Subodh Gopal Bose

Vs

Bejoy Kumar Addya and Others

Civil Appeal No. 343 of 1967

(G. K. Mitter, K. S. Hegde, A. N. Grover JJ )

18.04.1972

JUDGMENT

MITTER, J. -

1. This is a plaintiff's appeal from a judgment of reversal by the High Court, setting aside the finding of the trial court that the defendants (respondents before this Court) were trespassers to the extent of the plaintiff's interest in the lands in suit and awarding a decree holding the plaintiff entitled to get has possession of the said lands, to the extent of the said interest by evicting the defendants therefrom. Disagreeing with the finding of the trial court, the High Court held that the defendants and their predecessors-in-interest had, to the knowledge and without objection of the proprietors of the Touzi in which the lands are situate, been in possession thereof more than 12 years asserting a lakheraj interest in the property and had acquired the title of Nishkardar. According to the High Court the plaintiff could only ask for assessment of rent of the lands held by the defendants for which separate proceedings were necessary. In appeal to this Court, the plaintiff-appellant seeks to have the decree of the trial court restored.

2. The pleadings in the suit out of which the appeal arises suffer considerably from lack of clarity and precision. However the facts which form the background of the suit and now admit of no dispute are as follows. At the date of the suit i.e., in 1944, the defendants were by themselves or through their tenants in possession of a plot of land measuring approximately 6 bighas bearing premises No. 20/1 Chetlahat Road in mouza Chetla. The lands of this mouza were not all included in any one permanently settled touzi but were scattered over and appertained to no less than 15 touzis numbering 1 to 6 and 8 to 16 of the collectorate of 24 Parganas. The holder of the 16 annas share to touzi No. 6 was entitled to an undivided 1/6th share of the entire mouza Chetla including the lands therein. The said mouza had never been partitioned and the lands of the 15 touzis were in consequence held jointly by the owners of the touzis. The defendants were owner of touzi No. 4. Their predecessors-in-interest were mortgages of the said 6 bighas of land under a deed of 1877 and later auction purchased the same. In the mortgage document the said plot of 6 bighas of land - of the identity whereof there can be no dispute - was described variously as "auction purchased Nishkar land", "rent free land" an "Lakheraj land". The concurrent finding of both courts below is that touzi No. 6 was a permanently settled estate and under the Permanent Settlement Regulation I of 1793 no Lakheraj land (meaning land free from the obligation to pay revenue) could be included therein. Before the present proceedings no one appears to have claimed any rent of the said lands of the defendants or their predecessors-in-interest.

3. The suit out of which the appeal arises was filed in the court of the Subordinate Judge 24 Parganas West Bengal on December 8, 1944. The plaintiff based his title on a purchase at a revenue

sale held on January 6, 1936. The property which was put up for auction and purchased by the appellant was the 16 annas share of the permanently settled touzi mahal No. 6 of the Collectorate of 24 Parganas for default in the payment of revenue under the provisions of Act XI of 1859. The plaintiff got symbolic delivery of possession on June 4, 1936. Under the relevant portion of Section 37 of the said Act as in force at the time of the institution of the suit, the purchaser of an entire estate in the permanently settled districts of Bengal, Bihar and Orissa sold under the Act for the recovery of arrears due on account of the same, acquired the estate free from all encumbrances which might have been imposed upon it after the time of the Permanent Settlement. The purchaser was also entitled to avoid and annul al under-tenures and forthwith eject all under-tenants except Instimrari of Mukhurrari tenures which had been held at a fixed rent from the time of the Permanent Settlement and tenures existing at the time of the settlement which had not been held at a fixed rent. The plaintiff alleged that the defendants were holding possession of the said lands which appertained to touzi No. 6 without asking any settlement and their title and interest therein being no better than an encumbrance within the meaning of Section 37 of the Act were liable to annulment after due notice. The plaintiff asserted that such notice had been given. The plaintiff claimed to have thereby become entitled to joint possession with the defendants to the extent of one sixth interest therein in has and through tenants.

4. The defendants raised a large number of defences but those with which the courts below were mainly concerned were : (1) they had been enjoying and possessing the said lands in Lakheraj right even before the creation of the touzi, (2) they had otherwise acquired a good title arising out a adverse possession independent of the Lakharej interest, and (3) in consequence of the above the plaintiff was not competent to annul either or both of these rights on the strength of his auction purchase. The defendants alleged that they and the maliks of the other touzis in the mouza were owners of may lakheraj lands therein and that they were tenants under the said lakheraj : further their tenancy being under the owners of touzi Nos. 1 to 6 and 8 to 16 could not be destroyed in part.

5. The trial court found that the disputed lands had been assessed to revenue and the defendants had no lakheraj rights therein. Besides the mortgage deed already referred, the defendants had been able to produce no other document of title. The trial court held that the mere fact this nobody had ever realised rents from the defendants at least since 1877 was not enough to establish their alleged Lakheraj right. Further, the plaintiff being a purchaser at a revenue sale was entitled to all the rights which the original settlor had at the date of the Permanent Settlement. The defendants could acquire no tenancy rights by waiver an acquiescence as pleaded in the written statement. They must, therefore, be treated as trespassers and the plaintiff would be entitled to get has possession to the extent of his 1/6th share.

6. The High Court agree partially with the trial court and held -

> (1) That touzi No. 6 had no land exclusive to it.
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> (2) That there had been no partition of the lands in the mouza with respect to the said touzi and that they were held jointly.
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> (3) The defendants had taken an mortgage of a plot of land 6 bighas more or less in extent by Ex. M in 1877 and had obtained a decree against the mortgagors Ex. A-1 and purchased the said plot in execution as covered by the sale certificate Ex. J. The identity of the plots in the sale certificate with the plot now held by the defendants was established by the report of the Commissioner appointed for the purpose.

(4) Although the plot was variously described as Lakheraj and Nishkar these words were used indiscriminately at a time when the distinction between the meaning of the two words was not properly appreciated. That these words were so used in old documents has the support of the decision of the Calcutta High Court in Keshwar Bhagat v. Sheo Prasad (18 Cal LJ 166.).

(5) As the property was situate within the Mal assets of touzi No. 6 the defendants must necessarily hold under the plaintiff and his predecessors-in-interest. Although the defendants never pleaded specifically their Nishkar title they had, however, asserted a Lakheraj interest in the property and claimed to have been in possession of the land for more than 12 years to the knowledge and without objection of the proprietors of the touzi. As such their defence amounted to an assertion of rent-free interest acquired by adverse possession.

(6) The plaintiff had produced no evidence to challenge the defendant's assertion that they were Nishkardars or to establish that they were ordinary tenants.

(7) The defendants, who were not assessed to rent by any previous purchaser at a revenue sale, might have acquired by prescription a right to hold rent-free against the former purchaser. The right to hold land-free of rent would be an encumbrance which stood annulled because of the last revenue sale. The right to hold free of rent was gone but what remained with the defendants was a right to hold the land with a liability that rent could be assessed within a period of twelve years.

(8) The plaintiff was not entitled to has possession but was only authorised to sue for assessment of rent.

7. In our view, in order to succeed the plaintiff had to allege and prove that the defendant's interest was an encumbrance imposed upon the estate after the time of the permanent settlement and was not within the four corners of the exceptions provided. Section 37 of Act XI of 1859 was substituted by a new section by West Bengal Act VII of 1950. As a result of the amendment a purchase of an entire estate in the permanently settled districts of West Bengal sold under the Act of 1859 for the recovery of arrears due on account of the same, was entitled to acquire the estate free from all encumbrance which may have been imposed after the time of the settlement and was also to be entitled to avoid and annul all tenures, holdings and leases with some exceptions. The said exceptions were -

(a) tenures and holdings which have been held at the time of the Permanent Settlement either free of rent or at a fixed rent or fixed rate of rent, and

(b)(i) tenures and holdings not included in exceptions (a) above made, and

(ii) others leases of land whether or not for purpose connected with agriculture or horticulture, existing at the date of issue of the notification for sale of the estate under this Act.

8. Under sub-section (2) 'tenure' includes a tenure as defined in the Bengal Tenancy Act, 1885 and 'holding' includes a holding as defined in the said Act. Section 7 of the Act of 1950 provided that if the suit, proceedings etc., could not have been validly instituted, preferred or made had the Act of 1950 been in operation at the date of the institution, it would abate. The High Court examined the

question of abatement and held that in 1944 when the suit was filed Section 37 had not been amended and the plaint was a perfectly good plaint. It also opined that if the defendants had raised the question of abatement of the suit before the hearing in 1955 the plaintiff might have applied for an amendment of the plaint by introducing an alternative case of an unprotected encumbrance. As the defendant had not taken any step for a period of four years after the amendment of the statute the High Court did not allow the defendants to raise the question of abatement and further held that the suit could not have been said to have abated on the averments in the plaint.

9. Both the courts examined the title set up by the defendants and the finding of the High Court that the defendants were holding as nishkardars although they could not prove that the lands were revenue free, is beyond challenge. The plaintiff made no effort in his plaint to plead that the defendant's interest in the property was an encumbrance which had been imposed upon the estate after the time of the Permanent Settlement. The plaint seems to have proceeded on the basis that it was an encumbrance inasmuch as the defendants were described as holding the lands without taking any settlement and as such their interest was liable to annulment in terms of the unamended provisions of Act XI of 1859. After the amendment of the Act in 1950 the plaintiff made no effort to amend his plaint and raise a plea that the interest of the defendants was an encumbrance liable to be annulled as being a tenure or a holding or lease not covered by any of the exceptions provided in the amended section. When exactly the rent-free interest of the predecessors-in-interest of the defendants was created is not known and at this distance of time it is impossible to ascertain what were the circumstance which caused the original Nishkar grant to be made or when it was made. We therefore adopt the principle enunciated by the Judicial Committee of the Privy Council in Bawa Mangiram Sitaram v. Kasturbhai Nanibhai (49 IA 54, 59 AIR 1922 PC 163.), that the courts will assume that the grant was made as alleged in order to secure as far as possible quiet possession to people who are in apparent lawful holding of an estate. Beyond question the onus was on the plaintiff to establish before the courts that the defendant's interest was an encumbrance which was not protected even by the amendment of Section 37 by Act VII of 1950 and the plaintiff-appellant has signally failed to discharged the said burden of proof.

10. In the result, we uphold the judgment and decree of the High Court and dismiss the appeal with costs.

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