

APPELLATE CIVIL

Before Mr. Justice Ziaul Hasan

GULAI (PLAINTIFF-APPELLANT) v. SRIPAL (DEFENDANT-RESPONDENT)*

1936
March, 17

Second appeal—Finding of fact—Finding based on instruments of title, if can be challenged in second appeal—Evidence Act (I of 1872), section 13—Judgment of Court, evidentiary value of.

A finding based on *khasra* and *khatauni*, which are the instruments of title in the case, can be challenged in second appeal even if it be a finding of fact. *Wali Mohammad v. Mchammad Bakhsh* (1), and *Amjad Husain v. Nawab Ali* (2), relied on. *Ballabh Das v. Nur Mohammad* (3), referred to.

A judgment of Court relating to the subject-matter in issue, even though it may not be binding on a party has a great evidentiary value under section 13 of the Indian Evidence Act.

Mr. Kashi Prasad Srivastava, for the appellant.

Mr. Bhagwati Prasad Srivastava, for the respondent.

ZIAUL HASAN, J.:—The plaintiff-appellant Gulai and Sripal, the defendant-respondent, are sons of one Mathura Brahman by two wives. The suit from which this second appeal arises was brought by Gulai for possession of grove plot No. 250 of village Bilbharia in the Gonda District by demolition of a *ghari* erected by the defendant thereon and for recovery of Rs.25 as damages for cutting and appropriating a tree and some bamboo clumps.

The defendant denied the plaintiff's title to the plot in question and set up exclusive title in himself. He also denied having cut away any trees or bamboos.

The trial Court appointed a commissioner to find out whether the trees said to have been cut away by the defendant and the *ghari* in dispute stood in plot No. 250 or not. The commissioner reported that the trees were

Second Civil Appeal No. 259 of 1934, against the decree of Pandit Dwarka Prasad Shukla, Additional Subordinate Judge of Gonda, dated the 14th of May, 1934, reversing the decree of Babu Badri Prasad Tandon, Munsif of Tarabganj at Gonda, dated the 11th of January, 1934.

(1) (1929) L.R., 57 I.A., 86.

(2) (1935) I.L.R., 11 Luck. 642.

(3) (1936) O.W.N., 153.

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on plot No. 250 but that only a portion of the *ghari* was in that plot. The trial Court held that while the plaintiff had proved his exclusive title to the plot in dispute, the defendant had failed to substantiate his claim to the plot. It therefore decreed the plaintiff's suit for possession by removal of that portion of the *ghari* which was in plot No. 250 and for Rs.2 damages about the trees. The defendant appealed against the decree of the trial Court and the learned Additional Subordinate Judge came to the finding that both parties were joint owners of plot No. 250 and that the plaintiff was not entitled to get the *ghari* of the defendant demolished without bringing a suit for partition of the plot. He, therefore, allowed the appeal, set aside the decree of the first Court and dismissed the plaintiff's suit with costs.

The plaintiff brings this second appeal and challenges the finding of the lower appellate Court that the plot in question belongs jointly to the parties. It was conceded that the finding in question is a finding of fact but reliance was placed on the case of *Amjad Husain v. Nawab Ali* (1) in which the Hon'ble Chief Judge and Mr. Justice Nanavutty following the Privy Council ruling in *Wali Mohammad v. Mohammad Bakhsh* (2) held that a finding based upon documents which are instruments of title and not merely historical material can be challenged in second appeal even if it is a finding of fact. In the present case the lower appellate Court has based its finding on exhibit A-12 which is *khatauni* for 1329 Fasli and on exhibits A-10 and A-11 which are *khasras* for 1327 and 1329 Fasli respectively. In the *khatauni*, plot No. 250 is recorded as in the possession of Gulai and Sripal both while in the *khasras* it is recorded as in the possession of Gulai "*waghaira*". It is argued that these documents are instruments of title within the meaning of the ruling cited above. I think the contention of the learned Advocate for the appellant is right. No other instrument of title has been produced

(1) (1935) I.L.R., 11 Luck., 642.

(2) (1929) L.R., 57 I.A., 86.

by either party and in the case of *Ballabh Das v. Nur Mohammad* (1) their Lordships of the Judicial Committee say:

“Where the *khasra* itself is the instrument which confers or embodies rights, the *khasra* and the map are not merely historical materials but are within the ‘phrase instruments of title or otherwise the direct foundation of rights’ ”.

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I am, therefore, of opinion that the finding of the lower appellate Court in this case can be examined in second appeal.

As said above, exhibit A-12 clearly mentions Sripal's name along with Gulai's about the plot in question and exhibits A-10 and A-11 also show as if Gulai had a co-sharer or co-sharers with him in the plot. It is said, however, that these entries were wrongly and dishonestly made by the village patwari who is said to be inimical to the plaintiff-appellant. No doubt as the Court below has remarked there is no direct evidence of the alleged enmity of the patwari beyond the plaintiff's own statement but there are to my mind circumstances in the case which clearly go to support the allegation that the entries in exhibits A-10, A-11 and A-12 are not correct.

The plot in question is in the zamindari of the Ajudhia Estate and so far back as 1912 the estate tried to resume the plot in question as well as two other plots. This suit was brought against Gulai alone but it was dismissed and it was held that the grove in question belonged to Gulai and rent was assessed on it (exhibit 1). Then, in 1921 the Ajudhia estate again served Gulai with notice for his ejection from plot No. 250 as well as from the other two plots which were also the subject-matter of the litigation of 1912. This suit was also dismissed.

These judgments may not have a binding effect against the respondent but they are undoubtedly of great evidentiary value under section 13 of the Indian Evidence Act. The *khasra* for 1331 Fasli (exhibit 11) records Gulai's

(1) (1936) O.W.N., 153.

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name alone in respect of the plot in question. What is very significant is that the defendant-respondent had to admit that he never paid rent for the plot in suit, and the plaintiff's evidence shows that it is he who has been paying rent to the zamindar.

In view of all the above circumstances, I am clearly of opinion that the finding of the trial Court was correct. The appeal is, therefore, allowed with costs, the decree of the lower appellate Court set aside and that of the Court of first instance restored.

Appeal allowed.

APPELLATE CIVIL

Before Sir C. M. King, Knight, Chief Judge

1936
March, 17

BHIKHARI SINGH (DEFENDANT-APPELLANT) *v.* BADRI,
PLAINTIFF, AND ANOTHER (DEFENDANT-RESPONDENTS)*

Oudh Laws Act (XVIII of 1876), section 9(1)—Pre-emption—Under-proprietary khata—Sub-division of under-proprietary tenure—Co-sharers in khata, whether co-sharers in sub-division—Pre-emptor, whether has prior right if a relation of vendor—"Sub-division", meaning of—Sub-division, whether includes under-proprietary khata.

An under-proprietary *khata* is a component part of the under-proprietary tenure and is a sub-division within clause (1), section 9, Oudh Laws Act. So when the property sold forms part of an under-proprietary *khata*, and both the pre-emptor and the vendee are co-sharers in that *khata*, they are co-sharers in a "sub-division" of the under-proprietary tenure under the said clause (1), but the pre-emptor, if he is a relation of the vendor, has a preferential right over the vendee who is not such relation. *Mohammad Abdul Aziz v. Bhagwan Das* (1), followed.

The word "sub-division" in section 9(1), Oudh Laws Act, should be literally construed so as to include an under-proprietary *khata* which is a unit or component part of an under-proprietary tenure in a *mahal*.

*Second Civil Appeal No. 255 of 1934, against the decree of Babu Gauri Shankar Varma, Subordinate Judge of Gonda, dated the 22nd of May, 1934, upholding the decree of Babu Mahesh Chandra, Munsif of Utdaula at Gonda, dated the 28th of February, 1934.