

(1934) 08 CAL CK 0047**Calcutta High Court****Case No:** None

Kanta Mohan Mallik and Others

APPELLANT

Vs

Basudeb Ghora and Others

RESPONDENT

Date of Decision: Aug. 24, 1934**Acts Referred:**

- Evidence Act, 1872 - Section 13

Citation: 164 Ind. Cas. 319**Hon'ble Judges:** R.C. Mitter, J**Bench:** Single Bench**Judgement**

R.C. Mitter, J.

This appeal is on behalf of the plaintiffs Nos. 1 to 5 and arises out of Suit No. 172 of 1929. The plaintiffs Nos. 1 to 5 are admittedly the zemindars of Pargana Mandalghat having 3-5ths share in the said zemindary. The plaintiffs Nos. 6 and 7 are also zemindars of the said pargana having the remaining 2-5ths share. In this suit the plaintiffs prayed for assessment of rent in respect of 12 plots of land. The defence is that two of the plots, namely 91 and 101 had already been assessed to rent as parts of another jama which they held under the plaintiffs. Regarding the 10 other plots their defence is that they are nishkar lands. In the Record of Rights all the 12 plots have been recorded as not paying rent but liable to pay rent. Both the Courts have found that plots Nos. 91 and 101 had already been assessed to rent. This being a finding of fact based on evidence, the plaintiffs' appeal to this Court with regard to these two plots must necessarily fail. Regarding the other 10 plots, the Court of first instance held that they were mal lands liable to assessment and assessed the rent for the same at Rs. 17-14.7 pies. On appeal by the defendants to the lower Appellate Court in respect of these 10 plots, the lower Appellate Court has found that 8 of these plots are mal lands, but the remaining 2, namely, plots Nos. 911 and 1026 are nishkar lands. The lower Appellate Court has accordingly assessed Rs. 10-10.0 as rent on 8 of the plots but has dismissed the plaintiffs' claim in respect of plots Nos.

911 and 1026. The plaintiffs Nos. 1 to 5 have accordingly appealed and they claim that the finding of the learned Subordinate Judge in respect of these 2 plots is erroneous inasmuch as, they say that the said learned Judge has relied upon evidence which is not admissible in law. The learned Subordinate Judge first of all takes notice of the fact that the entry in the Record of Rights is in favour of the plaintiffs. He has in fact held that the initial onus which is on the zemindars in such a case has been shifted on to the defendants by reason of the favourable entry in the Record of Rights. He accordingly approaches the evidence from the correct point of view formulating to himself for consideration the question whether the presumption arising from the entry in the Record of Rights has been rebutted by the evidence adduced on behalf of the defendants.

2. In examining the evidence produced on behalf of the defendants, the learned Subordinate Judge firstly remarks that the plaintiffs" evidence that the said plots of land were khamar lands, that rent used to be realised for the same by appraisement of crops by the plaintiffs" patnidars is a false story. He believes the evidence of the defendants that they had been in possession in respect of these plots for a large number of years without any payment of rent and says that that is a circumstance from which an inference as to nishkar title can be drawn. The learned Subordinate Judge then considers the char chitta which was produced and marked as Ex. E in this case, comes to the conclusion that the lands mentioned there as nishkar cannot be identified with the, lands in suit. Lastly he considers the effect of the non production of the zemindary chitta of the year 1268-69 by the plaintiffs. The defendants had made a definite case in their written statement that the said zemindary chitta contained detailed specification of all nishkar lands within that part of the zemindary. They accordingly served upon the plaintiffs a notice to produce that chitta. In the evidence it transpired that two copies of the said chitta were prepared, one copy was retained by the zemindars, the other was given to the tenants. But it was not proved who was the particular tenant who had possession of the chitta. At Least it was not proved that the defendants had any knowledge of the particular tenant who had the counter-part of the said chitta. The learned Subordinate Judge considers that the non-production of the chitta is a circumstance which goes much against the landlord"s case. The learned Judge then takes into consideration two documents Exs. C and D. These are two kobalas by which the predecessor of the defendants purchased the two dags Nos. 941 and 1026 with a description that they were nishkar lands. It is in respect of these two documents that Mr. Sen has raised the question of admissibility. He says that two documents are not admissible in evidence to prove the nishkar rights and they would not be admissible in evidence u/s 13 of the Evidence Act. Having regard to the decision in Brijendra Kishore Roy Chaudhuri Vs. Mohim Chandra Bhattacharji and Others . I am inclined to hold that Exs. C and D are not admissible in evidence for the purpose of proving nishkar. The question, therefore, arises whether the case has to be remanded or not. That depends upon the use to which the learned Subordinate Judge put Exs. C and D. The

learned Subordinate Judge relies very strongly upon the fact that no rent had ever been paid for the lands in suit, that the defendants and their predecessors had been holding them for a very long time without any demand for payment of rent. He relies to some extent also on the fact that the plaintiffs withheld without any justification the zemindary chitta of 1268-69. He used Exs. C and D however, only by way of corroboration as he expressly puts it in his judgment. Reading the judgment as a whole, I come to the conclusion that the learned Subordinate Judge was really basing his judgment upon the other circumstance which I have mentioned above but used Exs. C and D only for the purpose of further support, that is to say, he has arrived at his finding really independently of Exs. C and D. I accordingly hold that the case comes within the principle formulated by Garth, C.J. in *Worries Chunder v. Chundee Churn Roy* 7 AC 293, at p. 293 Page of 7 C.-[Ed]. I would accordingly affirm the judgment and decree of the learned Subordinate Judge in respect of the two plots also.

3. The result is that this appeal is dismissed with costs. (The remaining portion is not necessary for purposes of this reporting.)