
(1921) 06 CAL CK 0005
In the Calcutta High Court

Saraj Kumar Acharji Chowdhury and Others

APPELLANT

Vs

Umed Ali Howladar and Others and Gopal Chandra Saha and Others

RESPONDENT

Date of Decision : 07-06-1921

Acts Referred:

Bengal Tenancy Act, 1885 — Section 106
Limitation Act, 1963 — Article 120

Citation : AIR 1922 Cal 251 : 63 Ind. Cas. 954

Hon'ble Judges : Suhrawardy, J;N.R. Chatterjea, J

Bench : Division Bench

Judgement

1. This appeal arises out Suit No. 134 brought by the plaintiff for a declaration that the lands in dispute form part of their nimhowla Asaruddi within howla Haris Chandra situate in the patni of the defendants Nos. 8 or 9, and for recovery of possession of the said lands. The Plaintiffs alleged that they let out the lands for one year to a subtenant in 1321, but the defendants having obstructed then in taking possession, he surrendered the lands to the plaintiffs. The main defence was that the lands were not included in the plaintiffs' nimhowla but we khas lands of the patinidar, that the suit was barred by the provisions of Section 109 of the Bengal Tenancy Act and was also barred by limitation. The Courts below have concurred in decreeing the suit.

2. The first contention raised on behalf of the appellants is that the suit is barred by the provisions of Section 109 of the Bengal Tenancy Act. It appears that the plaintiffs brought a suit u/s 106 of Bengal Tenancy Act, but withdrew from the suit with liberty to bring a fresh suit. It is urged that Section 109 bars a suit even if the previous suit was withdrawn, and reliance is placed upon the case of Abeda Khatun v. Majubali Chowdhury 59 Ind. Cas. 760 :24 C.W.N. 1020 : 48 C. 157 : 33 C.L.J. 304 Section 109 of the Bengal Tenancy Act lays down that "subject to the provisions of Section 109A, a Civil Court shall not entertain any application or suit concerning any matter which is or has already been the subject of an application made, suit instituted or proceedings taken u/s 105 to 108, both

inclusive." But where a suit is withdrawn with liberty to bring a fresh suit, we think it must be regarded as having been nonexistent. A similar view was taken in *Chiodith v. Tulsi Singh* 18 Ind. Cas. 130 : 40 C. 428 : 17 C.W.N. 467 where an application u/s 105 was withdrawn without liberty to bring a fresh suit. The learned Judges (Chitty and Tunon JJ.) held that an application u/s 105 cannot be regarded as a suit, and that, therefore, although an application was withdrawn without liberty to bring a fresh application, a suit for enhancement of rent is not barred by the provisions of Section 109. In *Kamini Sundari v. Abdul Halim* 47 Ind. Cas. 420 : 28 C.L.J. 254 Teunon and Richardson, JJ., following the above, held that an application (under Section 105) made, but withdrawn, is to be treated as one never made. In the case of *Abeda Khatun v. Majubali Chowdhury* 59 Ind. Cas. 760 : 24 C.W.N. 1020 : 48 C. 157 : 33 C.L.J. 304, however, there is an observation of Mookerjee, A.C.J., and Fletcher, J, that an application which has been made, whether it is withdrawn or whether it is dismissed for non prosecution, is nevertheless an application made within the meaning of Section 109. But in that case the application u/s 105 was dismissed for non prosecution. Where an application or a suit has been dismissed, whether upon the merits or for non prosecution, it comes within the words "has been the subject-matter" of the application or the suit, and the applicant cannot avoid the consequence merely by not prosecuting the application or suit. Where, however, as in the present case, a plaintiff in a suit u/s 106 has been permitted to withdraw from the suit with liberty to bring a fresh suit, we think it should be treated as one not having been brought. The application u/s 105 in the cases of *Chiodith v. Tulsi Singh* 18 Ind. Cas. 130 : 40 C. 428 : 17 C.W.N. 467 and *Kamini Sundari v. Abdul Halim* 47 Ind. Cas. 420 : 28 C.L.J. 254 was withdrawn without liberty to make a fresh application and the observations of the learned Judges in the case of *Abeda Khatun v. Majubali Chowdhury* 59 Ind. Cas. 760 : 24 C.W.N. 1020 : 48 C. 157 : 33 C.L.J. 304, as to the effect of withdrawal of an application, must be taken to apply to a case where the application is withdrawn without liberty to make a fresh application.

3. It is contended that the Revenue Officer had no power to give liberty to bring a fresh suit in the Civil Court. But it is unnecessary to decide that question, because assuming that he had no power to do so, he could allow the suit to be withdrawn, with liberty to bring a fresh suit in his own Court, and the effect of such an order must be taken to be (as we have said above) as if the suit had never been brought. We are accordingly of opinion that the suit is not barred by the provisions of Section 109 of the Bengal Tenancy Act.

4. No question of limitation arises in this case as the suit is for recovery of possession on declaration of title, and the suit is brought within 12 years of the dispossession.

5. The next contention is that the Court below, in arriving at the conclusion that plaintiffs have proved their title and possession, has relied upon certain documents (Exhibits 3 to 6) which are inadmissible in evidence. These

documents were executed between strangers to the suit, and the lands in dispute were referred to in the boundaries of lands dealt with in those documents.

6. It is contended on behalf of the respondents that the documents objected to were used in Suit No. 1882 out of which Appeal No. 1341 arises, and not in this case, the documents which have been used in this case being Exhibits 15, F and 21, to which no exception can be taken. It appears, however, that the evidence relating to both the suits was considered together, and the Court below in more than one place refers to the recital of nimhowla Asaruddi and howla Haris Chandra in the boundaries of the documents Exhibits 3 to 6. That being so, it is difficult to say that they were not used in evidence in deciding this case.

7. In the case of Dwarka Nath v. Mukundu Lal 5 C.L.J. 55 it was held that documents, though not inter partes, containing recitals that a particular land belongs to a particular tenure which is in question, are admissible in evidence under either Section 11(6) or Section 14 of the Evidence Act, although they are not conclusive or binding evidence and may be very weak evidence or even of no weight at all. A contrary view was, however, taken in Abdul Ali v. Rejan Ali 21 Ind. Cas. 618 : 19 C.W.N. 468. The question whether recitals in boundaries of other lands in documents between third parties (such as there are in the present case) are admissible in evidence u/s 11 or Section 13 of the Evidence Act, was considered in the case of Abdullah v. Kunja Behari Lal 12 Ind. Cas. 149 : 14 C.L.J. 467 : 16 C.W.N. 252 and was answered in the negative, The question is not free from doubt, but having regard to the recent decisions on the point, we hold that Exhibits 3 to 6 are not admissible in evidence.

8. There is, no doubt, considerable other evidence, both oral and documentary, in support of the finding of the Court below, but in second appeal we cannot uphold the finding upon the other evidence after excluding the evidence which is inadmissible. We are accordingly constrained to send the case back to the lower Appellate Court for a finding upon the other evidence upon the record.

9. Second Appeal No. 1341 arises out of Suit No. 1882. In this case no question arisen whether the suit is barred by Section 109, Bengal Tenancy Act, as there was no previous suit u/s 106. But the question of limitation has been urged in this case.

10. It appears that the Record of Rights was published in February 1907 and the suit was Instituted on the 15th December 1914 i.e., more than 6 years after the publication of the Record of Rights. But the plaintiffs do not pray for correction of any entry in the Record of Rights. It is contended that a suit for declaration of title is governed by Article 120 of the Limitation Act and the cases of Mohabharat Shaha v. Abdul Hamid Khan 1 C.L.J. 73 and dhyamanand Das v. Raj Narain Das (5) are relied upon. There is also a prayer for confirmation of possession. It is unnecessary to consider whether a suit for confirmation of possession is governed by Article 120, because assuming that Article 120 applies, the plaintiffs stated that their cause of action arose when the defendants attempted to disturb

the possession of the plaintiffs. The attempt at dispossession was made in 1914 (i.e., within 6 years of the suit) and the plaintiffs' case on the point has evidently been accepted by the Courts below, it is true that the entry in the Record of Rights was made more than 6 years before the suit, but the entry merely raised a presumption of correctness against the plaintiffs and they had to prove by evidence that it was incorrect. We are accordingly of opinion that the suit is not barred by limitation. The question of admissibility of Exhibits 3 to 6 in evidence arises in this case. We have already dealt with the question in Appeal No. 1380, and our decision on the point will govern this case also. The learned Pleader for the respondent pointed out that two of the documents, viz., Exhibits 3 and 4, were not executed by third parties, the executant being a co-owner of the *nimhowla* under which the plaintiffs claim the *raiya* Jote and was, therefore, interested in the land. The Court, below will consider the point in this case, as also in Suit No. 134, if it applies to that suit.

11. Objection is also taken to the admissibility of Exhibits 1 and 2. It is found, however, that the original records are destroyed, and the copies were admitted as secondary evidence. We do not think, therefore, that there is anything in that objection.

12. The last contention is that there is no specific finding whether the land in dispute is included in the, *raiya* jote, claimed by the plaintiffs.

13. The Court of appeal below has come to the finding that the lands in suit "were within the *howlas* as stated above," and in an earlier part of the judgment it refers to the *howlas*, *nimhowlas* and *raiya* as set up by the plaintiffs," It seem, therefore, that by the words "within the *howlas* as stated above," the Court below meant to find that the lands were included within the *raiya* jote set up by the plaintiffs, but it might have been made clearer, because the *raiya* jote and the *howlas* are not co extensive, and as the case is going back, the Court below will come to a clear finding upon the point whether the lands are included within the *raiya* set up by the plaintiffs. So far as the other case is construed (No. 1380), we think the finding that the lands are included in the *howla* is sufficient, because no *raiya* jote was claimed in that case.

14. The result is that both the cases must go back to the Appellate Court for a fresh decision upon the evidence on the record other than the documents which are inadmissible in evidence, having regard to the observations made above.

15. Costs to abide the result.