

Ananda Mohan Poddar and ors. Vs. Durga Charan Dutta and ors.

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Court : Kolkata

Decided On : Mar-05-1942

Reported in : AIR1942Cal527

Appellant : Ananda Mohan Poddar and ors.

Respondent : Durga Charan Dutta and ors.

Judgement :

Biswas, J.

1. This is an appeal on behalf of the plaintiffs against a decision of the Subordinate Judge of Dacca, modifying that of the Additional Munsif of Narayanganj. The plaintiffs were purchasers of a taluk named Taluk Rajaram Roy, being estate No. 4015 of the Dacca Collectorate, from one Prasanna Chandra Saha by a kobala dated 10th December 1934. Prasanna, in his turn, had acquired the taluk by purchase at a sale for arrears of revenue held on 20th June 1934, and for the purposes of the suit, the plaintiffs have been held to be entitled to all the rights of the purchaser at the revenue sale. After their purchase, the plaintiffs through Prasanna applied, for delivery of possession, and possession was delivered, to them on 11th April 1935. Thereafter they got their names recorded in the collectorate register, but when they went to take actual possession, they were resisted by the defendants. That led them to commence the pre-sent action. There were a large number of defendants, but the suit was contested by only three of

them, defendants 1, 2 and 42, The main defence was that the disputed lands were comprised in a mokarary tenure Sikmi Taluk Bhagyamanta Roy held under Estate Rajaram Roy from the time of the Permanent Settlement; in other words, that the defendants were protected from ejectment by virtue of Clause 1 of Section 37 of Act 11 of 1859. A further plea was taken in respect of one specific plot, C.S. Dag No. 24, as regards which it was alleged that it did not form part of the estate which had been sold, but that it appertained to a separate taluk No. 12520, which had been carved out of the parent estate as a result of butwara proceedings under the Estates Partition Act.

2. As regards plot No. 24, both Courts held that it appertained to Estate No. 4015. On the other point, the learned Munsif negatived the defence, but on appeal the learned Subordinate Judge gave effect to it, holding that the Sikmi Taluk set up by the defendants was shown to have been in existence from the date of the Permanent Settlement. Against this decision the plaintiffs have preferred the present appeal, and the defendants have filed a cross-objection as regards plot No. 24. The main question which has been argued by Mr. Sen, on behalf of the plaintiffs, is that the finding of the learned Subordinate Judge is not a proper or legal finding at all, inasmuch as it is based on certain presumptions not warranted by law. It appears that in support of their case that the Sikmi Taluk existed from the time of the Permanent Settlement, the defendants relied on certain ancient documents which have been marked as Exs. E to H, the oldest of which, Ex. E, is a judgment of the year 1853 in a proceeding under Act 4 of 1840. It is said that these documents make mention of a subordinate taluk Bhagyamanta Roy under taluk Rajaram Roy, which the learned Judge apparently takes to be identical with the Sikmi Taluk alleged by the defendants. In the said Ex. E there is a reference to two earlier documents, one of the year 1846 and the other of the year 1830, and it is said that these documents also contain an allusion to the Sikmi Taluk. From these data the learned Subordinate Judge came to the conclusion that the Sikmi Taluk was definitely proved to have existed at least as far back as 1830, and then from this finding, he proceeded to draw the further inference, in the absence of any evidence to the contrary from the plaintiffs' side, that the taluk must have been in existence since the date of the Permanent Settlement. It is Mr. Sen's grievance that the learned Judge permitted himself to draw this inference, presuming

backwards from 1830 to the year 1793.

3. So far as the question of the identity of the Sikmi Taluk is concerned, namely, its identity with the taluk mentioned in the documents relied on by the defendants, I do not think the appellants can go behind the finding of the lower appellate Court in this respect, nor, in my opinion, are they entitled to challenge the conclusion that the Sikmi taluk was shown to have been in existence at least as far back as 1830. The only question which may be said to have the semblance of a question of law is whether this last mentioned fact is sufficient in law to raise the further presumption in favour of the defendants regarding the existence of the taluk at the date of the Permanent Settlement. The learned Subordinate Judge expressed himself on this question in these terms:

It is not necessary for the defendants to prove by evidence that the Sikmi Taluk was created before the time of the Permanent Settlement. Mere proof of existence of the Sikmi Taluk from over 100 years back raises the presumption in the defendants' favour and shifts the onus on the plaintiffs to show that the Sikmi Taluk was created after the creation of the parent taluk.

4. It may be taken for granted that in a suit for ejectment of an under-tenant under Section 37 of the Revenue Sale Law, the onus lies on the defendant to prove that he comes within one or other of the exceptions mentioned in the section, assuming, of course, that the lands held by the defendant are comprised in the estate which was sold. The exception on which the defendants rely in the present case is that set out in Clause (1), which saves an istamrari or mokrari tenure which has been held at a fixed rent from the time of the permanent settlement. It is obvious that in many cases it must be a matter of great difficulty for a defendant to give positive evidence in support of a case under this exception, by carrying the proof right back to the date of the permanent settlement. If the Courts were to insist on such a strict standard of proof, the protection given by the Act might indeed be rendered illusory. It is not to be wondered at therefore, that in applying the rules of evidence to a case of this kind, the Courts have been induced to take a reasonable and rational view, and allow the defendant the benefit of a certain presumption from mere proof of long and undisturbed possession. As to what

should be deemed to be sufficiently long possession for the purpose of justifying such a presumption that has of course varied, as it must, in different cases, according to the facts and circumstances thereof.

5. There is an instructive judgment of the Judicial Committee in an old case reported in *Forbes v. Meer Mahomed Hossein* ('73) 20 W.R. 44, where certain principles were laid down by their Lordships as to the burden of proof as regards the existence of tenures created before the perpetual settlement. These principles have been since applied by this Court in several cases arising between purchasers at revenue sales and holders of under-tenures, and so far as I can see, it has been uniformly held that though the burden of proof rests upon the defendants whose tenures are questioned by the auction-purchasers, the burden will nevertheless be lightened to a great extent by giving effect to presumptions in their favour arising from proof of long and undisturbed possession. Thus, in *Nityanund Roy v. Banshi Chandra* ('99) 3 C.W.N. 341, it was found that the taluk had been in existence and in the possession of the defendants and their predecessors for a period of 100 years, which meant in that case a period going back to five years after the date of the permanent settlement, but there was no proof one way or the other as to the precise date on which the taluk had been created. Still their Lordships held that so far as probabilities were concerned, it was, to say the least, as probable that it had been created before the date of the permanent settlement, as that it had been created within the five years which elapsed since that date. In *Ananda Chandra v. Kunjo Behari* ('08) 8 C.L.J. 177, Mitra J. also quoting from the Privy Council decision referred to above, definitely negated the suggestion that in a case of this description direct evidence must be given to prove the existence of a tenure from before the permanent settlement, in order that it might be protected from avoidance on account of a revenue sale. Here, the positive evidence went back to the year 1824, but the learned Judge was not prepared to say that the Court could not from this and other facts that might be present come to the conclusion that the tenure had been in existence in 1793. The same rule was again affirmed in *Nagendra Lal Chaudhury v. Nazir Ali* ('06) 10 C.W.N. 503, where the defendants had proved that the tenures were mentioned in the survey chitta of 1839, that they were not avoided on purchase by the Government and were again recognised by Government in 1864, that rents

had been paid at a uniform rate for at least 60 years and that there had been sales of the tenures. It was held upon these facts that the Court might and ought to presume backwards and hold that the defendants had succeeded in discharging the burden of proof which Section 37 threw on them.

6. Mr. Sen has sought to distinguish these cases. All, he says, that these cases establish, is that there is nothing to prevent a Court of fact drawing, from direct evidence having reference to a particular point of time, a presumption regarding the existence of a similar state of things at a remote period, but he will object to the formulation of a principle that mere proof of the existence of a taluk in a particular year must inevitably raise a presumption that it must have subsisted also at an earlier date, however remote. I do not think that it was the intention of the Court in any of the cases referred to, to lay down a hard and fast rule of evidence in any such terms. On the other hand, it was expressly pointed out in some of these decisions that each case must depend upon its own facts, and speaking for myself, I respectfully agree that it must be so. In the present case, I do not think the learned Subordinate Judge, when he spoke of presumptions, meant in any sense to regard them in the same way as one would regard, for instance, a statutory presumption. All that he meant was that on the particular facts of the case, in the absence of anything to the contrary coming from the side of the plaintiffs, it was open to the Court to infer as a fact that the tenure did exist at the date of the Permanent Settlement, seeing it was proved by positive evidence to have been in existence in 1830. In other words, the position was that in view of the positive evidence in the case, the Court was prepared to bridge over the gap between the date of the Permanent Settlement and the year down to which the positive evidence went. In this view of the matter, I must hold that the finding of the learned Judge regarding the age of the tenure cannot be disturbed by me in second appeal. It must accordingly be held that the defendants have made out their case that the Sikmi taluk set up by them existed from the time of the Permanent Settlement.

7. Mr. Sen next argues that there is no direct evidence that the tenure had been so held at a fixed rent as required by Clause (1) of Section 37. I do not think that is of any consequence, having regard to the fact that if the tenure existed from the date

of the Permanent Settlement, Clause (2) would be equally applicable, and Clause (2) does not require that the tenure should have been held at a fixed rent. As regards the cross-objection, which relates to plot No. 24, the finding is, as I have already pointed out, that it belongs to estate No. 4015. That finding cannot be attacked in second appeal. Mr. Mitra, however, says that his clients' alternative case regarding this plot had not been considered at all by the Courts below. That alternative case was that even if plot No. 24 appertained to estate No. 4015, it was still comprised in the Sikmi taluk set up by the defendants under that taluk. The question is whether I should direct a remand for a trial of this specific issue. It is said, the settlement record bears out the defendants' case that this plot is a part of the Sikmi taluk, but as against this, there is the finding of the learned Munsif, which seems to have been affirmed by the learned Subordinate Judge, to the effect that the defendants never realised any rent in respect of the lands in plot No. 24, showing to my mind that the defendants were not in possession of this plot. In this state of the record, I think it would be proper to send the case back to the lower appellate Court for a specific finding as to whether plot No. 24 was comprised in Sikmi taluk, and I direct accordingly. If it was a part of the Sikmi taluk, the plaintiffs' claim for ejectment must be dismissed; otherwise, if it is found to be not comprised in the taluk, the plaintiffs will be entitled to a decree for ejectment. The result is that, in my opinion, as regards the disputed lands, with the exception of plot No. 24, the plaintiffs will be entitled to a declaration of their title as the superior zemindars, but the rest of their claim will fail. The appeal, therefore, stands dismissed with costs; the cross-objection is allowed but costs will abide the result. Leave to appeal under Clause 15 of the Letters Patent is refused.