Ganpat Mahton and Others Vs Rishal Singh and Others

Court: Calcutta High Court

Date of Decision: June 17, 1914

Acts Referred: Bengal Tenancy Act, 1885 â€" Article 1(a), 116, 120(2)(a)

Citation: 33 Ind. Cas. 978

Hon'ble Judges: Beachcroft, J; Asutosh Mookerjee, J

Bench: Division Bench

Judgement

1. This is an appeal by the defendants in a suit for ejectment and arrears of rent. The plaintiffs are landlords, and their case is that the defendants

executed a kabuliyat in their favour for a term of seven years, and came into occupation of the disputed lands on the 19th September 1902. The

term expired on the 4th June 1909. The kabuliyat states expressly that on the expiry of, the term the tenants would give up the lands, but they did

not vacate the lands, and the present action was consequently commenced on the 16th September 1910. The plaintiffs assert that the lands are

their zerait and that the defendants have not acquired the status either of occupancy or non-occupancy raiyats under the provisions of the Bengal

Tenancy Act. The defendants allege, on the other hand, that they were in occupation from before the execution of the kabuliyat, that the lands are

not zerait and that they are in fact occupancy raiyats as recorded in the Settlement proceedings. The Court below has held that the lands are zerait

lands and that the plaintiffs are entitled to eject the defendants. On the present appeal it has been argued that there is no evidence to show, at any

rate no reliable evidence to prove, that the lands are zerait as alleged by the plaintiffs.

2. The evidence has been placed before us and it appears that the only evidence to show that the lands are zerait is the recital in the kabuliyat of

the 19th September 1902. It has been argued on behalf of the defendants-appellants that this recital is not admissible in proof of the allegation that

the lands are zerait; and in support of this view reliance has been placed upon the cases of Nilmoni Chuckerbutti v. Bykant Nath Bera 17 C. 466

Sher Bahadur Sahu v. Mackenzie 7 C.W.N. 400 Masudan Singh v. Goodar Nath Pandey 1 C.L.J. 456 and Ajodhya Prosad Singh v. Ram

Golam Singh 4 Ind. Cas. 529 : 13 C.W.N. 661. On the other hand attention has been invited to the decision in Bhagtu Singh v. Raghu Nath Sahai

1 Ind. Cas. 571 : 13 C.W.N. 135 : 9 C.L.J. 15 where, it is said, a different view was taken. The question raised must be determined primarily on

a construction of the statutory provisions on the subject.

3. Sub-section (3) of Section 120 of the Bengal Tenancy Act, read with Sub-sections (1) and (2), lays down the tests to determine the question,

whether a particular land is the proprietor''s private land. According to Clause (a) of Sub-section (1), land which is proved to have been cultivated

as zerait by the proprietor himself with his own stock or by his own servants or by hired labour for twelve continuous years immediately before the

passing of the Bengal Tenancy Act is the proprietor''s private land. There is no evidence of this description in the case before us. According to

Clause (6) of Sub-section (1), cultivated land which is recognised by village usage as the proprietor''s zerait is also the proprietor''s private land.

There is no evidence of this description in the present case. Finally, according to subsection, (2) of Section 120, when a question arises whether

any land, other than land of the description mentioned in Clauses (a) and (6) of Sub-section (1), is zerait the presumption is that the land is not

zerait, but to determine the question regard shall be had to (a) local custom, (b) to the question whether the land was before the 2nd March 1883

specifically let as the proprietor''s private land, and (c) to any other evidence that may be produced. It will be observed that this sub-section refers

to evidence of three descriptions: first, local custom; secondly, letting of the land specifically as the proprietor''s private land before 2nd March

1883; and thirdly, any other evidence that may be produced. In the case before us, there is no evidence of local usage or of letting before the 2nd

March 1883; the only evidence of letting which has been produced is the kabuliyat of the 19th September 1902. The question is, whether regard

can be had to this evidence as included in the comprehensive description any other evidence that may be produced.'''' Upon this point there has

been some divergence of judicial opinion.

4. In the case of Nilmoni Chuckerbutti v. Bykant Nath Bera 17 C. 466 the view was adopted that the expression ''''any other evidence that may be

produced'''' means any other evidence tending to show the assertion of any title on the part of the proprietor and communicated to the tenant before

the 2nd March 1883. The particular evidence produced in that case was as entry made in a settlement record in 1885 and 1886, to the effect that

the disputed land was the proprietor''s private land. The Court held that this evidence was inadmissible, because it was evidence of an event which

had happened after the 2nd March 1883. This interpretation seems open to the criticism that it unduly restricts the generality of the expression any

other evidence that may be produced;"" but, as will presently appear, it is not necessary for our present purpose to consider whether this extreme

view gives effect to the true intention of the Legislature. The question was raised again in the case of Sher Bahadur Sahu v. Mackenzie 7 C.W.N.

400 where reliance was placed upon a statement made in a kabuliyat executed after the 2nd March 1883. The Court held that the evidence was

not admissible, not on the ground that it was not included in the expression any other evidence that may be produced,"" but for the reason that when

the Legislature expressly made evidence of letting before the 2nd March 1883 admissible in proof of the character of the land, they must have

intended to exclude evidence of letting after the 2nd March 1883. The Court held in substance that it would not be right to impute to the

Legislature the, intention that they specifically made mention of evidence of letting before the 2nd March 1883 and then included evidence of letting

after the 2nd March 1883 in the general expression ""any other evidence that may be produced,

5. Had this been the intention the sub-section might have been differently framed, and it might have been laid down that regard shall be had to

local custom and any other evidence that may be produced."" The view taken in the case of Sher Bahadur Sahu v. Mackenzie 7 C.W.N. 400 does

seem reasonable, and, if we adopt it, there is no room for controversy that the recital in the kabuliyat of the 19th September 1902 cannot be

treated as evidence of the alleged zerait character of the disputed lands. The same question was again mooted in the case of Masudan Singh v.

Goodar Nath Pandey 1 C.L.J. 456. One member of the Court did not commit himself finally to an opinion upon the matter, but expressed a doubt

whether the case of Nilmoni Chuckerbutti v. Bykant Nath Bera 17 C. 466 gave effect to the true intention of the Legislature. The other member of

the Court held that the evidence contained in an agreement executed after the 2nd March 1883 was not admissible in view of Section 178 of the

Bengal Tenancy Act, Clause (4) of Sub-section 3 whereof provides that nothing in any contract made between a landlord and a tenant after the

passing of the Act shall prevent a raiyat from acquiring, in accordance with the Act, an occupancy right in land. The view taken was that if the

recital in an agreement between the landlord and the tenant made after the passing of the Bengal Tenancy Act was admitted in evidence to prove

that the land was the proprietor''s private land, in which no occupancy right would be acquired by the tenant, the provisions of Clause (a) of Sub-

section (3) of Section 178 would be practically defeated. The matter came under consideration again in the case of Ajodhya Prosad Singh v. Ram

Golam Singh 4 Ind. Cas. 529 : 13 C.W.N. 661 where the view taken in Nilmoni Chuckerbutti v. Bykanti Nath Bera 17 C. 466 was practically

adopted, though for the purposes of that case the more restricted view taken in Sher Bahadur Sahu v. Mackenzie 7 C.W.N. 400 would have been

sufficient to support the conclusion of the Court. Finally, in the case of Bhagtu Singh v. Raghu Nath Sahu 1 Ind. Cas. 571 : 13 C.W.N. 135 : 9

C.L.J. 15 the earlier cases were distinguished, and it was held that evidence, which was relevant under the provisions of the Indian Evidence Act,

could be admitted quantum valebat, although it related to a transaction subsequent to the 2nd March 1883. Since the decision of these cases, the

Legislature have added Sub-section (2)(a) to Section 120. That sub-section is in these terms: ""Notwithstanding anything contained in any

agreement or compromise, or in any decree which is proved to his satisfaction to have been obtained by collusion or fraud, a Revenue Officer shall

not record any land as a proprietor''s private land, unless it is proved to be such by satisfactory evidence of the nature described in Sub-section (1)

or Sub-section (2)."" The intention of the Legislature, as indicated in the new sub-section, obviously is to exclude from Sub-section (2) evidence

contained in an agreement or compromise between the landlord and the tenant. This clearly confirms the view taken in the case of Sher Bahadur

Sahu v. Mackenzie 7 C.W.N. 400 and shows that the expression any other evidence that may be produced"" does not include an agreement or a

compromise between the landlord and the tenant. We hold, accordingly, that the recital in the Kabuliyat of the 19th September 1902 cannot rightly

be treated as evidence of the alleged zerait character of the disputed lands. We may add, however, that even if the view taken in Bhagtu Singh v.

Raghu Nath Sahai 1 Ind. Cas. 571 : 13 C.W.N. 135 : 9 C.L.J. 15 were adopted, we feel no doubt whatsoever that the recital by itself would not

justify the inference that the lands were zerait. We must further remember that the defendants have been recorded as settled raiyat. They start with

a presumption in their favour. We have also the important fact that the defendants were found to be settled raiyats in a proceeding for commutation

of rent u/s 40 of the Bengal Tenancy Act. We have finally the presumption mentioned in Sub-section (2) of Section 120, that the lands are not the

proprietor''s private lands. The burden lies very heavily upon the plaintiffs to establish their allegation of zerait, and is unquestionably not discharged

by the recital in the kabuliyat of the 19th September 1902, even if such recital were deemed admissible as evidence for this purpose. The inference

is irresistible that the plaintiffs have wholly failed to establish that the disputed lands are zerait.

6. There would have been a grave difficulty in the way of the success of the plaintiffs, even if they had established that the lands were zerait. Article

(1)(a) of Schedule III of the Bengal Tenancy Act provides that a suit to eject a non-occupancy raiyat on the ground of the expiration of the term of

his lease shall be brought within six months from the expiration of the term. This Article replaces Section 45 of the Bengal Tenancy Act which

originally found a place in Chapter VI. Section 116 excluded the operation of Section 45 in the case of a proprietor''s private lands, when such

lands were held under leases for a term of years or under leases from year to year. Section 45 laid down a two-fold condition, namely, first, that

six months before the expiry of the term a notice must be served upon the non-occupancy raiyat and secondly, that the suit for ejectment must be

instituted within six months after the expiry of the term. This provision was, by virtue of Section 116, inapplicable to zerait lands, when such lands

were held under leases for a term of years or under leases from year to year. Section 45 has now been repealed and has been replaced by Article

(1)(a) of Schedule III. There can be no question that the defendants, even if they had been tenants of zerait lands, would be non-occupancy raiyats

though by virtue of Section 116, the special provisions of Chapter VI might not have applied to them. But the operation of Article (1)(a) of

Schedule III is not excluded by Section 116 in the case of zerait lands. Consequently, if the lands were proved to be zerait, the plaintiffs would be

bound to institute this suit within six months from the 4th June 1909; but it was not commenced till the 16th September 1910. The suit is

consequently clearly barred by limitation.

7. The result is that this appeal is allowed and the decree of the Subordinate Judge discharged. The claim for ejectment is dismissed. As the plaint

contained a claim for the rent of the year 1316, we make a decree in favour of the plaintiffs for Rs. 600 in respect of the rent and cesses for that

year, without prejudice to the right of either party to prove the proper amount of rent, for subsequent years, in any suit that may be brought

hereafter. The, arrears decreed will carry interest at 12 1/2 per cent. per annum from the 4th June 1909 to the date of suit, and at 6 per cent. per

annum from date of suit to this date. The total amount thus determined will be set off against the costs allowed to the defendants. The defendants

will have full costs both here and in the Court below.