**(1959) 08 CAL CK 0001**

**Calcutta High Court**

**Case No:** Appeal from Appellate Decree No''s. 716 and 717 of 1954

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| Banamali Saha | | APPELLANT |
| | Vs | |
| Subala Dasi and Others | | RESPONDENT |

**Date of Decision:** Aug. 20, 1959

**Acts Referred:**

- Civil Procedure Code, 1908 (CPC) - Section 102, 115, 99
- West Bengal Non-Agricultural Tenancy Act, 1949 - Section 6(2), 6(2)(c)

**Citation:** 64 CWN 172

**Hon'ble Judges:** Banarjee, J

**Bench:** Single Bench

**Advocate:** Susil Kumar Biswas, for the Appellant; Narendra Nath Banerjee and Manan Kumar Ghosh for the Deputy Registrar, for the Respondent

**Final Decision:** Dismissed

**Judgement**

Banerjee, J.
These two appeals, at the instance of the plaintiff are directed against two appellate decrees reversing in one case and modifying in the other the decrees passed by a learned Munsif. S.A. 716 of 1954 is directed against the decree passed in Money Appeal No. 74 of 1953, modifying the decree passed in Money Suit No. 160 of 1952. The claim in that suit was valued at Rs. 17-10-6 p.

2. S.A. 717 of 1954 is directed against the decree passed in Money Appeal No. 73 of 1953, reversing the decree passed in Money Suit No. 159 of 1952. The claim in that suit was laid at Rs. 70/-.

3. According to the plaintiff the predecessor-in-interest of the defendant became a tenant under the predecessor-in-interest of the plaintiff and executed a Kabuliat, dated August 3, 1879, in respect of the land in suit measuring 28 of an acre and recorded in C.S. Plot No. 1970 of Khatian No. 1634, Mouza Amta. The rent agreed upon was said to be Rs. 7-3-5 p. per annum.

4. In Money Suit No. 160 of 1952 the plaintiff claimed from the defendants arrears of rent in respect of the disputed property in suit for the years 1357 and 1358 B.S. together with usual cesses and damages and laid his claim at Rs. 17/10/6 p.

5. In Money Suit No. 159 of 1952 the plaintiff claimed damages amounting to Rs. 70/-, being the price of palm trees and tamarind trees said to have been cut down by the defendants in breach of the prohibition contained in the Kabuliat, hereinbefore referred to.

6. Both the suits were contested by the defendants. They contended that they were not aware of the execution of any Kabuliat by their predecessor-in-interset as alleged and dispute the right of the plaintiff to realise rent. They further contended that then-status was that of occupancy-raiyat, in the disputed land. So far as the plaintiff''s claim for damages was concerned, the defendants contended that they had a right to cut clown and fell the trees, standing on the disputed land by virtue of their status as occupancy-raiyats. So far as the plaintiff''s claim for arrears of rent was concerned the defendants disputed the rate of rent as also their liability to pay the cesses. They also raised a plea of payment.

7. The trial Court found that the plaintiff was entitled to the rent. It was further found that the defendants were not occupancy raiyat and the tenancy was not governed by the Bengal Tenancy Act. It was also found that the defendants had committed breach of the contract, contained in the Kabuliat, (Ex. 2), by cutting down the trees as alleged by the plaintiff and decreed the claim for damages, about the quantum of which there was no dispute. So far as claim for rent was concerned, the trial Court disbelieved the plea of payment and decreed the rent as claimed, namely at the rate of Rs. 7-3-5 p. per annum. which was the rent as appearing also in the C.S. record. The claim for cesses and damages were also allowed. The defendants appealed to the lower appellate Court.

8. The learned District Judge, who heard the appeal, affirmed the findings of the trial Court to the effect that the plaintiff was entitled to rent from the defendants and that the tenancy was not governed by the Bengal Tenancy Act. According to the learned District Judge the defendants were non-agricultural tenant holding non-agricultural land and the relationship between the plaintiff and the defendant was governed by the West Bengal Non-Agricultural Tenancy Act 1949. The learned District Judge further held that the defendants were entitled to the benefits of Section 6(2) and (3) of the aforesaid Act and were entitled to fell, utilise and dispose of the timber of any tree standing on the disputed land. In that view of the matter, he dismissed the plaintiff''s claim for damages for trees felled and cut down by the defendant and allowed Money Appeal No. 73 of 1953.

9. So far as Money Appeal No. 74 of 1953 was concerned, the learned District Judge relied on the statement as to the annual rent as appearing in the Kabuliat (Ex. 2), namely, a sum of Rs. 5/- per annum and held that the amount of rent as in the C.S.

Khatian was wrong and the presumption of correctness of the entry as to rent, in the C.S. Khatian, stood rebutted. The plaintiff''s plea of subsequent enhancement of the rent was disbelieved. So far as the claim for cesses was concerned, the learned District Judge was of the opinion that the plaintiff was not entitled thereto and disallowed the claim. The decree in Money Suit No 160 of 1952 was therefore, modified to the extent indicated above and Money Appeal 74 of 1953 was allowed in part.

10. The propriety of both the decrees is being disputed in these two appeals.

11. Before I go to the merits of the appeal, I have to clear the ground of a preliminary objection as to the maintainability of the appeals.

12. The claim in S.A. 716 of 1954 is for ground rent, cesses and damages amounting to Rs. 17-10-6 pies. The claim in S.A. 717 of 1954 is for damages, for loss to property, amounting to Rs. 70/-. The question is, whether a Second appeal to this Court is barred, in each of the case, under the provisions of Section 102 of the Code of Civil Procedure.

13. In order to find out an answer to the question, it has to be seen whether the two suits were of the nature cognizable by Courts of Small Causes.

14. Article 8, Schedule II of the Provincial Small Cause Courts Act excepts from the cognizance of a Court of Small Causes suits for recovery of rent other than house rent unless the Judge of the Court of Small Causes has been expressly invested by the State Government with authority to exercise jurisdiction with respect thereto under Notification No. 3009 J. dated June 6, 1951. Only the Senior Munsif at Howrah (Sadar) in the District of Howrah has been invested with such authority. As such the trial Court namely, the Court of the Munsif at Amta, (District Howrah) could not try Money Suit No. 160 of 1952, in which the plaintiff claimed arrears of the ground rent of the disputed land, as a Small Cause suit. In such circumstances the bar under Sec. 102 of the CPC does not apply to S.A. 716 of 1954 (arising out of Money Suit No. 160 of 1952) and I hold that the said Second appeal is maintainable under the law.

15. Article 35(ii) was introduced in Schedule II of the Provincial Small Cause Court Act by Amending Act VI of 1914. Under the said Article, a suit for compensation for an act which is, or, save for the provisions of Chapter IV of the Indian Penal Code, would be an offence punishable under Chapter XVII of the Code, is excepted from the cognizance of a Court of Small Cause. The question is whether Money Suit No. 159 of 1952, in which claim for damages on account of felling of trees by a tenant was made, is a suit contemplated under Article 35(ii) of the Provincial Small Cause Courts Act.

16. In a case reported in (1) AIR (1950) Calcutta 109 (Gadadhar Dey v. Sm. Rani Bala Dasi) Rama Prosad Mookherjee, J. made the following observations on the scope of Article 35(ii):-

It has, however, been repeatedly pointed out that when there is a dispute between a landlord and a tenant with regard to the question as to whom the right to the trees or the right to the timber when the trees are felled, belongs is often a question of considerable difficulty. The right of a landlord and a tenant in respect of trees is often a disputed right, depending in some cases upon statutory provisions and in others upon custom or otherwise. A criminal case, either for mischief or misappropriation or for theft, would easily be defeated by the defendant urging that he had a right to appropriate the trees, as also the timber after felling them, and in the written statement as filed in this case that defence was actually raised. The tenant in such a case can very well plead that he bonafide believed that he was entitled to cut the trees and if under such bonafide belief he had felled the trees and removed the timber the provisions contained in Chapter XVII, Penal Code, cannot at all be attracted. Such a suit is one which is not excluded from the cognisance of the Court of Small Causes, (Dildar Hossain v. Sadaruddin Chowdhury, 27 C.W.N. 469; Radha-ballav Guha v. Panchcowri Seal 46 C.L.J. 552; Damodar Jha v. Baldeo Prosad. 9 Pat. 569: and Ram Prosad v. Sri Charan Mondal 27 C.L.J. 594). In my view, therefore, the learned Subordinate Judge was correct in holding that no appeal lay before him against the decision of the learned Munsif.

17. I respectfully agree with the observations contained in the aforesaid judgment. Regard being had to the nature of the dispute in the instant case, the defence raised, and the change of law effected by the operation of the West Bengal Non-Agricultural Tenancy Act 1949, I am of the opinion that Money Suit No. 159 of 1952 (out of which S.A. 717 of 1954 arises) was cognizable by a Small Cause Court and was not excepted therefrom on account of the provisions of Art. 35(h) of the Second Schedule of the Provincial Small Cause Courts Act.

18. The fact that Money Suit No. 159 of 1952 was tried by the learned Munsif in his ordinary jurisdiction did not take away the prohibition as to appeal contained in the Provincial Small Cause Courts Act. This was the view taken by Rankin and B.B. Ghosh, JJ. in a case reported in (2) 39 C.L.J. 532 (Mohini Mohan Roy v. Sankar Das Mahanta).

19. The position, therefore, is that against the decree in Money Suit No. 159 of 1952, no appeal did lie even before the lower appellate Court, far less a Second appeal before this court.

20. Mr. Susil Kumar Biswas, learned Advocate for the plaintiff appellant, contended that although the position above stated is ordinarily so, even then a Second appeal to this Court would be competent, because the decree by the lower appellate Court was without jurisdiction. He strongly relied on the following observations to be found in the separate judgment of Mookerjee J. in a case reported in (3) AIR (1917) Cal. 320 (Gangadhar Karmakar v. Shekharbasini Dasya) in support of his contention-:--

A decree made without jurisdiction possesses nonetheless the qualities of a decree as between the parties thereto, and if there is a statutory appeal from decrees made in suits of that character the decree does not become unassailable because it has been made without jurisdiction. That an appeal lies against a decree made without jurisdiction is indeed also clear from the terms of Sections 99 and 115 C.P.C.

21. Mr. Biswas contended that I should apply the aforesaid dictum to the instant case and treat S.A. 717 of 1954 as a competent appeal.

22. A view contrary to what was taken by Mookherjee, J. above referred to was, however, taken by Rankin and B.B. Ghosh, JJ. in a case reported in (2) 39 C.L.J. 532 (Mohini Mohan Roy v. Sankar Das) and I quote an extract from the aforesaid judgment, delivered by Rankin, J.

The result, therefore, on this view is that the first appeal was without jurisdiction. The second result but for Section 102 CPC would be that this appeal would lie to set aside the decree made without jurisdiction on the first appeal. That would be on the well-known doctrines that are laid down in Kalipada v. Shekhar Basini (24 C.L.J. 235) and Aduram v. Nakuleswar (29 C.L.J. 48). But in this case, there is a further complication that there is a special prohibition against a second appeal. In that view, an objection has been taken by the plaintiff that this appeal is. incompetent. In my opinion, on the assumption which I think to be right that the case is cognizable by the Small Cause Court, the present appeal is not competent, and is barred by Section 102, Code of Civil Procedure. But it is open to the appellant to ask us to treat his memo of appeal as an application in revision and to set aside the order made without jurisdiction.

23. The review of case laws on this point will not be complete unless reference is made to Madras Full Bench decision. In the case reported in (4) ILR 33 Madras 323 (FB) (Kollipara Seetapathy v. Kankipati Subbayya) the point that was referred to the Full Bench was as hereinbelow quoted:--

Where a small cause suit is tried by the Munsif on the Original Side and his decision in appeal is reversed by the subordinate Court, is the High Court bound to set aside the decree in appeal as having been passed without jurisdiction?

24. Answering the question in the affirmative the Full Bench observed as follows:--

As the decision of the Appellate Court in the case before us was made without jurisdiction, we think this Court is bound to set it aside.

25. With very great respect to learned Judges, who decided the Full Bench Reference, aforesaid, I venture to make this observation that their Lordships left much unsaid in their somewhat cryptic expression of opinion.

26. Before I leave this topic, I need refer to a Calcutta decision reported in (5) ILR 21 Calcutta 219 (Suresh Chandra Moitra v. Kristo Rangini Dasi), wherein it was observed

as follows:--

If no objection to jurisdiction is raised, the District Court is left to act in exercise of its own discretion either to decide the appeal or submit the case to High Court.

27. The observation about submission of the case to High Court has apparently reference to the procedure laid down in Sec. 646 B of the CPC of 1882 corresponding to the provisions in Order 46, Rule 7 of the present Code. It is difficult to conceive how consent can confer jurisdiction on a District Judge to try a matter, which he is, fey law, not competent to try.

28. Faced with somewhat conflicting lines of decision, as indicated above, the best course for me, particularly when sitting singly, is to adopt the course indicated by Rankin, J. (later en Rankin. C.J.) in (2) 39 C.L.J. 582 (Mohini Mohan Roy v. Sankar Das) and to treat the memorandum of appeal in S.A. 717 of 1954 as an application for revision u/s 115, C.P.C. That is what I do in S.A. 717 of 1951

29. Having thus cleared the ground of the preliminary objection as to the maintainability of the appeals. I now propose to deal with their merits.

30. In S.A. 716 of 1954 (arising out of Money Suit No. 160 of 1952) the finding of fact by the lower appellate Court is that the plaintiff''s story of enhancement of rent subsequent to the execution of the Kabuliat in 1878 was net made out and the entry in the C.S. Khatian about the rate of rent stood rebutted. That is a finding of fact which is binding on me. I, therefore, hold that the rent is to be decreed at the rate of Rs. 5/- per annum as done by the lower appellate Court. I affirm the decree for damages. I do not however, agree with the finding of the lower appellate court to the effect that the plaintiff is not entitled to cesses including education cesses. The learned District Judge gave no reason as to why he found the plaintiff''s claim for cesses untenable. u/s 5 of the Cess Act 1880, subject to certain exceptions with which I am not concerned, all immovable property situate in a district where the Act applies shall be liable to the payment of a road cess and a public works cess. The definition of the terms "immovable property" and '""land" in Section 4 of the Act does not exclude the type of property in dispute. The learned District Judge found that the lands were taken far residential purpose and that the defendants were The defendants therefore, are liable to pay road cess and public works cess assessed according to Rule 59 of the Rules and Orders issued under or with reference to the Cess Act. Now that I find that the defendants are liable to pay road cess and public works cess, they must be held liable to pay education cess also, u/s 29 of the Bengal (Rural) Primary Education Cess Act, 1930. I, therefore, allow S.A. 716 of 1954 to the extent indicated above and direct the trial Court to calculate and allow the claim for cesses according to law. If that Court feels that for the purpose of the calculation it shall be necessary to take evidence, it shall have the liberty to take further evidence. S.A. 716 of 1954 is therefore allowed and the matter is remanded to the trial Court for the limited purpose indicated above. There will be no order as to costs in that

appeal.

31. So far as S.A. 717 of 1954 is concerned, it was not disputed that the defendants are non-agricultural tenants governed by the West Bengal Non-Agricultural Tenancy Act. Their tenancy commenced from the year 1879. That being so, they are entitled to the benefits of Section 6(2) (c) of the West Bengal Non-Agricultural Tenancy Act and the plaintiff''s claim for damagaes must fail. In the above view of the matter. I dismiss S.A. 717 of 1954, which I have treated as an application for revision; I do not make any order as to costs.