
(1933) 06 CAL CK 0025
In the Calcutta High Court

Sree Sree Goddess Pitha Kali Matha Thakurani

APPELLANT

Vs

Surendra Nath Tagore and Another

RESPONDENT

Date of Decision : 28-06-1933

Acts Referred:

Bengal Tenancy Act, 1885 — Section 103A, 106
Specific Relief Act, 1877 — Section 42

Citation : AIR 1934 Cal 192 : 150 Ind. Cas. 617

Judgement

1. The lands which form the subject matter of this suit were recorded in the finally published C.S. Khatians of 1917, No. 632 of Mauza Kaligram or Kaligaon, No. 186 of Mauza Gopalpur and No. 123 of Mauza Kaya, as appertaining" to a debuttar in the name of Sree Sree Iswar Peeth Kali Mata Thaku-rani, who, represented by her shebait, is the plaintiff in this suit. In the Khatians the plaintiff's interest has been recorded as that of a permanent tenure-holder within Touzi No. 141 of the Collectorate of Rajshahi of which the defendants are the present proprietors the tenure being described therein as rent-free tenures for which certain cesses only were payable. In 1915 objection had been taken on behalf of the plaintiff u/s 103-A, Ben. Ten. Act, on the ground that the tenures did not lie within Touzi No. 141 but were Nishkar (revenue free) lands comprised in Touzi No. 47-B of the B Register; but this objection had been overruled. Subsequently in November 1917 an application for correction of the entry was made u/s 106, Ben. Ten. Act; but eventually on 23rd July 1919 it was allowed to be withdrawn "with permission to bring a fresh suit". On the basis of the entries in the Khatians a Suit No. 2276 of 1921 was instituted by the defendants in the Court of the Munsif at Nowgaon in which cesses were claimed for the years 1324 to 1327 B.S. The shebait took the same plea as he had taken in the proceedings u/s 103-A, Ben. Ten. Act. This suit was decreed by the Munsif on 6th May 1922 and this decree was- affirmed on appeal by the Subordinate Judge of Rajshahi on 19th June 1926. A second appeal subsequently preferred to the High Court was also dismissed.

2. On 22nd December 1927, the present suit was instituted on the allegation that

the lands constitute a debuttar which goes by the name of Debuttar Kasha is a Nishkar (revenue-free) mehal included in Touzi No. 56-B of the Rajshahi Collectorate and never appertained to a rent-free mehal within Touzi No. 141; that the plaintiff's title had been affected by the decree in the suit to which reference has been made above and that the plaintiff apprehended injury if the said decree was executed. The cause of action was put down as having arisen on 6th May 1922, the date of the decree of the trial Court in suit No. 2276 of 1921. The prayers in substance were:

Ka.?For a declaration that the plaintiff has Siddha Nishar (valid revenue-free) title in the lands of Khatians Nos. 632, 186 and 123 of Mauzas Kasba, Gopalpur and Koya, the said lands constituting mehal No. 56-B of the Rajshahi Collectorate.

Kha.?For a declaration that the cess-decree in Suit No 2276 of 1921 dated 6th May 1922 which had been upheld by the Subordinate Judge and by the High Court was a nullity.

Ga.?For a permanent injunction against the defendants restraining them from executing the said decree.

3. The contesting defendant, who at the time, was solely interested in Touzi No. 141, took various pleas on the merits and in bar. The Secretary of State who had been impleaded as a defendant did not appear. The Subordinate Judge dismissed the suit. The plaintiff has then preferred this appeal. It would be convenient to deal with the merits first. On the merits the respondent's contention is that the lands are rent-free lands forming a part of the zamindari Touzi No. 141. So far as the lands of Khatians Nos. 123 and 186 are concerned, namely those of Mauzas Kaya and Gopalpur, the appellant has really no case. Neither of these two Mauzas find mention in the Robokari of the Collector of Rajshahi (Ex. 10) dated 1846 (=1252 B.S.) which forms the sheet-anchor of the appellant's case. It is only the case as regards the lands of Khatian No. 632, that is to say, the lands of Mauza Kasba, which we have to consider in this appeal.

4. The robokari was in connection with a resumption proceeding held under Regn. 2 of 41819 and Regn. 3 of 1828. The proceedings related to about 25 thousand bighas of land lying in 50 mehals in all. One of these mehals was Debuttar Kasba, Pargana Kaligaon, consisting of 413 bighas 9 Ch. of land. It appears that at that time Government attempted to resume the lands of all these mehals and assess them to revenue and that the plaintiff's predecessor Raja Ananda Nath Roy contested the proceedings upon various grounds. The robokari shows that the Collector's decision was as follows: Item 1.?13 meals were claimed as mal and included within the zemindari, and this was found to be so. Item 2.?5 mehals had already been resumed. Item 3.?Separate investigation was pending as regards 10 mehals. Item 4.?1 mehal was unfit for resumption as the area was less than 50 bighas, Item 5.?13 mehals were proved to be revenue-free by productions of sanads. Item 6.?8 mehals were proved to be debuttar mehals

of different deities. Out of these eight three were found to be the debuttar of Peeth Kali Thakurani of Kaligaon and it was also found that her Debsheba was carried on out of the income of these three mehals. No sanad was forthcoming in respect of any of these mehals, "Mouzah Kashba Pargana" Kaligaon "413B. 9C." was one of these three. The Collector observed as follows:

Though the defendant has not been able to file any document or sanad for proving that the Eight mehals mentioned in para. 6 containing an area 3,127 bighas 5 cottahs and 12 chittaks of land are revenue-free, and though from inquiry in the Collectorate Sherista no evidence of the registration of lakheraj sanads in respect of these can be found: but it appears from the report of the Collectorate record officers that in the year 1208-1209 B.S. Taidads numbering 60,000 were filed in this Collectorate. Of the same, 16,500 were registered. And the rest of the Taidads having been worm-eaten were put in a tin box under orders of the authorities of the Board of Revenue. Further, when the Khas Deputy Collector was established in the Sub-Division, out of the said worm-eaten Taidads those, which were intact, were taken into the said Khas Deputy Collectorate and there they were soaked in oil and again they were taken back to the Collectorate and so they were entirely destroyed. Therefore because of such carelessness of the Sherista, there cannot be any objection to the registration of the Sanads. Specially, the Tappes and Parganas, in which all these Debattar lands are distributed were zemindari properties of the defendant's ancestors from long before the possession of the Government. Even after the possession of the Government, though these Tappes and Parganas were sold at auction and passed into the possession of others, still no doubt arises about the aforesaid Mehals comprising the lands in claim having been uniformly (torn) and possession as Debuttar (torn and "illegible) by (torn) and afterwards by the defendants. Under these circumstances, under the provision of Section 2, Regn. 19 of 1793, the claim of the Government to these lands cannot be valid. Specially from the investigation robakari of the Deputy Collector it appears that the images and sheba of all the gods in whose names properties were given as debuttar are in existence.

5. On these grounds the Collector dismissed the claim of the Government in respect of the 39 mehals, including Mehal Debuttar Kashba Pargana Kaligaon, 413 bighas 9 C. It appears from the Robakari itself that it was forwarded to the Revenue Commissioner, as, under the regulation, final orders had to be passed by the Board of Revenue, but it is not known what other or subsequent orders may have been passed. It is in evidence however, and that is not disputed, that the lands were never afterwards resumed by Government or assessed to revenue. The Subordinate Judge was of opinion that "the robakari does not help the plaintiff in any way." In our judgment the learned Judge was entirely wrong in taking such a view. The defendants' predecessors, it is true, were not parties to the resumption proceeding. But the fact is proved that after elaborate investigations, which Regulation 2 of 1819 contemplates, and which, as the robakari shows, were held, the Collector did not think fit to assess the lands to

revenue. The learned Judge was of opinion that this fact does not show that the lands were revenue-free and the reason he gave for this conclusion is in these words:

The robakari does not show that the lands are revenue-free: all that is meant is that the Government did not think them fit for assessment of revenue; they might be rent-free, as is really the case. It appears from the robakari that the predecessor-in-interest of the plaintiff was the original owner of zamindari No. 14 and the defendants' predecessor came to be the owner of the estate at some subsequent time. During the time of the former, some lands including the lands of Kasba, were set apart for the worship of various idols. When thus the zamindari was purchased by the defendants' predecessor the plaintiff's predecessor continued to hold the above lands as debuttar under them. From these facts it cannot be held that a revenue-free property was created for the lands in suit.

6. We are of opinion that the learned Judge has misunderstood the Robakari altogether. According to the Robokari the lands were exempted from assessment not because they had been already assessed but because a Lakheraj title was found in favour of the plaintiff's predecessor. This title was claimed on the ground that they constituted the debuttar lands of Peeth Kali Thakurani for which no rent had to be paid, and it was alleged that this debuttar was covered by a sanad which, had existed, but was not; forthcoming then. On the facts the Collector was prepared to accept the case of the plaintiffs' predecessor that the sanad must have been lost or destroyed because he observed in the Robokari:

Therefore because of such carelessness of the there can be no objection to the registration of the sanads.

7. He found further that though the Tappes and Parganas, which had been zamindari properties of the plaintiffs' predecessors from long before the advent of the Government had subsequently passed on to the defendants' predecessors, the lands constituting the debuttar which had never been assessed had all along remained in the possession of the plaintiff's predecessors. Once it is taken, as it must be taken, that these lands were not assessed to revenue when the zamindari was so assessed, the position becomes perfectly clear, because in that case the defendants who are proprietors of the zamindari never obtained settlement of the lands. If it is claimed by the defendants that the lands were part of their zamindari, Touzi No. 141, as they claim that they are they have to show, not merely that the lands are situate within the geographical ambit of their zamindari but also that they were at some time or other assessed to revenue. But any such supposition is demolished by the Robokari. The Robokari therefore is a very important piece of evidence, which though it is not conclusive against the defendants because their predecessors were not parties to the proceedings in which it was made, strikes at the root of the defendants' case and supports the plaintiffs' case as to revenue-free title to the hilt. The Record of Rights having recorded the lands as a rent-free tenure under the zamindari, there is a presumption of which the defendants are entitled to the benefit. But the

Robokari, in our judgment, sufficiently rebuts and nullifies that presumption.

8. To destroy the probative value of the Robokari several matters were put forward in the Court below and they apparently weighed with the Subordinate Judge. In the first place it was urged that as under Regn. 2 of 1793 the Collector had to send the Robokari to the Board of Revenue and as the Robokar itself shows that he had sent it to the Commissioner, no reliance should be placed upon the Robokari for it might be that those authorities did not approve of the decision contained in it. This argument is at best a supposition: and such a supposition seems to us to be entirely un-justified because in no subsequent document in which anything was said about the revenue-free character of the lands, no other order of any superior authority, but it is the Robokari itself that has been referred to. Reliance was in the next place placed upon the remarks in the thak map (Ex. A A) and its corrected copy (Ex. BB) of 1853-54.

9. The remarks are couched in words the meaning of which it is not quite easy to understand, but it would be a substantially correct appreciation of their effect to say, as the learned Subordinate Judge has said, that some lands of kasba lying within 70 chaks were at first separately measured and shown on the map as appertaining to a debuttar mehal of Iswar Kali Thakurani, but it was subsequently ordered that inasmuch as the lands of the said 70 chaks had been confirmed as mal lands by a decision under Regn. 2 of 1793 the said 70 chaks were to be taken out of the map; and that accordingly a fresh map was prepared not showing the said 70 chaks separately. In these remarks it was stated that the first survey was cancelled because the lands were of kamtaidad (short of the requisite area). This expression has been sought to be explained on behalf of the respondent by reference to a copy of an order dated 19th September 1854 which they have produced in this Court. As the remarks on the maps which are illegible at places closely follow the words of this order and can be better read with its assistance we have looked into it. The order states that on the map first prepared and bearing date 30th April 1854 the 70 chaks were separately measured and shown as debuttar lands of the goddess Iswar Kali Thakurani. Then it states that as under the decision under Regn, 2 of 1819 surveys of lands of kamtaidad were cancelled and it was considered unnecessary to survey such lands separately and thought proper to keep such lands along with mal lands, consequently the said 70 chaks of land were not to be shown separately in the map but were to be shown along with the mal lands of the respective mehals. This direction appears to have been carried out and a fresh map was prepared not showing the 70 chaks.

10. We are unable to read the observations as in any way affecting the rights of the plaintiffs' predecessors: the correction, as far as we can gather, was made in accordance with some rule, order or procedure under which lands of kamtaidad (less than 50 bighas in area) though revenue-free were not to be separately shown in the thak, Why this rule, order or procedure should have been applied to these lands of which the area in the aggregate was 413 B 9 C is a matter which

we do not understand. But whatever that might be, we cannot possibly read the remarks in the thak maps as suggesting that there was some other order of some competent authority in the proceedings under Regn. 2 of 1793 which varied the Robokari or that the lands which had till then been revenue-free were by reason of the correction made in the thak map thenceforth become only rent-free. It should be noted here that there is nothing to show that the plaintiffs' predecessors were parties to the order under which the correction was made or that the said order was passed in their presence or with notices to them. It is true that the signatures of some persons who purport to have been their agents are to be found on the corrected copy of the map. But from those signatures no admission on their part can possibly be inferred, because the same signatures also appear on the map first prepared and may have been copied into the corrected map, which was not a new map in any sense but only a copy of the old one with the chaks removed from it.

11. As against these matters which the defendants have put forward to destroy the effect of the Robokari the plaintiff has produced the copy of the B. Register of revenue-free lands kept Under Sections 9 and 10 of Act 8 of 1876. This copy shows that in Estate No. 56.B which is the estate in which the lands are claimed to lie, the plaintiffs' predecessors had 136 ac. 1 Rule 24 p. =413 b. 9 C of revenue-free lands of Debuttar Kasba. To discredit this entry two objections have been taken. It has been said that plaintiff's predecessor is described in it not as shebait but as proprietor; but this objection, in our opinion, has no substance because the lands are described as Debuttar Kasba and that is enough. Another objection urged is that the property is designated in the entry as Mohisnoti. This objection also is not of any substance because Mohisnoti appears to have been the first of several mouzahs named in the Robokari and it may have been copied into the register as a comprehensive word indicative of all the mauzahs. That the entry relates to the lands of the debuttar concerned is a matter about which there can hardly be a doubt; the name Debuttar Kasba is there and the area exactly tallies. The Subordinate Judge is of opinion that this entry in the B Register entry (Ex. 15) should not be relied on as there are certain mistakes in Col. (e). The mistake however is not of a vital character as it consists only in a slight misappreciation of the exact words of the Robokari, in that it is said in this column that the claim of the Government for resumption in Suit No. 288 of 1839 (which was the suit to which the Robokari relates) was dismissed on the finding that the lands were valid lakheraj because the sanads were found to be binding and the lands were valid lakheraj; whereas in reality no sanad was filed so far as Debuttar Kasba was concerned but it was held, in effect, that there had been a sanad but it was not forthcoming because it may have been lost or destroyed.

12. The Subordinate Judge has found, and with this finding we agree, that the cess return submitted by the defendants or their predecessors and the cess valuation roll prepared in 1903 on the basis thereof Pitha Kali Debuttar was not mentioned as a rent-free estate under touzi No. 141. The learned Judge however was not inclined to place any reliance on this omission, and has said: "There may

be various reasons why the debuttar was not shown in the return." We are not prepared to agree in this remark. In our opinion, the omission appears to be a very important piece of evidence and requires a cogent explanation. We do not think we can hold, on the collection papers such as have been filed on behalf of the defendants, that actual realisation of cess by them from the plaintiff has been proved thereby; for that much more satisfactory documentary evidence was necessary. These collection papers have been prepared with an imaginary rental allotted to the lands and as showing that cesses had been amicably realised on the basis of such rental. It is admitted now that no rent was ever realised. It is not unlikely that the revenue officers in preparing the Khatians were misled by these collection papers. Nor again, are we prepared to regard the non-production of the plaintiffs' collection papers in respect of the debuttar as "very suspicious," as the learned Judge seems to have thought because we do not find how those papers could have thrown any light on the questions with which we are concerned. The Subordinate Judge has commented adversely against the plaintiff for not producing the chitta of Debuttar Kasba which he admittedly has in his possession. The learned Judge thinks that the chitta would have been a material piece of evidence, and has observed thus:

This paper should have been produced to show the nature of the plaintiff's title and the description of the debuttar given in it, i.e., whether it is Siddha Lakheraj or not.

13. We are unable to appreciate the force of this observation. The plaintiff's possession is admitted? a matter on which the chitta would have been relevant. A description of the debuttar given in the chitta would hardly have been of any use to the plaintiff, and there is no reason to imagine that not having paid any revenue or rent for it at any time, any entry should have been made in it which might be read as an admission derogatory to a revenue-free title. The plaintiff has proved that in two years at least i.e., 1912 and 1914, cesses in respect of touzi No. 56-B along with cesses due on other estates were paid by him direct to the Government. It has been argued that receipts of such payment for other years have not been produced; but this argument is of no weight, because if there is a touzi No. 56-B, cess in respect of it must have been realised all through and from none else than the plaintiff who is the recorded proprietor of that touzi. (His Lordship then discussed evidence and concluded that the plaintiff's revenue-free title to the lands of khatian No. 632 or such of the said lands as still belongs to him, must be held to have been established.) The other objections which the defendants have also taken to resist the decree asked for in this case will have to be considered now.

14. The first objection is on the ground of Section 109, Ben. Ten. Act, as it stood before the amendments of 1928. The suit u/s 106, Ben. Ten. Act, was instituted upon the allegation that Mauza No. 106 Kaligaon was really a revenue-free debuttar mehal not included in touzi No. 141, which is the zamindari of the defendants, but in touzi No. 47-B of the B Register ; and it was prayed that on a

declaration being made to that effect Khatian No. 632 might be corrected by deleting No. 141 and inserting 47-B in its place and by making other alterations which would show that the superior interest belonged not to the defendants but to the King-Emperor on declaration of the Niskar Debuttar interest. Now the present suit in which it is alleged that the plaintiff has a revenue-free title to the lands inasmuch as they are included in touzi No. 56 B of the B Register, in our opinion, cannot be regarded as a suit concerning a matter which was the subject of the suit Under Section. 106, Ben. Ten. Act, because in that suit what was alleged was that the lands were included in another revenue-free touzi, namely, No. 47-B of the said Register. It is true that the declaration as regards the lands constituting a revenue-free debuttar which was asked for in that suit was similar to the declaration prayed for in the present suit, but in that suit the said declaration was only asked for as prefatory to the real relief claimed, namely, the correction of the record. A declaration, by itself, being outside the scope of a suit u/s 106, a prayer for such a declaration made in a suit u/s 106, cannot bar a similar prayer in any subsequent suit. We are of opinion therefore that Section 109, Ben. Ten. Act, does not operate as a bar to the maintainability of the present suit.

15. The next ground urged is that the suit is barred by the principle of res judicata by reason of the fact that in Rent Suit No. 2276 of 1921 the plaintiff's defence, which is substantially his ground of action in the present suit, was overruled. That suit was instituted and tried in the Court of the Munsif, in which Court the present suit having regard to its valuation could not have been entertained. The Subordinate Judge has held that the suit has not been over-valued and has given adequate reasons for such a conclusion. Nothing has been shewn to us on which we can dissent from this view which he has taken. And for the purposes of res judicata it is the competency of the Court of first instance that has to be looked to. We think we must hold that the ground as to res judicata fails.

16. Thirdly, it has been argued that the appeal is imperfectly constituted as the Secretary of State, who was made a party to the suit in the Court below, has not been impleaded as a respondent in the appeal. The Secretary of State did not appear in the Court below and we are not satisfied that he was a necessary party in the sense that in his absence the suit could not proceed. Lastly, it has been contended that the suit is time-barred, because the plaintiff, if he wants to have a declaration relating to an entry in the Record of Rights, must come within six years from the date of its final publication. The Subordinate Judge held that the suit was within time as it was instituted within 12 years from the date of the final publication. Possibly, such a view could be taken if this were a suit for recovery of possession on a declaration of title or on a declaration that the entry was wrong. The present suit not being a suit of that description the learned Judge's view cannot be upheld. At the same time we are of opinion that so long as the entry did not injure the plaintiff he need not have come to Court at all. It was really the decision of the trial Court in Suit No. 2276 of 1921 which was pronounced on

6th May 1922 that afforded the plaintiff a cause of action. As the plaintiff instituted this suit within six years of that date, the suit, in our judgment, was laid in time, Article 120, Schedule 1, Lim. Act, being the article applicable to it.

17. The question then arises, what relief is the plaintiff entitled to in this suit. There are no averments in the plaint, nor has anything been established, such as would justify a declaration being made against the validity of the decree in Suit No. 2276 of 1921. It was a contested decree based on proper materials: the khatians, on the basis of which the claim was made in the suit, were challenged but the challenge failed on the merits. It is clear therefore that a declaration against the validity of the decree is not possible. It follows from this that the permanent injunction that has been asked for restraining the defendants from executing the decree must also be refused. Indeed no such injunction could under any circumstances be any longer issued, because the decree has already been realized. But the plaintiff, in our judgment is entitled to the declaration he has asked for as regards the lands being revenue-free and such other declarations as would make the said declaration of his title effective. It has been contended on behalf of the defendants that if only declaratory reliefs are granted the suit would offend against the proviso to Section 42, Specific Relief Act. But it does not appear to us that the plaintiff stands in need of any other consequential relief. Where such is the position a suit for a mere declaration is not incompetent. Courts have ample inherent powers, and indeed it is their duty, to shape their declaration in such a way that they may operate to afford the relief which the justice of the case requires.

18. Our order therefore is that the appeal be allowed, that the decree of the Court below dismissing the suit be set aside and that a decree be passed in plaintiff's favour declaring that the lands covered by Khatian No. 632 of Mauza Kaligaon No. 166 constitute a revenue-free de-buttar of Iswar Pitha Kali Thakurani included in Towzi No. 56-B of the Rajshahi Collectorate, and that the defendants, as proprietors of Touzi No. 141 of the said Collectorate, are not entitled to realize any cess in respect of these lands. The rest of the plaintiff's claim in the suit should be dismissed. The appellant will get his costs in both the Courts, pleaders' fee in the Court below being assessed at Rs. 150 and hearing, fee in this Court and 10 gold mohurs.