

(1893) 05 CAL CK 0009
In the Calcutta High Court

Promoda Nath Roy and Others

APPELLANT

Vs

Modhu Sudan Kundu

RESPONDENT

Date of Decision : 05-05-1893

Acts Referred:

Transfer of Property Act, 1882 — Section 3

Citation : (1893) ILR (Cal) 732

Hon'ble Judges : W. Comer Petheram, C.J.; Ghose, J

Bench : Division Bench

Judgement

Ghose, J.—This was a suit for ejectment of the defendant from 1 bigha 14 1/2 cottahs of land in chur Sulkea (Howrah).

2. It appears that the main estate, chur Sulkea, was settled by Government with the plaintiffs and the pro forma defendants' predecessors in title in the year 1849. Subsequent thereto, there was an accretion to that estate, and the whole of the lands, both old and new, were settled by Government with the then owners of the parent estate in November 1877.

3. In the meantime the Government made a public road over a portion of the lands, measuring 7 1/2 cottahs, and upon the passing of the Bengal Municipal Act, III of 1864, and upon the extension of that Act in 1865 to the town of Howrah, the Municipality of Howrah took possession of the land; and they held such possession by erecting a toll-house and stacking stones for metalling roads. The predecessors in title of the plaintiffs then brought a suit for possession of their share in the said land, and some other lands, but that suit was dismissed by the High Court on the 8th May 1868 (see 9 W.R. page 535). Subsequent to this, it would appear that the municipality somehow or other lost possession of the land, and, as already mentioned, the whole of the lands of chur Sulkea were settled by Government with the plaintiffs and the pro forma defendant's predecessors in title in the year 1877. In the settlement proceedings the defendant was recorded as the tenant in possession of 1 bigha 14 1/2 cottahs of land, including the said 7 1/2 cottahs.

4. In the same year, 1877, the Howrah Municipality brought a suit against the defendant for recovery of possession of a ten-anna share of the said land. The defendant pleaded that he was in possession as a sub-tenant under one Preonath, the tenant under the maliks of the ten-anna share; but this plea did not avail him, and a decree was passed in favour of the municipality on the 25th of September 1877, declaring their maliki right, but the prayer for ejectment was disallowed. The defendant then obtained a conveyance of the land from the municipality for a consideration on the 24th August 1878.

5. The present suit was brought on the 30th March 1889 for declaration of the plaintiffs' title to the said 1 bigha and 14 1/2 cottahs of land and for ejectment of the defendant in respect of the plaintiffs' share of the lands, upon the ground that the defendant had forfeited his right as a tenant by repudiating the plaintiffs' title as landlord.

6. The Court of First Instance dismissed the suit as regards the 7 1/2 cottahs but as to the rest of the lands gave them a decree, declaring their proprietary right and dismissing the claim for khas possession.

7. Upon appeal by the plaintiffs, the District Judge has held that the plaintiff's are entitled to succeed altogether, both as regards the 7 1/2 cottahs and the other lands, and that they are entitled to khas possession.

8. The first contention that has been raised before us in second appeal on behalf of the defendant is, that the suit as regards the 7 1/2 cottahs of land is barred by res judicata by reason of the decree passed by the High Court in May 1868. No doubt, at first sight, it seems that the contention is right; but if the matter be closely looked into, it would appear that it cannot be supported. The High Court, at any rate, the senior Judge of the Bench who had to deal with the case (Bayley, J.) held that the Government had been in possession of the land for more than 12 years as part of the public roadway, and that the municipality under Bengal Act III of 1864 succeeded Government in the right which they, the Government, held, and therefore when the municipality took possession of the land they did so under the Municipal Act, and inasmuch as this possession was taken more than 3 months before suit, the claim was barred by limitation u/s 87 of the Act. The other learned Judge (Phear, J.) did not apparently agree with Bayley, J., in the view expressed by him, and for somewhat different reasons agreed with him in dismissing the suit. But, whatever was the correct view, this much is clear upon the judgments delivered on that occasion, that the land was held by Government as part of a public road, and that, upon the Municipal Act being extended to Howrah, the municipality obtained possession by virtue of Bengal Act III of 1864. Section 10 of the Act provides: "All public highways in any place to which this Act shall be extended (not being the property of, and repaired by and kept under the control of, the Government, and not being private property) existing at the time this Act comes into operation or which shall afterwards be made, and the pavement stones and other materials thereof, and also all erections, materials, implements, and other things provided for such highways, shall vest in and

belong to the Municipal Commissioners." Bengal Act III of 1864 has been superseded by Bengal Act V of 1876, and in the corresponding section in the latter Act the word "roads" has been used instead of "public highways."

9. Now, it has been held that the word "roads" as used in that Act and in Act XV of 1873 (applicable to the North-Western Provinces) does not include the subsoil: that the subsoil does not belong to the municipality, and that the Act is not intended to deprive any person of any private right of property that he may have in the land used as a public road, or to vest that right in the municipality; and that when the land is no longer required for a public road, the owner is entitled to have it. See *Chairman of Naihati Municipality v. Kishori Lal Goswami* ILR 13 Cal. 171 and *Nihal Chand v. Azmat Ali Khan* ILR 7 All. 362.

10. If the then municipality entered into possession of the land u/s 10, Act III of 1864, and if the right in the subsoil continued to be in the owner of the property, that right could not be said to have become extinct by reason of the dismissal of his suit in 1868, and the owner would, therefore, be entitled to claim the land when it is no longer required by the municipality for the purpose of roads. In this view of the matter, we are of opinion that the suit is not barred by *res judicata*.

11. We further observe that the settlement made by Government with the owner of the property was subsequent to the judgment of the High Court. The owners were entitled to the settlement under Regulation XI of 1825 and Act XXXI of 1858, and it was a settlement by the Government as the ruling power. This settlement may be viewed as having conferred upon the owners a fresh right. But this matter is not free from doubt, and we do not, therefore, rest our judgment upon that ground.

12. It was next contended before us by the learned Counsel for the defendant-appellant that the plaintiffs' claim is barred by limitation, because their cause of action accrued when the land ceased to be used as a public road, and was appropriated by Government or the municipality for other purposes. But it will be observed that between the date of the judgment of the High Court in 1868 and the settlement proceeding in 1877, the land reverted to the possession of the proprietors : it came to be held by their tenant, and the municipality had afterwards to bring a suit against the tenant for possession. In that suit the present defendant (the tenant) in his written statement dated the 2nd July 1877 admitted the title of the plaintiff's predecessor as landlord; and the municipality did not recover judgment until September 1877.

13. The present suit was brought in March 1889, that is, within 12 years from either of those two dates, and is therefore not barred.

14. The next contention that was raised before us was as to the decree for khas possession given by the District Judge. We think this contention is right. There was no denial of the plaintiffs' title as landlord at any time previous to this suit, and we do not think that the acceptance by the defendant of a conveyance from the municipality after the defence he raised in the suit of the municipality had

failed, and a decree passed against him in 1877,, amounts to such a denial of the plaintiffs' right as would in equity entail a forfeiture of the tenancy. The learned Judge has referred to Section 3 of the Transfer of Property Act, but we do not think it has any application to the circumstances of this case.

15. In this view of the matter, we think that the plaintiffs are not entitled to eject the defendant from their share of the lands held by him. He should be regarded as still holding the 7 1/2 cottahs, as also the other lands, as a tenant, and accordingly we think that the plaintiffs are entitled to a decree declaring their proprietary right to the lands in suit. To this extent, the decree of the District Judge should be modified. We make no order as to the costs of this appeal.