**CALCUTTA HIGH COURT**

Manmatha Nath Haldar

Vs

Girish Chandra Roy

(Mitter ,J.)

21.03.1934

**JUDGMENT**

**Mitter, J.**

1. This is an appeal Under Section 15 of the Letters Patent from a judgment of my learned brother Patterson, J., reversing the decisions of the Courts below and decreeing the plaintiff's suit. It appears that the plaintiff who is the respondent before us brought a suit for the ejectment of the defendant from the lands which are comprised within a certain non-transferable occupancy holding. To this suit the original tenant has not been impleaded, the case of the plaintiff being that he, the original tenant, has transferred the entire holding to the defendant who is in possession thereof as trespasser, and the transfer not having been recognized by the plaintiff who is the landlord of the holding in question, the plaintiff is entitled to a decree in ejectment. The substantial defence to the suit is that the entire holding has not been transferred, that the original tenant still continues in possession of the holding and has never refused to pay rent and that there has been no abandonment, and that even quite recently the plaintiff has obtained a decree for rent and has been realizing rent from the original tenant. The transfer is alleged to have taken place in the year 1328 B.S., corresponding to the year 1921. Both the Courts below have come concurrently to the conclusion that there has been a transfer only of a part of the holding.

2. It appears that although the Munsif found that the defendant was a part purchaser of a non-transferable occupancy holding, that finding of the Munsif was not challenged before the Subordinate Judge. Before the Subordinate Judge the question debated was that since the institution of the suit or rather since the disposal of the suit in the first Court, the Record of Rights-has been published, and the Record shows that the defendant has been in possession of the entire holding. An application was made before the hearing of the appeal in the lower Court, for the reception of this finally published Record of Eights as additional evidence in the case and the Court rightly said that the application should be considered after the hearing of the appeal had commenced and after the Court had considered the question as to whether the additional evidence should be taken. But the Court did not pass any formal order admitting this Record of Eights in evidence, although it made reference to the Record of Eights in its judgment.

3. In the first place, it has now been definitely laid down by the highest authority that before a Court can admit an additional evidence it must record its reason for doing so. In a recent decision

in the case of *Parsotim Thakur v. Lal Mohar Thakur*[1], Sir George Loundes in delivering the judgment of their Lordships of the Judicial Committee, pointed out: that in a case coming Under Clause (1)(b), Rule 27, Order 41, it is only when the Court itself requires additional evidence, that is to say, finds it needful in order to pronounce judgment or for any other substantial cause, that such evidence can be admitted. The legitimate occasion for exercise of this discretion is when on examination of the evidence as it stands some inherent lacuna or defect becomes apparent. The defect may be pointed out by a party or a party may move the Court to supply the defect, but the requirement must be of the Court itself.

4. It seems to us that though the learned Judge of the lower appellate Court did not receive this as an additional evidence in the case but he referred to the Record of Rights and has considered the weight which has to be attached to it. It is really in favour of the appellant before the lower appellate Court who is the respondent before us. The learned Judge of this Court has really rested his decision and upset the concurrent findings of the Courts below, on the entry in the Record of Rights, as Patterson, J., observes in one place: In these circumstances it must, I think, be held that the findings of the Courts below to the effect that only a portion has been transferred are vitiated by the fact that the entry in the Record of Rights has not been taken into consideration, by those Courts, and that if the entry in question be taken into consideration, as in my opinion it ought to be, the only con-clusion which it is possible to arrive at, is that the entire holding was transferred to the defen-dants by the kobala, Ex. 1 and that the defendants are now in possession of the entire holding under the said kobala.

5. In this connexion it is important to notice that the suit was instituted in March 1929 and the cause of action for the suit arose on the date of transfer, which was sometime in the year 1921 as also on the date of knowledge of the plaintiff, which was sometime in August 1928. Even assuming that the Record of Eights was properly admitted as evidence before the lower appellate Court or could be referred to, its effect would be to raise a presumption of possession of the defendant at the date when it was finally published, which is said to be after the disposal of the suit in the first Court, namely, after 16th December 1929. It has been very strenuously contended by Mr. Sen on behalf of the respondent that it was open to the learned Judge of this Court to draw an inference from the fact of possession, as shown in the Record of Rights, of the holding in suit that the possession must be referable to the deed of sale which was executed in the year 1921. It is difficult to accede to this contention., Record of Rights is a presumptive evidence of the state of things at the date the Record of Rights was prepared. Besides there is nothing in the Record of Rights to show that this possession has any reference to the purchase in the year 1921. There might have been some force in the argument if it could be shown that the entry in the Record of Rights disclosed that possession at the date of its final publication was referable to the particular deed of sale, in other words if the entry had referred to this document. It is difficult to imagine bow one can presume backwards from the Record of Rights Under Section 103-B, Ben. Ten. Act, and say that the same state of things as disclosed by the Record of Eights existed seven years before the record was finally published.

6. The rule of evidence is in favour of, presuming the continuity of things) shown to exist at a prior date. There is no rule of evidence by which one can presume backwards. We are clearly of opinion that the learned Judge of this Court has interfered,with the concurrent findings of fact of the Courts below and as such has exceeded his jurisdiction Under Section 100, Civil P.C. The re-suit is that the judgment of the learned Judge must be set aside and the second appeal to this

Court must be dismissed with costs before us and Patterson, J.

**McNair, J.**

I agree.

Cases Referred.

11931 P C 143