

To be substituted for copy of Judgment previously issued ; the word
" payment " in line 34 page 3 has been altered to " non-payment."

Privy Council Appeal No. 91 of 1928.

Patna Appeal No. 39 of 1927.

Shama Kant Lal and others - - - - - *Appellants*

v.

Mahanth Ramdhan Puri - - - - - *Respondent*

FROM

THE HIGH COURT OF JUDICATURE AT PATNA.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE
PRIVY COUNCIL, DELIVERED THE 4TH MARCH, 1932.

Present at the Hearing :

VISCOUNT DUNEDIN.

LORD THANKERTON.

SIR DINSHAH MULLA.

[*Delivered by* LORD THANKERTON.]

This is an appeal from a decree of the High Court at Patna, dated the 1st July, 1927, which varied a decree of the Court of the Subordinate Judge of Gaya, dated the 29th August, 1923.

The present suit was instituted on the 30th November, 1921, by Mohunt Dalmir Puri, in whose place the present respondent was substituted on the 2nd August, 1922, against eight defendants. Defendant No. 1 having died, his interest passed to his sons, who were defendants Nos. 2 and 3, and on the 14th August, 1923, the defendants were renumbered. Defendants Nos. 1 to 6 are now represented by the present appellants, and defendant No. 7 was Babu Nageshwar Prasad, but service of the summons on him was not proved and he did not appear to resist the suit, and his name was removed from the record under the judgment of the Subordinate Judge.

The respondent is the proprietor of a 12 annas share in Mauza Baghore, District of Gaya, the remaining four annas being the property of one Kameshwar, who gave a mokarrari of his four annas to one Gyani Lal, Nageshwar formerly defendant

No. 7, succeeded to the mokarrari interest of Gyani Lal, and is in possession as mokarraridar under Kameshwar. In the record of rights, which was published on the 2nd December, 1915, the respondent was recorded as the proprietor of 12 annas of the mauza, and defendants 1 to 6 were recorded as mokarraridars in respect of four annas comprised within the respondent's 12 annas under a "verbal" mokarrari.

In the plaint the respondent challenged the correctness of the entry in the record of rights and alleged that the defendants had no legal right to possession and that their possession was against right and as of "trespassers." The prayer of the plaint was for possession and for mesne profits, and, in the alternative, that a proper and fair rent might be assessed upon the lands, if the Court found that the defendants had any tenancy rights in the lands in question. He alleged that his 12 annas share was let in oral thika to Nageshwar from 1902 to 1915, and that Nageshwar paid rent up to 1914 at the annual rate of Rs. 1,955; that he had recently learned that Nageshwar, in league with the appellants, had joined them in four annas out of the twelve annas oral thika without the respondent's knowledge or consent; that the appellants had got themselves recorded as holding such four annas as oral mokarrari in the record of rights in 1915; and that the respondent first came to know of the matter after the publication of the record of rights.

The appellants, in their original written statements, in addition to certain defences no longer in question, claimed that the four annas out of the respondent's twelve annas was their permanent bafarzandan mokarrari, and that it had been in their possession for over twenty years and was never in his possession of the respondent; that the jama was fixed in perpetuity at Rs. 159, which, by arrangement, was payable at Rs. 158 to revenue and cesses by them. They further claimed that the suit was barred by limitation as they had been openly and adversely in possession for over twelve years to the full knowledge of the plaintiff, and denied that they were in league with Nageshwar.

In a set of additional written statements, the appellants stated that the four annas in suit had been held by their ancestors since 1857, that in 1871 Gossain Lachman Puri, predecessor in interest of the respondent, brought a suit against Din Dayal Lal, a predecessor of the appellants, and against Dalchand Ram, brother-in-law of Din Dayal Lal, for recovery of khas possession of eight annas share of Mauza Baghore, in which the plaintiff repudiated any mokarrari, and that the mokarrari set up by Din Dayal Lal was confirmed by the High Court of Calcutta; and that this constituted *res judicata* as between the present parties.

Among the issues framed by the Subordinate Judge were the following:—

(3) Is the suit barred by limitation?

(4a) Is the suit barred by *res judicata*?

- (5) Have the defendants no title to the share in dispute, and is the survey entry recording them as mokarraridars incorrect ?
- (6) Have the plaintiffs any right to get the mokarrari jama assessed ? If so, how much ?
- (7) Is the plaintiff entitled to get sir possession over the property in dispute by evicting the defendants ?

The learned Subordinate Judge found against the appellants on issues (3), (4a) and (5). He held on the evidence that there was no proof of mokarrari right, and that the survey entry was without foundation and incorrect.

In support of the plea of *res judicata*, the appellants had produced a copy of the judgment of the High Court of Calcutta in the suit of 1871, from which it appeared that the plaintiff, as owner of eight annas of Mauza Baghore and two annas thirteen dams of Mauza Bhandajore, sought a declaration that a mokarrari deed for, *inter alia*, the whole sixteen annas of Mauza Baghore set up by one Girwardhari Singh was forged, fraudulent and collusive. The deed was dated 28th July, 1857, and was in favour of Girwardhari Singh. The High Court upheld the deed. The appellants' case was that Girwardhari Singh was a benamidar for Din Dayal Lal, and that he was the same man as Girdhari Singh, a former tehsildar of the present appellants. The Subordinate Judge held that this identity was not proved, and that any way Girwardhari could not be benamidar for Din Dayal Lal, as the judgment of the High Court of Calcutta observes, "It should be noticed that the real lessee was Repal Singh, the name of his son Girwardhari being used." He further pointed out that there was absolutely no evidence worth the name that Repal Singh's mokarrari came down to the appellants. He therefore rejected the plea of *res judicata*. He also rejected the plea of limitation in respect that, having failed to prove a mokarrari right, the appellants had not proved any adverse title, or non-payment of rent, or any overt act which would show adverse possession.

The learned Subordinate Judge, however, expressed the view "that the defendants are found to have been in possession of some interest in the Mauza since a very long time and for want of better explanation, the presumption relates to the share now in dispute which is in present possession of the defendants," and stated "The plaintiff is not anxious to evict the defendants and has conceded the long possession of the defendants and is quite willing to treat them as tenants"; he therefore assessed Rs. 583 besides legal cesses as the rent for the lands from 1919.

From this decree the present appellants appealed to the High Court of Judicature at Patna, and the present respondent filed cross-objections, denying that he had made the concession stated by the Subordinate Judge, and claiming khas possession. The High Court, in their judgment dated the 1st July, 1927, concurred in the finding of the Subordinate Judge that the

defendants had failed to establish any mokarrari right, and in his finding as to *res judicata*. On the question of limitation and assessment of rent, the judgment states " It is the common case that the learned Subordinate Judge was not entitled to assess a rent payable by the defendants to the plaintiff. If the plaintiff's suit was barred by limitation, the learned Subordinate Judge should have dismissed it ; but that, if it was not barred by limitation, there was no escape from the conclusion that the plaintiff was entitled to a decree for khas possession. I am of opinion that this view which has been presented before us by both the parties is right and that the order of the learned Subordinate Judge cannot be maintained. Either the plaintiff is entitled to a decree for khas possession or his suit should be dismissed." The learned Judges held that the defendants had failed to identify the land of which they had been in possession for so long with the four annas in dispute, and they declined to accept the presumption of identification which the Subordinate Judge had applied in favour of the defendants ; they also held that the evidence showed that the plaintiff was in sir possession of the entire twelve annas in 1900 and that the plaintiff was clearly in possession of the entire twelve annas from 1902 to 1915 through Nageshwar as thikadar, so that the suit must be regarded as in time. They therefore agreed with the Subordinate Judge in rejecting the plea of limitation, and awarded khas possession to the plaintiff.

The present appeal is taken by the defendants from the decree of the High Court. It may be noted that, defendant No. 3 having died shortly before the date of that decree, appellants Nos. 3 and 4, his widows, had been substituted in his place. In September, 1931, before the appellants' case had been filed, a petition was presented by the respondent on the narrative that appellant No. 4 had died, that appellant No. 3 was the proper person to be substituted in her place on the record, and that appellant No. 3 had made a compromise with the plaintiff-respondent, under which she renounced all claim to her alleged one anna and four pie share out of the disputed four annas share in Baghore ; he accordingly asked that the compromise should be recorded and that the appeal might stand dismissed to the extent of the interest of the third appellant.

In the case of appeal subsequently presented by the remaining appellants only two grounds of appeal were stated, viz. : (1) Because the plaintiff's suit for khas possession was barred by limitation, and (2) because the plaintiff gave up his claim for khas possession before the Subordinate Judge recognised the defendant's tenancy and only asked for a fair assessment of rent.

On the 19th January, 1932, the appellants presented a petition for admission of further documents as evidence in the appeal and for the amendment of their case by the addition of four further reasons of appeal. These documents all formed part of the record in the 1871 suit, which the appellants had

discovered to have come up on appeal to this Board, who, on the 21st January, 1879, affirmed the judgment of the High Court of Calcutta. The case is reported in Sutherland's Judgments of the Privy Council, Vol. III, 581. This petition was first dealt with at the hearing, and their Lordships refused the admission of the documents, but allowed the amendment of the appellants' case by the addition of another ground of appeal, viz.: "3. Because in the circumstances of the case, the respondent's claim is barred as *res judicata*."

The appellants did not seek to maintain their second ground of appeal, but, as in the argument before the High Court, they accepted the position that, if the suit was not barred by limitation or *res judicata*, the respondent was entitled to decree for khas possession.

On the question of limitation, their Lordships see no reason to differ from the conclusions of both Courts below, but they would point out that the failure of the appellants to identify the "some interest in the Mauza," of which the learned Subordinate Judge found they had been in possession "since a very long time," with the four annas in dispute is of itself sufficient for rejection of the plea of limitation, and that, if the Subordinate Judge had not erroneously given the appellants the benefit of a presumption, he would evidently have agreed that the appellants had failed in that identification.

In their Lordships' opinion, the appellants equally fail to establish their plea of *res judicata*. They are entitled, of course, to refer to the judgment of this Board of 1879 and, in so far as it may be necessary for elucidation of that judgment, to refer to the record in the appeal. A perusal of the judgment makes clear (a) that the plaintiff in that suit, as owner of an eight annas share in Baghore, challenged the genuineness of a mokarrari grant of 1857 of the entire sixteen annas; (b) that the only issue raised or decided was the genuineness of the deed and that the right of the defendants *inter se* was not in issue or decided; and (c) that Din Dayal Lal was made a defendant as the purchaser of a share in the mokarrari. The appellants no longer maintained that Girwardhari was benamidar for Din Dayal Lal, and there is no evidence to show that any share Din Dayal Lal had has come to the appellants, and, even if that were assumed, there is no evidence to identify such share of Din Dayal Lal with the four annas share in dispute in the present suit.

Their Lordships will humbly advise His Majesty that the compromise between appellant No. 3 and the respondent should be recorded, that the appeal should be dismissed and that the respondent should be paid his costs in the appeal up to the 14th September, 1931, by appellants 1 to 3 and 5 to 7, and his costs thereafter by appellants 1, 2 and 5 to 7.

In the Privy Council.

SHAMA KANT LAL AND OTHERS

v.

MAHANTH RAMDHAN PURI.

DELIVERED BY LORD THANKERTON.

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