

(1924) 01 CAL CK 0043
In the Calcutta High Court

Umesh (Chandra) Durbar and Others	APPELLANT
Vs	
Chowdhry Jamini Nath Mallik and Others Chandra Chatterjee Vs Mahendra Nath Gopat and Others	RESPONDENT

Date of Decision : 24-01-1924

Acts Referred:

Citation : 78 Ind. Cas. 836

Hon'ble Judges : Rankin, J; Mukerjee, J

Bench : Division Bench

Judgement

Rankin, J.—This is an appeal by the landlord in a suit brought by him to have an entry in the Record of Rights corrected. The entry is with respect to a Mousah called Dakhin Aukhua and it is contained in what is called Part II of the general khatian in respect of that Mouzah. The entry is to the effect that in that Mousah, if inundation takes place, the raiyats are to get a rateable proportionate deduction of rent from their landlords. The judgment under appeal proceeds upon the basis that that entry attracts the presumption u/s 103 B, Sub-section (3) of the Bengal Tenancy Act ; in other words, that it shall be presumed to be correct until it is proved by evidence to be incorrect. Accordingly, the learned Judge of the lower Appellate Court has approached, first, the plaintiff's evidence and he has examined into the question whether that evidence, first of all, taken by itself, succeeds or fails to rebut the presumption of the correctness of the entry. Having dealt with the plaintiff's evidence and having come to the conclusion that it does not rebut the presumption, he says that, in the circumstances, it is not necessary for him to consider the evidence on the defendant's side in detail ; but he proceeds to consider it with a view to see whether there is material in the evidence adduced by the defendants which assists the plaintiff in his contention that the Record of Rights is incorrect, and comes to the conclusion that the oral evidence on the defendant's side rather supports than detracts from the correctness of the entry. Having dealt with the case with a view to decide whether there is any ground for supposing that custom alleged in the Record of Rights is bad for any reason and having

negated that suggestion, he upholds the Record of Rights, allows the appeal and dismisses the plaintiff's suit.

2. The main contention of the plaintiff-appellant is that the entry in question is not entitled to the presumption of correctness laid down by section 103 B of the Bengal Tenancy Act and the reason which is relied upon to take the case out of that provision is that it is not an entry in respect of a particular tenancy in the khatian which is appropriated to a particular tenant or set of tenants but is an entry in the general khatian-- a statement of a rule obtaining in the village ; not of a particular stipulation obtaining as between an individual landlord and an individual tenant. Such an entry of a general character, it is contended, is not within the contemplation of Section 103 of the Bengal Tenancy Act. I propose, first, to deal with this contention.

3. By Section 101 of the Act, the Local Government, in some cases with the sanction of the Governor General-in-council, and in some cases without, may take an order directing that a Survey be made and a Record of Rights be prepared and by Clause (4) of that Section "the Survey shall be made and the Record of Rights prepared in accordance with rules made in this behalf by the local Government." The particular order governing the present case is not in evidence and no point has been or can be made upon any specific term in that order. When we come to Section 102, we find that it provides that " where "an order is made u/s 101 the particulars to be recorded shall be specified in the order and may include, either without or in addition to other particulars, some or all of the following." It will be seen, therefore, that it is for the local Government by its order to specify what is to be included for the purposes of the Record of Rights and it is not limited to the things which are mentioned in Section 102. Moreover, the Survey is to be made and the Record of Rights prepared in accordance with rules to be made by the Local Government. Now, the particular things mentioned in Section 102 not being exhaustive, it is pointed out that the general tenor of the language of Section 102 is directly applicable to entries affecting particular tenancies. The present entry comes nearest, at all events, to Sub-clause (m) which is " the special conditions and incidents, if any, of the tenancy." The provisions of the Bengal Tenancy Act as regards the method of making and preparing the Records of Rights provide for the preliminary publication of a draft. The Revenue Officer is to publish the draft in the prescribed manner, that is, in a manner to be prescribed by rules. He is to consider any objections which may be made to any entry or to any omission therefrom. After doing that, he is finally to frame the Record and to cause it to be finally published in the prescribed manner and he may publish separate draft or final records for different local areas, estates, tenures of parts thereof. It is after that final publication that the presumption of correctness is attributed to the record by the Statute.

4. In the present case, for the Mouzah now in question, there is a khatian of the following character. There are really five matters dealt with as general matters

applicable to the Mouzah as a whole. The first matter is irrigation. As to this, there is a statement that there is no rule for irrigation but that the lands are watered by rain. Then comes the question of trees. It is said that the rctiyats have full right in trees grown by them. As to other trees, their rights are governed by their contracts. As to grazing, it is said that the raiyats have a right to pasture the cattle by custom or usage. Then, weights and measures states how many seers there are to a maund and so forth. Lastly, comes paragraph 4a which is headed by some vernacular words which may be translated as special stipulation or special rights, and, under that heading, is the statement which I have already referred to as the entry now in question. It appears that particular khatians given to particular tenants in the Mousah contain a reference by number to this general khatian. So that, in effect, what has happened is that, instead of repeating in each tenant's khatian as regards this Mouzah the various stipulations or terms stated in Part II of the general khatian, the Revenue Officer has done the same thing by reference. He has set forth once and in full the stipulations. He has not repeated them in each particular tenant's khatian.

5. Now, it was not apparently contested in the Courts below nor I think until Mr. Sen came to reply that the purport and effect of the entry now in question were to state a custom of the Mouzah. Certain it is that the plaintiff thought that it stated a custom. It is quite clear that all the other items are statements of the tenant's right and, speaking for myself, I do not doubt that the entry now in question is, in substance, not merely a statement that the landlord of this Mouzah had in times past been kind enough to his tenants to make a remission but is, as in other entries, in the general khatian, statement, as it says, of a special right. I cannot, therefore, feel any doubt that this is an entry of a local custom and nothing short of it.

6. So far as the presumption of correctness is concerned, I am of opinion that there is no ground for holding that a statement as to the custom of a Mouzah is outside the purview of Chapter IX of the Bengal Tenancy Act. On the contrary, I can imagine no more valuable part of a Record of Rights than the part which states the alleged Customs. The provisions for publication, "for objections", all apply. There can be no reason for implying a prohibition so far as regards the recording of such very necessary matters and, unless it was allowable in some way or another to deal with the matter of local custom, it may well be doubted whether the preparation of a Record of Rights would be worth the trouble and expense. As regards the manner in which they are to be recorded, I see no reason to think that in the present case, the Record of Rights was in any wise contrary to the terms of the order u/s 101 or in any wise contrary to the rules made in this behalf by the local Government under Clause (4) of Section 101. It will be no doubt a matter for the local Government to consider very carefully when it lays down in detail the scheme for preparing a Record of Rights whether entries made in the general khatian are or are not sufficiently brought to the notice of the tenants or of the landlords in all cases by the provisions which the rules make in that behalf. In the present case, it appears that a reference to the

general khatian was inserted in the individual khatian copies of which no doubt were, in due course, furnished to each of the tenant and to the landlord as required by the rules." That, however, is a matter over which the local Government by its rules has power of complete provision. There is nothing in the Act itself that would entitle us to lay down that the particular method as shown in this case is contrary to the Statute or outside the purview of the same. It has been suggested that in such cases a person desirous of bringing a suit u/s 106 to correct a statement of a general character might have to implead the whole of the neighbourhood and might be very much embarrassed. I fail to see in the case of a tenant why it should not be sufficient for him to debate the matter with his own landlord, and I do not think that there is, in fact, any difficulty as indeed in the present case the landlord's suit seems to show. However that may be, it is, in my opinion, not possible for us to lay down that a general khatian such as this is outside the scope of the Bengal Tenancy Act or outside the powers of the local Government to arrange for under their powers to make rules. In my opinion, therefore, the learned Judge of the lower Appellate Court was quite right in commencing his study of this case by giving to that entry the presumption of correctness until it was proved by evidence to be incorrect. On this footing, I fail to see that the judgment under appeal can be successfully challenged at all.

7. The present case is not one in which it can be contended as a matter of law that the custom is unreasonable or is too vague. In my judgment, the custom is manifestly reasonable and is not too vague.

8. It was suggested to us, however, that we should go into the findings of fact upon each side with a view not merely to see whether the plaintiff in the end had rebutted the correctness of the Record of Rights but from a point of view much more favourable to the appellant. It is said that, after all, there has been evidence given on both sides and, when evidence had been given on both sides the mere question of onus is of no great importance. Now, that is a proposition which I confess to have met with more than once and, as we have been referred to the cases in which it is said to have been laid down, I would like to say a word or two about it.

9. It is perfectly true that, in contested cases of fact, a great deal of time is constantly wasted in discussing mere propositions of law about the initial onus. In some cases of second appeals, that is almost the only way in which hostile findings of fact can be dislodged but before Courts of fact it is very often a purely vain employment for the simple reason that the onus shifts as each fact is brought to notice and it is generally wrong to select one particular fact arbitrarily and claim the benefit of the onus whereas, if other, particular facts had been selected, the onus might have been the other way, still the proposition that we are now invited to accept is not only much too broad but in result might have a very extraordinary effect.

10. Now, the first case which seems to have stated the proposition is a case of the Privy Council (*Kundal Lal v. Musammatt Begumun-nissa*) 47 Ind. Cas. 337 :

22 C.W.N. 937 : 8 L.W. 233 (P.C.). In that case, the suit was to enforce a mortgage-bond. The defence was that the bond had been paid off as appeared by endorsement on the back of the bond. The plaintiff replied that the endorsements were fictitious and fraudulent and the question went to trial in that way. The learned trial judge who saw the witnesses came to the conclusion that the endorsements were forgeries. The High Court came to an opposite conclusion and the Privy Council said this: (it is a judgment delivered by Viscount Haldane.) "It is no doubt true that the initial burden of proof rests on the appellant in such a case as this both on general grounds and by reason of the provisions of section 114 of the Indian Evidence Act. But this burden is one which shifts easily as the evidence is developed and their Lordships do not, after considering facts which appear to them to be sufficiently established in the two suits, attach much importance to the question on whom the initial onus lay." From that point of view, having come to the conclusion that it was more probable that the bond had not been paid off, their Lordships restored the decision of the trial judge who had come to that finding. That is, it seems to me, a perfectly justifiable and intelligible principle. In the case of *Puratnatn Aiyar v. Venkataehela Goundan* 56 Ind. Cas. 117 : 43 Mp. 567 at p. 569; (1920) M.W.N. 61 : 27 M.L.T. 102 : 11 L.W. 399 : 38 M.L.J. 476 : 22 Bom. L.R. 578 : 18 A.L.J. 707 : 25 C.W.N. 485 : 47 I.A. 76 (P.C.) decided by the Privy Council, the judgment being delivered by Sir Lawrence Jenkins, a comment was made upon a passage in the High Court's judgment. The plaintiff was a Pattadar and the question was whether certain tenants had a permanent right or not. The High Court said "We hold that the mere fact of the plaintiff being Pattadar does not entitle him to any presumption in his favour." The Privy Council said : " This proposition is open to the construction that the burden lay on the plaintiff not only to establish his title but also to negative the defendant's claim to permanency and if this is what was meant it was wrong. But the sentence that immediately follows shows a truer perception of the position. The learned Judges there say: " We also hold that even if that fact could be of any use to him the various circumstances proved un rebutted by anything in the plaintiff's favour necessarily raise a presumption that the defendants have occupancy rights." Sir Lawrence Jenkins went on to say : "The controversy has passed the stage at which discussion as to the burden of proof was pertinent; the relevant facts were before the Court and all that remained for decision was what inference should be drawn from them." The case most relied upon before us was the decision of this Court in *Jogendra Nath Saha Choudhury v. Moharaja Jagadindra Nath Boy Choudhary* 67 Ind. Cas. 170 : 34 C.L.J. 133. There, the learned Judges, after referring to the two cases which I have already dealt with, said this : " Where, as in the present case, evidence has been adduced by each of the contestants in support of their respective cases and the relevant facts are before the Court, the question of burden of proof is immaterial and importance should not be attached to the question on whom the initial onus lay." They went on to find that the Subordinate Judge had correctly held that the case for the defendant had been completely negated by the evidence adduced on behalf of the plaintiff. Now, if that proposition is to be laid

down in such a manner as contended for in the present case, it is manifest that the intention of the legislature in enacting that the Record of Rights should be presumed to be correct until it is proved by evidence to be incorrect might be entirely overthrown. The truth is that just as the law imposes a very heavy burden on a person who has to prove a custom--we have had a very careful and forcible exposition of the burden that is upon the person who has to prove the custom --so, when the burden is put upon the other person's shoulders and the presumption is in favour of the custom, the litigant claiming the benefit of the custom a very valuable right indeed. It is the intention of the Bengal Tenancy Act in matters such as this, the Record of Rights which is prepared with great care and publicity should be attached to it, a great presumptive value. It cannot be denied that, if the plaintiff adduced evidence insufficient to rebut the presumption and the defendant led no evidence at all, the plaintiff must fail. Can it then be contended that, if the defendant goes further and adduces some evidence in support of the record of the benefit of the presumption is lost to the defendant and he is in a worse position than if he had adduced no evidence at all. Plainly not. It seems to me, therefore, that the learned Judge of the lower Appellate Court handled this matter in a manner what was entirely warranted by the Bengal Tenancy Act. All the burden, heavy as it is, of proving the custom was by the record taken off the shoulders of the tenants. The landlord may show that the custom is unreasonable or vague and he may, by evidence show that, in fact, no such custom obtains. If that is the true form of the question, in my judgment, the learned Judge of the lower Appellate Court has dealt with it correctly. For these reasons, it seems to me that the appeal fails and should be dismissed with costs--hearing fee 3 gold mohurs.

Mukerji, J.

11. I entirely agree.

12. S.A. 2309 of 1920

13. This appeal is not pressed. It is accordingly be dismissed with costs--hearing-fee two gold mohurs.