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**(1924) 05 CAL CK 0001**

**Calcutta High Court**

**Case No:** None

Haladhar Das Tanti

APPELLANT

Vs

Nagendra Nath Mandal

RESPONDENT

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**Date of Decision:** May 16, 1924

**Citation:** AIR 1925 Cal 431 : (1924) ILR (Cal) 997 : 84 Ind. Cas. 846

**Hon'ble Judges:** Greaves, J; Chakravarti, J

**Bench:** Division Bench

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### **Judgement**

Greaves, J.

This is an appeal by the first defendant to recover possession of one anna share in a certain mauza and four annas share in certain, land We are told that the claim was to recover ejmali possession; but this is only true as regards the pro forma defendants and the real contest is between the defendant, the appellant and the plaintiff. The first Court decreed the suit in favour of the plaintiff and the Munsif's decree was confirmed on appeal by the District Judge and hence this appeal by the first defendant. The circumstances leading up to the claim are as follows:One Tara Chand Mahapatra was the proprietor of the mauza in respect of which the one anna share is claimed. He settled the mauza with Sitaram and Premchand each of them getting a one-half share. Sitaram subsequently sold eight annas of the mauza to Sonatan and one Chaudhury and Sonatan and Chaudhury sold these eight annas to Dinu, who is the father of the present plaintiff, and to one Kristo. On the 5th of August 1893 the heirs of Tara Chand sued Sonatan and Chaudhury for rent. Dinu and Kristo were not made parties in respect of the eight annas which they had acquired and the result was that only a money-decree was passed in favour of Tara Chand's heirs in that suit. One Jiban in execution of the decree purchased the property on the 9th September 1895. In fact by reason of the decree being a money decree no interest in the property was purchased by Jiban but apparently it was assumed that by virtue of his purchase he acquired an interest in the property. In the year 1897 Jiban released his interest in the property to Kristo and to Dinu's wife, Dhani. In the year 1901 Dhani mortgaged her four annas share in the property

released to her by Jiban to defendant No. 1. In the year 1914 the first defendant obtained a decree in a mortgage suit and on the 7th March 1916 in execution of his decree the first defendant purchased the mortgage property. In fact, for the reasons which I have stated he obtained no interest in the property. He obtained on the 9th July 1916 from the Court possession of the property which he had purported to purchase. It is not suggested that by virtue of the decree which Jiban purchased the property passed but what is said is that by reason of the doctrine of res judicata the plaintiff who is, as I have stated, a son of Dinu, is debarred from setting up his father's title to the property. Two matters are relied on in support of this; one is a decision in September 1916 in a criminal case but I do not think that anything turns on this or that this is really of any assistance to the defendant but the real matter on which the defendant relies is a decree passed in July 1904 in a contribution suit. In that suit Kristo claimed contribution from Dinu. Dhani was defendant No. 5 in that suit and in that suit as originally framed no relief was claimed against her--Kristo's case being that the property was Dinu's. It was further suggested that Dhani was a benamdar for Dinu. In that suit Dinu gave evidence and he state that his wife was not liable because she had previously paid the whole of some rent due in respect of the property. The Court decided against this contention and held that Dhani was liable for the contribution which Kristo claimed from Dinu. Now the real question that we have got to decide is whether this operates as res judicata so as to prevent the plaintiff who is Dinu's son from claiming the property against defendant No. 1 who was a mortgagee from the mother. There is no doubt that ordinarily the doctrine of res judicata does not operate as between co-defendants and that the Court applies the doctrine with considerable caution as between co-defendants but this doctrine has been applied as between co-defendants where there is a conflict of interest as between them where it is necessary for the Court to decide the conflict and where the judgment clearly decides the question as between those co-defendants. It is unfortunate that the pleadings in the suit are not exhibited in the case and we have not had the advantage of seeing them. We have, however, before us the judgment that was delivered in the contribution suit and also the decree which was passed in that suit and I think that it is impossible to say that there was not any conflict of interest in that suit as between Dinu, the husband and Dhani, the wife, that is to say, we think that there was a conflict as to which of them was liable to Kristo for the payment of the contribution which Kristo claimed in the suit. It is true that no issue was directly framed between the husband and the wife because the husband asserted that the property was his wife's, this clearly must have been the assertion that he made having regard to the fact that he contended that his wife had paid the previous rent and that she was not the benamdar for him. Then it seems to us that it was necessary for the purposes of the suit to decide this conflict of interest as between defendant No. 1 and defendant No. 5 for the whole question that arose in the suit was as to who was to be saddled with the contribution which Kristo claimed, that is to say, whether Dinu or Dhani was the person liable and having regard to the judgment which has been read to us and also

the decree, I think that there can be no doubt that the Court arrived at a decision on the question of the liability for the rent and consequently, on the question as to who was the owner of the land at that time. This being so, I think that the appellant rightly contends that the proceedings in the contribution suit of 1914 make the matter *res judicata* as between himself and the plaintiff. For these reasons we think that the appeal must succeed with the result that the plaintiff's suit stands dismissed.

2. The appellant will be entitled to his costs in all Courts.

Chakravarti J.

3. I agree and wish to add a few observations Immediately after Dinu and Kristo purchased the eight annas share of the holding the landlord brought a rent suit against the tenants in his books and obtained a decree for rent and put the property up to sale and it was purchased by Jiban. Kristo took a release of his four annas and the four annas of Dinu went to his wife Dhani. This transaction shows, at any rate the old tenant accepted the position, that the tenancy passed by the sale. This was in 1895. In 1901 Dhani mortgages her four annas share in the property to the defendant No. 1 and Dhani apparently continued in possession down to the date of sale and delivery of possession to defendant No. 1, i.e., 1916.

4. In 1904 a suit for contribution was brought by Kristo against Dinu and others and in that suit defendant No. 5 Dhani was a party but no relief was claimed against her. Dinu was sued as owner of the four annas share apparently treating Dhani as his *benamdar*. Now we find that in that suit Dinu gave his evidence and deposed that Dhani was not his *benamdar*. The decree for contribution for rent was made against Dhani on the basis of Dinu's deposition. In these circumstances it appears clear that Dinu allowed Dhani to possess the property as owner of the four annas share from 1895 and stood by when Dhani mortgaged it in 1901 and in 1904, he avoids liability for contribution for rents and throws it upon Dhani and that was done and could be done only on the basis that Dhani was the owner of the four annas share of the tenancy. In these circumstances it seems to me that the plaintiff who is the son of Dinu cannot be heard to say that the property belonged to Dinu and not to Dhani. Whatever might have been really the effect of the sale in execution of the rent decree all the parties treated it as a rent sale and as between Dinu and Dhani the latter was treated as the owner. In my opinion the contribution decree decided as between Dinu and Dhani that Dinu was not the owner of the tenancy but that Dhani was. This decision was essential for the decision of the suit for contribution.

5. Dr. Mitter, who appears for the respondent, argued firstly that the pleadings were not before the Court. The decree and the judgment are in, and if his client wanted to rely upon anything which the pleadings would have shown he ought to have put them in. The decree and the judgment are sufficient for the defendant's purpose. Nextly, Dr. Mitter argued that the point was incidentally decided. I cannot agree.

Between Dhani and Dinu the question arose who was the owner and the plaintiff in that suit could not get a decree against Dhani unless it was found that the latter was the owner and not Dinu. It was argued that there was no real contest because Dinu admitted Dhani's title. I think the point was no less controversial at its inception because one of the parties gave up the contention and admitted the truth of the claim of his adversary. In my opinion the decision between the co-defendants was essential for the determination of the suits as between the plaintiff and the defendants and the liability of the defendants as between them could not be determined and the plaintiff's claim allowed until it was decided as between the defendants as to who was the real owner and as such liable for the plaintiff's claim.

6. The mortgage sale took place long after this decree and the defendant No. 1 who bought the equity of redemption belonging to Dhani in 1916 and standing in her place can successfully plead, that Dhani and not Dinu was the real owner.

7. All the elements of res judicata as laid down in the cases of Gurdeo Singh v. Chandrikah Singh I.L.R.(1907) Cal 193 and Magniram v. Mehdi Hossein Khan ILR (1903) Cal 95 and Rajendra Kumar Bose v. Biswarup (1921) 35 C.L.J. 173 as between co-defendants exist in this case and the plaintiff who stands in the shoes of Dinu cannot be heard to say that his father and not his mother was the real owner, although his father succeeded in saddling Dhani with the liability of the claim of her co-sharer for contribution for rent payable for the tenancy.