Abdul Wahed Khan and Another Vs Srimati Tamijannessa Bibi and Others

None

Court: Calcutta High Court

Date of Decision: June 29, 1925

Citation: AIR 1926 Cal 679 : 92 Ind. Cas. 905

Hon'ble Judges: Cuming, J; Chakravarti, J

Bench: Division Bench

Judgement

Chakravarti, J.
This is an appeal by the plaintiffs and arises out of a suit for rents for the years 1324 to 1327. In para. 8 of the plaint, the

plaintiffs stated amongst other matters this ""out of the said purchased niskar property plaintiffs also having purchased some jote right lands no rents

were claimed amongst the co-sharers and the rent due to each co-sharer used to be set-off, but the defendants Nos. 1 and 2 in collusion with

other defendants disregarded the said arrangement and instituted Title Suit No. 2062 of 1919 in the Munsifs First Court Sadar on the claim of

getting mesne profits and khas possession with regard to some other jotes by the plaintiffs Nos. 1 and 2 and obtained decree with mesne profits

from 1324 A.S."" Now the defence of the defendants was substantially the same as alleged by the plaintiffs that there was an arrangement between

the co-sharers by which instead of paying rent to each other the rent due to each other was to be set-off. But the written statement goes a little

further than what was stated in the plaint. It seems to state to the effect that, as a matter of fact, no rent was payable to each other at all. Now it

appears that the learned Munsif on the 3rd of May 1921 recorded the following order: ""Parties are ready. Suit taken up. Heard Pleaders on both

sides about maintainability of the suit documents Exs. 1 and 2 marked for the plaintiffs and A and B for the defendant. Order reserved."" It appears

that the learned Munsif proposed to try the question as to maintainability of the suit upon the pleadings and also upon the four Exhibits which were

marked in the case a point preliminary to the trial of the suit on the merits. From what one finds in the two judgments it appears that the question as

to maintainability of the suit was tried on the pleadings and not with reference to any of the four documents which were marked as exhibits in the

case. The learned Munsif in the course of his judgment stated as follows: ""It is stated in para. 8 of the plaint that by an amicable arrangement and

agreement between the co-owners no body realized rent from anybody and the rents due to one used to be set-off against the rents due from him

to the other."" The learned Munsif does not refer to any of these documents as to what the real arrangement or agreement between the parties was;

and on this arrangement as set out in para. 8 the learned Munsif later on says this. ""Because by the agreement between the parties realization of

rents by one from another came to an end and one ceased to be a tenant under the other and a rent, suit by one against another cannot lie."" In this

view the learned Munsif dismissed the plaintiff''s suit as not maintainable. On appeal by the plaintiffs the learned District Judge also tried the suit on

the question of its maintainability and holding that the suit, apparently on the arrangement admitted by the plaintiffs, was not maintainable dismissed

the suit. Now, the present appeal is by the plaintiffs against that judgment and decree of the learned District Judge. It is contended by the learned

Counsel who appears for the plaintiffs that the suit was tried on the issue as to whether it was or was not maintainable upon the statement

contained in the plaint and that the agreement as stated in para. 8 of the plaint does, not prevent the "" present suit being maintainable; secondly that

the finding of the learned Munsif as to the effect; of the arrangement that one ceases to be a tenant under the other was erroneous, because that

was not the effect of the arrangement set out in the plaint. It was next argued that the learned District Judge has also erred in dismissing the suit as

not maintainable, as he also tried the suit on the plaint filed by the plaintiff and that the learned District Judge has not based any of his findings upon

any evidence in the case.

2. Now, it is quite clear to us that the suit was tried as on an objection in the nature of a demurrer and, therefore, the plaintiff''s case as made in the

plaint ought to be accepted as correct. It was contended by the defendants-respondents as they are entitled to do that on the arrangement set out

in the plaint the plaintiff''s suit was not maintainable. But we are, of opinion, that the arrangement as set out in the 8th para, of the plaint, is nothing

more than an arrangement which one finds very usual in this country, namely, that when rents are due to zemindars each paying rent to and

receiving from the other, instead of each paying the amount to the other, the payment of the rent is usually made by entries in the account books

and in the result rent is set-off against each other and if there is any balance payable to either of them only the balance is paid. So far as I can

understand the arrangement clearly mentioned that the rent when its fell due to each other instead of paying in cash to each other there would be

set-off between the co-sharers. This arrangement did not prevent the rent from falling due. All that it provides is that after the rent has fallen due to

each other payment of the rent is made by set-off against each other. Payment is not really effected until the set-off is made. Now, if the plaintiffs in

disregard of this arrangement bring a suit for rent due to them the defendants may show that under the arrangement they refrained from realizing the

rent which fall due to them and that the money has already been paid by set-off when rent falls due, the party in whose favour the rent is due, is

entitled to enforce his right. Such an arrangement cannot prevent the rent from being realized unless it is shown that the rent has been paid either by

set-off or otherwise. Of course it is open to a defendant in a suit like this to show, as I have already said, that the rent has already been paid by

set-off between the parties. But if there has been no such set-off I do not see how a mere arrangement to make a set-off stops the rent falling due

and in fact the arrangement set only by the plaintiffs contemplates the rent falling due. It is no doubt open to the two co sharers to make an

arrangement by appropriate agreement putting an; end to the relationship of landlord and tenant between themselves, or, in other words giving up

the right to receive rent in favour of each other. But that is not the agreement which is set out in the plaint. The defendants as I have already stated,

go further in their written statement as to the nature of the agreement but no effect can be given to that plea without entering into evidence. In the

circumstances we think that the judgments and decrees of the Courts below ought to be set aside and the case sent back to the Court of first

instance to be decided after taking evidence to be adduced by the parties. That Court will decide the whole suit once for. all upon the issues which

may arise between the parties. All that we decide is that para. 8 of the plaint does not put an end to the relationship of landlord and tenant between

the parties. The'' rent does fall due and the defendant cannot escape liability without proving payment in some way.

3. Costs will abide the result.

Cuming, J.

4. I agree.