
(1958) 05 CAL CK 0027

Calcutta High Court

Case No: Appeal from Appellate decree No. 669 of 1951

Renupada Saha

APPELLANT

Vs

Oramb Pada Mondal
and Others

RESPONDENT

Date of Decision: May 12, 1958

Citation: 62 CWN 816

Hon'ble Judges: Renupada Mukherjee, J

Bench: Single Bench

Advocate: Priti Bhusan Barman and Kiran Chandra Mitra, for the Appellant; Shambhunath Banerjee, for the Respondent

Final Decision: Allowed

Judgement

Renupada Mukherjee, J.

This appeal arises out of a suit for compensation filed by appellant Renu Pada Saha against respondent Orambapada Mondal for exclusive use and occupation of a large tract of char land of the river Bhagirathi. There were also some proforma defendants in the trial court who are co-sharers of the plaintiff, but they are taking no interest in this litigation. Some of the main facts involved in this appeal are no longer in dispute. The plaintiff is the owner in one anna share of a char known as Char Ganjamurshidpur described in the schedule of the plaint and the proforma defendants are the owners in the remaining fifteen annas share. The principal defendant took lease of the fifteen annas share of the proforma defendants and went into possession of the disputed char in 1348 B.S., and exercised various acts of possession therein without taking settlement of the one anna share of the plaintiff.

2. Upon these facts the plaintiff claimed compensation to the extent of Rs. 700/- in his one anna share for the use and occupation of the char by the principal defendant during the years 1348 B.S.

3. The main defence of the principal defendant in so far as it is material for the purpose of this appeal, was that he possessed only a portion of the char after having taken lease from the owners of fifteen annas share and he did not oust the plaintiff who never demanded joint possession with the defendant and was free to possess the char to the extent of his share. As there was no ouster of the plaintiff he was not entitled to get any compensation from the defendant and his remedy lay in a suit for partition.

4. The above defence succeeded in the trial court except with regard to a portion of the char which has become arable. This portion measures 26 bighas and odd kathas and as the principal defendant was in exclusive possession of it during the years in suit, the trial court allowed compensation to the extent of Rs. 54/- to the plaintiff for the arable portion and decreed the suit accordingly in part for Rs. 54/-with costs according to the success of the plaintiff.

5. The plaintiff filed an appeal from the above judgment and decree of the trial court and the principal defendant also filed a cross objection regarding the portion of the claim decreed against him. Both the appeal and the cross objection were dismissed by the lower appellate court. So the plaintiff has filed this second appeal and the principal defendant has also filed a cross objection.

6. Mr. Barman who appeared on behalf of the plaintiff appellant argued the case with great thoroughness contending principally that the courts below have committed an error in law in holding that no suit for compensation lies at the instance of the co-sharer unless there has been an ouster of his title. The proposition of law as applied to the facts of this case has thus been enunciated in the judgment of the lower appellate court.

It comes to this that the defendant is in possession of the disputed char (except the arable portion) without denial of plaintiff's title or assertion of any hostile title. In order to recover compensation from a co-sharer, (because defendant being successor-in-interest of the major co-sharers of the char, is in the position of a co-sharer of plaintiff), plaintiff must prove that the defendant either denied his title or set up a hostile title, but nothing has been proved in the present case. When one of several tenants in common is in separate possession of a portion of the common lands without any objection from or ouster or exclusion of his other co-sharers he is under no obligation to render accounts or pay compensation to other co-sharers.

7. Mr. Barman contended that in order that a co-sharer may be entitled to get compensation from other co-sharers who are in exclusive possession of the land held in joint tenancy by all, actual or implied ouster need not be proved and exclusive possession by some of the co-sharers would be a sufficient ground for a suit for compensation against them. In support of this argument Mr. Barman referred me to two Privy Council cases, one of which is reported in 17 Indian Appeals, 110 (Robert Watson & Co. v. Ram Chand Dutt and others), (1) and the other in 51 Ind App 293 (Midnalore Zemindary Company Limited v. Naresh Narayan Roy and others), (2). The first of these two cases is

the famous case of Robert Watson & Co. v. Ram Chand Dutt and others (1). The following quotation from page 120 of the report of the judgment delivered by Sir Barnes Peacock is pertinent in this connection.

It seems their lordships that there be two or more tenants in common, and one (A) be in actual occupation of part of the estate, and is engaged in cultivating that part in a proper course of cultivation as if it were his separate property, and another tenant in common (B) attempts to borne upon the said part for the purpose of carrying on operations there inconsistent with the course of cultivation in which A is engaged, and the profitable use by him of the said part, and A resists and prevents such entry, not in denial of B's title, but simply with the object of protecting himself in the profitable enjoyment of the land, such conduct on the part of A would not entitle B, to a decree for joint possession. Their lordships are further of opinion that the decree of the District Judge, so as it orders an injunction to be issued, ought to be reversed. It appears to their lordships that, in a case like the present, an injunction is not the proper remedy.

8. The observation quoted above would show that in the absence of denial of title, a suit for joint possession or injunction is not the appropriate remedy in cases like the present. It was, however, decided in that case that a co-sharer who has been deprived of possession can get compensation from the co-sharers in exclusive possession. In the other Privy Council case which is the case of Midnapore Zemindary Co. Ltd. v. Naresh Narayan Roy and others, (2) it was held that an exclusive use of land held in common by a co-sharer is not an ouster of his co-sharers from their proprietary right as co-sharers in the land. It was further laid down that where lands held in India are so held in common by co-sharers, each co-sharer is entitled to cultivate in his own interests in a proper and husband-like manner any part of the land? which is not being cultivated by any other of his co-sharers, but he is liable to pay to his co-sharers compensation in respect of such exclusive use of the land. Thus in both the Privy Council cases it has been held that an exclusive use of joint lands by some co-sharers may be the foundation of a claim for compensation by other co-sharers who are not in possession and there need not be any ouster of their title. Such ouster is necessary only in suits for joint possession or for injunction. Admittedly, there was no ouster of the title of the plaintiff appellant in the present case. But in view of the Privy Council cases mentioned above, I am of opinion, that the lower appellate court was wrong in holding broadly that it was necessary to prove ouster in this case although this is a suit for compensation and not for joint possession or injunction.

9. Although the proposition of law applicable to the facts of this case has not been quite correctly or accurately stated by the lower courts it would appear that the courts below have applied the correct law so far as the arable portion of the char measuring 26 bighas and odd kathas is concerned. It has been found by them that the defendant respondent has been in exclusive possession of the arable portion for the years in suit and so the courts below have assessed a compensation of Rs. 54 in the one anna share of the plaintiff appellant. This part of the decree was the subject matter of the cross objection

which was not. however, pressed by Mr. Banerjee who appeared on behalf of the defendant respondent.

10. Mr. Burman contended on behalf of the appellant that the law has not been correctly applied so far as the possession of the remaining portion of the char is concerned. This brings me to the question of the nature of the remaining portion of the char and the manner of user of it.

11. The area of the char has been roughly described in the plaint to be 300 bighas. There was a local investigation in this case by a pleader commissioner and he found the area of the char to be 141 bighas and odd kathas upon measurement. The manner of user of the char by the defendant respondent, besides cultivation of the arable portion, is the following:

(1) Maintaining a ponaghat and rearing and collecting spawns therein:

(2) Taking and selling sands:

(3) Realising khutagari taxes or tolls from boats which come on shore along the char for the purpose of loading and unloading their merchandise.

12. The commissioner who held the local investigation was also directed to ascertain by local enquiry what probable income was derived by the defendant respondent during the period in suit from the above source. The commissioner has given the figures. The courts below held that the three modes of possession of the portion of the char mentioned above did not amount to exclusive possession because the plaintiff appellant was not hindered or precluded from possessing other portion of the char in the above manner. I agree with this view of the courts below so far as the possession of the char by the first two of the above mentioned three modes is concerned, namely maintenance of a ponaghat and taking and selling sands. The char comprises quite a large tract measuring a little more than 141 bighas. The commissioner has found that there is only one ponaghat for rearing and collecting spawns which was possessed by the defendant respondent. Nothing prevented the plaintiff appellant from maintaining a similar ponaghat for his own use and profit. Similar observations apply to appropriation of sands by the defendant respondent from only a portion of the char. In my opinion, it cannot be said that possession of only a portion of the char in these two ways amounts to exclusive possession of the entire char and so the claim for compensation under these two heads has been rightly dismissed by the courts below.

13. The realisation of khutagari taxes or tolls from boats, however, stands on a different footing. It is evident from the commissioner's report that the defendant respondent has realised such taxes from all boats which came on shore at the char without any exception. Such realisation of tolls amounted to exclusive enjoyment of this income by the defendant respondent to the deprivation of the appellant who is entitled to get his share of this income by way of compensation. The commissioner has assessed the appellant's

share at Rs. 81-4-0. Half of the amount must be deducted on account of establishment charges and the appellant will get a decree for Rs. 40-10-0 in his share under this head. This amount of Rs. 40-10-0 will be added to the amount of Rs. 54 which has been decreed by the courts below. The plaintiff appellant will, therefore, get a total decree for Rs. 94-10-0 in his favour against the principal defendant respondent.

14. In view of the foregoing findings this appeal is allowed in part and the judgments and decree of the courts below are modified to the extent that the plaintiff appellant will get a decree for Rs. 94-10-0 against the principal defendant respondent with costs proportionate to his success in all the courts including this Court. The cross objection is dismissed without any" costs to any party. As the failure of the defendant respondent to take settlement of the share of the plaintiff appellant is responsible for this litigation, he is not allowed any costs in any" court although the suit has been decreed partially against him.