

(1868) 06 CAL CK 0015

Calcutta High Court

Case No: Special Appeal No. 40 of 1868

Mahima Chandra Chuckerbutty

APPELLANT

Vs

Rajkumar Chuckerbutty

RESPONDENT

Date of Decision: June 5, 1868

Judgement

Sir Barnes Peacock, Kt., C.J.

The plaintiff sues four defendants with reference to five plots of land, and his prayer is to set aside a summary Thakbust award, to have a Thakbust map, which was amended in pursuance of that award, rectified, and to confirm his right to the five plots of land; and also to confirm his possession thereof. It appears that in November 1858, a Thakbust map was made, in which the land was demarcated as being in the possession of the present plaintiff. One of the present defendants made a claim that the plots, or one of them, had been unjustly demarcated with the present plaintiff's estate, whereas it belonged to a joint mehal of the plaintiff and defendant. It is not clear, nor is it very material, according to the view which the Court takes, whether the claim extended to the whole of the plots, or only to one of them. In the revenue proceedings, it was determined by too decision founded upon the defendant's answer, the report of the peshkar, and upon the evidence of witnesses, that the lands had been improperly demarcated, and that the Thak map should be rectified, and it was rectified by demarcating the lands to the plaintiff and the defendant jointly. The decisions, in the Revenue Courts were, one on the 17th, and the other on the 18th November 1858. This suit was commenced on the 11th of December 1865; and it is contended that the plaintiff is barred by the 6th Clause of Section 1 of Act XIV of 1859.

2. Between the date of the Thakbust award and the commencement of the suit, the defendant brought a suit in the Munsiff's Court, against the plaintiff, to recover the value of certain mangoes which grew on two of the plots; and in that suit the question arose whether those plots belonged to the plaintiff alone, or to the plaintiff and defendant jointly. On the 12th of December 1864, that suit was decided in favour of the defendants, upon the ground that the plots belonged to the plaintiff

and defendant jointly.

3. It is contended that in consequence of that decision, the plaintiff is barred from suing in this action in respect of those two plots, by virtue of Section 2 of Act VIII of 1859. Both the Lower Courts have held that the plaintiff is so barred. We think that the decision in that respect is erroneous.

4. Section 2 enacts that " the Civil Courts shall not take cognizance of any "suit brought on a cause of action which shall have been heard and determined "by a Court of competent jurisdiction, in a former suit between the same "parties, or between parties under whom they claim." It is clear that the cause of action to recover damages for the mangoes, and a suit brought to have a declaration of right and to set aside a Thakbust proceeding, are not the same; and the plaintiff is not barred by that section. Nor is he estopped by the decision in the suit relating to the mangoes upon a point which came collaterally in issue. It is contended that, in that suit the plaintiff paid the stamp duty upon a valuation not merely of the mangoes, which he sought to recover, but of the lands which he did not seek to recover. But the fact of the plaintiff's having paid a higher stamp duty in that suit than he was by law bound to pay, cannot affect the rights of the parties in the present suit. Two cases upon the subject of estoppel by decisions upon matters coming collaterally in issue may be referred to, *Kanhai Lal v. Radhacharan* Nos. 158 and 256 of 1846, 6th April 1867 and *Musst. Edun v. Mustt. Bechun.* 2 Ind. Jur., N.S., 264 and 8 W.R., 175.

5. With regard to the three years" limitation, plaintiff contends that he is not barred by Clause 6, Section 1 of the Limitation Act, by reason of his not having brought this suit within three years from the date of the award in the Thakbust proceedings. He says that, although his name is used in those proceedings, he was no party to them; in fact that he was never summoned, and that he never even heard of the awards until they were used as evidence against him in the suit relating to the mangoes, and no evidence was given in the present case to show that he was summoned by the Collector in the revenue proceedings. If the plaintiff had been out of possession and was suing to recover possession, it would have been necessary to determine whether he was bound by the Thakbust awards, without some evidence to show that he was a party to the proceedings, beyond the mere fact of his name appearing in them. But the plaintiff is not entitled to ask to have the Thakbust maps rectified in a suit commenced more than three years after the date of the award, whether he is legally bound by the award or not. If the award was a nullity, and the map was rectified by virtue of that award, plaintiff cannot ask us to rectify an award which he says was a nullity. The award was de facto made under Regulation VII of 1822, and Regulation IX of 1825; and a suit to contest an award or a map made under it, is barred unless brought within three years. The award and the map do not determine the title of the parties, nor are they evidence of title. Even if they would have authorized the Revenue Authorities to put the defendant into possession, they have not been executed, if the plaintiff's contention is right, that he is in possession and

has been in possession ever since those awards were made. There is no necessity, therefore, for the plaintiff's having the awards rectified.

6. Then, is the plaintiff barred as to his claim for confirmation of right and for confirmation of possession? Clause 6, Section 1, says that a suit to recover any property comprised in such award must be brought within the period of three years from the date of the award; but a suit by a person in possession to have his title confirmed, is not a suit to recover property. The defendant has denied the plaintiff's possession, and without determining the question of possession, or the question of right, both the Lower Courts have held that the plaintiff is barred by limitation, because his suit was not brought within three years from the dates of the awards. "We think that a person who remains in possession for three years and upwards after the making of a revenue award, is not barred by Clause 6 from maintaining a suit to confirm his title. Such an award could not, by virtue of Section 22 of the Act, be executed by turning him out of possession.

7. We think that the decision of the Lower Appellate Court must be reversed, and that the case must be remanded to that Court to try whether the plaintiff was, at the time of the commencement of his suit, in the sole possession of the plots in question. If the Principal Sudder Ameen find that issue in favour of the plaintiff, then he will have to determine whether the plaintiff is entitled to a declaration of confirmation of his possession, and that he has the right to the property as well as the possession. The plaintiff's suit for confirmation is based upon his allegation of possession, and in this suit he would not be entitled to a declaration of right or of confirmation of possession, if his allegation of possession is unfounded. We should not declare the right of a man out of possession, if the right claimed was a right which entitled him to possession. In such a case we should leave him to sue for his possession, and in that suit his right might be determined. We say " when the right claimed would entitle him to possession," that we may not be misunderstood as referring to suits brought for declarations of right by persons entitled in reversion.

8. If the Principal Sudder Ameen should find that the plaintiff was not in possession at the time he commenced this suit, it will be unnecessary for him to enter into the question of title. The costs of this appeal will abide the ultimate decision of the case.

¹[Cl. 6, Sec. 1:-- To suits brought by any person to contest the justice of an award which shall have been made under regulation VII, 1822, Regulation IX, 1825, and Regulation IX, 1833, of the Bengal Code, or to recover any property comprised in such award--the period of three years from the date of the final award of order in the case]