(1869) 03 CAL CK 0013

Calcutta High Court

Case No: None

Devaji Gayaji and Others		APPELLANT
	Vs	
Godabhai Godbhai and Another		RESPONDENT

Date of Decision: March 1, 1869

Judgement

1. Their Lordships having had very full opportunity of considering the facts in this case, and the arguments which have been addressed to them, are now prepared to dispose of it. The matter has been conveniently divided into three stages. The first litigation is that which commenced in the year 1836 with a suit by the present appellants, before the Assistant Collector. That appears to have been a suit instituted by them for the recovery of the villages in question. On that occasion, it appears that the defendants did not enter into any evidence, and, accordingly, upon the evidence which then existed, which was entirely on one side, in August 1838, a judgment was given by the Assistant Collector in favour of the present appellants.

2. That judgment was appealed against to the District Judge, who remanded the case for re-trial before the Principal Sudder Ameen. The trial proceeded, and, in the course of this, which was the first litigation in which the respondents entered into any evidence, the bond of the 24th February 1792 was put forward by the respondents in support of their case. By that bond, after mortgaging the share in the village for the sum of money which is there mentioned, it is stipulated that the money shall be paid with interest; and if the mortgagors do not pay it with interest within ten years, "the said villages shall become "aghat,"--an absolute transfer in your favour." This bond was filed and deposited in Court on the 23rd January 1841, and it has ever since remained there. With reference to the argument as to the evidence in support of this bond, and particularly with respect to the custody of the bond, it is, in their Lordships" opinion, sufficient to state that the bond was produced in the usual manner by the persons who claimed title under the provisions of it, and who therefore were entitled to the possession of it; so that the bond must be held to have come from the proper custody. On the 14th July 1841 evidence was given in support of that bond. The witness, No. 11, states that" the bond was written

"out by me. I do not remember by whose hands the signatures were made." He says, "I do not know whether I made them or caused to make them." The names of the persons who made the signatures are written in the said "signatures. I do not know who attested the writing."

3. That suit proceeded until the 14th December 1841, when it was dismissed on the application of the plaintiffs, and on that occasion the razinama, upon which so much discussion has since arisen, was recorded as the foundation of that dismissal. Whether the practice of the Indian Courts be exactly in accordance with the practice of our own Courts, by which a plaintiff may, up to a certain stage, dismiss his own suit upon obtaining an order for its dismissal with costs, it is unnecessary to inquire; because we think it is quite sufficient to say that, on the face of these proceedings, it is apparent that the razinama was entered upon the record as the ground for the withdrawal of the suit. At the same time, it is equally clear that it was stated expressly upon the record itself that the defendants'' vakil represented that they were not aware of the razinama, but, as the plaintiffs'' vakil admitted the razinama, the Court removed the suit from the file, and ordered that the plaintiffs should bear all the costs; in other words, the Court says the defendants do not in the least degree admit any of the statements contained in the razinama, for they state they were not at all aware of the razinama; but as the plaintiff admits that he desires to withdraw his suit, and to pay the costs, with that precautionary recital in favour of the defendants, the justice of the case was obviously met by allowing the plaintiffs to withdraw their suit, and ordering them to pay the costs of the suit thus withdrawn. But, at the same time, with reference to the questions of fact with which their Lordships have now to deal, it is very material to see what were the terms which, by this razinama, were alleged to have been entered into and agreed to by the parties. The razinama states, "the said case is pending in this Court, but we plaintiffs and defendants appointed arbitrators in regard to this case, and got the case decided by the arbitrators as follows: that the defendants should make over to the plaintiffs possession of the two villages of Waodi and Tugdi, in Pergunna Gogo; that the plaintiffs should pay to the defendants Rs. 7,150 of sicca currency; that until the payment of the said money, the defendants do enjoy, in lieu of interest, half of the income of the villages, after deducting the assessment, and the plaintiffs do enjoy the other half, and that the defendants being the descendants of Devaji Sutaji their shares in the villages be upheld." Therefore, that is in plain terms a statement of an agreement of preference to arbitration and a subsequent award, and that under that award the plaintiffs were to be put in possession of the whole; consequently, that the plaintiffs being in possession were to bear the burdens incident to that position; that is, they were to pay the assessment, and that then the defendants, in lieu of interest, should enjoy half of the income of the villages after deducting the assessment. It is material also to observe that the evidence in the case certainly does not come up to anything like the performance during any period of time of that agreement or award, so stated in the razinama; but by that razinama,

and by the consequent dismissal of the suit, the first litigation is put an end to.

4. This brings us to the second litigation, which commenced in 1850; and, although we have not the claim which was then filed, the substance of it appears from the judgment, and from that it appears that the second suit, the suit of 1850, which was instituted by the then plaintiffs, was a suit mainly relying upon this alleged award. The defendants appeared to that suit, and again set up as a defence the bond of 1792. The suit having been heard by the Moonsiff, he, by his judgment, considered that the plaintiffs'' case, so far as it depended on the submission and the award, failed. He enters into a long statement, into the details of which it is not necessary now to go, showing the manner in which the submission to the arbitration had been signed, so as not to bind the defendants in that suit, and also into the question as to how the alleged award was signed, ending with the conclusion that those documents were not proved. He says, under the above circumstances the Court finds the writing sued on is not properly proved; and, therefore, the Court throws out "the claim of the plaintiff with costs." That suit was, therefore, so dismissed by the Moonsiff on the 23rd March 1852.

5. From that decision and dismissal there was an appeal to the District Judge, and his decision was given on the 27th March 1856. He says, "The plaintiffs'' claim is to recover half of the said villages under the award of the arbitrators, but they have not proved their claim. The Court therefore orders that the decree of the Moonsiff of Gogo, dated 23rd March 1852, be affirmed, and that this decree be no bar to the plaintiffs'' filing a suit to establish their right of inheritance, if they have any." And then the costs are thrown on the appellants. That decree terminates the second litigation; and it is only material to observe, that from that decision of the Moonsiff, so affirmed by the decision, to which I have just referred, there has been no appeal.

6. The present litigation, then, commenced by a plaint in the Court of the Moonsiff, filed on the 16th June 1859. It is material to observe that that plaint prefers a claim on behalf of the present appellants to be let into possession of the whole of the two villages. After stating the proceedings in the former suit, they state, "That the half of the said two villages was in our occupation, possession and enjoyment up to 1852-1853, as above stated; but after the passing of the said decree by the Moonsiff of Gogo, the defendants forcibly took the said half-share into their possession. The other half-share has also been forcibly retained by them, although the debt due to them has been liquidated. We therefore pray that the whole of the said two villages of Waodi and Tugdi, together with the lands, trees, etc., may be awarded into our possession." That suit proceeded; and in that suit the defendants again set up, as a defence, the bond of 1792. The time for producing evidence was frequently enlarged; but on the 25th February 1860 an order was made that the cause should be brought on the 10th March 1860. On that day the hearing of the cause was again postponed; and on the 16th April 1860, an application was made on the part of the appellants for leave to adduce evidence, the principal object of such evidence being

to show that the bond of 1792 was a forgery. On the 19th April 1860, that application was formally refused by the Judge, upon the ground that the parties had already had quite sufficient time for entering into evidence, and that it was then too late to ask the Court to allow further evidence to be gone into. He says,--"The application for witnesses and papers now made ought to have been made previously, but it has not been done so. Now at this stage, that of giving judgment, this application cannot be admitted. It is therefore rejected, and "recorded in the case." It is material to observe upon that rejection, because, in the course of the argument before their Lordships this application of the 16th April 1860 has been repeatedly referred to as being a pending application, whereas it appears that there was a formal judgment refusing that application on the 19th April 1860.

7. Under these circumstances the matter came on to be heard before the Moonsiff, and he made his decree on the 19th April 1860, by which, upon the evidence then before him, he dismissed the claim of the appellants with costs. That decision was appealed against, and the grounds of appeal do not mention the rejection of any evidence nor the improper dismissal of the application of the 16th April 1850.

8. The matter came on to be heard by the District Judge, on the 10th December 1861, and the decision of the Moonsiff was affirmed, and the appeal dismissed by the District Judge, on the ground that the matter was res judicata, and accordingly he ordered the appellants to pay the costs of that appeal.

9. From that decision there was an appeal to the High Court. The grounds of that appeal are set forth, and it appears that in neither of those grounds is there contained anything distinctly referring to the rejection of the evidence, or the dismissal of the application of the 16th April 1860; but, the matter coming on to be heard before the High Court on the 5th October 1868, that Court reversed the decision of the Judge, considering that he was in error in treating the matter as res judicata, and, accordingly, directed it to be submitted to a new trial. That date, the 5th October 1863, it is very material to observe, because it is obvious that, as from that date, it was perfectly competent to either of the parties to make any application with respect to the introduction of fresh evidence, or to the adding to the evidence which had been given in the former suits, or as to producing the depositions of the witnesses which had been taken in either of the former suits. Accordingly, we find that on the 4th April 1864, an application was made by the respondents to be allowed to file a copy of the deposition of that particular witness to whom we have already alluded, viz., the witness who stated that he had written the bond in question. That application states that the witness appears to have been dead. That is a statement which does not appear to have been in the least degree disputed, and, in the judgment of their Lordships, there is no reason to suppose that the Court acted at all erroneously in allowing that deposition to be filed; but what is more material to the present inquiry is, that although there was this application on the part of respondent on the 4th April 1864, there was no application whatever by the

plaintiffs for the production of any of the evidence mentioned in their petition of the 16th April 1860, nor any complaint made to the Judge as to the evidence having been shut out. Accordingly, the District Judge reheard the case, and, on the 4th April 1864, he confirmed the Moonsiff''s decision, having arrived at the conclusion, first, that the bond in question was a true deed, and, secondly, that its validity was confirmed by the fact of long undisturbed possession in consistency with the terms of that deed. Thus, upon those two questions of fact, viz., first, the validity of the bond, and, secondly, the long possession of the defendants, consistently with the provisions of the bond, there have been two decisions of the Courts in India, both arriving at the same conclusion.

10. There was, however, an appeal to the High Court from that decision of the District Judge, and the grounds of that appeal state, amongst other things, that the evidence in support of the bond was not sufficient to establish it, but they do not raise any distinct or separate grounds of appeal on the point now insisted on as to the rejection of the evidence mentioned in the petition of the 16th April 1860. That appeal was dismissed by the High Court on the 25th January 1865, and the matter now comes before this committee. In their Lordships'' judgment, the whole case is now open before them, both as to the law and as to the facts, and the question which their Lordships have to consider is, whether it will be their duty, under the circumstances of this case, either to advise Her Majesty to make an immediate decree in favour of the plaintiffs, or to remand this matter to India for further trial, or to dismiss this appeal.

11. As to the first alternative, that of making an immediate decree in favour of the plaintiffs, having regard to the pleadings and evidence in this case, it is difficult to see what immediate decree could now be justly made in their favour.

12. The plaint asks that the whole of the villages may be awarded into the plaintiffs'' possession, but the evidence on both sides clearly shows that the defendants have, and that they and their ancestors have always had, some share in the villages, though the extent of that share is disputed. The plaint also admits a borrowing by the ancestors of the plaintiffs from the ancestors of the defendants, and the award, upon which the plaintiffs rely, finds a sum of money due from the plaintiffs to the defendants, and gives a charge on one half of the income of the villages to secure the repayment of that sum. A decree in accordance with the plaint is therefore inconsistent with the evidence on both sides, and it Would be equally difficult to make a decree in the nature of a redemption decree in favour of the appellants, while they have not proved the existence of any mortgage, and while they assert that the only mortgage which has been put in evidence, that of 1792, is a forgery.

13. It remains to be considered whether it is right that this case should be sent back to India for a further hearing. The litigation between these parties and their ancestors has already existed since the year 1836; there have, as has been already said, been two decisions on matters of fact by the Courts in India. These decisions

have been approved by the High Court, and it has been the invariable practice of their Lordships sitting here to require a very strong case indeed to induce them to interfere with such decisions of the Courts in India upon mere questions of fact. It would require a very strong case to induce their Lordships to send such a matter, upon a mere question of fact, for further trial, especially when, in the opinion of their Lordships, the appellants have had abundant opportunities of producing evidence, and when the material questions of fact are few and simple, being mainly, first, the question as to the validity of the bond of 1792, and, secondly, the question relating to the possession of the property in question.

14. First, then, as to the bond. The bond has been insisted upon by the defendants ever since they first entered into evidence; it has been recorded in Court ever since the 23rd of January 1841; it is supported by the evidence of the witness who swears that he wrote it, and whose evidence has not been impeached, except by an attempt which has been made to displace his evidence by a formal objection, which, in the opinion of their Lordships, is entitled to no weight, viz., that he was not proved to have been dead when this deposition was admitted. But this bond is also to some extent supported by the evidence brought, forward by the appellants themselves. There are several instances in which the substance of the bond is referred to by their own witnesses. For instance, witness No. 51, who is one of the plaintiffs'' witnesses, says:--"In 1791 there was a famine. Ever since that time Godabhai''s ancestors enjoyed the income of the village on account of debts." He there refers to the year before that in which the bond bears date, and refers to the possession of Godabhai''s ancestors of the income of the village on account of debts. So, also, another of the plaintiffs'' witnesses, No. 56, says:--"My father used to say that the Puchhegaum men, having borrowed money from the ancestors of Godabhai, had given the villages in aghat (mortgage). I do not know for how many "years Godabhai''s men held the management of the villages under that right of mortgage." Again, another of the plaintiffs'' witnesses, No. 151, says:--"Previous to 1813, Godabhai''s ancestors used to receive, out of these villages, an income for about 20 years on account of debt." He refers there to 20 years before 1813, which would bring us to the years 1793, being one year after the date of the bond and agreeing very nearly with the evidence of the other witness, which brings the date to one year before the date of the bond.

15. But if it could be shown that the possession of the property has been inconsistent with the title created by this bond, or if it could he shown that an agreement had been entered into by the respondents of such a nature that it could only be accounted for by their belief in the invalidity of the bond; if either of those positions could be established on behalf of the appellants, no doubt very great suspicion would be cast on the validity of the bond. But, in their Lordships'' opinion, no such agreement is proved to have been entered into or to have been acted upon; and there is a decree, which has not been appealed from, which has decided that there was no award binding on the respondents or affecting their interests.

16. It remains, therefore, only to consider whether the possession of the property has been inconsistent with the title created by the bond, and this is the second of the two questions of fact. The appellants mainly rely upon the allegation that there was a joint possession from 1842 to, as it is stated in the plaint, 1852, 1853, or, as it has been put in the argument, down to 1852, 1853, or 1854. It is material again to observe that the razinama, which is in December 1841, states that the award directed that possession should be given to the plaintiffs. That razinama is dated 6th December 1841, and it states that possession is to be delivered to the plaintiffs, but that, after deducting the assessment, the defendants are to enjoy, in lieu of interest, one half of the income. Now, with respect to the numerous witnesses who have been called in support of the case of the plaintiffs, the objections have been justly made that none of them reside in the villages in question, and that many of them state what appears to their Lordships to be altogether inconsistent with the real truth of this case. They state not only joint possession before the alleged joint possession commencing in 1842, which is that which is now relied upon mainly in the argument and stated in the plaint, hut also a payment, either by the ancestors of the appellants or by the appellants themselves, of the Government assessment before the year 1842. We may refer to a few passages in the evidence of the plaintiffs in which that statement is made. The witness, No. 69, says that, "from before 1813 to before 1832 the management of the said two villages was held by Godabhai''s men and the Puchhegaum men jointly, and, deducting the assessment, the balance of income was divided between them both. So, also, witness, No. 67, says, Both the parties held the management previous to 1842;" and, another of the plaintiffs'' witnesses, No. 69, says, Before 1842 both the parties used to hold the management of the villages. Godabhai used to make collections of the revenue, and then the Puchhegaum men used to come to the village and draw money sufficient only to meet expenses, and they--that is, the Puchhegaum men--"used to pay the assessment." The witness, No. 70, another of the plaintiffs'' witnesses, says, Previous to 1842 the Puchhegaum men and Godabhai used to hold the management of the village, and, after deducting the assessment and expenses, the balance was paid to Godabhai on account of his debts. Lastly, one of the plaintiffs'' witnesses, No. 53, says, "Previously, from 1842 to 1854, the Puchhegaum men, Godabhai, and Sadabhai held the management and enjoyed the income of the villages half and half. I and my ancestors have been servants of the Puchhegaum men for five generations, and the management of the villages was held through my brother and partly through me also. The accounts of management have been produced before the Sarkir. All these accounts are in the handwriting of my brother. They were produced in the case then pending in the Gogo Moonsiff''s Court. Godabhai now pays the assessment to Government."

17. Now it appears to their Lordships that this statement, on the part of the plaintiffs'' witnesses, is inconsistent with the fact which in their judgment is clearly established, viz., that the name of Godabhai or his ancestor has always been

entered in the Government books, and that he has always paid the Government assessment; and this fact, though it may not be evidence of title, is, in their Lordships'' opinion, very strong evidence of possession. The fact that Godabhai''s name has always been entered on the Government record is not only proved by many of the witnesses brought forward on the part of the defendant, but it is also proved by several of the plaintiffs'' witnesses. We will give only two instances of that: the witness, No. 59, says, Ever since the introduction of the British rule, the name of Godabhai has been entered on "the Government records." And another of the plaintiffs'' witnesses, No. 65, says, '' I do not know what assessment is paid. Godabhai pays the assessment. He has been doing it from before my birth." It appears, therefore, in their Lordships'' judgment, that there is one fact which is clearly established in the evidence, that is that this payment throughout has been made by Godabhai or his ancestor, and that his name and his name alone has been entered on the Government records; and the clear establishment of that fact and the attempt which has been made on the part of so many of the plaintiffs'' witnesses to set up a story which is entirely inconsistent with that fact, in the judgment of their Lordships necessarily casts very considerable discredit upon the testimony of those witnesses of the plaintiffs.

18. But in addition to this, an attempt has been made by means of certain accounts to show that in fact there was such a joint possession. We think to dispose of that, it is sufficient to say in the first place, that the accounts themselves, as they appear in the preliminary record, were brought forward for the purpose of showing that the appellant''s father and the other appellants have held the management of the two villages and have received the income and have paid half of it to the respondent Godabhai. Now, even if the accounts had shown any such thing as that, they would certainly have been open to very great suspicion, as being brought forward to establish a fact which is entirely inconsistent, as we have already shown, with the rest of the evidence in the case; but in truth the second observation which may be made upon these accounts is sufficient to dispose of them, that is, that they are not proved to have been accounts in any degree binding upon the respondents, or made in such a way as that they can he treated as accounts with which the respondents are so connected as not to he able to be heard to dispute any fact alleged in these accounts.

19. The nature of the claims which have been made by the appellants from time to time, and the sort of interference which has, in fact, been made by them with the income derived from these villages is, in their Lordships'' opinion, in fact, very succinctly stated in the report of the Mamledar. That report appears to their Lordships to be in accordance with the real facts of this case as disclosed by the evidence. It states among other things that Ever since the introduction of the British rule, 48 years ago, in this Mahal, the management has been held by Godabhai''s ancestors and Godabhai. He also says, "The papers relating to the collections of the revenue, etc., and the revenue settlement did not show that the complainants and

others of Puchhegaum and the sharers held any management." Now that, in their Lordships'' judgment, is entirely consistent with that which is the true result of the evidence; and they are also of opinion that if it had been otherwise, it is evident that the parties who say that they and their ancestors have had this possession, could have proved it distinctly and clearly, and that they have had many opportunities of proving it, but they have not done so. The report proceeds to state that "the complainants and others have filed a suit in the Civil Court in regard to the present matter, and no decision has as yet been given, and the petitioner had, in the time of the late Mamledar, presented a petition to the Collector to get his name entered and to obtain possession of the villages." In the fifth paragraph it states. The complainants state that they are ready to pay the money, but there is no lease in their name, nor was the money ever paid in their name. The circumstances in regard to this are stated in the first paragraph; the complainant, with a view to secure evidence for the civil suit, as it appears, made the statements in the petition with the advice of those "who are in league with him." That confirms the conclusion which has been before mentioned as being that of their Lordships, viz., the conclusion that although there may have been on the part of the appellants, from time to time, attempts to disturb the possession, still the possession has throughout been in Godabhai and in his ancestors, and consequently has been a possession in accordance with the title derived under the bond. The report also shows that which the document itself proves, viz., that on every occasion of litigation the appellants are found out of possession. Every plaint and every claim of theirs is a plaint and a claim asking for possession, and it is admitted that from 1852, 1853, if we take the date as stated in the plaint, or from 1852, 1853, and 1854, if we take the dates as stated in the argument, those being the dates when the alleged joint possession terminated, they have been out of possession until the year 1859, when the plaint, which commenced the present suit, was first filed. The conclusion, therefore, which their Lordships draw from this evidence, is a conclusion in accordance with that to which the two Indian Courts have before arrived,--a conclusion upon questions of fact--but even if their Lordships had felt some doubt or hesitation, in accordance with that which has been the invariable practice of this Board, they would have hesitated long when, upon a mere doubt with respect to a question of fact, they were asked to re-open the litigation and to send this matter again for trial to India. But the conclusion to which their Lordships have arrived being in accordance with that of the Indian Courts, their Lordships have no doubt or hesitation in humbly advising Her Majesty to put an end to this litigation, to affirm the decree of the High Court'' of Judicature at Bombay, and to dismiss this appeal with costs.