

Ambika Prasad Thakur and Others

Vs

Maharaj Kumar Kamal Singh and Others

Civil Appeal No. 435 to 437 of 1959

(K. Subba Rao, R. S. Bachawat, J. R. Mudholkar JJ)

08.09.1965

JUDGMENT

BACHAWAT J. –

After stating the facts of the case and discussing the evidence his Lordship proceeded :

On the question of title also, the plaintiffs must fail. In the plaint, the basis of their claim of title was (a) occupation of 426 bighas 18 kathas and 9 dhurs of Dubha Taufir by their ancestor Naurang Thakur as occupancy tenant and the record of his rights in the survey papers of 1892 and (b) the oral arrangement with the Dumraon Raj. The first branch of this claim is obviously incorrect. The survey papers of 1892 do not record occupancy tenancy rights of Naurang Thakur in 426 bighas 18 kathas and 9 dhurs. In the High Court, counsel for the plaintiffs conceded that in the Khasra of 1892-1893 survey the plaintiffs' branch was recorded as tenant for about 19 bighas only. The oral arrangement is not established, and the second branch of this claim also fails. The Subordinate Judge did not examine the basis of the plaintiffs' claim of title. His finding in favour of the plaintiffs' title was based chiefly on (1) oral evidence, (2) depositions of witnesses in previous litigations, (3) possession, (4) an admissi

The claim of title based upon cl. (1) of s. 4 of Regulation XI of 1825 was not clearly made in the pleading. It was clearly put forward for the first time in the High Court. It was contended that the decision in Suits Nos. 22 to 31 and 199 of 1937 conclusively established this claim. The High Court rightly pointed out that those suits did not relate to any portion of the subject-matter in the present suit, and the decision in those suits cannot operate as res judicata. The plaintiffs now contend that the judgment is admissible to show that the plaintiffs' ancestors asserted title to other Taufir lands as an accretion to frontier Dubha Mal plots under the Regulation and their claim was recognised. But the plaintiffs' ancestors did not consistently assert such a title. In Attestation Dispute Cases Nos. 1 to 253 of village Dubha they claimed title to the lands in suit as an accretion to their 77 bighas, and this claim was negatived.

The survey records of 1892, 1895, 1904 and 1909 disclose that the ancestors of the plaintiffs held some of the frontier plots of Dubha Mal. The High Court was, therefore, asked to draw the inference that their ancestors held those plots during 1845 to 1863 when the Taufir lands accreted. The question is whether such an inference should be drawn. Now, if a thing or a state of things is shown to exist, an inference of its continuity within a reasonably proximate time both forwards and backwards may sometimes be drawn. The presumption of future continuance is noticed in

Illustration (d) to s. 114 of the Indian Evidence Act, 1872. In appropriate cases, an inference of the continuity of a thing or state of things backwards may be drawn under this section, though on this point the section does not give a separate illustration. The rule that the presumption of continuance may operate retrospectively has been recognised both in India, see *Anangamanjari Chowdhurani v. Tripura Soondari Chowdhurani* and England, see *Bris*

In Ex. L-1 (13), the Khatian of Mauza Dubha published on January 2, 1912, the tenancies of several plots held by the ancestors of the plaintiffs are described as *Sharah Moaiyan* (at fixed rate of rent). The plaintiffs contend that this record read in conjunction with s. 50(2) of the Bengal Tenancy Act, 1885 shows that the ancestors of the plaintiffs must have held those plots from the time of the Permanent Settlement. The contention is based on fallacious reasoning. Section 50(2) of the Bengal Tenancy Act, 1885 raises in a suit or proceeding under the Act a presumption that a raiyat has held at the same rate of rent since the Permanent Settlement, if it is shown that the rate of rent has not been changed during the last 20 years. Fixity of rent may arise not only from this presumption but also from express grant. An entry in the record of rights showing that the tenancy was at a fixed rate of rent does not necessarily mean that the tenant was holding the land from the time of the Permanent Settlement. The poi We think that this new point ought not to be raised at this stage.

The suit as framed must fail, even if we presume that the ancestors of the plaintiffs' branch held some of the frontier plots in Dubha Mal between 1845 and 1863, when the *Taufir* lands accreted. The ancestors of the defendants-third party's branch also held numerous frontier plots of Dubha Mal between 1892 and 1909, and making the same presumption in their favour, it would appear that they also held numerous frontier plots of Dubha Mal between 1845 and 1863. The ancestors of the plaintiffs' branch and defendants-3rd party's branch separately held and enjoyed the several frontier plots of Dubha Mal, and on the plaintiffs' own case, the ancestors of the plaintiffs' branch would be entitled to the alluvial accretions in front of their plots and similarly, the ancestors of the defendants-3rd party's branch would be entitled to the alluvial accretions in front of their plots. The alluvial accretions of each plot must be apportioned by drawing perpendicular lines from its boundary points to the new course of the Ga

Realising this difficulty, counsel for the plaintiffs made an entirely new case before us. He submitted that *Dihal Thakur*, the common ancestor of the plaintiffs and defendants-3rd party owned all the frontier plots of Dubha Mal between 1845 and 1863 and consequently acquired occupancy rights in all the *Taufir* lands accreted in front of his plots, those rights have now devolved jointly upon the plaintiffs and defendants-3rd party, and the plaintiffs and defendants-3rd party are jointly entitled to the entire *Taufir* lands. There is no trace of this case in the pleadings and the judgment of the trial Court. This case was not made even in the High Court. On the contrary, the plaintiffs' case all along has been that the branches of the plaintiffs and defendants-3rd party separately possessed and enjoyed their respective plots. Moreover, we are not inclined to draw the presumption that *Dihal Thakur* owned all the frontier plots of Dubha Mal between 1845 and 1863. Even if we assume that the descendants of *Dihal Thak*

To establish their claim based upon cl. (1) of s. 4 of Regulation XI of 1825, the plaintiffs must also prove that the *Taufir* lands were gained by gradual accession from the recess of the river. Having regard to our conclusions on the other points, we do not wish to express any opinion on this question. Even if the *Taufir* lands were gained by gradual accession, this gain did not accrue for the benefit of the plaintiffs. The plaintiffs have failed to establish that they or their ancestors held any plot or plots to which the accretions were annexed.

The plaintiffs have failed to prove their title based upon cl. (1) of s. 4 of Regulation XI of 1825. They have also failed to establish their claim of title based upon oral arrangements. Their claim of title based upon occupation of the disputed lands is also not established. They have failed to prove that they were in occupation of the disputed lands. Moreover, mere occupation does not confer tenancy rights.

The result is that Civil Appeals Nos. 435 and 436 of 1959 must fail.

C. A. Nos. 435 to 437 dismissed.

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