(1869) 07 CAL CK 0006

Calcutta High Court

Case No: Special Appeal No. 668 of 1869

Ramgobind Pal		APPELLANT
	Vs	
Radhanath Dhubi and Mahes Chandr Dhubi		RESPONDENT

Date of Decision: July 8, 1869

Judgement

Hobhouse, J.

In this case the plaintiff sued to obtain possession of a certain howla tenure, alleged to be situated in the talook of the zamindars, defendants, on the ground that they had been dispossessed of the said tenure by the two defendants who are now the special appellants before us. The said two defendants alleged that the lands in question were not howla lands at all, but were khas lands of the zamindar defendants which had been sold to them as such in the month of Falgun 1272. The issue between the parties was (and that issue has bean admitted on all sides to have been correct) whether the disputed howla, called Braja Mohan Pal''s, appertained to the talook in question, and whether the plaintiff had been in possession thereof, and had been dispossessed, as alleged by the defendants. On this issue the first Court found against the plaintiffs, and dismissed their suit: the lower appellate Court reversed that decision, and gave the plaintiffs a decree for possession.

2. There are three grounds taken in special appeal before us. The first is to the effect that the lower appellate Court has passed its judgment on evidence improperly admitted by it, under the supposition that it was entitled to admit it by the provisions of section 355 of Act VIII of 1859. The second ground is, that the lower appellate Court is wrong in law in considering any secondary evidence of the title set up by the plaintiffs, until the loss of the original patta, plaintiffs'' chief title-deed, had been accounted for to its satisfaction. The third ground is that the lower appellate Court has erred in not noticing a patta produced by a certain witness Durga Charan. This witness was, as we understand, a witness summoned by the defendants, and with reference to the evidence of all the witnesses for the defendants, the Court states that it cannot foe relied upon, and gives its reasons for making that

statement. If therefore the Court could not rely on the witness, it clearly could not rely on any patta which that witness was cited to prove. We think therefore the last objection taken on special appeal may at once be disposed of.

3. On the first objection, we understand the argument of the learned Advocate-General to result in this: viz., that in taking the evidence of two persona, Kali Prasad Sen and Bhairab Chandra Das, the lower appellate Court has not acted under any sanction given under the provision of section 355, but that it has, in reality of its own motion, supplemented certain facts of the original case, which the plaintiffs attempted to prove in the first Court and to show that this was an error in law, the learned Advocate-General relies on a case, Jagabandhu Deb v. Golak Chandra Haldar 10 W.R. 228.

4. In that case the Judges remarked: that the lower appellate Court had not given any reasons for summoning for the first time a certain witness, and that if the Court had any reasons at all they were nothing more than in effect this, viz., that the defendant had failed to give material evidence which it was in his power to give in the Court below, and that on the representation given by the Judge of the course taken by him, it amounted very nearly to saying that he, finding that he was unable upon the state of the evidence on the record to give a decision on the evidence, had therefore called for the additional evidence of the defendant himself for the purpose of giving him an opportunity of proving certain matters. In such a case the Judges in that decision might have thought that the evidence should not have been admitted, and therefore rejected it.

5. The grounds stated by the lower appellate Court in this case for admitting the evidence of the two persons mentioned are these. The case being called on for hearing on the 29th July, the Court with reference to the nature and circumstances of the case considered it "necessary for the proper decision of the case to take the depositions of the owner of the parent talook--the witness I have referred to." At the very first sight, therefore, the case seems to us materially to differ from that on which the learned Advocate-General relies. In that case no reasons were given at all, or, if there were any reasons given, they simply seem to express a determination on the part of the Court to prove for the party that which he had failed to prove for himself.

6. But here the case seems to us to be very different. In the first place the lower appellate Court has given its reasons for admitting the evidence in question, and those reasons seem to us to be almost word for word, such as those on which the law permits such evidence to be received. The terms of section 355, Act VIII of 1859, applying to this case are these: "If the appellate Court require any witnesses to be examined to enable it to pronounce a satisfactory judgment, or for any other substantial cause, the appellate Court may allow such necessary witnesses to be examined, whether such witnesses shall have been previously examined in the Court below or not, provided only that the Court records its reasons for the

admission of such evidence." Now it seems to us that the meaning of the Court was this, that it wished to make up its mind, on a point before it, and yet could not, in the words of the law, pronounce a satisfactory judgment on that point, without taking the evidence of certain necessary witnesses, i.e., as we read the law, witnesses "necessary to enable it to pronounce a satisfactory judgment." And obviously the witnesses selected were the very best that could have been selected for the purpose. They had not been examined on either side. It was therefore reasonable to suppose that they would give impartial evidence. They were persons who could give the best evidence either on the one side or the other. They were the zamindars of the talook, and would therefore know whether this howla existed in that talook: they were also the vendors to the special appellants, and therefore would know what it was that they had or had not sold to the appellants, and there was a further reason for considering that they were likely to be impartial witnesses, in the fact that they had no longer any interest to speak anything but the truth, for they had ceased to be the proprietors of the talook. There were therefore the best reasons for considering that they were necessary witnesses, and the terms of the law seem to us to entitle the Principal Rudder Ameen to call for any such witnesses in order to his pronouncing a satisfactory judgment. We are of opinion therefore that the first objection taken by the special appellant fails.

7. We have had more difficulty in coming to a decision on the second objection, but on the best consideration we can give to it we think this objection must also fail. We remark in the first place, as the learned counsel for the special respondent begs us to notice, that the plaintiff did not rely in his plaint on any one particular title deed, and it was not until the plaintiff himself had been examined that it came out at all that any title deed in the shape of a patta had ever been in existence. On this point the evidence of the plaintiff amounted to no more than this; that he had reason to believe that a patta that existed in the time of his grandfather, and that it had then been lost; and that at least he knew that it had not reached his father''s or his own custody, and he therefore could not produce it. Now of course this evidence does not prove the existence of the patta, but it is sworn evidence to the fact that if there ever was a patta it could not be produced, because it was not in the plaintiff''s custody; and it seems to us that when the plaintiff had sworn that he could not produce a particular paper because he had it not, and had never had access to it, the Court was entitled to believe him if it chose on that point; and it is difficult to know what evidence there could be after the expiration of 70 years of the existence of a document of that kind, unless there were collateral evidence on this point. There was, we think, legal evidence on the record by which the Court could find, as it did find, as a matter of fact, that the plaintiff had been in possession of the lands in dispute for a period, as Mr. Paul contends, as far back as 1246. It is very true that there are gaps in the dakhilas to which the plaintiff''s witnesses swore, but they are not wider gaps than one would have expected in such a case; and even in arriving at the 20 years'' presumption of title created under the provisions of section 4 of Act X

of 1859, our Courts have repeatedly held that the fact of the existence of such gaps in the case of such documents as dakhilas, would not destroy the effect of the dakhilas that remained and were produced. On the whole, we think that we must affirm the decision of the lower appellate Court and dismiss this special appeal with costs.