
(1913) 07 CAL CK 0015
In the Calcutta High Court

Satyes Chandra Sarkar and Others

APPELLANT

Vs

Monmohini Dasi

RESPONDENT

Date of Decision : 04-07-1913

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 8 Rule 5

Citation : AIR 1914 Cal 842 : 25 Ind. Cas. 567

Hon'ble Judges : Lawrence Jenkins, C.J.; Asutosh Mookerjee, J

Bench : Division Bench

Judgement

1. This is an appeal under Clause 15 of the Letters Patent from a judgment of Mr. Justice Richardson who has reversed the decree of the Subordinate Judge and passed a limited decree in the plaintiff's favour. This has given rise to two appeals, one by the defendants who claim that the decree of the Subordinate Judge should not have been disturbed, and another by the plaintiff who claims that the learned Judge was in error inasmuch as he did not establish the petitioner's claim to an additional one-third share over and above the two-thirds decreed.

2. The suit is one to recover khas possession of land, and to understand the points in conflict between the parties, it will be convenient to refer to a rough map which has been placed before us. From that it would appear that there is a public road running substantially north and south; that to the west of that road there is a rivulet called the Kondor, that between the road and the rivulet there is a plot of land described as containing 40 bighas; that to the east of the road and immediately adjoining it on its eastern side there is another piece of land said to contain 39 bighas. The plaintiff's claim extended to these two plots of land, but in the opinion of the lower Appellate Court, the plaintiff failed to establish his title to them inasmuch as that Court was convinced, on a map and report of the Amin, that these two plots of land did not fall within Kotal-Ghosa. Mr. Justice Richardson, before whom the case came on appeal, has varied the decree of the learned Subordinate Judge in so far as it relates to these plots of land and has

held that the plaintiff is entitled to a decree in respect of them to the extent of a two-thirds share. He came to that conclusion upon the ground that the defendants by their written statement had not, in his opinion, put in issue the plaintiff's title to those two plots of land. He would seem to have treated the silence in the written statement with regard to these plots of land as amounting to an admission by the defendants that the two plots were a part of Kotalghosa which belonged to the plaintiff, and did not appertain to the defendants' mouzah which lies to the West, Mouzah Moheshwarpur. In my opinion, that decision proceeds upon a misconception. In the first place, the written statement is before the passing of the new CPC and there was nothing in the Code of 1882 corresponding With Order VIII, Rule 5, of the present Code which provides that "every allegation of fact in the plaint, if not denied specially or by necessary implication, or stated to be not admitted in the pleading of the defendant, shall be taken to be admitted except as against a person under disability," and I may here note under the new Code the effect of such failure to deny does not necessarily amount to a proof in the plaintiff's favour, because there is a proviso to the rule "that the Court may in its discretion require any facts so admitted to be proved otherwise than by such admission." There was a distinct issue raised in the Court of the Munsif which covers the ground on which the lower. Appellate Court decided in favour of the defendants. The fifth issue was in these terms, "Does the entire land set forth in schedule (gha) of the plaint appertain to lot Kotalghosa? If not, what portion thereof? What is the extent of the plaintiff's darpatni and ijara interest in the said mahal?"

3. That issue, then, notwithstanding anything that may appear or not appear in the written statement, distinctly puts in issue the plaintiff's title to the whole of the land claimed by his plaint, and it casts upon him, as indeed the law casts upon him, the obligation of proving his title to the whole of the land. In saying this, I do not overlook the fact that there was an unsuccessful application for amendment of the written statement. But to that and to the failure to obtain leave to amend, I am unable to attribute the consequences which in the opinion of the learned Judge follow. Any doubt is removed by the 5th issue. Therefore, I hold that the 5th issue having formulated one of the points on which the parties went to trial, it was open to the lower Appellate Court to decide, as it did, that the plaintiff had failed to make out title to the plots containing 39 and 40 bighas. Therefore, the appellants before us are entitled to have their appeal allowed: and it would follow from this that subject to the further point to which I will draw attention, the decree of the lower Appellate Court should be confirmed and the judgment of Mr. Justice Richardson set aside.

4. This further point to which I am about to allude arises out of the contention of the plaintiff that he ought to have been given leave to amend, his plaint so as to allege that even if the plots of 39 bighas and 40 bighas were outside the boundaries of Kotalghosa, still the plaintiff, by adverse possession through his tenants or otherwise for the requisite statutory period, had acquired a right to that land, and that the right, if any, of the defendants in this land as owners of

the adjoining mouza was extinguished by the provisions of the Limitation Act. There was an application to amend on those lines made as far back as the 2nd of February 1903, but it was disallowed by the Court of first instance on the following day.; and I do not think that we should be justified now in saying that the Court was not within its rights or that it exceeded its powers in, refusing this application,--it was a matter for the exercise of its discretion; and it has exercised that discretion in a particular way. At the same time we appreciate that the case has taken a somewhat tortuous course, and that possibly the plaintiff may have been misled by the absence of a specific denial as to the 39 bighas plot in the written statement, and that both the plaintiff and the defendants may have found themselves confronted with a result that they did not anticipate when they saw the Amin's report and the map. All these matters appear to me to justify a course which has been suggested as a possible solution, though not necessarily a satisfactory solution, of the plaintiff's difficulties in regard to the 3.9 bighas plot. That suggestion is that the plaintiff should be entitled to abandon for the purposes of this suit so much of his claim as related to the 39 bighas with liberty to institute a fresh suit in respect to those 39 bighas. The defendants through their Vakil have left this matter in our hands, and we think that in the circumstances of the case it would be proper to allow the abandonment so that the result will be that the plaintiff will abandon his claim in the suit to the 39 bighas lying to the east of the public road, and we grant him permission so to do, with liberty to institute a fresh suit in respect of that subject-matter, that is the 39 bighas--what remedy he may seek is a matter with which we are not concerned. But this permission is only granted on the condition that the costs that will be thrown upon the plaintiff as the result of this litigation must be paid within six months of the arrival of the record in the lower Appellate Court as a condition precedent to the suit being brought,

5. The result then is that save as to so much of the claim as is abandoned, the decree of the Subordinate Judge will be confirmed, for we think that it would not be right in this case for us to give effect to the prayer of the plaintiff to have the title to the additional one-third established in this suit. If he has title, it is open to him to establish it in another suit brought for that purpose.

6. The plaintiff must pay the costs, both before Mr. Justice Richardson and this Bench, of the appeal as well as the cross-appeal.