(1918) 06 CAL CK 0010

Calcutta High Court

Case No: Appeals From Original Decrees Nos. 409 of 1911 and 114 of 1912

Bipra Das Pal Choudhury and Others		APPELLANT
	Vs	
Kedar Nath Rai Kedar Nath Rai Vs Bipra Das Pal Choudhury and Others		RESPONDENT

Date of Decision: June 21, 1918

Final Decision: Dismissed

Judgement

N.R. Chatterjea, J.

These two appeals arise out of a suit for possession of 289 bighas and 7 cottas of land situated in mouza Phulia appertaining to Taraf Santipur. It appears that Mouza Phulia and 37 other mouzas constituting Taraf Santipur originally belonged to the Moharaja of Nadia. Before the permanent settlement the Raja''s successor declined to take settlement of the Taraf and it was, accordingly, let out in temporary ijara by the Government to different persons from time to time. Moharaja Tej Chandra Bahadur of Burdwan purchased the right of the last ijaradar. Ultimately it was permanently settled with the Moharaja about the year 1800, and the latter granted a putni of the Taraf to one Eamesh Chandra Mukherjee in 1807. The zemindary interest passed to certain persons who may be conveniently referred to as the Tagores. The zemindar in execution of three decrees for arrears of rent against the putnidar put up the putni to sale and it was purchased by the Plaintiff on the 2nd of October 1899 and the sale was confirmed on the 28th November 1900. On the 10th September 1901 the Plaintiff applied for settlement and record-of-rights under Chap X of the Bengal Tenancy Act. In these proceedings the lands were entered as "rent-free." Objections were raised by the Plaintiff to the entry : but they were decided against him by the Settlement Officer on the 25th May 1909. On the 27th June 1909 the Plaintiff took steps for service of notice under sec. 167 of the Bengal Tenancy Act for annulment of the incumbrance of the Defendants. On the 21st July 1909 the present suit was brought on the allegation that the land formed part of the

mal lands of the putni which was granted in 1807.

2. The defence was that the lands were revenue free lakhiraj, that the Defendant''s predecessor had purchased them from the representatives of one Mr. Broderick, that they and their predecessors had been in possession of the lands without payment of any rent from before the creation of the putni and even from before the permanent settlement and that the suit was barred by limitation. Several other pleas were taken which will be referred to later.

3. The Defendant No. 1 claimed the lands as lahhirajdar and Defendants Nos. 2 to 5 claimed as mourasidars under the Defendant No. 1. The Court below held that no notice under sec. 167 of the Bengal Tenancy Act had been served upon Defendants Nos. 2 to 5 and, accordingly, dismissed the suit as against them. As against the Defendant No. 1, it held that notice had been served, that the suit was not barred by limitation, that the Defendant had failed to prove that the lands were held by them from before 1790 and accordingly decreed the suit against her. The Defendant No. 1 has preferred Appeal No. 409 of 1911 and the Plaintiff has preferred Appeal No. 114 of 1912.

4. The grounds taken on behalf of the Defendant-Appellant are, first, that the sale of the putni having taken place in execution of three rent decrees was not a sale under which the Plaintiff could annul incumbrances.

5. Secondly, that the notice which was served upon the Defendants not having been signed by the Collector, was not a legal notice as contemplated by sec. 167 of the Bengal Tenancy Act.

6. Thirdly, that the finding of the Subordinate Judge that the Plaintiff became aware of the incumbrance of the Defendant with in one year of the institution of the suit is erroneous.

7. Fourthly, that the Court below has wrongly placed the onus upon the Defendant of proving (a) that the lands in suit were held as valid lakhiraj from before 1790 and (b) that the possession of the Defendants commenced from before the creation of the putni in 1870, and, lastly, that the question of limitation has been wrongly decided.

8. In order to show that the lands in dispute formed part of the mal lands of the estate, the Plaintiff produced various documents for showing that there were no lakhiraj lands (except a few bighas) in the mouza. The quinquennial register mentions the name of Jaga Mohan Boy as the proprietor of Taraf Santipur. That register, which was for a period of five years commencing from 1202 (1795), shows that the area of Mouza Phulia was 1,739 bighas, the jama assessed being Rs. 246. Next, there is a dowl of ijara, dated 20th April 1799, in the name of Moharaja Tej Chandra of Burdwan in respect of Taraf Santipur for one year, which, however, does not give the area. The evidence does not show exactly when the permanent

settlement was made, but it appears that it was after 1206 and before 1212. The Plaintiff''s case is that Taraf Santipur was permanently settled with Moharaja Tej Chandra in 1207 (1800). There is no evidence to show the area which was actually settled at the time of the permanent settlement, as the papers relating to the permanent settlement have not been produced. The Plaintiff however has produced certain other papers to show the area of the mal lands of the mouza. The Mahal war register gives the area of the mal land of the mouza as 577 acres odd (about 1,748 bighas) and the Land Registration Act registers show that the area of the mouza was 589 acres (mal lands 577 acres and resumed lakhiraj lends 11 acres). The revenue survey map gives the total area as 655 acres which includes the 577 acres mal and the resumed and released lakhiraj lands. These documents would go to show the area of mal lands to be 577 acres, i.e., about 1,739 bighas. In the recent settlement proceedings the total area of the mouza is shown as 1,726 bighas, out of which 655 bighas are recorded as mal, and the rest as lakhiraj. The learned Subordinate Judge was of opinion that the area as given in the settlement proceedings cannot be correct, and the lands claimed as lakhiraj in those proceedings " must be due to encroachment, as otherwise the quantities recorded as mal in the registers cannot be explained."

9. Some other registers were produced on behalf of the Plaintiff. The pargana register kept under Reg. VIII of 1800 does not mention any lakhiraj land in the mouza, and the Kanoongoe register shows only 28 bighas as lakhiraj in the names of certain persons under whom the Defendant does not claim. The thak map shows only three acres odd as lakhiraj, and the thak statement does not mention any lakhiraj lands in the mouza. The learned Subordinate Judge held upon these documents that the Plaintiff had given sufficient prima facie evidence to show that the disputed 289 bighas cannot be lakhiraj lands of the mouza, and that the onus had been shifted on the Defendants to show that the lakhiraj existed before December 1790. He has found from certain old documents that 85 bighas were purchased as lakhiraj by the Brodericks (the predecessors of the Defendants) from time to time, but with respect to 65 bighas (out of the 85 bighas) there was no old document to show that they were lakhiraj before 1790. As regards the remaining 20 bighas there is a taidad of a date prior to 1790, but there is nothing to connect the names of the persons mentioned in it with the persons who executed the conveyance (Ex. Q5) in favour of the Brodericks. There are no old documents with respect to the remaining lands, and the Court below accordingly held that the Defendant had failed to show that any of the lands in suit were held in lakhiraj right from before the 1st December 1790, and that therefore the lands in suit are mal lands.

10. As already stated, there is no direct evidence to show the area of the lands which was permanently settled. But the quinquennial register shows the area of the mouza to be 1,739 bighas, which is nearly the same as the area which appears from the recent settlement proceedings. The quinquennial register was for a period

immediately preceding the permanent settlement; ordinarily therefore and in the absence of anything to show that there was any change between the date of the register and the permanent settlement, the Court would be justified in holding that that was the area which was permanently settled with the zemindar in 1800, and having regard to the evidence, the finding of the Court below that the lands were assessed as revenue-paying lands at the time of the permanent settlement may be accepted.

11. The putni was granted by the zemindar in 1807. The putni kabuliyat shows that all the rights (excepting certain rights with which we are not concerned in this case) which the zemindar had in Taraf Santipur were settled in putni with the putnidar. It is contended, however, on behalf of the Appellant that the Plaintiff must not only show that these lands were included in the area which was permanently settled with the zemindar, but also that he was in possession thereof at the date of the putni grant, and that the putnidar lost possession after the commencement of the putni, in other words, that the incumbrance of the Defendant came into existence after the date of the putni.

12. The Respondent, on the other hand, contends that if the lands were included in the permanent settlement, it is for the Defendants to show that the possession of their predecessors in title commenced before the date of the putni, and that the zemindar lost possession between the date of the permanent settlement and the date of the putni grant. The documents produced by the Plaintiff mentioned above with the exception of the extract from the quinquennial register and the ijara dowls are all subsequent to the date of the putni grant.

13. The Defendant''s predecessor, Swarnamoyi, purchased the lands from the Brodericks in 1274 (1868), and the oral evidence adduced on behalf of the Defendant shows possession for over 60 years; one of the witnesses, Chandra Kant Banerjee (83 years old), speaks to the possession of the Saheb from before the thak survey and Swarnamoyi''s possession for the last 40 or 45 years. The Kanoongoe register and the pargana register are of the years 1825 and 1843 respectively, but in the case of Biprodas Pal Chowdhury v. Monoroma Debi 22 C.W.N. 396(1917) the probative value of these registers was considered and it was held that they were of no evidentiary value. However that may be, they do not prove actual possession of the disputed lands by the putnidar. The registers under the Land Registration Act would not mention lakhiraj lands which were not valid revenue-free lands, and they and the thak map date from periods subsequent to the date from which the Defendant has proved the possession of his predecessors in title, and all the documents with the exception of quinquennial register and the dowls referred to above are subsequent to the date of the putni grant. These documents therefore do not show whether these lands were in the possession of the zemindar at the date of the creation of the putni.

14. We have been referred to three decisions of this Court in which some of the questions raised in this case were considered. They arose out of suits for possession of lands situated in the very same putni taluk, viz., Taraf Santipur, which were claimed by various persons as lakhiraj. In two of them Bipro Das Pal Chowdhury was the Plaintiff, and in the third he was the Defendant. All the cases were decided against Biprodas Pal Chowdhury. In the first case, Kalikananda Mookerjee v. Biprodas Pal Chowdhury 19 C.W.N. 18 (1914), it was laid down that it was for the purchaser of the putni to show that the possession of the Defendants commenced after the creation of the putni, or that the proprietor of the estate was in possession at the time when the putni was granted; and that unless he could show that the interest acquired by the Defendant could not be deemed to be an incumbrance which he could annul. It was further held that the doctrine that possession follows title has no application to a case like the present, where the Plaintiff has to establish possession at a particular point of time, and that the mere production of the kabuliyat by which the zemindar purported to let out in putni the whole estate (though an ancient document) is not evidence that the zemindar was in possession of the entire land of the estate unless there was an assertion in the kabuliyat that the grantor of the putni at the time was in possession of every parcel of land comprised within the boundaries of the putni, or an allegation in the document that the grantee of the putni obtained actual possession of every piece of land within the tenure granted to him. In the second case (Second Appeal No. 2700 of 1915 and analogous cases decided by Fletcher and Newbould, JJ., on the 29th May 1917, unreported) in which the executors of Biprodas Pal Chowdhury were the Appellants, the learned Judges held that it was clearly covered by the decision in Kalikananda Mookerjee v. Biprodas Pal Chowdhury (2) and followed the principles laid down in that case. In the third case, Biprodas Pal Chowdhury v. Monoroma Debi 22 C.W.N. 896 118171, the probative value of some of the registers produced in this case was considered as stated above.

15. The cases referred to above, however, related to lands in mouzas other than Phulia, and the evidence is not the same in all the cases (in particular it may be noted that the quinquennial register was not produced in those cases), though the right of the Plaintiff and some of the questions of law raised are common to all the cases.

16. The case of Kalikananda Mookerjee v. Biprodas Pal Chowdhury 10 C.W.N. 19 (1914) was sought to be distinguished on the ground that in that case there was evidence to show that the Defendants had been in possession before the date of putni; but the decision was based not upon that ground, but upon the ground that it was for the purchaser of the putni to show that the possession of the Defendants commenced after the creation of the putni and other grounds mentioned above. The correctness of some of the propositions laid down in that case has also been challenged, but it is unnecessary to consider in the present case the correctness of the principles laid down in that case as applicable to all cases of this description

generally. In the present case the lands were entered in the record-of-rights as " rent-free," and lands though they are not held revenue-free from before the permanent settlement, but are held without payment of rent from a period subsequent to the permanent settlement and before the creation of the putni, would come under that description. Under sec. 103B of the Bengal Tenancy Act the entry in the record-of-rights shall be presumed to be correct. The onus is therefore upon the Plaintiff to prove by evidence that the entry is incorrect. The plaintiff himself alleged in his plaint that during the period " the Government was realising revenue by khas ijara settlement, the ijaradars, in collusion with the view of reducing the revenue, caused the creation of sanads of imaginary revenue-free rights " though he added that " at the time of the inquiry by the Government, the grantees of the taidads had no possession at all in the lands mentioned in them and they were not registered." Although therefore there is no admission that such persons had any possession of the lands, it shows that there had been assertions of hostile title even at that time. It is further alleged in the plaint that " until the Thak and Revenue Surveys of 1852 the quantity of the wall lands was not at all ascertained," that they were ascertained at the time of those surveys, and that the Defendants were not in possession of the lands in suit at that time. It is also alleged that Moharaja Tej Chandra Bahadur had khas possession of Taraf Satipur for a short time only. The Defendant has produced copies of the quinquennial Terij (Exs. J1 and J2) of the land and jama of Mouza Phulia of the years 1207 and 1212. Ex. J2 was of the year 1207, and it was a return submitted by the Talukdar Moharaja Tej Chandra and while it shows that the total jama of the mouza was Rs. 298-11-2, the area in possession was only 1,157 bighas. Ex. J1 was for the year 1212. This also showed the area to be 1,157 bighas and jama as Rs. 298-11-2, and was submitted by Ramnarain Chatter, jee as " ijaradar " (under) " zemindary of Moharaja Tej Chandra Bahadur." The learned Subordinate Judge observes " the quinquennial register (produced by the Plaintiff) was kept under Reg. 48 of 1793, while the Terij, Exs. J1 and J2, were only returns to be submitted under the Regulation; that it is not impossible, though it is difficult, to be positive about it at this distance of time, that the returns embodied in the Terij might have been submitted with some motive; with regard to Ex. 41, which is an extract from an authorised register, no such suspicion can arise, and as such, Ex. 41 appears to be more reliable than the Terij, Exs. J1 and J2." It is also pointed out on behalf of the Respondent in this Court that under sec. 12 of Reg. VIII of 1800, the quinquennial register was not to show the area of mouzas, so that in 1212 (1805), when Ex. J was filed, it was no longer necessary to show the area. But no objection was taken to the admissibility of the documents, Exs. J1 and J2, and the Court below considered their comparative value. Although it might have been unnecessary for insertion in the register, they appear to have been submitted to, and accepted by, the authorities, and in any case the statements made more than a century ago by persons, who are dead, are admissible in evidence. If Exs. J1 and J2 are not returns, but entries in registers, they would be evidence as being entries in a public record made by a public servant in the discharge of his official duty. (Sec. 35 of the Evidence

Act, first portion). The area (1,157 bighas) given in Ex. J1 is the same as that given in Ex. J2, which was filed in 1207 (1800), i.e., in the very year in which the permanent settlement of the Taraf is alleged by the Plaintiff to have been concluded with the Moharaja; and this return (Ex. J2) was submitted by the Moharaja and not by an ijaradar. The Moharaja is described in Ex. J2 as " talukdar " which indicates that it was before the permanent settlement. It appears therefore that the same area (1,157 bighas) which was shown as the area of the mouza by the Moharaja in 1207 continued to be in the possession of the Moharaja in 1212, when Ex. J2 was filed by his ijaradar after the permanent settlement. The learned Subordinate Judge was of opinion that the quinquennial register, Ex. 41, is more reliable than the returns, Exs. J1 and J2; but they refer to two different periods; the register Ex. 41 was for a period of five years commencing from 1202 (1795)) which preceded the permanent settlement of the Taraf, whereas the Terij, Exs. J1 and J2, were for the years 1207 (1800) and 1202 (1805) respectively, and the latter, Ex. J1, was for a period subsequent to the permanent settlement. Ex. J1 might possibly have been submitted by the ijaradar in order to help persons who were in possession under invalid lakhiraj right. However that may be, the fact remains that in 1805 the return submitted by the ijaradar under the Moharaja showed only 1,157 bighas as in his possession and there is no suggestion in the evidence that there was any other ijaradar. This was two years before the putni was created, and is some evidence to show that a large quantity of land in the mouza was in the possession of persons other than the zemindar or the ijaradar under him.

17. Having regard to the fact that under sec. 163B of the Bengal Tenancy Act the onus is upon the Plaintiff to prove that the entry in the record-of-rights is incorrect, to the facts admitted in the plaint, viz., that " imaginary " lakhiraj rights were set up even before the permanent settlement, that Moharaja Tej Chandra Bahadur was in khas possession only for a short period before granting the putni, that until the Thak and Survey of 1852 the quantity of mal lands had not been at all ascertained; and also to the facts that there is no evidence to show that any rent had ever been realised in respect of these lands, that the return, Ex. J1, showed only a small quantity of land in the possession of the Moharaja''s ijaradar in 1212 (1805) and that the Defendant and his predecessor in title have been in possession for a very long period without payment of rent, we think it was incumbent upon the Plaintiff to show that the zemindar was in possession of the lands in dispute at the date of the creation of the putni; and that the incumbrance (the adverse possession) of the Defendant came into existence after the date of the putni. This the Plaintiff has failed to show, because the quinquennial register is of a period prior to the permanent settlement, and there is no evidence going back to 1807 when the putni was granted.

18. But even assuming that the zemindar was in possession of the lands in dispute at the date of the grant of the putni, and that the incumbrance of the Defendant came into existence after the grant of the putni, the Plaintiff cannot succeed unless

the incumbrance of the Defendant has been Annulled within one year from the date of the sale, or the date on which he first had notice of the incumbrance as prescribed by sec. 167 of the Bengal Tenancy Act. The sale at which the Plaintiff purchased the putni became final on the 28th November 1900. The notice under sec. 167 was served upon the Defendant No. 1 on the 27th June 1909; the Plaintiff therefore must show that he had first had notice of the incumbrance within one year prior to the 27th June 1909. The learned Subordinate Judge observes :-- " There is no direct evidence adduced on the Plaintiff''s side, but the circumstances proved would go to show that Plaintiff could have no knowledge of the alleged lakhiraj claim before the Defendant No. 1 set up that claim during the attestation proceedings. There is no evidence on the Defendant''s side also to show that at any time before the attestation proceedings, the Plaintiff had any occasion to be apprised that the lands were claimed by Defendant No. 1 as lakhiraj. I accordingly hold that the suit is not barred by one year''s limitation as regards Defendant No. 1, the notice having been served within one year from September 1908."

19. It appears however from the evidence of Plaintiff''s own witness, Mangal Sardar, who is the Plaintiff''s halsana for 11 years, that when the Plaintiff attempted to measure the lands of Mouza Phulia in 1307 (1900) the Defendants stopped the measurement. This witness was formerly in the service of Pal Choudhuries of Baira (the co-sharers of the Defendants Nos. & to 5) and he speaks to the possession of the said Defendants for 40 years, and of the Broderick Sahebs prior to that period. In the plaint itself it is stated that on the Plaintiff attempting to measure amicably those mouzas and by appointing an Amin to determine the areas of lands in the possession of tenants and different persons, and to measure the same for the purpose of ascertaining other particulars, the said durputnidar, the tenants, and other persons conspired and put obstacles to the measurement. So the Plaintiff could not at all ascertain the mal lands and could not get possession of the lands in claim." This attempt to measure the lands as stilted by the Plaintiff''s witness Mangal Sardar took place immediately after the Plaintiff''s purchase, i.e., in the year 1900. No steps were taken for the service of the notice under sec. 167 until 1909, although for about nine years after the Plaintiff''s purchase he had been kept out of the lands. The Plaintiff therefore undoubtedly had notice of the possession of the Defendants. It is contended on behalf of the Plaintiff that possession for a period less than 12 years is not an incumbrance. But as pointed out in Kalikananda Mookerjee v. Biprodas Pal Chowdhury 19 C.W.N. 18 (1914) "the slightest enquiry such as a prudent owner would in ordinary course have made, would have ''disclosed that the occupants of the land claimed to hold them without payment of rent to the proprietor or his representatives." The Plaintiff himself alleges in the plaint that imaginary revenue-free rights had been set up in collusion with ijaradars from before the permanent settlement. He admits that about nine years before the suit he had been prevented from measuring the lands. He has not examined himself to show when he became aware of the incumbrance. Having regard to all the

circumstances it is impossible to hold that the Plaintiff became aware of the incumbrance of the Defendants for the first time within one year before the 27th June 1909. We are accordingly of opinion that the suit is barred by reason of the fact that the incumbrance was not annulled within the time prescribed by sec. 167 of the Bengal Tenancy Act. It is unnecessary therefore to consider the questions raised in Appeal No. 114 of 1912, viz., whether the rights of Defendants Nos. 2 to 5 is an incumbrance, whether any notice is required to be served upon these Defendants and was, as a matter of fact, served upon them.

20. In the view we have taken, it is also unnecessary to consider the other contentions raised in the Defendant''s appeal. The result is that Appeal No. 409 of 1911 is allowed and Appeal No. 114 of 1912 is dismissed, and the suit dismissed with costs. In Appeal No. 409, the Appellant will be entitled to half the costs of this Court including the costs of the supplementary paper-book which will be taxed.

Greaves, J.

I agree