
(1935) 12 PAT CK 0024
In the Patna High Court

Sudhakar Misra and Another

APPELLANT

Vs

Nilkantha Das and Others

RESPONDENT

Date of Decision : 18-12-1935

Acts Referred:

Evidence Act, 1872 — Section 66

Citation : AIR 1936 Patna 129

Hon'ble Judges : Wort, J;Rowland, J

Bench : Full Bench

Judgement

Wort, J.—This appeal has been argued elaborately; but the points in dispute fall into a small compass and I propose to deal with them as briefly as possible. It was the plaintiffs' action in which they claimed a declaration that the settlement record was erroneous and fraudulent. The entry in the record appears to have been that one Anant Misra and seven others were entitled to the mauza to the extent of two annas each. The plaintiffs claimed that Anant was entitled to the 16-annas interest and that the defendants were not co-sharers. In order to establish this the plaintiffs alleged that they were his legal heirs and the nearest agnates, and with regard to this claim issue 10 was settled by the Judge of the trial Court. So far as this question is concerned, both the trial and the appellate Courts have come to a conclusion in favour of the plaintiffs, and, as it is a decision on a question of fact, no point arises in this Court. The trial Court decided that Anant, and therefore the plaintiffs, were entitled to the 16 annas interest in the property, but that there was a charge in favour of the defendants to the extent of Rs. 5 each. The appellate Court modified this decision coming to the conclusion that the plaintiffs were entitled to two annas and that the seven defendants were also entitled to two annas each. This second appeal has been preferred against the decision of the learned District Judge.

2. Two questions arise: one as regards the admissibility of certain evidence and also the alleged error of the record, and the other is the question of limitation. Amongst the documents which the defendants relied upon was Ex. F-I. This

purports to be a copy of the confirmatory sanad of the year 1841, and in passing, I should like to say that the entry in the Record of Rights was founded on the original sanad. It is a matter of some comment and perhaps of some importance to state that this sanad which was in the possession of the plaintiffs, was not produced by them. The contention of Sir Sultan Ahmed is that Ex. F-I was not admissible in evidence, and that it being admitted in evidence, the Judge of the appellate Court has been wrongly influenced by the document in discounting the evidence adduced by the plaintiffs. As already stated, Ex. F-I was a copy of a sanad purporting to be of the year 1841. Of the original sanad of which it was a copy there is no evidence. It appears from the record of the case that this document, amongst others, was objected to by the plaintiffs.

3. The nature of the objection is not stated, nor do we find any reference to the particular matter raised and argued by Sir Sultan Ahmed on behalf of the plaintiffs in this regard. It is contended that it is not even secondary evidence; that is to say, (I assume) that it is not a copy of the original sanad. All I need say with regard to that matter is that there is no foundation for that argument. Ex. F-I purports to be a copy of the original sanad, and it would appear to have been admitted on that basis, although the learned Judge in the Court below is in some error in stating it to be a certified copy. The point taken is this that no evidence was adduced by the defendants, nor were the facts proved, which would justify the Court in admitting it as secondary evidence of the original sanad. The objection, as I have already stated, appears to have been merely formal and this point was not discussed by either of the Courts; the trial Court, I might say, in coming to the conclusion, incidentally said that the document was not a genuine one. Mr. Bose contends however that the point cannot be taken in appeal before this Court as there was no objection, on the ground now stated, before the trial Court. If the record of the case gives no indication of what took place, I must say that I am in agreement with the argument of Mr. Bose that the objection was not taken in the form in which it is now presented. The objection in the first instance may have been merely formal, and if the plaintiffs intended to rely upon the objection, they certainly should have developed it, which, as I have already stated, was not done.

4. Assuming however that the objection was taken, one of the questions which would arise is whether it comes within the proviso to S. 66, Evidence Act. One of the contentions on behalf of the appellants was that in order to entitle the Judge to admit the document as secondary evidence, notice would have to be given to the other side to produce the original. I have already stated that although the record of rights was founded upon the original sanad, and although it is quite clear that the document was in the possession or under the control of the plaintiffs, they failed to produce it. I should have very little hesitation in coming to the conclusion that, had the question been raised in the form in which it is now raised, the learned Judge in the Court below would have come to the conclusion that Sub-clause (2) of the proviso to Section 66, Evidence Act, applied; that is to say by the nature of the case the adverse party (who were the

plaintiffs in this case) knew that they would be required to produce it. That in itself is sufficient, in my opinion, to answer the point. As I stated, the contention with regard to this document was that the Judge had been influenced in his consideration of the evidence that the plaintiffs adduced as regards their title. In my judgment, the reason which I have just stated is a sufficient answer to the argument advanced by Sir-Sultan Ahmed on this point.

5. The other argument connected with this question is that in certain instances the Judge in the Court below has been guilty of errors of record. We have been referred to a number of documents, and it has been contended that the learned Judge has been in error in deciding what was their import. It is not contended that any of these documents was a document of title; it is not contended that any question or any decision of the learned Judge with regard to these documents, was a decision on a question of law; and that being so, in my opinion quite clearly it is erroneous to describe an error (assuming there be an error in the Judge of the Court below) as an error of record. It is an erroneous decision on a question, of fact and nothing more. Lord Buck-master, in delivering the opinion of their Lordships of the Judicial Committee in *Nafar Chandra Pal v. Shukur Sheikh* 1918 PC 92, in reversing the decision of a Court of fact with regard to certain, conclusions upon oral and documentary evidence, makes this statement:

Their functions (referring to the High Court) were completely circumscribed by the provisions of the statute passed for the express purpose of securing some measure of finality in cases where the balance of evidence, verbal and documentary, arose for decision.

6. That, in my judgment, is this case, and we are bound by the decision of the Court below on questions of fact. There only remains the question of limitation. The claim in the plaint is, what I stated it to be at the commencement of my observation, a prayer for a declaration, of the plaintiffs' title, and that the settlement record is erroneous and fraudulent. In answer to a question from the Bench as to the existence of a claim for possession, Sir Sultan Ahmed referred us to paras. 14, 15 and 16 of the plaint. It is now abundantly clear that paras. 14, 15 and 16 of the plaint refer to properties not now the subject-matter of the action, a prayer for relief concerning which was withdrawn under an order dated 20th November 1929. It leaves us therefore in this position: that the plaintiffs' prayer was merely for a declaration. Now it is not disputed by Mr. Misra, although he has faintly argued that it is otherwise, that he was entitled to bring his action immediately after the final publication of the Record of Rights in 1909, and that the period of limitation ran from that date. The learned Judge in the trial Court, it would appear, had decided the point in favour of the plaintiffs on the ground that they had no knowledge of the entry in the Record of Rights. So far as that finding is concerned, it has been set aside by the appellate Court, the learned District Judge coming to the conclusion that the plaintiffs were aware of the Record of Rights, and therefore were aware of the existence of what has been described as

a "cloud upon their title." That being so, and there being no dispute (and there can be no dispute) that Article 120, Limitation Act, applies, the action is quite clearly barred by limitation. The fact that the plaintiffs paid an ad valorem court-fee can in no way affect the decision that this was a claim for a mere declaration and not a claim for possession; and indeed the plaintiffs alleged that they were in fact in possession. Mr. Misra's contention that it was open to the plaintiffs to bring their action within a period of six years from the death of Kshetramoni, the widow, is true only in a case where the action was for possession.

7. In my judgment, for the reasons I have stated, it seems to me that the action is barred by limitation, the decision of the learned District Judge is right and must be confirmed, and the appeal must fail and be dismissed with costs.

Rowland, J.

8. The attempt on the part of the appellants to escape from the finality of the findings of fact of the lower appellate Court suffers from the initial disadvantage of having to ignore the earlier part of the District Judge's judgment in which after pointing out that by statute the presumption is in favour of the correctness of the Record of Rights and that the onus lies heavily on the plaintiffs to displace that presumption, he discusses the evidence adduced by the plaintiffs and concludes:

Thus I have considered all the important documents that the plaintiffs rely on and none of them appears to me to be inconsistent with the correctness of the entry in the Record of Rights.

9. Thereafter the District Judge proceeded to consider the evidence adduced on behalf of the defendants. It is contended that his treatment of Ex. F-I is not justified both as regards its admissibility and as regards the significance to be attached to it. It is further said that he has not correctly interpreted Ex. D and that he has misread Ex. L. It seems to me that I need hardly dilate on this line of argument when from the outset it was doomed to failure in view of the finding that the plaintiffs had failed to discharge the onus of showing that the Record of Rights was incorrect. On the second point, that of limitation, the Munsif came to the conclusion that the suit was not time-barred after considering two decisions of this Court and without noticing that in both those decisions the suit, was framed so as to claim an adjudication coupled with consequential relief. In such a suit the plaintiff, it has been held, is not bound to include a prayer for correction of the Record of Rights, and if he does not include such a prayer, his suit for possession will not be defeated for that reason. Nor will it come under any different Article of limitation other than the ordinary limitation applying to suits for recovery of possession merely by reason that in order to succeed the plaintiffs require a finding that an entry in the Record of Rights is incorrect. But the present suit is differently framed. There is no consequential relief prayed for at all. The prayer is for a declaration and one of the declarations expressly asked for is that the settlement record is erroneous and fraudulent. Such a suit, I am

clearly of opinion, is barred by the six years rule of limitation, commencing from the final publication of the record. I therefore entirely agree that the appeal should be dismissed.