

(1922) 08 CAL CK 0055
In the Calcutta High Court

Tarakeshwar Pal Chowdhury

APPELLANT

Vs

Sirish Chandra Ghosh Mandal and Others

RESPONDENT

Date of Decision : 14-08-1922

Acts Referred:

Evidence Act, 1872 — Section 90

Citation : AIR 1924 Cal 236

Judgement

1. These two appeals are directed against an order of remand made by the Subordinate Judge in a suit for recovery of possession of immovable property on establishment of title. The subject-matter of the litigation is a tank with its banks, situated within the property of the Plaintiff. The Defendants purchased the tank under two conveyances, dated the 4th and 11th November 1906 from persons who claimed to hold under two grants made" in favour of their predecessors on the 6th October 1836 and 16th July 1849. The Plaintiff alleged that, as the vendors of the Defendants had no transferable right, they were liable to be ejected, as trespassers. The primary Court held that the Defendants had aspired a valid title by their purchase and dismissed the claim for ejectment, subject to a declaration in favour of Plaintiff in respect of his title as the superior landlord. The Subordinate Judge has remanded the case for further investigation. The Plaintiff as also the Defendants are dissatisfied with this order. They are agreed that further enquiry is not needed, but while the Plaintiff contends that the suit should have been decreed on the facts found, the Defendants maintain that the suit should have been dismissed. On the present appeals two questions have been raised, first, whether the grants made by the predecessors of the Plaintiff on the 6th October 1836 and the 16th July 1849 are operative against him, and secondly, whether the Defendants have acquired a valid title by their purchase.

2. As regards the first point the Plaintiff has contended that the document should not have been received in evidence, on the authority of the cases of Ubilack v. Dallial [1878] 3 Cal. 557 and Uggra Kantu Chowdhury v. Harro Chandra Shickdar [1880] 6 Cal. 209.

3. We are of opinion that the decisions mentioned do not assist the contention of the Plaintiff. There are really two questions for consideration, namely, first, whether the documents were genuine, and, secondly, if genuine, whether they were executed by persons who had authority to bind the predecessors of the Plaintiff. The solution of the first question depends upon Section 90 of the Indian Evidence Act, *Shafiqun-nessa v. Shaban Ali* [1904] 26 All. 581. The Courts below, as we understand their judgments, have found that those instruments might be treated as ancient documents, and that they were in fact executed by the persons whose signatures they bear. The second question is whether these documents were executed by persons who had the necessary authority. The first grant was made by one Biswanath Bhattacharja who describes himself as the *ijaradar*, in other words, as a temporary farmer or tenure-holder. The document recites that the grantee Sonatan Ghose had made an application to the superior landlord for the grant of 8 bighas of land for the purpose of excavation of a tank, that the landlord had sanctioned the application and had directed the *ijaradar* to grant a *sanad*. The *ijaradar* accordingly made the grant in favour of Sonatan Ghose, to be held from generation to generation, in order that a tank might be excavated. The second document purports to have been granted by one Umesh Chandra Pal Chowdhury through the pen of Guru Prasad Banerjee, who describes himself as a superintendent. This document recites the previous grant, and states that as on measurement the tank had been found to extend over 14 bighas of land, it was necessary to make a supplementary grant of 6 bighas so that the grantee might remain in possession of the tank from generation to generation. Both the document stated explicitly that no rent would ever be paid. The Plaintiff contends that the burden lies upon the Defendants to establish that in respect of the first document the *ijaradar*, and in respect of the second document the superintendent, had the requisite authority to make a grant which would be operative against the zamindar. It is not disputed and cannot be disputed that the application of Section 90 of the Indian Evidence Act does not justify the inference that the documents, which are established to be genuine, were in fact executed by persons possessed of the requisite authority. That is an entirely different question, and the correctness of the decision in *Ubilack Rai v. Dallial Rai* [1878] 3 Cal. 557 and *Uggra Kanta Chowdhury v. Harro Chandar Shickdar* [1880] 6 Cal. 209 which were followed in *Maharam Chaprasi v. Telamuddin Khan* [1911] 15 C.L.J. 220 cannot be questioned. Indeed, a similar view was adopted in *Airey v. Stapleton* [1897] 1 Ch. 164. In that case, where a deed purported to be an appointment under a special power and to be executed by the attorney of the donee of the power, it was ruled that presumption only arose as regards the execution of the deed, but not with regard to the authority of the solicitor to execute the power. It does not follow, however, that it is necessary for the grantee of the document or his successor-in-interest to establish by direct evidence that the executant had the requisite authority. When a grant has been in operation for a long series of years, as in this case, it may be impossible to adduce direct evidence of authority. In such a contingency the Court may draw an inference from all the surrounding circumstances. In the

present case the grantee and his successors in interest from generation to generation have been in possession for more than 70 years. If the grants were unauthorised, the zamindar might have been expected to take steps long before this to eject the grantees; *Naina Pillai v. Ramanathan Chettiar* (1916) 33 M.L.J. 84. The burden thus shifts upon the zamindar to prove how he came to acquiesce in the long possession of the grantee and his successors. Besides, it is the zamindar who is aware of the scope and extent of the authority conferred by him upon his lessee, or upon the superintendent of his estate. No evidence, however, is forthcoming from his side, *Suduman Jamadar v. Behari Mahton* (1911) 15 C.W.N. 953. In these circumstances, it was open to the Courts below to draw the inference that the grants must have been made by persons who possessed the requisite authority. We are of opinion that the Plaintiff cannot now successfully urge that the grantee and, his successors have held for 70 years without a lawful origin of their title and possession.

4. As regards the second point, the question for consideration is, whether the interest of the grantee was transferable. It has been rightly held by the Courts below that the effect of the grant cannot be determined by a reference to the provisions either of the Transfer of Property Act or of the Bengal Tenancy Act. The point for determination is, whether, in 1836 and 1849, interest in land created by a grant of this description was or was not transferable by custom or by contract; *Sulin Mohon Banerjee and Others Vs. Raj Krishna Ghosh and Another*, . No evidence of custom has been produced. The terms of the grant, however, leave no room for doubt that the grant was made in perpetuity. The grant stated explicitly that the grantee was to hold from generation to generation. The expression used is *putra-pautradikrame*. The Plaintiff has urged that there is no evidence to show that this expression, now so familiar, had in 1836 and 1849, the same meaning as is at present attributed to it. In this connection, reference has been made to the decision of the Judicial Committee in *Ram Narayan Singh v. Ramsaran Lal* AIR 1918 P.C. 203, which reversed the decision of this Court in *Ramsaran Lal v. Ram Narayan Singh* (1916) 42 Cal. 205. There, however, the expression was used in relation to a very special type of grant, namely, *Jagir*, which possessed well-known incidents. Here, on the other hand, we have a grant of land made for the excavation of a tank. The evidence recited in the judgment of the trial Court shows that there was scarcity of water in the village, and that *Sonatan Ghose* whose daughter had been married in that village, undertook to remove the difficulty felt by the villagers, if land were granted to him in perpetuity, so that he might excavate a tank at considerable expense of money. The grant was made accordingly and the tank was excavated for public benefit. As pointed out by Chatterjee, J., in *Birendra Krishna v. Akram Ali* (1912) 39 Cal. 439, according to Hindu religious notions such grant of land for digging tank was supremely meritorious. In these circumstances, it is inconceivable that the grant could have been of a temporary character or that the landlord could ever have intended to resume the grant. We feel, no doubt, that the grant comprised in the documents of the 6th October 1836 and the 6th

July 1849 was a perpetual grant; and if it was a perpetual grant, there can be no room for controversy that the interest created was transferable. In our opinion, the decree made by the trial Court was correct and should not have been set aside by the Subordinate Judge.

5. The result is that the appeal preferred by the Defendants (M.A. 392 of 1920) is allowed and that preferred by the Plaintiff is dismissed. The order of the Subordinate Judge is set aside and that of the Court of first instance restored. This order will carry costs both here and in the Court of the Subordinate Judge. There will be no separate order for costs in M.A. 330 of 1920.