

(1926) 06 CAL CK 0027
In the Calcutta High Court

Pramatha Nath Roy Chowdhury and Others

APPELLANT

Vs

Rajah Bejoy Singh Dhudhuria and Another

RESPONDENT

Date of Decision : 15-06-1926

Acts Referred:

Evidence Act, 1872 — Section 13, 32(3)

Citation : AIR 1927 Cal 234

Hon'ble Judges : Cammiade, J;B.B. Ghose, J

Bench : Full Bench

Judgement

B.B. Ghose, J.—These three appeals arise out of three suits for rent brought by the plaintiff for the years 1325 to 1327 for lands which are non-agricultural and which are said to have been let out to the predecessors of the plaintiffs a considerable number of years ago extending over 50 years.

2. The original defendants in Suit No. 1742 out of which the second appeal No. 402 arises were three. Defendant No. 1 subsequently died and Defendants Nos. 2 and 3 were her heirs. Defendant No. 3 had transferred his interest to Defendants Nos. 4 to 8. The appellants before us are the defendants. The plea of the defendants was that the plaintiffs had no right to maintain the suit for rent. The appeal was limited to the claim for rent after Assin 1327, when Budh Singh, the testator, whose executors, are two of the plaintiffs, died. It is now admitted by the appellants that they are bound to pay rent to the plaintiffs for the period till the death of Budh Singh. But after the death of Budh Singh they are not bound to pay rent to the present plaintiffs. Their argument is based on the following facts : Budh Singh was a member of a joint Mitakshara family which consisted of the Plaintiff No. 1 and the direct descendants of Budh Singh who are shown in the genealogical table given in the judgment of the learned Subordinate Judge (at page 14 of the paper-book). Budh Singh being a member of such family and the properties in suit being his ancestral properties he was not competent to execute a Will with regard to these properties; and on that ground it is contended that the executors named in the Will had no right to bring these

suits. They do not stand in the shoes of the coparceners of Budh Singh to whom the properties would go by survivorship. It is also urged that the lower appellate Court ought not to have taken into consideration the statement made in the Will of Budh Singh that the properties were self-acquired properties. But the difficulty in the way of the appellants is that this question was not raised in the trial Court. With reference to this contention the learned Subordinate Judge observed as follows:

But those objections were not raised in the trial Court. Had they been raised there, the plaintiffs could have adduced evidence to show that they were the separate and self-acquired properties of Budh Singh.

3. From that observation of the learned Subordinate Judge it is not possible for us to differ. The learned Subordinate Judge does not find as a fact whether these properties were self-acquired properties of Budh Singh on the basis of the statement in the Will. What he states is that it is stated in the Will that these properties were self-acquired properties. It was not shown that they were ancestral properties. Had the defendants taken the plea that they were-ancestral properties of the joint Mitakshara family evidence might have-been adduced by the plaintiffs to substantiate the statement made in the will. That being so it is not open to the¹ defendants who are the appellants before-us to raise that contention in second appeal. This argument of the appellants-must fail.

4. It is next contended that these tenancies are not transferable and therefore they could not be bequeathed. The difficulty with regard to this question again is that the properties have not been transferred at all. A bequest cannot be placed on the same category as a transfer inter vivos. It is also argued that the tenancies having been created before the Transfer of Property Act the incident of heritability and transferability does not attach to it. But as a matter of fact-these properties have been inherited, according to the defendant's own allegation, and the plaintiffs' right of inheritance was acknowledged by the landlord. Under such circumstances even if it be conceded that the interest under the lease was not originally heritable Budh Singh might claim to have acquired a new title when his interest was acknowledged by the landlord. This might very well have been after the passing of the Transfer of Property Act. This question does not appear to have been directly put in issue in either of the Courts below. It seems to me therefore that this question is without any substance. The Subordinate Judge has very rightly refrained from coming to any conclusion as regards; the question whether the plaintiffs' right is a permanent right or not. But he comes to a finding as to the facts relating to the tenancy, that its origin is unknown; that the rent had been paid at a uniform rate for more than 50 years; and that the lease was for dwelling purpose. From these findings of fact he might have drawn the inference that the tenancy was permanent and heritable. But as this question does not directly arise in a suit for rent brought by the plaintiffs against the defendants as tenants he has not drawn the obvious inference from the facts found in the case. This appeal must therefore fail and is dismissed with costs.

5. With regard to Appeal No. 405 arising out of Suit No. 1739 the questions raised above are common to it. But there was another question with reference to the identity of the land. It was objected by the defendants that this land did not belong to the plaintiffs. The learned Subordinate Judge has come to the conclusion upon the evidence in the case that this land did actually belong to the plaintiffs. In dealing with the evidence he has taken into consideration two documents Exhibits 109 and 108 as being in favour of the plaintiffs' contention. These two documents appear to have been executed by one Imam Bux who was a person holding some land on the immediate east of the disputed land. He executed these documents in favour of some other person and in describing the boundaries of his own land he gave the name of the plaintiff's predecessor as the owner of the land on one of his boundaries. It is objected on behalf of the appellants that this evidence is inadmissible; and although the learned Subordinate Judge has come to his conclusion upon this evidence as well as upon other evidence it is contended that if this evidence is held to be inadmissible we have no other alternative but to send the case back to the lower appellate Court in order that that Court may come to a finding of fact on the question after excluding these two documents from the evidence in the case. I have therefore to examine the proposition that these two documents are not admissible in evidence.

6. There has been some conflict of decisions on this question. But before I deal with that question I must state that no objection was taken to the admissibility of these documents in the trial Court. It is not known whether any person gave evidence to the effect that Imam Bux was the person holding any land on the boundary of the disputed land. The documents themselves were, proved by a person who was not a party to the document. Imam Bux was dead, The Subordinate Judge held on the authority of the case of *Abdullah v. Kunj Behary* [1911] 14 C.L.J. 476 that u/s 32(3) of the Evidence Act the documents were admissible in evidence. It is contended before us that it is not so, and reliance has been placed on two cases : *Saraj Kumar Acharji Chowdhury and Others Vs. Umed Ali Howladar and Others* and *Gopal Chandra Saha and Others*, and *Pramatha Nath Choudhuri and Others Vs. Krishna Chandra Bhattacharjee and Another*, . As the Subordinate Judge points out the case of *Saraj Kumar Acharji Chowdhury and Others Vs. Umed Ali Howladar and Others* and *Gopal Chandra Saha and Others*, does not deal with the question whether documents such as these are admissible u/s 32 of the Evidence Act or not. The learned Judges there dealt with the question whether such documents were admissible in evidence u/s 11 or Section 13 of the Evidence Act. The question that we have to consider is whether these documents are admissible u/s 32 of the Evidence Act. This question was dealt with by a Division Bench of this Court consisting of Panton, J., and myself in *Sheik Ketabuddin and Others Vs. Nafar Chandra Pattok and Others*, , where I enumerated all the cases I could find in which the question was considered. It has been held in a number of cases that such documents are admissible u/s 32 of the Evidence Act : See *Ningawa v. Bharmappa* [1899] 23

Bom. 63, Haji Bibi v. H.H. Sir Sultan Mahomed Shah [1909] 11 Bom.L.R. 409; Abdulla v. Kunj Behary Lal [1911] 14 C.L.J. 467; Natwar v. Alkhu [1913] 11 A.L.J. 139; Imrit Chamar v. Sirdhari Pandey [1911] 15 C.L.J. 7; Ambar Ali y. Lutji Ali (1918) 45 Cal. 159. There is only one case of Pramatha Nath Choudhuri and Others Vs. Krishna Chandra Bhattacharjee and Another, which lays down the contrary proposition. I may also refer to the case of Raja Leelanund Singh v. Mt. Lakhputee Thakoorani [1874] 22 W.R. 231 which was discussed and followed in the case of Ningawa v. Bharmappa [1899] 23 Bom. 63 as laying down the proposition that such documents were admissible. As there is such a long line of authority in the different High Courts in support of the proposition that these documents are admissible u/s 32 of the Evidence Act, it is not necessary to discuss the question as I should have felt it to be if this point were res integra. I need only say that I prefer to follow the long line of cases rather than accept the view expressed in the single case mentioned above. The result is that this point also fails and this appeal must also be dismissed with costs.

7. With regard to Appeal No. 412, arising out of Suit No. 1740, in addition to the question as to the right of the plaintiffs under the bequest of Budh Singh another question was raised that this property did not belong to Budh Singh at all. The learned Subordinate Judge has, however, found as a fact that the defendant and his father before him had been paying rent with regard to this land to Budh Singh and they had attorned to him. The defendants' case was that the land belonged to Panna Bibi, a lady of that family. Having regard to this finding of the Subordinate Judge this question cannot be raised in the second appeal. The special point with regard to this appeal also fails and this appeal also must be dismissed with costs.

Cammiade, J.

8. I agree.