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Calcutta High Court

Case No: None

Sivadas Dutta and Another	APPELLANT
Vs	
Birendra Krista Dutta	RESPONDENT

Date of Decision: Aug. 6, 1925

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Section 11

Citation: 94 Ind. Cas. 844

Hon'ble Judges: Mukerji, J; Ewart Greaves, J

Bench: Division Bench

Judgement

Mukerji, J.

The appeal arises out of a suit for rent. The plaintiff claims in his one-anna share, rent for certain lands at the rate of Rs. 89-10-101/2 gandas per year from 1324 to 1327, alleging that the defendants hold 2610 bighas odd at a rental of Rs. 1,434-8-8 gandas. His case is that the area and the rental were fixed in a suit inter partes, i.e., Rent Suit No. 49 of 1887 of the first Court of the Subordinate Judge at Alipore. The defendants contend that they hold about 1002 bighas of land under two pottas dated 4th Jaistha 1242 and 5th Falgoon 1247, that since the grant of the said pottas the plaintiff and his co-sharers have got remission of 25 per cent. of the rent payable by them to the Government under whom they hold, and that by the terms of the aforesaid pottas the defendants are legally entitled to get a deduction at the same rate. They further say that some of the lands hare been washed away or rendered unculturable and under the terms of the pottas they are entitled to a deduction on that ground as well. In order to have the rental assessed they applied for a measurement of the lands. As regards Rent Suit No. 49 of 1887 their case is that the result thereof is of no consequence so far as the plaintiff is concerned.

2. The Courts below have decreed the plaintiff''s suit. The Court of first instance held that the defendants are bound to pay rent to the plaintiff at the rate claimed end that in a previous rent suit between the parties, viz., Suit No. 447 of 1917 it had been

held that that was the rate at which they should pay. It refused the application for measurement and left the question as to the area of the rent-land open and undecided. It also observed in its judgment that the pottas had not been proved in the case and so no interpretation of the pottas was possible, and that the defendants had failed to prove what quantity of land, if any, had been washed away. The Court of Appeal below proceeded upon the view that no plea of abatement could be given effect to in a suit in which all the co sharer-landlords are not parties. It also held that the decree in Suit No. 49 of 1887 was binding between the parties as to the rental, as also the decree in the subsequent suit for rent, namely, Suit No. 447 of 1917. The defendants have thereupon preferred this appeal.

3. In our judgment of the 27th February 1925 we decided that the learned Subordinate Judge was wrong in holding that the defendants were precluded from raising the question of abatement of rent by reason of the constitution of the suit, namely, that it was a suit between one of several co-sharer-landlords and the tenants, when the said co-sharer under an arrangement between himself and his other co-sharers and the tenants has been collecting his share of the refit separately. To this decision we still adhere.

4. Then arises the question whether the defendants are entitled to have the lands measured in order that their plea of abatement may be given effect to. As regards this part of the case I confess I was under a misconception and I did not appreciate the exact position until Sir Pravas explained the facts to us.

5. The question whether the defendants are entitled to have the lands measured could not and in point of fact did not arise in any of the earlier suits, and standing by itself that question cannot be regarded as concluded upon any principle of res judicata or any such similar principle. When deduction or abatement is claimed by the tenant in a suit for rent he may insist on a measurement, and an order for measurement must be made if a case justifying or necessitating the order is made out. In the present case the defendants'' application for an order for measurement has been refused; and in order to determine whether it has been rightly refused or not we must examine the grounds on which the application was based, or rather the grounds on which abatement was claimed.

6. The defendants'' plea of abatement of rent rests on the terms of the pottas of 1242 and 1247 referred to above. To put the matter more precisely we have to refer to some documents which have been freely referred to in the arguments before us, though some of them, e.g., the pottas of 1242 and 1247, are not on the record. The defendants, as I have said, had to make out a case for measurement, and if we are to proceed merely on the materials on the record we must be constrained to hold that the necessary evidence has not been adduced by them. It would not, however, be right to dispose of the appeal on that ground as the relevant documents, on which the decision of the question depends, have been placed before us and have been referred to by both the parties, and the facts in so far as they are necessary for

the determination of the question are either undisputed or indisputable.

7. It appears that there is no controversy as to the rent payable under the lease of 1242. There is, however, a stipulation in the lease of 1247 which runs thus: "As the Government will in my case exempt embankments, dams, chowkas, pasturage and irreclaimable lands from assessment, so (we) shall allow exemption in your case." The landlords subsequently obtained a concession from the Government exempting them from assessment to the extent of one-fourth of the entire grant for ever. The defendants, therefore, claim that under the stipulation contained in the aforesaid terms of the lease they are entitled to a deduction of one-fourth of the rental, and for that purpose they want the lands to be measured. In para. 10 of the written statement the defendants further alleged that large quantities of land have teen washed away or rendered unfit for cultivation owing to influx of saltwater and that they are entitled to have the lands measured and claim abatement of rent on that ground under the terms of the pottas. Evidently, therefore, there were two grounds on which the measurement was asked for, that is to say firstly to support the claim on the ground of deduction of 25 per cent. and secondly to support the claim on the ground of abatement for diminution of area.

8. As regards the second of the aforesaid two grounds, it may be disposed of in a few words. The pottas are not in and it is not possible to say whether the right which the defendants claim is reserved to them. Moreover the learned Munsif observes in his judgment that, "the defendant (sic) has not examined any witness and has failed to prove what quantity of his land has been washed away." It is clear, therefore, that this ground is not supported in any way, and no case has been made out for a measurement on this ground.

9. The other ground requires serious consideration. The plaintiff''s case is that by reason of the decree in Suit No. 49 of 1887 the defendant is precluded from claiming the deduction of one-fourth of the rental as stipulated for in the pottas of 1247. The facts relating to that suit are these : In that suit five persons, viz., Bhupendra, Jnanendra Narendra, Jatindra and Sukhamoyee who were owners of 3-annas 15-gandas share sued the appellant''s predecessor Mr. A.B. Mitter for rent for the years 1290 to 1292 B.S. for 13 annas share of the rent making all the other co-sharers pro forma defendants, These co-sharers were ranged in two groups; the first group consisting of pro forma-defendants Nos. 1 to 13, who were the owners of the remainder of the 13-annas. share, and the second consisting of the pro forma defendants, one Uma Sundari who was the owner of the remaining 3-annas. share which was not included in the suit. Soon after the institution of the suit some of the pro forma defendants of the first group including one Haridas Dutt, the pro forma defendant No. 2 in the suit, who was the predecessor of the plaintiff in this suit got themselves transferred to the category of the plaintiffs. The other pro forma defendants of this group and also pro forma defendant Uma Sundari, the owner of the remaining 3-annas share remained pro forma defendants as before. In that suit

rent was claimed on the allegation that the suit-lands were 1265 bighas 10 cottas 6 chittaks and at the rate mentioned in the pottas that is to say Rs. 715 and odd. Mr. Mitter, the appellants'' predecessor pleaded in that suit that he was entitled to the deduction on the basis of the pottas. One of the-issues framed in the suit was: "What is the amount of jama payable by the defendant? Is not the defendant entitled to get a deduction of one-fourth of the rental according to the terms of the potta dated the 5th Falgoon 1247? This issue was decided against the defendant Mr. Mitter by the Court of first instance. He appealed to the District Judge who allowed him the deduction claimed. The five original plaintiffs then preferred an appeal to this Court with the principal defendant Mr. Mitter, the added plaintiffs amongst whom was Haridas Dutt, and the other co-sharer defendants as respondents in that appeal. Of the respondents the only one who appeared in the appeal was Mr. Mitter. That appeal was disposed of by this Court(Maclean, C.J. and Banerjee, J) on the 24th April 1890 by the following order: "By consent let this case be remitted to the Court of first instance which is to depute an Amin to go to the place and measure the culturable lands included within the defendants'' holding and the amount of rent which will be payable by them will be assessed upon that measurement. The costs will be in the discretion of the Court of first instance". On this order the case went before the Trial Court and a measurement being made a report was submitted by the Amin who made the measurement. The Subordinate Judge then took up the matter and in his judgment there appears the following observation: "The defendant cited the Civil Court Amin as a witness on his own behalf, but declined to examine him, and nothing has been shown to induce me to think that the Amins measurement is inaccurate. I must under the circumstances find the quantity of culturable land within the defendants'' holding to be 2610 bighas 9 1/2 cottas". The learned, Judge, however, held that the quantity of land being in excess of the area stated in the plaint, he should make a decree in favour of the plaintiffs for the amount claimed., A decree was very carefully pre-pared and the relevant portions of that decree run as follows:

The claim of the plaintiffs and the pro forma defendants in respect of their 13-annas share be decreed. Out of Rs. 2733-6 2 1/4 gandas claimed Rs. 789-14-14 3/4 gandas due in the share of the plaintiffs Nos. 1 to 5 be decreed in their favour with interest at the rate of 12 per cent. per annum from the 11th April 1887, the date of suit to the date of realization and that the principal defendant No. 1 the Official Trustee do pay the said amount to the plaintiffs Nos. 1 to 5 from out of the estate of the late Srinath Dutt". Then follow certain directions as to costs in favour of the plaintiffs Nos. 1 to 5. Thereafter, " It is further ordered and decreed that the rent of the land in arrears be assessed as follows : For 1086 bighas 4 cottas 8 chittaks of culturable land in plot No. 1 of the potta dated 4th Jaistha 1242, Rs. 577-3 0. For 456 bighas 18 cottas of culturable land in plot No. 2 and 1067 bighas 5 cottas of culturable land in plot No. 3 of the potta dated 5th Falgun 1247, Rs. 577-3 annas and Rs. 857-5-8 1/4 gandas respectively. As regards the balance of the amount in claim, viz., Rs.

1,943-7-8 gandas the pro forma defendants do get the same together with interest at the rate of 12 per cent. per annum from the 11th April 1887 the date of the institution of the suit, from the defendant No. 1 out of the said estate, that is to say the co-plaintiff Haridas Dutt will get in his own 1-anna share Rs. 210-10-6-9. 12." Then follow the amounts which the other co-plaintiffs would receive.

10. This decree does not purport to have been passed in the presence of the Pleaders of the co-plaintiffs. Nevertheless it was a decree inter partes as between the predecessors of the parties to the present suit. Of this decree two views may possibly be taken. As between the original plaintiffs and Mr. Mitter it was a decree passed on the basis of a consent order, and as between the co-plaintiff Haridas Dutt and Mr. Mitter it was passed, not on the basis of a consent order, but in the ordinary way in a contested proceeding. The effect of this decree judged from either point of view, in my opinion, is practically the same.

11. Res judicata by its very words means a matter upon which the Court has exercised, its judicial mind, and a judgment passed on consent cannot be considered as a judicium. A consent decree, therefore, does not come within the rule of res judicata as contained in Section 11 of the C.P.C. It, however, raises an estoppel as much as a decree passed in invitumm Nicholas v. Asphar 24 C. 216 at p. 237 : 12 Ind. Dec. 810, Laksmishankar Devshankar v. Vishnuram 24 B. 77 : 1 Bom. L.R. 534 : 12 Ind. Dec. 588, Bai shankar v. Morarji 12 Ind. Cas. 535 : 36 B. 283 : 13 Bom.L.R. 950 and Kumara Venkata Perumal v. Thatha Ramaswamy Chetty 9 Ind. Cas. 875 : 35 M. 75 : (1911) 1 M.W.N. 290 : 9 M.L.T. 487 : 21 M.L.J. 709.] In so far as the decree was based on the consent order, and purported to proceed on the consent as between the original plaintiffs and Mr. Mitter it must be held binding as against them unless there was want of jurisdiction, such as was the case in Rajlakshmi Dassi v. Katyayani Dassi 12 Ind. Cas. 464 : 38 C. 639 and some of the authorities cited and discussed therein or unless there were present some circumstances which would go to vitiate the agreement on which the consent was founded, as was the case in Huddersfield Banking Co., v. Lister (1895)2 Ch. 273 : 64 L.J.Ch. 523 : 12 R. 331 : 72 L.T. 703 : 43 W.R. 567 or Great North West Central Railway v. Charlebois (1899) A.C. 114 : 68 L.J.P.C. 25 : 79 L.T. 35. The decree, therefore, although it goes beyond the scope of the suit, which must be taken to have been enlarged by consent, is binding as between the consenting parties and their successors-in-interest.

12. As between Haridas Dutt and Mr. Mitter it was not a decree based on consent, but a decree passed in a contested proceeding, wherein Haridas Dutt cast in his lot with the original plaintiffs and took no active part in the litigation and secured ultimately a decree as against Mr. Mitter giving him certain rights. Consent was given by Mr. Mitter to have the decree which the learned District Judge had made in his favour allowing him deduction of the 25 per rent. on the basis of the pottas set aside, the scope of the suit was enlarged and a decree was passed in the suit, the suit being finally heard and determined in his presence. He waived the objection

which he had taken to the claim on the ground of the deduction to which he was entitled, and allowed a decree to be passed declaring the quantity of the land, and the rental to be paid for it. This objection not only might and ought to have been made a ground of defence in the former suit, but was actually taken therein. An issue was directly raised on it, and it was decided against Mr. Mitter in the Trial Court and in his favour in the Appellate Court. He allowed the decision of the latter Court to be set aside, waived the objection and allowed a decree to be passed fixing the quantity of land and assessing the rental thereon and he took no appeal from this decree. In my judgment the same matter can no longer be pleaded in defence to the plaintiff''s claim and the defendant''s plea as to deduction based on the aforesaid term of the pottas must be ruled out as being barred by the principle of res judicata.

13. But then it is said that the cause of action in the present suit is different from what it was in the suit of 1887 and, therefore, the defendants are entitled to raise the question again. I have carefully considered this matter, but, in my opinion, in the face of the declaration in the decree to which I have referred it is impossible to take the view that the defendant Mr. Mitter merely failed to prove in the said suit his right to the deduction he claimed--a position which would have enabled him or his successors to raise the defence in a subsequent suit; but that the only view possible to take of the matter is that in the said previous suit the Court definitely determined the area of the land in the defendant''s possession and the annual rent payable for the same. The distinction has been very clearly pointed out in the decision of this Court in the case of Nil Madhab Sarkar v. Brojo Nath Singha 21 C. 236 at p. 239 : 10 Ind. Dec. 789 where this is what is stated, "But the cause of action is in this case different, each year''s rent being in itself a separate and entire cause of action, and the mere failure of the defendant to prove what he tried to prove in the previous suit would not, we think, prevent him from proving it in this. The case might have. been different if the Court had in the previous suit definitely determined the area of the land in the defendant''s possession and the annual rent payable for the same. It might then be said that the determination was general, and not limited to the particular years for which rent was claimed, and that the defendant could only succeed in the present suit by proving that the area and the rent has since altered". In my opinion the present case comes within the class of cases last mentioned in these observations.

14. It then becomes necessary to decide whether the decision of Suit No. 447 of 1917 of the First Court of the Munsif at Baruipur operates as res judicata or not. That suit was between the parties to the present suit and was in respect of rent for the same lands for the years 1321 to 1323. The Munsif held as to the plea for deduction of 25 per cent. that the decree in Suit No. 49 of 1887 operated as res judicata. The Subordinate Judge on appeal was of a different opinion but he decreed the plaintiff''s suit in full, so that the plaintiff could not prefer any appeal against this adverse finding of the. Subordinate Judge on the questions of res judicata. Under

circumstances such as these it has been repeatedly held that the finding cannot operate as res judicata, the decree of the learned Subordinate Judge not being based on the finding but inspite of it and such a finding not being necessary, for his decision : Rango Balaji v. Mudiyeppa 23 B. 296 : 12 Ind. Dec. 197, Nando Lall Bhuttacharjee v. Bidhoo Mookhy Debee 13 C. 17 : 6 Ind. Dec. 508 and Thakur Magundeo v. Thakur Mahadeo Singh 18 C 647 : 9 Ind. Dec. 432.

15. Lastly in view of the arguments advanced before us it is necessary to refer to the result of a few other litigations in some of which, it is said, a view contrary to which [have taken has been adopted by this Court of the effect of the decree in Suit No. 4.J of 1837.

16. The first one is the litigation which culminated in R. A. Nos. 373 and 450 of 1897. These appeals arose, out of Suit No. 13 of 1835 in which the five original plaintiffs sued the predecessors of the present defendants for their 3 annas-15-gandas share of the rent. The suit finally came up to this Court on appeal. This Court, Maclean, C.J. and Banerjee, J., overruled the defendants'': contention that the decree had gone beyond the limits of the suit held that the decree was binding between the parties to the consent, and that the true view to be taken was that by consent of the original plaintiff and the defendant and the other parties not objecting the scope of the suit had been enlarged. In the judgment in these appeals there is, if anything a declaration very much, against the appellant''s contention, a declaration to the effect that the decree of the previous suit is binding on the appellant as regards future rents. This declaration seems to be too general, but what the precise meaning of it is need not be enquired into in the present appeal.

17. The next one is S.A. No. 75 of 1903. It arose out of a suit for rent against the appellant No. 1 and another instituted by the heirs of Umasundari the owner of the 3-annas share. Umasundari''s interest was outside the scope of Suit No. 49 of 18.37. This Court, Mitra, J., held that she was not competent to take advantage of the decree.

18. The next one is S.A. No. 1867 of 1911.

19. In this suit the plaintiffs who claimed not merely the shares of the original plaintiffs but also of some of the co-sharers, who were not made co-plaintiffs sued the appellants for rent. This Court (Chatterjea and Beachcroft, JJ.) held that so far as the share of the original plaintiffs was concerned the decree was binding but in respect of the shares which the plaintiff obtained from the pro forma defendants, the co-sharers of the remainder of the 13 annas share, who had not transferred themselves to the category of the plaintiffs the decree was not binding.

20. None of these decisions appear to me to be in conflict with the view I take.

21. The result, therefore, is that, in my judgment, no ground has been made out which would support a prayer for measurement such as was put forward on behalf

of "the defendant in this suit and the suit has been rightly decided by the Courts below. The appeal fails and should accordingly be dismissed with costs.

22. As regards the proceedings in review I desire to observe that the incorrect information supplied by the parties to their learned Vakils was responsible for the error in our judgment of the 27th February 1925, and that, therefore, the costs of these, proceedings should be borne by each party for himself or themselves.

Greaves, J.

23. I agree.