Privy Council Appeal No. 81 *of* 1926.
Bengal Appeal No. 27 *of* 1924.

Kumar Gopika Raman Roy - - - - - - *Appellant*

v.

Atal Singh and others - - - - - - *Respondents*

FROM

THE HIGH COURT OF JUDICATURE AT FORT WILLIAM IN BENGAL.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 22ND JANUARY, 1929.

Present at the Hearing :
LORD SHAW.
SIR JOHN WALLIS.
SIR LANCELOT SANDERSON.

[*Delivered by* SIR JOHN WALLIS.]

This is an appeal from a decree of the High Court at Calcutta affirming a decree of the First Subordinate Judge at Sylhet and dismissing the plaintiff's suit, which both Courts held to be barred by limitation.

The plaintiff sued as the owner of a one-seventh share of the permanently settled estate No. 85 of the Collectorate of Sylhet to eject defendants 1 to 160 from 143 holdings in the occupation at the date of the plaint of defendants 1 to 160, as shown in the first schedule to the plaint. Defendant 161 was joined as a purchaser from defendant 148, defendants 162 to 186 as the co-sharers with the plaintiff in the estate, and defendant 187 as vendor to the plaintiff's father in 1896.

The plaint alleged that by an amicable arrangement the lands in schedule I had been allotted to a predecessor of the plaintiff in respect of a one-seventh share, which was afterwards acquired by the plaintiff's father in 1896, that they had all

along been in the occupation of the defendants 1 to 160 as tenants, that in 1896 these defendants had rendered themselves liable to forfeiture by denying their landlord's title, that the plaintiff's father had enforced their forfeiture and determined the tenancies by instituting 120 suits in 1904, which were afterwards withdrawn by leave with liberty to bring a fresh suit, and that the present suit was within time because brought within twelve years of the determination of the tenancies by the institution of the aforesaid suits. There was also a plea that the suit was not barred because the plaintiff was entitled under Section 14 of the Limitation Act to exclude the time spent in prosecuting the former suits, but this has not been relied on before their Lordships.

Defendants 1 to 160 pleaded, in addition to other defences, that they were not and never had been the tenants of the plaintiff and his predecessors in title, and both the lower Courts, after a very careful examination of the evidence, have found that the plaintiff has failed to prove the alleged tenancies and so to bring the case within Article 139 of the Limitation Act.

This was the only question argued on this appeal, and their Lordships, after carefully considering the evidence before the lower Courts, and the additional evidence which they thought it right to admit in the circumstances hereinafter stated, have arrived at the same conclusion.

The case is a very unusual one because both the lower Courts have found that the plaintiff has failed to prove any payment of rent to the plaintiff or his predecessors in title in respect of these lands ever since they began to be reclaimed and brought under cultivation about a hundred years ago. In these circumstances the learned Counsel for the appellant has been obliged to rely mainly on the effect of a decree in a suit of 1854, which, as found in the plaintiff's favour, was between his predecessors in title and the predecessors of defendants 1 to 160.

It is common ground that the suit lands were dense jungle until, in 1828 or later, some of the defendants' predecessors began to cultivate them. In 1844 the revenue authorities, treating them as *illam* or unsettled lands which were at the disposal of Government not having been included in any permanently settled estate, assessed them to revenue; and it was only after a long struggle that the plaintiff's predecessors succeeded in getting the revenue authorities in 1852 to reverse this decision and to recognise that these lands formed part of their permanently settled estate No. 85 in the Collectorate of Sylhet.

It is also clear that the contesting defendants' predecessors preferred the position of *raiyats* holding directly under Government and were very unwilling to be included in the plaintiff's *zemindari*, and it was in these circumstances that the plaintiff's predecessors on the 24th March, 1854, instituted suit No. 9 of 1854 in the Court of the Principal Sudder Amin of Sylhet against these defendants' predecessors for possession and mesne profits.

According to the allegations in the plaint (Exhibit 19), Pesal Chandra Rajkoer and other Manipuries, immigrants from the neighbouring state of Manipur, had executed *kabuliats* in favour of the husbands of two of the plaintiffs, who were widows, and had gone on paying rent to them until Shyan Sing, one of the defendants, and others had presented petitions alleging that these lands were *illam* and not included in the plaintiff's *zemindari*.

It may be observed here that, if the plaintiffs had been in a position to prove these allegations, they might have framed their suit against the defendants to enforce their rights as landlords on the footing of a subsisting tenancy, but it is equally clear from the terms of this plaint that they did not do so.

After setting out that the revenue authorities had assessed the suit lands as *illam* and had afterwards reversed their decision and paid over to the plaintiff the assessments they had collected, the plaint proceeded to state the cause of action against the defendants as follows :—

> "The settlement holder(s) and *jotedar* defendants having been *raiyats* and *jotedars* of the disputed settled and unsettled lands, they are in joint possession of the disputed lands as such."

The defendants were referred to in this way because the revenue authorities had only effected settlements with some the defendants.

> "After the disputed land was found, upon re-trial by the Sadar Board, to be revenue-paying land as appertaining to the said *taluq* belonging to us and was released from assumption as unsettled class of land, we on 1st Jaistha, 1259 (June, 1852), asked the defendants to give up possession of the disputed land, but instead of doing so the principal defendants are in possession of it as *ejmal* (joint). Accordingly we and the co-sharer defendants are entitled to get possession."

The plaint then concluded with a claim for past and future mesne profits, which it is unnecessary to set out.

In their Lordships' opinion this plaint is quite inconsistent with the view that there was any subsisting relation of landlord and tenant between the plaintiffs and the defendants in that suit.

It is equally clear from the summary of the written statements in the judgment (Exhibit 19A) that the defendants repudiated any tenancy under the plaintiffs. Their case was that they had been "living on the land in dispute from 1255 B.S. (1828) and possessing the Government unsettled lands by bringing under cultivation the jungles."

It remains then to be seen whether the effect of the judgment was to establish a relation of landlord and tenant which was not the case of either side.

Some reliance has been placed on the finding on one of the preliminary issues that the defendants as *jotedars*, according to the ruling of the Court of Sudder Adalat, could not plead limita-

tion against the *maliks* as owners. In their Lordships' opinion, this ruling, the grounds of which are not given, falls far short of affirming the existence of a subsisting tenancy.

The Court then recorded its finding on the "issues regarding the facts affecting the claim," which were as follows :—

> "Whether the disputed land belongs to the plaintiffs in purchased *zemindary* right as appertaining to *taluk* No. 85, Mahamad Jalal, within Mouza Patharkandi, and whether upon proper enquiries the said land was found to appertain to the said *taluk*, and was thereupon released by Government officers in favour of some of the plaintiffs, and whether the rent received from the *jotedar* defendants was paid back to the plaintiffs, and whether the objection made by the defendants that the said lands are *ilam* lands, though they were released by the Sadar Board on behalf of the Government is admissible ? And whether the plaintiffs are entitled to the mesne profits they have claimed ?"

On this issue the Court held that it could not go behind the decisions of the revenue authorities that the suit land was not *illam* land, and that it formed part of Estate No. 85. It accordingly proceeded to give the plaintiffs a decree for possession and mesne profits at specified rates.

> "Therefore for the above reasons it is ordered that the suit be decreed infavour of the plaintiffs awarding Rs. 1,235–6-10 pies as mesne profits for the disputed lands in the plaintiffs' share for the years 1258 B.S. to 1260 B.S. at the rates mentioned above and costs in proportion to the claim together with mesne profits at the said rates from 1261 B.S. till recovery of possession and awarding them possession of the disputed land as per boundaries given in the plaint as *zamindars*; that as long as the defendants are ready and willing to pay rents legally according to the rates prevailing in the village they should not be ousted from their right as *jotedars*, that the defendants do pay to the plaintiffs the mesne profits due to them and the costs to the extent of the claim as well as cost in Court."

Their Lordships agree with the lower Courts that the latter part of this order cannot be read as establishing the relation of landlord and tenant between the parties, which, as already observed, neither side had set up, but is to be read as giving the plaintiff a decree for possession with past and future mesne profits, subject to this condition that, so long as the defendants were willing to pay rent at the specified rates to the plaintiffs, they should not be ousted from their rights as *jotedars*.

"*Jotedar*," according to Wilson's Glossary, means cultivator, and it may well be that in those days, before the enactment of the Bengal Rent Act, 1859, the view was entertained that, by bringing these waste lands into cultivation, the defendants had acquired a right of occupancy of which they ought not to be deprived even though they had not set it up in their pleadings. But, whatever the right of the *jotedar* may have been in those days, it seems clear that under the decree the defendants were only to be entitled to it if they were ready and willing to pay rent to the *zemindar*, and there is abundant evidence in this case that they were not so willing, but entirely disregarded the decree.

The plaintiff also relied on Exhibit 5, a certified copy of an award of the Deputy Collector of Sylhet in certain boundary cases under Reg. VII of 1822. The plaintiffs in those cases were the predecessors of the plaintiff, and Case D related to the alleged inclusion of 5,636 *bighas* of estate No. 85 in other *mauzas*. The defendants' names are given as Ramanand Singh Mohan Singh and Nunai Singh, who are not shown to have been the predecessors of defendants 1 to 160 or any of them. The plaintiff relies on certain statements of the Deputy Collector in his award in this case as to rent having been realised by the plaintiffs in suit No. 9 of 1854 from the defendants in that suit.

In their Lordships' opinion these statements are not admissible as evidence of rents having been realised from the defendants in that suit. The Indian Evidence Act does not make finding of fact arrived at on the evidence before the Court in one case evidence of that fact in another case. Their Lordships also agree with the Courts below that this evidence, even if admissible, would be of very little weight.

Their Lordships have next to deal with the fresh evidence which they decided to admit in the following circumstances.

On the 20th August, 1918, the plaintiff, before closing his case, called as his 32nd witness one Gopesh Charan Chowdury, 165th defendant, who was impleaded as one of his co-sharers. The witness produced certain documents which the Subordinate Judge would not allow to be filed at that stage. Thereupon the plaintiff on the 22nd August, 1918, presented a petition praying for the admission of these documents, supported by an affidavit in which it was stated that the plaintiff's law adviser only saw them for the first time on Sunday, the 18th August.

The Subordinate Judge did not accept this statement, as the last mentioned witness had stated that the law agent had come to his house about two years ago—that is, in 1916—to see what documents he had, and the witness had showed him all the documents. In his order of the 22nd August the Subordinate Judge observed that the suit had been filed on the 7th October, 1912, and that after certain adjournments issues were settled on the 8th July, 1913, when the parties were directed to put in their documents within seven days. In these circumstances the Subordinate Judge apparently considered that they were out of time, and he refused to exercise his discretion in the plaintiff's favour, although the documents were certified copies of public records, because in his view it would have been prejudicial to the defendants to admit them at this late stage, and this order was upheld by the Appellate Court.

Now, in addition to enabling the parties to a suit to apply for discovery of documents, a matter regulated by Order XI, the Code of Civil Procedure imposes certain obligations on parties to a suit with reference to the documents on which they rely.

Under Order VII the plaintiff must file with the plaint the documents on which he sues and also a list of the documents on which he relies, and under Rule 18 documents which ought to have been and have not been included in the list cannot be exhibited without the leave of the Court. Further, under Order XIII the parties at the first hearing must produce the documents in their possession or power on which they rely, and under Rule 2 no document " which should have been but has not been produced in accordance with the requirement of this rule " is to be admitted in evidence without the leave of the Court. It is apparently under this Rule that the Subordinate Judge acted, as he observes that, on the 8th July, 1913, at the settlement of issues, which is at the first hearing, the parties were ordered to put in their documents within seven days.

This rule of exclusion, however, only comes into operation when the documents on which the parties rely should have been, but were not, produced at the first hearing. Now, according to the evidence at the date of the first hearing, these documents were not in the possession or power of the plaintiff, and the plaintiff and his advisers did not know of their existence so as to enable them to inspect them and form an opinion as to whether they would rely on them or not. In these circumstances it cannot be said that they should have been produced at the first hearing and therefore the rule does not authorise the exclusion. Further, as has been held in India, even where the rules of exclusion apply and the documents cannot be filed without the leave of the Court, that leave should not ordinarily be refused where the documents are official records of undoubted authenticity which may assist the Court to decide rightly the issues before it.

Their Lordships accordingly admitted the excluded documents, but find on examining them that they do not assist the plaintiff. Documents 2 and 3, which are copies of the measurement *chitta* prepared by the Amin in connection with the execution of the decree in suit No. 9 of 1854 and the Amin's report, only show that the Amin had great difficulty in executing the decree by putting the plaintiffs in possession owing to the absence of the defendants, and do not show, as contended for the plaintiff, that he gave them only symbolical possession instead of vacant possession.

Documents Nos. 4 to 11 are judgments of the Collector of Sylhet in suits filed by the plaintiffs in Suit 9 of 1854 against defendants alleged to be in possession of eight holdings for the execution of *kabuliats*. The judgments directed the defendants to execute *kabuliats* in respect of their holdings, but these holdings have not been identified with any of the 143 holdings which are the subject of the present suit, nor have the defendants in these suits been shown to be the predecessors in title of any of the defendants 1 to 160 in the present suit. It is not proved that decrees for the execution of *kabuliats* were obtained against any of the predecessors of defendants 1 to 160.

Section 88 of the Bengal Rent Act of 1859 no doubt provides that where a decree has been passed for the execution of a *kabuliat* and the defendant refuses to execute it, the decree is to have the same effect as if the *kabuliat* had been executed, and in this way a tenancy might be proved; but in the present case it is not shown that decrees for the execution of *kabuliats* were obtained against the predecessors of defendants 1 to 160 or that they refused to execute them.

For these reasons, in their Lordships' opinion, the appeal fails and should be dismissed with costs, and they will humbly advise His Majesty accordingly.

In the Privy Council.

KUMAR GOPIKA RAMAN ROY

v.

ATAL SINGH AND OTHERS.

DELIVERED BY SIR JOHN WALLIS

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