

(1924) 07 CAL CK 0005

Calcutta High Court

Case No: None

Sujjad Ahammad Chowdhuri and
Another

APPELLANT

Vs

Sachindranath Roy and Others

RESPONDENT

Date of Decision: July 15, 1924

Citation: AIR 1925 Cal 1052 : 85 Ind. Cas. 1012

Judgement

1. This appeal is by the plaintiffs against the decree of the District Judge of Murshidabad affirming the decree of the Munsif of Jangipur dismissing the plaintiffs' suit for recovery of possession, or in the alternative for assessment of rent. The facts are that the plaintiffs and the defendants are landlords of contiguous mouzahs. There was a dispute between them with regard to the boundary between the two mouzahs. There was a purvey under the Bengal Survey Act, 1875, in 1914, which fixed the boundary line between the two mouzahs. The tank which is the subject-matter of the present suit was found to be within mouzah, Lal-pore belonging to the plaintiffs. In the Record-of-Rights which was published in 1916, this tank was recorded as belonging to the plaintiffs' Mouzah, Lalpore, but in the possession of the defendants who held it without payment of rent; but it was subject to assessment or rent. Thereafter the plaintiffs brought the present suit for correction of the Record-of-Rights and for khas possession of the tank, as belonging to them, being situated within their mouzah, and in the alternative for assessment of rent. Both the Courts below have found that the plaintiffs' case was barred by the defendants' 12 years adverse possession and dismissed the plaintiffs' suit.

2. In appeal it is argued that u/s 41 of the Bengal Survey Act the plaintiffs must be presumed to be in possession in 1914 and hence the suit is wrongly held to be barred on the ground that the defendants were in adverse possession for more than 12 years before the institution of the suit. There is considerable force in this contention. u/s 41 of the Bengal Survey Act, 1875, the Collector shall determine the boundaries according to actual possession and cause it to be secured by boundary marks. If no further steps are taken challenging the order of the Collector, it shall

under that section be regarded as an order of a civil Court declaring the parties to be in possession of the land in accordance with the boundary as determined by the Collector. In this case no appeal was preferred under Sections 59 and 60 of the Bengal Survey Act, and we must take it that the boundary fixed by the Collector u/s 41, placing the tank within the plaintiffs' mouzah, was final so far as the question of possession is concerned. This view of the effect of the Bengal Survey Act has been held in *Kala Charan Tea Co. v. Sukul Singh* (1886) 13 Cal. 280. The learned Judges there observed that "the duty of the Collector under the Act is to determine in a proper proceeding the fact of possession; he is to lay down the boundary line according to actual possession." They further observed that "if there had been the most regular proceeding and the most formal decision on the question of boundary in a boundary dispute, though that would have been conclusive as to possession, u/s 62 it would have been no bar to a suit based upon title." That case, as well as the other cases, that followed it, took the view that though the question as to who were in actual possession at the date of the survey was not open to be agitated in the civil Court, the question of title remained open for determination by the civil Court. In the case of *William Graham v. Phanindra Nath Mitter* (1915) 19 C.W.N. 1038 it is laid down that an order u/s 41 of the Bengal Survey Act does not bind the civil Court upon the question of title and does not preclude it from finding that during a period anterior to that order the party against whom the order was passed was in possession. A similar view has been expressed in the case of *Babu Kasturi Singh v. Raj Kumar Babu* (1903) 8 C.W.N. 876. It being thus settled law that the question of title may be determined by a civil Court and that Section 41 of the Act does not preclude it from finding as to who was in possession of the disputed land anterior to the order passed by the survey authorities, it is open to the Court below to find title in the defendants on the basis of their possession prior to 1914. No doubt the case was not tried on that basis. The issue on which the parties went to trial was whether the plaintiffs' suit was barred by limitation. The findings arrived at by the first Court are that possession of defendants for above 30 years was proved, and that regard being had to actual evidence and the circumstances and probabilities of the case, the defendants have been freely and openly exercising acts of possession in respect of the tank and its banks to the exclusion of others for a period for more than 12 years. If the defendants were the plaintiffs in this suit and had brought the suit for a declaration of their title on the basis of adverse possession for more than 12 years before the survey in 1914, according to the authorities that we have cited, that would have been maintainable. Here, the position is reversed and the plaintiffs have brought the present suit for recovery of possession on declaration of their title. We think that the defendants are entitled to take up the same position in defence which they could have successfully maintained had they been plaintiffs. There is no doubt a legitimate grievance by the plaintiffs that the case was not tried in the Courts below on that footing, namely, whether the defendants acquired a title by adverse possession prior to 1914. The defendants' case is that they have been in possession since 1861 under a certain exchange between their predecessors and one Mr.

Andrew who was the then putnidar of Lalpore. Both the Courts have believed the story and found that the defendants have been in possession since 1861, the date of the exchange or hebanama. We are asked to remand the case to the Court below to determine the question of defendants' title by adverse possession before 1914. We think that this will serve no useful purpose on the findings as they stand. In our judgment the Courts below have come to a correct decision though upon a ground which is erroneous. In this view of the case this appeal stands dismissed with costs.