
(1939) 05 CAL CK 0012
In the Calcutta High Court

Sm. Ashamayi Basu

APPELLANT

Vs

Baranagore Jute Factory Co. Ltd. and Others

RESPONDENT

Date of Decision : 19-05-1939

Acts Referred:

Bengal Land Revenue Sales Act, 1859 — Section 37

Citation : AIR 1940 Cal 141

Hon'ble Judges : Edgley, J

Bench : Division Bench

Judgement

Edgley, J.—In the suit out of which this appeal arises the plaintiff, Sm. Ashamoyee Basu, sued the defendants for the establishment of her title on recovery of possession of a certain property which had been purchased by her predecessor-in-interest at a revenue sale which was held on 13th January 1922. The plaintiff's case was to the effect that Kazi Rasid Jaman purchased Touzi No. 166 of the 24 Parganas Collectorate on 13th January 1922 and his heirs had conveyed this estate to her on 26th January 1929. Thereafter she issued a notice annulling the various tenures under Touzi No. 166 including two tenures which are recorded in Khatians 426 and fJ22 of the settlement records and comprise certain lands mentioned in schedules Ka and Kha attached to the plaint. From the terms of the plaint, it appears to have been admitted by the plaintiff that these particular tenures which were the subject-matter of the suit were held by the defendants not only under touzi No. 166 but also under several other touzies, namely touzies Nos. 63, 163, 168 and 222 of the 24 Parganas Collectorate. In the Record of Rights, the land included in Schedule Ka had been recorded as niskar by reason of possession and as regards the land in Schedule Kha the entry in the Record of Rights was to the effect that it was liable to assessment of rent. The plaintiff claimed that by reason of the annulment of these tenures she was entitled to eject the defendants from the land appertaining thereto.

2. The main case for the defendants in respect of these two tenures was to the effect that the plaintiff, as the successor-in-interest of the auction-purchaser, was

not entitled to possession as the land in suit appertained to certain niskar tenures which had been created before the time of the Permanent Settlement. In paras. 8 and 9 of their written statement a further point was taken by the defendants to the effect that the two tenures mentioned in the plaint could not be legally annulled and that the plaintiff was also not entitled to the relief claimed by her in view of the fact that she had obtained only an undivided fractional interest in the land in suit and was in the position of a cosharer landlord in respect of this land. Admittedly, the case proceeded to trial on the question as to whether or not the defendants were entitled to protection having regard to the existence of their alleged niskar right in the tenures which were the subject-matter of the suit and in the trial Court no further question seems to have been raised as to the right of the plaintiff to annul the tenures either by reason of her fractional interest in the touzies under which the tenures were held or on account of the fact that these tenures were held not only under touzi No. 166 but also under several other touzies.

3. The first Court decided that, as regards the land included in Schedule Ka, the defendants had established their case. As regards the Kha schedule land the plaintiff's suit was decreed and she was allowed possession in the terms of the relief sought by her in the plaint. The plaintiff then appealed with reference to the Ka schedule land and the defendants at the same time preferred a cross-objection with regard to the decision against them with reference to the Kha schedule land. The lower Appellate Court dismissed the plaintiff's appeal but allowed the cross-objection which had been filed by the defendants. As a result therefore of the decision of the lower Appellate Court the plaintiff's suit was dismissed in its entirety. The plaintiff has therefore preferred this second appeal to this Court.

4. The first point urged by the learned advocate for the appellant in this case is that the decision of the lower Appellate Court with regard to the Ka schedule land cannot be supported. As already pointed out, the entry in the Record of Rights with regard to this property is in favour of the contention which has been raised by the defendants. In a case of this sort in which the plaintiff is seeking to recover possession of property on the basis of a revue sale the initial onus must lie on the plaintiff to show that the land lies within his regularly assessed estate or mahal and not merely that it lies within the ambit of his zamindari, *Jagdeo Narain Singh v. Baldeo Singh* A.I.R.(1922) P.C. 272, *Sashi Bhusan Hazra Vs. Kazi Abdulla and Others*, , *Makhan Lal Paul Vs. Rup Chand Maji and Others*, . Having regard to the fact that the Ka schedule land is recorded as being niskar in the Record of Rights and in view of the presumptive correctness of this entry it cannot, in my opinion, be said that the plaintiff has discharged the initial onus which lies upon her in this matter. Even if it be assumed however that she has succeeded in discharging this onus the position is that the entry in the Record of Rights is in favour of the defendants. This fact would, in my opinion, have the effect of throwing the onus back on the plaintiff in order to prove that the Ka schedule land did not appertain to a niskar tenure. This onus the plaintiff has

failed to discharge. In this view of the case I am of opinion that the decision of the lower Appellate Court with regard to the Ka schedule land is correct.

5. As regards the land described in Schedule Kha the entry in the Record of Rights is to the effect that this land is liable to assessment of rent. The first Court gave the plaintiff a decree with regard to the land of this schedule and pointed out that the defendants had adduced no evidence to discharge the onus which lay on them by reason of the entry in the Record of Rights beyond adducing certain evidence to the effect that they had not paid rent for a certain number of years. When the plaintiff appealed with regard to the dismissal of her suit in respect of the Ka schedule land, as already pointed out, the defendants preferred a cross-objection with regard to the land covered by Schedule Kha. This cross-objection was allowed by the lower Appellate Court on the ground that the land in question had been in the possession of the defendants for a long time without payment of rent. It may however be mentioned that para. 7 of the grounds attached to the memorandum of cross-objection was to the effect that the learned Munsif was wrong in holding that the defendants' tenure could be annulled and that he should have held that the tenure was not liable to be annulled under the law and was not and could not, in fact, be annulled by the plaintiff as regards the land comprised in Schedule Kha. In view of the line of reasoning adopted by the learned Additional District Judge no occasion arose in the lower Appellate Court to consider the defendant's case in the light of the contention raised in para. 7 of the memorandum of cross-objection.

6. As already pointed out, the initial onus must lie upon the plaintiff to show that the land in suit lies within her regularly assessed estate or mahal. Having regard to the entry contained in the Record of Rights this initial onus appears to have been discharged. The question then arises as to whether or not it can be said that the defendants have succeeded in discharging the onus which lies on them to prove that the Kha Schedule land appertains to a niskar tenure. In holding that the defendants have succeeded in discharging this onus the learned Additional District Judge adverts to the fact that the defendants had been in long possession of this land without payment of rent and he holds that this is a circumstance which should be taken into consideration as evidence in support of the defendants' contention. The lower appellate Court places considerable reliance upon the decision of R.C. Mitter J. in *Kanta Mohan Mallik v. Makhan Santra* 39 C.W.N. 277. In that case the learned Judge was dealing with an appeal which arose with reference to a suit brought by the plaintiffs for the assessment of rent and he pointed out that long possession without any demand or payment of rent would be evidence of a grant of a rent-free title. It is true that in a case for the assessment of rent evidence of long possession without payment of rent might in certain circumstances lead to an inference that a former proprietor of the estate had created a rent-free title in respect of the land in suit. But even in such a case it would be essential that such evidence should be of a definite character and cover a sufficiently long period to allow such an inference to be drawn. In this connexion it was pointed out by Sir Lancelot Sanderson C.J. in

that the time during which the defendants have been in possession, in my judgment, has been left indefinite and I am not prepared to hold that when the period during which the defendants have been in possession is left in an indefinite and nebulous state that is sufficient even when taken with the fact that no rent has been paid to show that the entry in the Record of Rights is incorrect.

7. If such is the law with regard to a suit for the assessment of rent, in my opinion, in a case in which it is sought to annul a tenure u/s 37 of the Revenue Sale Law a fortiori the proof of long possession without payment of rent must be of a very definite and convincing nature such as would be sufficient to enable the Court to draw the inference that the niskar grant in respect of the tenure had been made prior to the permanent settlement. It certainly cannot be said that any such definite proof has been given on behalf of the defendants in the suit out of which this appeal arises. On the other hand the entry in the Record of Rights clearly indicates that no such niskar grant could ever have been made and in my opinion this entry stands unrebutted.

8. With regard to this point it was argued by the learned advocate for the respondents that in a case in which the plaintiff is seeking to annul an under-tenure, the onus would lie upon him to prove that the tenure in question had been created after the permanent settlement and could therefore be annulled. This proposition, in my opinion, it is not one which can be reconciled with the principles which have been laid down in Jagdeo Narain Singh v. Baldeo Singh AIR (1922) P.C. 272 and the other two cases cited above in which that decision has been explained. I consider that there can be no doubt that in a case in which the plaintiff has discharged the initial onus which lies upon him in a matter of this sort it would be for the defendant to prove that his case would fall within one of the exceptions to Section 37 of Act 11 of 11857. This onus the defendants have not been able to discharge. It would therefore follow that, in my opinion, the decision of the lower Appellate Court with regard to Kha schedule land is wrong and had the matter rested there, it would have been necessary for me to reverse the decision of the lower Appellate Court on this point.

9. In this connection it is urged by the learned advocate for the respondents that in any event the plaintiff cannot be entitled to a decree having regard to the fact that admittedly the tenures which she is seeking to annul are held by the defendants not only under touzi No. 166 but also under other touzies of the 24-Parganas Collectorate. It is argued on behalf of the appellant that the respondents should not be allowed to raise this point at this stage in view of the fact that no argument was raised on this contention at any stage of the case in the Courts below. Having regard to the position taken by the defendants in paras. 8 and 9 of their written statement it is perhaps surprising that they did not forcibly urge in the trial Court that their tenures could not be partially annulled. As already pointed out, their case in the first Court was merely to the effect that they were protected by reason of their niskar title. It would appear to

be probable however that the defendants did not raise this particular point in the first Court in view of the fact that the same learned Munsif had decided a similar point against them in a connected case, namely Title Suit No. 14 of 1934 which was decided in the Court of Babu Sailendranath Chatterjee on 23rd January 1935. In that particular suit the main contention of the defendants was to the effect that the plaintiff could not legally annul the tenures which were the subject-matter of that suit inasmuch as these tenures were held by the defendants under the five touzies of the 24-Parganas Collectorate to which reference has already been made. When this point was decided against them in the first Court they took the matter on appeal to the Court of the Subordinate Judge and thence to the High Court where they obtained a decision in their favour in *Ashamoyee Basu v. Baranagore Jute Factory* Second Appeal No. 797 of 1936 which was decided by M.C. Ghose and Bartley JJ. on 31st March 1938.

10. The decision in that case is based on two previous decisions of this Court in *Soharam Barma v. Doorga Charan Das* (1907) 5 C.L.J. 264 and in *Mahamad Furan v. Basarat Ali A.I.R.*(1920) Cal. 920. Deference was made in the judgment to two other decisions of this Court in *Kamal Kumari v. Kiran Chandra Roy* 9 W.C.N. 229 and that in *Preonath Mitter v. Kiran Chandra Roy* (1900) 27 Cal. 290. As regards the two latter cases I agree with Ghose and Bartley JJ. in thinking that they have no application in connexion with this particular matter as the points decided in those cases did not relate to any question in which it was sought to annul any part of a tenure held by the tenure-holders under several different touzies. I entirely agree with the view which has been taken by M.C. Ghose and Bartley JJ. to the effect that, if the words of Section 37 of the Revenue Sale Law be given

their natural meaning it is clear that the auction-purchaser is entitled to eject all under-tenants who hold their land entirely within his estate but he is not entitled by this Section to eject an undertenant who holds an under-tenure partly -within his estate and partly within other estates.

11. Although the defendants did not rely on this point in the first Court, the circumstances in which they failed to do so were certainly peculiar. They did however recite the point indirectly (Ground No. 7 of their memorandum of cross-objections) although no occasion arose for the learned Additional District Judge to consider this ground. In the circumstances of the case I think that for the ends of justice the defendants should be allowed to take this ground at this stage. It follows therefore that although the plaintiff has in my opinion succeeded in discharging the onus which lies on her with reference to the Kha schedule land, she nevertheless cannot succeed in obtaining the relief which she seeks as she cannot obtain possession of any portion of the land in suit without annulling the tenure to which that land appertains : AIR 1931 314 (Privy Council) . As the two tenures with which we are concerned are held by the defendants not only under the touzi purchased at a revenue sale by the predecessor-in-interest of the plaintiff but also under other touzies, these tenures cannot be annulled in part

and, therefore the plaintiff is not entitled to any relief by any way of ejectment. The appeal must therefore be dismissed. The parties will bear their own costs. Leave to appeal u/s 15 of the Letters Patent is refused.