(1925) 12 CAL CK 0050

Calcutta High Court

Case No: None

Manmatha Nath Kar	APPELLANT
Vs	
Probodh Chandra Ratari	RESPONDENT

Date of Decision: Dec. 3, 1925

Acts Referred:

- Evidence Act, 1872 - Section 65(e)

Citation: 94 Ind. Cas. 279

Hon'ble Judges: Suhrawardy, J; Mukerji, J

Bench: Division Bench

Judgement

1. The plaintiff-respondent is the landlord of a non-transferable occupancy holding. His case is that there were two non-transferable occupancy holdings which were amalgamated and formed into one occupancy holding and held by Durga Charan and other heirs of the original tenant. He found that the defendant was in possession of the holding whereupon he brought the present suit for recovery of possession from the defendant who was a trespasser according to him. The defence was that there was a mortgage of a portion of the holding by the original tenant in favour of a third party and that in execution of the decree upon that mortgage the defendant purchased the portion mortgaged and was in possession thereof. He further stated that the entire holding was not mortgaged and that the original tenant did not leave possession of the portion of the holding not mortgaged. The controversy between the parties was limited to the question as to whether the mortgage-deed and the decree thereon covered the entire holding or whether they related only to a portion of the holding. In order to prove his contention the defendant produced some copies of the Settlement khatians. It appears that these khatians were not certified copies of the original Settlement khatian but are said to be copies served upon the defendant by the Settlement Officer. When the copies of the khaitans were produced they were received in evidence without any objection being taken by the plaintiff. By these copies of the khatian the defendant attempted

to show that one of the plots mentioned in the khatians (Plot No. 996) was not within the mortgage or the decree and, therefore, the whole holding was not transferred to him. His case was that plot No. 2 of the mortgage-deed was not this plot No. 996 but a different plot No. 319, outside that holding. The plaintiff, on the other hand, contends that the second plot of the schedule to the mortgage is plot No. 996 and, therefore, the whole holding was included within the mortgage and the decree following it. Two objections were taken on behalf of the defendant : (1) that the holding in suit was not a non-transferable occupancy holding but a holding at a fixed rate of rent or a maurasi mokarrari holding; (2) that he was recognised by the plaintiff landlord who demanded rent from him after his purchase. The Trial Court dismissed the plaintiff''s suit holding that the entire holding was not mortgaged and transferred to him. On the other two points the finding of the Trial Court was against the defendant. There was an appeal to the District Court which reversed the decision of the Munsif and held that the sale certificate covered the entire land of both the holdings and, therefore, the plaintiff was entitled to re-enter. There was a further appeal to this Court by the defendant, which set aside the decree of the lower Appellate Court and sent the case back for rehearing of the appeal on all the three points taken by the defendant. At the re hearing of the appeal the lower Appellate Court has come to the same conclusion as before and held that the defendant purchased the entire holding and, therefore, the plaintiff was entitled to a decree in ejectment, of the defendant. On the other two points the lower Appellate Court has found against the defendant in agreement with the Trial Court.

2. With regard to the first point, namely, that the holding is maurasi mokarrari holding, an objection is taken on behalf of the appellant to the finding by the lower Appellate Court on the ground that that Court has overlooked the oral evidence on the record in respect of the defendant''s plea. The learned Subordinate Judge has found that the evidence discloses that the tenancy existed since 1312 and there is nothing to show ''that the tenancy existed before that year''. He has, therefore, held that the defendant has failed to prove uniform payment of rent? for a period of 20 years--the suit having been brought in 1919 or 1328 B.S. The defendant contends that there is some oral evidence on the record which the Court should have taken into account and the statement that there is nothing to show that the tenancy existed before 1312 is unwarranted. There is only one witness examined on behalf of the defendant who speaks about this matter. We have looked into his evidence and we think that it does not carry the matter far and the learned Subordinate Judge was entitled to disregard it. He knows nothing of the jama or the creation of it. The vague statement that it existed for a long time is not sufficient evidence in support of the defendant''s case. We do not think that there is any defect in the Judge''s judgment in so far as the first point is concerned.

3. With regard to the third point, namely, the recognition by the plaintiff of the defendant as his tenant by demanding rent from him, it has been found on the

evidence against the defendant. The learned Judge enters his finding in the following words: "I, therefore, do not find even the evidence of an intention to recognise the title of the defendant. My finding on this point too will, therefore, be against the defendant." The learned Advocate for the appellant has fairly admitted that this finding of fact concludes this point.

4. The second point is of some importance and has given rise to different decisions. The real controversy between the parties, as we have said, is whether plot No. 996 of the. Settlement khatian is or is not included in the mortgage and the decree. It may be noted here that the mortgage was executed before the settlement proceedings were commenced. The deed accordingly does not contain the plot numbers, but it is attempted to identify the plots in the schedule to the mortgage-deed with the settlement plots by a comparison of the boundaries. The Trial Court on a comparison of the boundaries given in the mortgage-deed and the decree and those in the Settlement khatian came to the conclusion that the boundaries tally more with the boundaries of plot No. 319 as stated by the defendant than with the boundaries of plot No. 996; and in this view it held that what was mortgaged and purchased by the defendant was the holding minus plot No. 996 and accordingly the original tenants did not part with their entire interest in the holding. The learned Subordinate Judge held that copies of the khatian produced in the case were not certified copies and, therefore, no judicial notice should be taken of them. After making this remark he observes thus: "There is, therefore, no legal evidence on the record on which it can be found that plot No. 996 appertains to the disputed jote and was not, sold in execution of the mortgage decree". This statement that there is no legal evidence on the record on which it can be found that plot No. 996 appertains to the disputed jote, has been challenged before us and we think rightly. The plaintiff himself admits in the plaint that plot No. 2 corresponds to plot No. 996 of the Settlement khatian. The only point in dispute between the parties, therefore, was as to whether plot, No. 2 was plot No. 996 as alleged by the plaintiff or was plot No. 319 as alleged by the defendant. The lower Appellate Court did not examine this question from the correct stand point and it is not correct to say that even apart from the khatian there is no legal evidence to show that plot No. 996 was included in the disputed jote. The learned Subordinate Judge has taken into consideration all the other evidence in the case and found that the plots mentioned in the mortgage-deed constituted the entire jote. But his conclusion cannot be considered to be satisfactory in view of the fact that the learned Subordinate Judge has missed the real point in controversy between the parties.

5. Then with regard to the admissibility of the copies of the khatians produced by the defendant. They were put in the Trial Court and received without objection. The defendant-appellant contends that if objections were taken in time by the plaintiff on the ground that they were not certified copies the defect could have been cured by putting in the certified copies and as such objection was not taken at the earliest

opportunity the plaintiff should not be allowed to take it at a later stage of the litigation; and the Court of Appeal below was not justified in treating the khatians as no evidence at all in the case. For this contention reliance has been placed upon the case of Shahasadi Begam v. Secretary of State for India 34 C. 1059 : 6 C.L.J. 678 : 9 Bom. L.R. 1192 : 2 M.L.T. 439 : 34 I.A. 194 (P.C.). It may be taken as settled at the present time that where evidence is admitted in the first Court without any objection being taken to its reception and the evidence is admissible as relevant no party will be allowed to object to the reception of such evidence at any later stage of the litigation. Reference may in this connection be made to the case of Chooni Lall Khemani Vs. Nilmadhab Barik and Others, . It is also settled that an omission to take objection to the reception of a document which is irrelevant or inadmissible in evidence in the case does not make it admissible, Miller v. Babu Madhab Das 23 I.A. 106 : 19 A. 76 : 7 Sar.P.C.J. 73 : 9 Ind. Dec. 50 (P.C.). In the present case it cannot be said that the khatians are totally inadmissible in evidence or irrelevant. But it is argued on behalf of the respondent that uncertified copies of the khatians could not be received in evidence u/s 65 (e) of the Evidence Act read with the second sub-clause under it. It is argued that only certified copies can be produced as evidence to prove a public document like the Settlement khatians and as no other mode of evidence is admissible under the law, uncertified copies of the khatians should not be used as evidence even though not objected to by the plaintiff. It is not necessary to decide this question in the present case for we are of opinion that this case must go back to the lower Appellate Court for a re-hearing of the appeal and thus the defendant will get an opportunity of producing certified copies of the khatians. There cannot be any doubt that rightly or wrongly the defendant was misled by the omission of the objection to the admissibility of the copies of the khatians produced by him and we think that in the interest of justice and fairness he should be put in the same position as he would have occupied had the objection to the inadmissibility of the documents been taken in proper time.

6. We accordingly set aside the decree of the lower Appellate Court and send back the case to that Court for a re-hearing of the appeal on the second point raised in the case namely, whether the entire holding was the subject of the mortgage and of the purchase by the defendant or whether the defendant purchased and is in possession of only a portion of the holding. The defendant is permitted to put in, if so advised, certified copies of the khatians of which uncertified copies were put in by him and exhibited in the Trial Court. The appeal will be re-heard on a consideration of such documents and of the remarks made above. It is to be understood that the appeal is to be re-heard upon this point alone. Costs will abide the result.