CALCUTTA HIGH COURT

Benode Lal Chakravarty

Vs.

Secy. of State

(Suhrawardy, J.)

04.06.1930

JUDGMENT

Suhrawardy, J.

1. The suits out of which these appeals arise were brought by the plaintiffs against the Secy. of State for India in Council for a declaration of their title to the disputed land and for recovery of possession of the same with manse profits. Their case was that the lands in the suit appertained to their permanently settled estates in which the plaintiffs claimed a talukdari and a patni right and were assessed with revenue at the time of the Permanent Settlement. Long after the Permanent Settlement a done or channel of the name of Lakshmipur Done appeared and subsequently silted up and formed the char which the defendants claimed and resumed in 1913 under deara proceedings under Act 9 of 1817. The case for the Secy. of State was that the lands did not form part of the permanently settled estates and were not assessed to revenue at the time of the Permanent Settlement. He further said that at the time of the Permanent Settlement the lands were in the bed of a public navigable river and even if they formed the bed of a non-navigable river they were still liable to assessment as they were not assessed with revenue at the time of the Permanent Settlement. The plaintiffs succeeded in the trial Court but the learned District Judge on appeal dismissed the plaintiff's suit. On several grounds he found that the plaintiffs had failed to prove that the lands claimed by them were assessed at the time of the Permanent Settlement and he was of opinion that the suits which were instituted in 1924 were barred by limitation. He further held that the plaintiffs, as tenure-holders, had no locus standi to bring these suits and that they were estopped by the conduct of the proprietors.

2. We propose to consider only the first ground on which the learned Judge dismissed the plaintiff's suit, namely whether the plaintiffs had succeeded in proving that the lands in suit were dry lands at the time of the Permanent Settlement and were assessed as included within their permanently settled estates. There is no dispute that the onus lies upon the plaintiff's to prove that the lands in suit were included within their estates and assessed at the time of the Permanent Settlement; and as it is a question of fact and not of law it is to be proved in order to enable the plaintiffs to succeed in the suits: see *Secy. of State v. Wazed Ali Khan*[1], The learned Judge relied upon several facts in order to come to the conclusion that the plaintiffs had failed to prove that the lands were assessed at the time of the Permanent Settlement. But he dismissed from his consideration an exhibit in the

[1] AIR 1921 Cal 687 : 65 Ind. Cas. 866
case (Ex. 75) which was considered by the trial Court and relied upon by it. The plaintiffs argue before us that the learned Judge is wrong in holding that Ex. 75 is inadmissible in evidence and that his decision on the question of fact is vitiated by his not taking into consideration this important piece of evidence. Ex. 75 is a judgment which the Subordinate Judge in the trial Court had passed in a suit brought by some other persons (Profulla Nath Tagore and others) against the defendant in 1914. The suit related to some other lands thrown up by the Lakshmipur Done and the defendant's plea in that suit was the same as in the present one. But the suit was decided against him and it was decided that the done came into existence after the Permanent Settlement. The case came on appeal to this Court and the judgment of this Court is reported in *Secy. of State v. Profulla Nath Tagore*[2]

3. The only point which we are called upon now to consider is whether the learned District Judge has wrongly excluded this piece of evidence from his consideration, for if he has, it would be necessary to remand the case to him for a proper hearing of the appeal before him taking the evidence which was wrongly held to be inadmissible into consideration. We[are however of opinion on a consideration; of the facts and of the law that the learned Judge was right in holding that Ex. 75 is inadmissible in evidence. In the first) place, it was not the final judgment in the; suit. It was a judgment of the trial Court from which there was an appeal to this; Court and the appellate judgment of this. Court must be taken to be the final judgment in the suit. The plaintiffs should have, if they wanted to use in their favour the judgment in the litigation between Profulla Nath Tagore and the defendant, put in as an exhibit the final judgment in the suit. When an appeal is taken against a decree, the decree of the lower Court gets merged in the decree of the appellate Court and so the judgment of the trial Court is not the final adjudication on the point in issue between the parties in the suit.

4. In the second place the findings of the Subordinate Judge in Profullu Nath Tagore's suit do not appear to have all been endorsed by this Court in appeal. The Subordinate Judge held on the oral evidence of witnesses of great age that this done came into existence after the Permanent Settlement. The learned Judges of this Court, referring to the ground on which the Subordinate Judge had relied for holding that the done had come into existence since the Permanent Settlement, somewhat quizzically remarked:

> It does seem that the locality must be a healthy one to produce so many old men with memories so clear, but their account of the matter is by no means impossible or improbable.

5. If the learned Judges rested their decision upon the oral testimony of the witnesses produced by the plaintiffs it could have been said on behalf of the appellants before us that the judgment, if admissible against the defendant in this suit, would show that the defendant's defense in the previous suit had failed on a finding of fact. But the learned Judges proceeded to observe:

> But if this body of evidence be rejected, and if it be assumed that this river existed at the Permanent Settlement, the result is the same.

[2][1920] 58 I.C. 896
6. Thereafter they proceeded to consider the law and held that, even if the done had existed at the

time of the Permanent Settlement, the bed of it, when dried, would appertain to the permanently settled estates to which it belonged. The view taken by the learned Judges was that the bed of a non-navigable river appertained to the permanently settled estate, and it must be taken to be part of the estate of which revenue was settled permanently under the Decennial and Permanent Settlements. After recording these findings they remarked:

> As regards the pleadings, oven if the question, whether the lands were dry at the Permanent Settlement, is anything more than a question of the evidence admissible under the general issue, whether the lands are liable to assessment, the result, in the view I take, is the same whether the lands were dry at the Permanent Settlement or were covered with water.

7. Reading the judgment as a whole it appears that the learned Judges did not rely upon the findings of fact given by the Subordinate Judge, though they did not upset those findings, in the view that the result was the same according to the view of the law taken by them. It may be remarked that the view of the law expressed by the learned Judges in that case has subsequently been dissented from by the Judicial Committee in *Secretary of State v. Maharaja of Burdwan*[3] We are accordingly of opinion that the judgment of the Subordinate Judge is not admissible in evidence.

8. But Mr. Roy Chondhury strenuously argues that as a matter of law the learned Judge ought to have received the judgment of the Subordinate Judge in the previous suit and considered it along with the other pieces of evidence. In the view that we have expressed above it is not necessary to examine this ground in detail. In our judgment there is no substance even in tins ground. The general Rule is that a judgment which is not inter partes is not admissible in evidence except for certain purposes. This rule is embodied in Section 43, Evidence Act. That section is in these words:

> Judgments, orders, or decrees, other than those mentioned, in Sections 40, 41 and 42, are irrelevant unless the existence of such judgment, order or decree is a fact in issue or is relevant under some other provision of this Act.

9. Section 40 deals with judgments which are generally considered as coming under the head of res judicata. Section 41 relates to judgments in rem and Section 42 to judgments relating to matters of public nature relevant to the enquiry. There cannot be any dispute that, if the defendant or some other defendant other than the Secretary of State produced the judgment in the previous suit, it would not be admissible against the plaintiff. As between strangers judgments in other suits are held inadmissible on the very cogent ground that the party against whom it is sought to be used was not a party to the previous suit and hence unable to defend himself properly, examine evidence on his own behalf and cross-examine the adversaries' evidence. But different considerations may arise when one of the parties in the two suits is the same. It is argued that if the defendant in one suit put forward a claim and was defeated, and in the subsequent suit by another person ho puts forward the same claim, he may be met by the judgment in the previous suit in which a similar claim was overruled. This argument is met by illustration (a) to Section 43:

[3] A.I.R. 1922 P.C. 6

Where A and B separately sue C {or a libel which reflects upon each of them, C in each case says that the matter alleged to be libellous is true, and the circumstances are such that it is probably true in each case or in neither. A obtains a decree against 0 for damages on the ground that 0 failed to make out his justification. The tact is irrelevant as between B and C.

10. Section 43 excludes all judgments as irrelevant in a former suit if they are not inter partes unless the existence of such judgment is a fact in issue or is relevant under some other provisions of the Act. The illustrations to the section show that the factum of the judgment may be relevant in a subsequent proceeding. But it nowhere lays down that the decision, as apart from the decree, may be relevant. In fact the law is otherwise. The existence of a judgment may be relevant, but the truth of it, by which it is understood the decision of the Judge and the opinion expressed by him, is not relevant. It may be relevant to show that a certain circumstance existed at the time when the judgment was delivered; for instance, it may show that the witnesses in the previous suit made contradictory statements; or it may be relevant to show the nature and the character of. the claim in the previous suit. But it cannot be used to prove the conclusion arrived at by the Judge on the particular evidence before him in the previous suit.

11. Several decisions have been referred to before us in support of the proposition so forcibly pressed by Mr. Roy Choudhury that though the judgment may not be admissible under Section 40, Evidence Act, it may be used in evidence in a subsequent suit against a party who was a party in the previous suit. Reliance has been placed on the decision of the Judicial Committee in *Ram Ranian Chakravarti v. Ram Narain Singh*[4] In that case the action was for ejectment by a zamindar and the defendant pleaded ghatwali tenure. In previous suits by other persons the defendant claimed to hold the land at fixed rates as ghatwals. Their Lordships held that the judgments in those cases were admissible as showing ancient possession at a rate of rent and assertion of title many years ago. This would bring the case within the words of Section 43 read with Section 13, Evidence Act. It is no authority for the general proposition that a judgment against a party can always be used against him in a subsequent suit by another person.' The next case referred to is the case of *Bitto Kunuar v. Kesho Proshad*[5]. In that case a decree was obtained previously against the defendant at the instance of some persons to the effect that the will was revoked. In a subsequent suit by other persons their Lordships held that the decree was not res judicata, but was admissible as evidence against him though not conclusive. The decree in the previous suit was probably admissible under Section 41 as a judgment in rem having been passed in the exercise of probate jurisdiction. In the above cases however the subject-matter of the two suits was the same. In the present case, it is different, bringing it within the decision of the Full Bench in the case of *Tepu Khan v. Rajani Mohan Das*[6] and that in *Kashi Nath Pal v. Jagat Kishore Acharya*[7] One other case which has been referred to in this connexion is the case of *Gopi Sundari Dasi v. Khirode Govinda Choudhuri*[8], There the judgment in the previous case was admitted in order to show the nature of the claim made in the previous suit. This may be evidence under Section 43 read with Section 11, Evidence Act. The general rule of law relating to the question before us has been stated by the Judicial Committee in *Gopiha Raman Boy v. Atal Singh*[9]

[4][1895] 22 Cal. 533 [6][1898] 25 Cal. 522 [8] AIR 1925 Cal 194: 82 Ind. Cas. 99.
[5][1897] 19 All. 277 [7][1916] 35 I.C. 298 [9] A.I.R. 1929 P.C. 99 (of 56 I.*A)*

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.

12. Mr. Roy Choudhuri lastly argues that this judgment is evidence under Section 11, Evidence Act. Section 11 cannot help the appellants in their contention that the findings in the judgment and the recitals in it are admissible in evidence in a subsequent suit. In our judgment Ex. 75 is not admissible in evidence and the learned Judge was right in excluding it from consideration.

13. The next point urged is that the learned District Judge has wrongly estimated the value of Rennell's Survey Map which was made in 1764 before the Permanent Settlement. In that map this done was not shown and from it is argued that the done was not in existence at the time of the Permanent Settlement, and the lands in suit were then dry lands within the permanently settled estates of the plaintiff's lessor. The learned Judge has observed that the instructions given to Major Rennell at the time were:

> For this purpose you will coast along the south side of the great rivers and examine every creek or nala which runs out of it to the southwards tracing them as far as you find them navigable for boats of 300 maunds burthen.

14. In his opinion Rennell's Survey Map only shows more important rivers and that the map does not show this channel is not evidence of any value. Thus, in view of the evidence before him he is not wrong. We have been referred to some decisions of this Court in order to show that Rennell's map was given importance in consideration of questions like the present. In *Secretary of State v. Upendra Narayan Roy*[10], the trial Court found it difficult to secure an accurate reproduction of the lines of Rennell's map and therefore left it out of consideration. The learned Judges on appeal held that he should have relied upon the map in order to show the position of the river as then existing. That case is an authority for holding that if Rennell's map shows a river it may be taken into account as showing its position and inferences may be drawn from that fact. In *Haradas Acharjee Choudhury v. Secretary of State*[11] the Judicial Committee referred to Rennell's map for the purpose of finding the position of the river shown there, and adopted that map as far as possible to the evidence before the Court. It is no authority for saying that because a certain rivulet is not shown in Rennell's map that map is evidence of its non-existence. The learned Judge has given good grounds for holding that Rennell's map was prepared for a particular purpose and does not show every feature of the land. It may also be remarked that the plaintiffs did not produce Rennell's map at the trial. They relied upon the deara proceedings (Ex-B) in which the Settlement Officer had said that Rennell's map did not show the river; though he further added that that map only shows more important rivers and that the map does not show this river is no evidence of any value.

> The plaintiffs cannot rely upon a statement made by a person who is not before the Court and whose statement cannot be tested. If they wanted to rely upon this piece of evidence they should have produced the map before the Court and asked it to form an opinion upon it. In this connexion the last point taken by the appellants is that the Secretary of State ought to have produced some papers which were in his

[10] AIR 1923 Cal 247 : 71 Ind. Cas. 849

[11] A.I.R. 1917 P.C. 86

possession and which not having been produced the Court should have drawn an adverse inference against him. The learned District Judge has relied, to some extent, upon the Thak and Survey Maps prepared in 1859 and 1860 which show this channel and he is of opinion that the presumption that it existed before may be carried back even up to the time of the Permanent Settlement. What the appellants say is that if the defendant had produced the papers in his possession, then the opinion of the Judge might have found a ready contradiction. The learned Judge upon this point observes that the onus was upon the plaintiffs, and if they desired to call for those papers it was within their power to do so by asking the defendant to produce those papers and that they should not make a grievance of the fact that they were not produced on the side of the defendant. We think that this remark is quite, reasonable in this case.

15. On a consideration of the whole evidence the learned Judge has found that the lands in suit existed at the time of the Permanent Settlement and were therefore presumably assessed. It is a finding of fact which in our opinion is not vitiated by any error of law or procedure.

16. We are accordingly of opinion that the first ground taken by the appellants fails and it is not necessary to refer to the other grounds. The result is that these appeals are dismissed with costs.

Costello, J.

17. I agree.
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