidence is given on either side. We hold accordingly that in a case like the present in which the owner of land seeks to recover possession on the allegation that the party in possession had no right to continue in it and his title to possession is proved or admitted, he can claim a decree unless the Defendant proves the existence of a tenancy which entitles him to retain possession. We are of opinion, therefore, that the learned District Judge could not rightly dismiss the Plaintiffs' claim merely upon the ground that they had failed to prove that the lands their were zerait, without reversing the finding of the Court of first instance that the Defendants were trespassers. The learned vakil for the Respondents has, however, contended that there has been such a reversal by implication and has invited our attention to passages in the judgment to shew that the learned District Judge has disbelieved the allegation of surrender made in the plaints. We are of opinion that this is not conclusive and moreover the story of surrender appears to have been set up only in respect of a portion of- the lauds in dispute. We think the learned District Judge ought to find expressly whether or not the Defendants had established their case of tenancy under the Plaintiffs which had been directly negated by the Court of first instance.

2. As regards the second contention advanced on behalf of the Appellants, we think it ought to prevail. According to the learned District Judge the Plaintiffs have made out that " the lands covered by the decrees, sale certificate, &c, amounting to about 40 bighas" were zerait, and we think that the Plaintiffs may well be afforded an opportunity of showing where these lands are situated and how much thereof is covered by the claim in each suit.

3. The result therefore is that these appeals must be allowed, the decrees of the Court below reversed "and the cases remitted to the learned District Judge in order that he may determine (1) whether the Defendants are tenants under the Plaintiffs as alleged by them, in respect of the whole or any portion of the lands in suit.

(2) What is the position of the 40 bighas of land proved to be zerait and how much thereof is covered by the claim in each suit.

4. If the first question is answered in favour of the Plaintiffs the question of limitation raised in the first issue must be tried before a decree can be made in their favour. Upon the determination of the second question, it will have to be further ascertained whether the tenancy, if any, of the Defendants is of such a character as would entitle the Plaintiffs to the benefit of sec 116 of the Bengal Tenancy Act and consequently to a decree for ejectment. The learned District

Judge will be at liberty to take additional evidence under secs. 568 and 569 of the CPC in order to enable him to arrive at a satisfactory decision upon any of these questions. The costs of these appeals will abide the result.