

(1931) 05 CAL CK 0032
In the Calcutta High Court

Sasi Sekhar Sen and Another

APPELLANT

Vs

Bir Bikram Kishore Manikya

RESPONDENT

Date of Decision : 01-05-1931

Acts Referred:

Evidence Act, 1872 — Section 114

Citation : AIR 1932 Cal 267 : 137 Ind. Cas. 147

Hon'ble Judges : Patterson, J; Mitter, J

Bench : Full Bench

Judgement

Mitter, J.—A meticulously careful argument has been addressed to us by Mr. Bejoy Kumar Bhattacharji who appears for the defendants-appellants in these two appeals. But after listening to that argument and after hearing the argument of the respondent we are unable to agree with his contention and we can come to no other conclusion than that this appeal must be dismissed. It appears that the plaintiff, the Maharaja of Tipperah instituted two suits for arrears of embankment costs due from the defendants in the two suits respectively according to the apportionment made by the Collector under the provisions of the Embankment Act, Act 2 of 1882. The defence to these two suits was common and it was said in the first place that the defendants are not liable to pay the embankment costs as the notice provided for by Section 69 of the Act has not been proved to have been served upon them. A further defence was taken that by the terms of the engagement between the Maharaja of Tipperah and the defendants an engagement which was entered into on 17th Asar 1256 B.S. the plaintiff Maharaja has precluded himself from realizing the embankment costs which have been imposed by a subsequent enactment of the Bengal Legislature. Both these defences were negatived by the Munsif who granted a decree to the plaintiff in the two suits against defendants. These decrees were affirmed on appeal by the Additional District Judge of Tipperah. In second appeal these two defences have been repeated before us by Mr. Bhattacharji and his contention is that the lower appellate Court was clearly in error in arriving at the finding that u/s 114, Evidence Act, it has to be presumed that the notice u/s 69 had been duly

served. It is argued that in the absence of any evidence as to the service of these notices the Courts below should not have merely relied on the presumption arising out of Section 114, Evidence Act, and should have held that the plaintiff has failed to establish the service of these notices. It is argued that as by Section 74, Embankment Act, a charge is created on the estate of the tenure holders defendants for realization of the embankment costs the service of notice u/s 69 is a condition precedent to the liability for the embankment costs.

2. With regard to the first branch of the argument as to whether the Courts below were right in relying on the provisions of Section 114, Evidence Act, for the purpose of raising a presumption it is to be noticed that there has been a recent decision of the Judicial Committee in the case of AIR 1930 193 (Privy Council) where Sir George Lowndes in delivering the judgment of their Lordships seems to, lay down that in the absence of evidence to the contrary it has to be presumed that the procedure laid down by Sections 12 and 13, Ben. Ten. Act, was duly followed and that proper statutory notice was given of the various incumbrances and execution sales from which the respondents' title have evolved. It is true that there are a number of decisions in the Indian Courts which have laid down that it is not sufficient for the purpose of proving service of notice to rely on the presumption arising out of Section 114, Evidence Act. Reference may be made to one of the cases cited by the appellants, namely, the case of Narendra Lal v. Jogi Hari [1905] 32 Cal. 1107. The soundness of the decisions of this type may have to be considered in view of recent pronouncement made by their Lordships of the Judicial Committee. It is argued for the appellants that these observations of their Lordships may have to be taken with the special facts of the particular case, and it is pointed out that in the case before their Lordships there was uncontradicted evidence to the effect that notices had been served. But it is to be observed that their Lordships dealt with this question apart from that of evidence of service. Their Lordships said thus:

But apart from this their Lordships have no hesitation in presuming, in the absence of evidence to the contrary, that the procedure laid down by Sections 12 and 13 of the Act was duly followed, and that the proper statutory notice was given of the various incumbrances and execution sales from which the respondent's title has evolved.

3. It appears however in this case that the notice the service of which is in question before us was not a notice the service of which was a condition precedent to the creation of a liability as was the case which has been decided with reference to the Roadcess Act and which was decided by Romesh Chandra Mitter, J., and is reported in Ashanulla v. Trilochan [1886] 13 Cal. 197. An examination of the Cess Act to which our attention has been drawn by Mr. Jogesh Chandra Roy who appears for the respondents, shows that in the case of Ashanulla v. Trilochan [1886] 13 Cal. 197 the service of notice was a condition precedent for fixing the liability for the cess. It appears from the examination of the provisions of the Bengal Embankment Act that the notice u/s 39 is a notice

informing the zamindars and tenure holders of the order which is passed finally u/s 6 of the Act. Section 68 runs as follows:

On the completion of any charge or apportionment under this Act, the Collector shall make an order specifying the estates and tenures in respect of which any sum charged or apportioned is payable, and the sums payable in respect of each of the instalments of such sums, and the dates on which such sums are payable.

4. Section 69 relates to service of notice of this final order of apportionment so that the notice which is said to be a condition precedent to liability under the Embankment Act is not a notice u/s 69, but a notice under the earlier provisions of other statutes, namely, of Sections 59 and 57 of the Act. The service of notice under these sections was not denied before the lower appellate Court and the question was never debated that notices under these sections were not served and the whole case proceeded on the footing that notice u/s 69 was not served. Mr. Bhattacharji realised the difficulty in this matter. We hold that notice u/s 69 is not essential for fixing liability for the embankment costs. Mr. Bhattacharji admits that the question debated was only with reference to notice u/s 69. The first ground taken therefore fails.

5. With regard to the second ground taken that the zamindar has precluded himself from recovering embankment costs by reason of terms of his engagement: We have no doubt on a reading of the document that there is no such term in the instrument which can justify the contention of the appellant. Stress has been laid on the words used in the translation which has been supplied to us by the appellants and which are as follows:

No demand shall be made either for any excess jama or for any other imposition over and above the aforesaid mukarrari jama.

6. It is argued on the strength of these words that the zamindar has precluded himself from recovering even the statutory obligation which is imposed not on the zamindar but on the tenure holder. The answer to this contention is that before effect can be given to such a contention it must be shown that by the express terms of the instrument the zamindar has precluded himself from the liability which may by a subsequent statute be imposed on the tenure holder in respect of his tenure. No such express words are to be found in the document. The present case is clearly distinguishable from the case of *Siva Proshad v. Gossain Das* AIR 1914 Cal. 128 where, as Sir Lawrence Jenkins, C. J., pointed out, the terms were express and were explicitly to the effect that the zamindar was not to get anything from the tenant by way of embankment cess whether imposed at the time the engagement was made or subsequently. This contention also fails.

7. The result is that those two appeals must be dismissed with costs.

Patterson, J.

8. I agree.