

(1879) 05 CAL CK 0018

Calcutta High Court

Case No: None

Dhununjoy Nushkur

APPELLANT

Vs

Brindabun Chunder
Sirkar

RESPONDENT

Date of Decision: May 16, 1879

Acts Referred:

- Civil Procedure Code, 1859 - Section 2
- Rent Law of Bengal, L.P. Act, 1869 - Section 27

Citation: (1880) ILR (Cal) 246

Hon'ble Judges: McDonell, J; Jackson, J

Bench: Division Bench

Judgement

Jackson, J.

In our opinion the plaintiff's suit ought to have been dismissed. He claimed to recover possession of jamai land by adjudication of jamai right thereto, together with mesne profits; and the ground of the suit was, that he had obtained a mourasi potta under the signature of the naib of the zemindar. The suit was brought in forma pauperis, and the plaintiff prayed for a decree for the recovery of possession by adjudication of tenancy right and for mesne profits.

2. It appears that, according to the plaint, the plaintiff had been dispossessed not by the present zemindar, but by his predecessors, in the year 1278 (1871). In the year 1281 (1874) the zemindari right of one of the co-sharers was acquired by another co-sharer, and it is now said the defendants Nos. 1 and 3 are wrongfully keeping the plaintiff out of possession of his jamai rights. The suit, therefore, is as against the defendants Nos. 1 and 3, who are zemindars, and against the defendant No. 2, who assisted the zemindars, for possession of the lands as aforesaid.

3. It seems that a first suit was brought on this cause of action on the 9th December 1875, which was dismissed after hearing on the 8th May 1876, on the ground that,

u/s 27 of Beng. Act VIII of 1869, the suit ought to have been brought within one year from the time of dispossession, and not having been so brought, it was barred by limitation. This, therefore, was a second suit upon the same cause of action.

4. The defendants set up limitation, *res judicata*, and also, as I gather, a denial of the plaintiff's *mokurari*, for, although the written statement says nothing of the kind, being rather in the form of a petition against the plaintiff being allowed to sue in *forma pauperis*, we are told that another written statement was afterwards put in, which is not before us now, and in that written statement apparently the plaintiff's alleged *mokurari* tenure was denied by the defendants. The present suit included a much larger claim for *mesne profits*, and was, therefore, instituted in the Court of the Subordinate Judge.

5. It was held by that Court, that although the plaintiff did not acquire a valid *mourasi* and *mokurari* interest by virtue of his *pottas*, he was entitled to recover possession, as he had acquired a right of occupancy, and that right was not legally determined. Accordingly the plaintiff got a decree for possession with *wasilat* for three years next proceeding the suit.

6. On appeal to the District Judge this judgment was in substance affirmed, and one of the defendants appeals to this Court and complains in the first place that the plaintiff's suit ought to have been thrown out u/s 2 of the CPC (Act VIII of 1859).

7. On this point we do not think that the appellant is right. It seems to us that, inasmuch as the Munsif considered that the first suit had been brought after the period limited by law, and that consequently it was not open to him to enter into the merits of it, in truth the cause of action had not been heard and determined by a competent Court. Whether the decision of the Munsif took the form of a dismissal of the suit or otherwise does not appear to make any difference. The plaintiff, if his suit was now in time, was entitled to have his cause of action heard and determined, which had not been heard in the previous suit.

8. The question remains whether the plaintiff had a cause of action, and whether he had brought it in the proper time. It appears that, in the judgment of both Courts, he failed to make out any valid *mourasi mokurari* title, but then the Courts concur in thinking that he was entitled to recover under the right of occupancy. It was a point taken not in the memorandum of appeal, but at the hearing before the lower Appellate Court, that the plaintiff having failed to establish the *jamai* title which he had set up ought not to succeed on the strength of a right of occupancy. This objection was overruled by the lower Appellate Court, but we find that, in a very similar case before the present Chief Justice and Mr. Justice McDonnell, in *Bijoya Debia v. Bydonath Deb* (24 W.R. 444), such a ground of appeal was held to be valid. The learned Chief Justice says: "The claim of the plaintiffs is simply to obtain a declaration of their title to the land under a *mokurari* lease, which they set up. The issues in the case were framed with a view to ascertain the existence and

genuineness of this particular lease and title, and it seems to us that the judgment of the lower Appellate Court negating the leasehold interest claimed by the plaintiffs, but investing them with an interest of a different character which they never claimed, is erroneous, and that if we were to confirm this judgment, we should be conferring upon the plaintiffs a totally different thing from that for which they brought their suit."

9. It appears to me that a plaintiff suing to recover possession of land as held under a mourasi mokurari title, and claiming wasilat in respect thereof not only from the present zemindars, but also from persons who dispossessed him, must bring a suit of an entirely different character from that of a ryot, suing his landlord for the recovery of possession of land in which he has a right of occupancy, and if the plaintiff in the first-mentioned kind of suit fails to make out his allegations, he will clearly not be entitled to fall back upon a cause of action of an entirely different kind. Now the cause of action which the plaintiff did make out in the present case was simply a right to be in occupancy of the land from which he was ejected, and that it seems to me was an injury, the remedy for which is referred to in Section 27 of Beng. Act VIII of 1869, and must be claimed within one year from the date of ouster.

10. The pleader for the respondent in this case appears to consider that there is an analogy between the rights of a tenant who by holding land and paying rent for it for twelve years acquires a right of occupancy, and the title of a person who by twelve years adverse possession extinguishes the rights of the previous owner and himself acquires a title by prescription.

11. It appears to me that there is no analogy between the two cases. The right, if any, which the plaintiff had in the present case, is created entirely by his continued occupancy of the land. It does not rest upon any grant, it is not in general transferable, and it appears to me that if the tenant desires to maintain that right and have himself to be replaced in the possession which he occupied before, ouster, he is bound to bring a suit u/s 27 of Beng. Act VIII of 1869 within one year from the date of dispossession. I think, therefore, that the plaintiff's suit in this case ought to fail, and that the judgments of the Courts below ought to be reversed, and the plaintiff's suit dismissed with costs.