

(1957) 07 CAL CK 0023

Calcutta High Court

Case No: Second Appeal No's. 1028 and 1029 of 1953

Badridas Goenka

APPELLANT

Vs

Fani Bhusan Dhae

RESPONDENT

Date of Decision: July 23, 1957

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Section 100, 100(1)

Citation: (1958) 2 ILR (Cal) 692

Hon'ble Judges: Renupada Mukherjee, J

Bench: Single Bench

Advocate: Rajendra Bhusan Bakshi and Manindra Krishna Ghosh, for the Appellant; Bankim Chandra Dutt, Bhabani Sankar Bagchi and Sanat Kumar Dutt, for the Respondent

Final Decision: Dismissed

Judgement

Renupada Mukherjee J.

1. The Appellant of these two appeals is the Calcutta Pinjrapole Society represented by its five trustees. For the sake of brevity the Appellant will henceforth be called the society. The appeals arise out of two suits, namely, Title Suits Nos. 151 and 152 of 1945 of the third court of the Munsif of Howrah. The former suit was instituted by one Brojalal Misra alias Brijlal Missir and the latter by one Ashutosh Dhar. In Suit No. 151 the Plaintiff prayed for a declaration of his title in 8 as. share in respect of six plots of land described in the schedule of the plaint and for khas possession of 4 of these plots and possession through tenant Ashutosh Dhar, Plaintiff, of suit No. 152 in respect of the remaining two plots. There was also a prayer for a declaration that the entry in the c.s. Khatian regarding these 6 plots of lands is erroneous. In Suit No. 152, the above mentioned Ashutosh Dhar figures as the Plaintiff and he prayed for confirmation of possession or in the alternative for recovery of khas possession of the aforementioned two plots upon a declaration of his tenancy right under the

Plaintiff of Suit No. 151. There was also a prayer in this suit for a declaration that the entry in the C.S. records to the contrary relating to these two plots is incorrect. The suits are thus co-related to each other and Suit No. 152 may conveniently be described as sub-suit of Suit No. 151. The suits were heard together by the trial court.

The defence of the Appellant society constituted in a denial of the material allegations of the plaint and it contended that the disputed lands appertain to its Jama of Us. 16 which at one time belonged to one Bindumani Dasi but which came to be possessed by the society by successive devolution of title. The society averred that the entries in the c.s. records are correct.

2. The above defence of the society was overruled by the trial court in both the suits which were decreed in terms of the prayers of the two Plaintiffs of the two suits. The society preferred two appeals which were dismissed by the lower appellate court and so it has preferred these two second appeals.

3. In order to understand the points in controversy in these two appeals it will be necessary to refer to two settlement Khatians, namely, Khatians Nos. 397 and 398 of Mauza Belur in Howrah district. The first of these two Khatians records a Jama of Its. 16 in the name of the Appellant society as the tenant under four sets of landlords having varying shares. The total quantity of land of the Jama is 2.36 acres out of which an area of 1.94 acres comprising c.s. plots Nos. 17, 73, 123 and 165 has been recorded as khas and an area of 42 acre surveyed in c.s. plots Nos. 68 and 69 has been recorded in Khatian No. 398 of the same Mauza as appertaining to a tenancy of one Kissendutt Noal under the society bearing a rental of Its. 4. The correctness of the entries in these two Khatians is the subject-matter of dispute in these two suits, it being the contention of the Plaintiff Brojalal Misra in Suit No. 151 that he and the heirs of one Dwarijjama are the tenants under the four sets of landlords mentioned in Khatian No. 397 and not the society, and they have also acquired a part of the superior interest. In Suit No. 152, Plaintiff Ashutosh Dhar contended that he has purchased the interest of the sub-tenant Kissendutt Noal and that his landlords are Brojalal Misra and the heirs of Dwarijjama and not the Appellant society.

4. Admittedly, all the disputed plots of Suit No 151. excepting c.s. plot No. "68 appertained at one time to a Jama of Its. 16 held under four sets of landlords, namely, Sasthi Ghosh, Jugal Pal, Atul Ghosh and Prankrishna Konar, who held diverse shares in this superior right. According to the case of Respondent Brojalal Misra this tenancy of Rs. 16 belonged to two brothers, Gopal Teor and his brother Bholanath alias Bhulu Teor and Brojalal Misra and deceased Dwarijjama, predecessor-in-interest of Defendants Nos. 17 to 22 of Suit No. 151, purchased this tenancy from Bholanath Teor alias Bhula Teor after the death of Gopal by a Kobala, dated April 4, 1921 (vide Kobala, Ext. 17). The case of Respondent Brojalal Misra further was that the names of the heirs of the superior landlords have been

recorded in c.s. Khatian No. 397, but the name of the Appellant society has been incorrectly recorded as tenant in place of the names of Brojolal Misra and Dwarijjama. Respondent Brojolal Misra of S.A. No. 1028 of 1953 also claimed a part of the superior interest. The entire suit of Brojolal Misra was decreed by the courts below, but the superior landlords have not preferred any appeal from that part of the decree in which they alone are interested. The contention of the Appellant society, on the other hand, was that this Jama of Rs. 16 belonged not to Gopal Teor and Bholanath Teor but to one Bindumani, who sold her interest to Srikrishna Gosala by a conveyance, dated February 17, 1920 (vide Conveyance marked Ext. A(l))-in the name of the then Manager of the Gosala, Ramchandra Sharma and the society purchased this Jama on August 6, 1927 from one Basudeo Pandey, who was authorised to sell the jama on behalf of the Gosala (vide Kobala Ext. A(2)). The real question in Suit No. 151 and therefore in E. A. No. 1028" of 1953 is whether c.s. plots Nos. 17, 73, 133, 165 and 69 were held in tenancy right by Gopal Teor and Bholanath Teor as contended by Respondent Brojolal Misra, or by Bindumani Dasi as contended by the Appellant. For the present I shall keep this matter out of my consideration and proceed to dispose of the other appeal, namely. S. A. No. 1029 of 1953 arising out of Suit No. 152 of the trial court.

5. Two c.s. plots are involved in S.A. No. 1029, namely, c.s. plots Nos. 68 and 69. It was admitted in the courts below and also in this appeal that c.s. plot No. 68 is not comprised within the Jama of Rs. 16 to whichever person or persons that Jama may have belonged. The title of Brojolal Misra to this plot was proved beyond the shadow of a doubt. It is true that the c.s. record is in favour of the society and certainly it is entitled to the benefit of the presumption that the entries in the record are correct. But in this case the presumption has been amply rebutted by satisfactory evidence. Exhibit 3(c) is a Patta, dated April 6, 1921. It was granted by one Atiar Rahman in favour of Brojolal Misra and Dwarijjama in respect of this plot of land at a rental of Rs. 2 per year. The identity of the Pattaland with c.s. plot No. 68 has been established by local investigation. Brojolal and Dwarijjama on their part granted a Patta in respect of c.s. plot No. 68 and also c.s. plot No. 69 to one Benarashi and Matilal on September 20, 1921 (vide Patta, Ext. 3(d)). Brojolal and Dwarijjama paid rent to Atiar Rahaman reserved by the Patta marked Ext. 3(c) (vide rent receipts Exts. 4-4(i)). The interest of Benrashi and Matilal was purchased by Kissendutt Noal by a sale certificate on January 9, 1934 (vide Ext. 9) From all these documents the courts below held that Brojolal and Dwarijjama possessed not only c.s. plot No. 68, which is outside the ambit of Jama of Rs. 16 but also c.s. plot No. 69 through their tenant Benarashi and Matilal at least from September 20, 1921, the date of the Patta marked Ext. 3(d) till the auction- purchase by Kissendutt Noal on the 9th January, 1934. Their title to one of these plots, namely, c.s. plot No. 68, is evidenced by the Patta granted by Atiar Rahaman and their title to c.s. plot No. 69 was perfected by adverse possession for a period of more than 12 years. Mr. Bakshi, on behalf of the Appellant, tried to raise a contention that the identity of c.s. plot No. 69 with the land

purchased under the sale certificate marked Ext. 9 was not established. No such contention appears to have been raised in the courts below and I am not prepared to allow it to be advanced for the first time in second appeal. Thus the Appellant has no other material beyond the settlement record to show that the society ever exercised any act of possession in respect of c.s. plots Nos. 68 and 69 through tenants prior to the final publication of the records- of - rights in March, 1939. It was on the basis of these records that the Appellant society obtained a rent decree against Kissendutt Noal and purchased the tenancy in execution of the decree (vide sale certificate Ext. W) but as the society was not the landlord of Kissendutt Noal, nothing passed by that auction sale. Ashutosh Dhar, Plaintiff of suit No. 152, has purchased the interest of Kissendutt Noal and the courts below have rightly decreed his claim of tenancy under Brojalal Misra and the heirs of Dwarijjama in respect of c.s. plots Nos. 68 and 69. S.A. No. 1029 of 1953 arising out of Title Suit No. 152 and out of corresponding First Appeal No. 37 of 1949 must therefore be dismissed.

6. I now pass on to S.A. No. 1028 of 1953 arising out of Title Suit No. 151 of 1945 and corresponding First Appeal No. 38 of 1949. The decrees passed by the courts below with regard to two plots of this suit, namely, c.s. plots Nos. 68 and 69, must stand confirmed because the respective claims of the contesting parties with regard to these two plots are covered by the decision of S. A. No. 1029 of 1953, which I have ordered to be dismissed.

7. So, I proceed to discuss whether the decree passed by the lower appellate court in respect of the remaining four plots, namely, c.s. plots Nos. 17, 73, 133 and 165, should be confirmed or set aside.

8. It has already been observed that the above mentioned four plots of lands appertained to a Jama of Rs. 18-the only question being whether this Jama was held by Gopal Teor and Bholanath Teor or by Bindumani Dasi. The Appellant society is claiming a derivative title from Bindumani and Respondent Brojalal Misra from Bholanath Teor. The lower appellate court has written a long and laborious judgment but, in my opinion, it has committed a vital error in law in deciding the above material issue. There is no document to show the origin of either of the tenancies claimed by the rival contestants. Both parties filed and proved a number of Dakhilas in support of their contentions. But because each party challenged the genuineness of the Dakhilas of the other side, the lower appellate court refused to take them into its consideration observing:

So I leave aside the dakhilas exhibited for either side for what they are worth.

Now, in the absence of any document of origin of the tenancy of Rs. 16, the Dakhilas constitute a material piece of evidence in support of the claim of other side. The lower appellate court has wrongly refused to take these Dakhilas into its consideration. Such refusal, in my opinion, amounts to a substantial error in following proper procedure. The judgment of the lower appellate court further

shows that it has not at all considered the evidence of possession furnished on behalf of the Appellant. There has thus been an omission to consider evidence adduced on material points.

9. Mr. Dutt, appearing on behalf of Respondent Brojajal Misra, tried to support the judgment by contending that the concurrent finding on the question of title is a finding on a question of fact and as the High Court has got only a limited jurisdiction in second appeals to set aside such a finding, I would not be justified in disturbing this concurrent finding. In support of this contention Mr. Dutt referred me to a number of cases which I need not cite here because the provisions relating to the jurisdiction of the High Court to interfere in second appeals are well known and are laid down in Section 100 of the CPC itself, which runs as follows:

100. (1) Save where otherwise expressly provided in the body of this Code or by any other law for the time being- in force, an appeal shall lie to the High Court from every decree passed in appeal by any Court subordinate to a High Court, on any of the following grounds, namely:

(a) the decision being contrary to law or to some usage having the force of law:

(b) the decision having failed to determine some material issue of law or usage having the force of law;

(c) a substantial error or defect in the procedure provided by this Code or by any other law for the time being in force, which may possibly have produced error or defeat in the decision of the case upon the merits.

(2) An appeal may lie under this section from an appellate decree passed *ex parte*.

10. In my opinion the present case is governed by Clause (c) of Sub-section (1). The procedure for hearing and deciding an appeal by an appellate court is that all important and material evidence adduced in the trial court must be considered by the court of first appeal, otherwise it will not be possible for that court to give a proper decision. Non-consideration of evidence on a material point by a court of first appeal must be regarded as a substantial error or defect in the procedure. In the present case non-consideration by the lower appellate court of the Dakhilas and the oral evidence of possession adduced on behalf of the Appellant must be regarded as a substantial error or defect in procedure which may possibly have produced an error or defect in the decision. So, I repel Mr. Dutt's contention that I have got no jurisdiction to interfere with the concurrent finding of the court below on the question of title in second appeal.

11. Apart from the fact that the Dakhilas filed and proved on behalf of the Appellant and the oral evidence of possession adduced by it were not considered by the appellate court, one other criticism has very validly been levelled against the correctness of that judgment by Mr. Bakshi on behalf of the Appellant. The finally published record-of-right is in favour of the Appellant. It appears in evidence that

during the earlier stages of settlement operation Dwarijjama got his name inserted as the tenant after expunging the name of the Appellant society by filing an objection. This objection was disposed of on June 5, 1936 (vide order of the Revenue Officer, Ext. 6). The record was finally published on March 31, 1939 and it contained the name of the Appellant society as the tenant. From pp. 54 and 55 of the paper-book it would appear that the lower appellate court was of opinion that the Kancha Khatian prepared on the basis of the order passed by the Revenue Officer on June 5, 1936 completely rebuts the presumption of correctness arising out of the entries appearing in the finally published record. This is an erroneous view of law, because no presumption of correctness, far less any finality, attaches to a Kancha Khatian. It is no doubt a relevant piece of evidence in a suitable case but such a Kancha Khatian is not sufficient to rebut the presumption of correctness of a finally published record.

12. On all the above grounds I am of opinion that the judgment of the lower appellate court passed in Appeal No. 38 of 1949 is not correct so far as c.s. plots Nos. 17, 73, 123 and 165 are concerned and the appeal must be re-heard with regard to these plots.

13. In the result, S.A. No. 1029 of 1953 is dismissed with costs to the plaintiff Respondent of that appeal. S.A. No. 1028 of 1953 is allowed in part. The decrees of the courts below are maintained in that appeal so far c.s. plots Nos. 68 and 69 are concerned, but the decree of the lower appellate court is set aside with regard to the remaining four c.s. plots, namely, c.s. plots Nos. 17, 73, 133 and 165 and the case is remanded to the lower appellate court for fresh hearing of the appeal on the existing materials with regard to the above mentioned four plots in the light of the above observations and in accordance with law, parties will bear their own costs in this Court in this appeal but the costs of the courts below will abide the final result.

14. The stay order which was passed in S.A. No. 1029 of 1953 is vacated and the stay order passed in S.A. No. 1028 of 1953 with regard to c.s. plots Nos. 68 and 69 is also vacated.