

CALCUTTA HIGH COURT

Nibaran Chandra Sikdar

Vs.

Abdul Hakim

(Mukerji, J.)

21.12.1927

JUDGMENT

Mukerji, J.

1. The suit which has given rise to this appeal was instituted by the plaintiff for declaration of title and recovery of khas possession of certain lands.
2. The lands comprised of two plots, the southern portion of Cadastral Survey Plot No. 3315 and the whole of Cadastral Survey Plot No. 3316. The plaintiff's case was that the lands originally belonged to his father in ryoti right and comprised a holding held under one Nobo Chandra Saha, that the said Nobo Chandra Saha sold up the holding at a rent sale, and that one Ramesh Chandra Rakshit purchased it at the said sale and let it out to the plaintiff in dar-ryoti interest on 23rd April 1920, that the defendants dispossessed him in August 1920, upon which he instituted a suit under Section 9, Specific Relief Act, but was unsuccessful therein and hence the suit. The case of defendant 1 was that Cadastral Survey Plot No. 3315 was held by his father in dar-ryoti right under one Sarada Charan Sikdar who in 1917 also mortgaged his ryoti interest to the said defendants' father. The case of defendant 3 was that Cadastral Survey Plot No. 3316 belonged to certain persons, that under a partition and a transfer subsequently made it came to be owned in ryoti right by defendant 3, and that be settled it in dar-ryoti to defendant 1.
3. The Munsif decreed the suit, but the Subordinate Judge on appeal has dismissed it.
4. The Subordinate Judge has found that the documents showed that one Nobo Chandra Saha having obtained a decree for arrears of rent against the plaintiff's father Ratanmani put the holding up to sale and Ramesh Chandra Rakshit purchased it at such sale in 1900 that in 1906, Sarada Charan Sikdar sold his interest in the lands to Ramesh Chandra Rakshit, and in April 1920, plaintiffs obtained a settlement thereof from the said Ramesh Chandra Rakshit. He was of opinion that there was nothing to show who this Nabo Chandra Saha was or whether he was the sole landlord and whether Ratanmani was the sole tenant, and that there was no explanation why

Sarada was not made a party in the rent suit which Nobo Chandra Saha instituted though Sarada along with Ratanmani were recorded in Cadastral Survey records as the tenants in respect of the two plots Nos. 3315 and 3316, which were also described therein as one holding with defendant 1's father as a korfa tenant under them. On the whole he was of opinion that the rent decree and the sale was a shady and suspicious transaction. He, however, decide the appeal on the ground of limitation holding that the suit failed as neither the plaintiff nor his lessor Ramesh was in possession within 12 years before the suit. It is this finding on the question of limitation that is challenged on behalf of the plaintiff who has preferred this second appeal.

5. To the maintainability of the appeal a preliminary objection has been taken on behalf of the respondents. It is pointed out on their behalf that this appeal was filed on 24th June 1925, that prior to filing the appeal the plaintiff had filed an application for review on 30th April 1925, before the Subordinate Judge and the application for review was allowed on 14th September 1925, the result being that the appeal was again heard; and on 20th January 1926, a fresh judgment was delivered by which the original judgment was held to stand good and a fresh decree was prepared and signed on 27th January 1926. It is urged that the present appeal is in the circumstances not maintainable. The appellant, on the other hand, urges that by the order granting the application, for review the Subordinate Judge merely kept his original judgment "in abeyance," as he expressly said in his order passed on 14th September 1925, and that when by the judgment ultimately passed on 28th January 1926, and the decree prepared and signed on 27th January 1926, the original judgment was held to stand good, the appellant is competent to attack the original judgment and the original decree in this appeal. In my opinion the effect of allowing an application for review is to vacate the decree originally passed, and the decree that is subsequently made on the review, even if it does not modify the decree originally passed, is a new decree superseding the original one. For this view that I take, I do not find any authority directly or clearly in point. The case of *Kanhaiya Lal v. Baldeo Prasad*¹ was one in which the former decree was modified in important particulars on the review; so also in the case of *Brijbasi Lal v. Salig Ram*² there was a modification. In the case of *Pyari Mohan Kundu v. Kalu Khan*³ it is said at p. 1016 (of 44 Cal) that if the application for review is successful the appeal cannot proceed, and *Kanhaiya Lal v. Baldeo Prasad*⁴ is quoted in support. The decision of the Lahore High Court in *Basheshar Nath v. Ram Kishen Das*⁵ is perhaps the only authority which may be cited as fully supporting my view.

6. In the circumstances I think it proper to record my views on the merits of the appeal on which also I think the appeal must fail. The argument on the merits is that as the defendants cannot claim any higher rights than those of under-ryots, and inasmuch as Ratanmani's and Sarada's names were recorded as ryots in the Cadastral Survey records, and because the defendants cannot dispute the purchase by Ramesh of Ratanmani's interest at the rent sale and of Sarada's interest by private purchase, or challenge the lease granted by Ramesh to the plaintiff, it should be held that the under-ryoti tenancy which was at one time held under Ratanmani and Sarada still continues and, therefore, the possession of Ramesh and also of the plaintiff is established. In

other words, it is contended that the relationship as between ryot and his under-ryots not having been determined, even though no rent may have been paid or received, Ramesh must be held to have been in possession and so the plaintiff. This argument assumes that a mere assignment or transfer is sufficient to put the assignee or transferee in possession as against persons claiming to hold under the assignor or transferor, a proposition which cannot be seriously put forward. In my opinion, the finding of the Subordinate Judge on the question of possession is a question of fact and should be viewed as such.

¹[1905] 28 All. 240

³[1917] 44 Cal. 1011

⁵[1919] 140 P.R. 1919

²[1912] 34 All. 282

⁴[1905] 28 All. 240

7. The appeal fails and is dismissed with costs.