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Jaga Mohan Ghose and Others Vs Behari Barui and Others

Appeal from Appellate Decree No. 2204 of 1932

Court: Calcutta High Court

Date of Decision: March 18, 1935

Judgement

R.C. Mitter, J.
This appeal is directed by the Plaintiffs against the judgment and decree of the Subordinate Judge of Faridpur by which the

Plaintiffs'' suit has been dismissed. The Munsif of Gopalgunj had decreed it. The suit is for imposition of additional rent on account of increase of

area in the Defendants'' holding and for recovery of arrears of rent for 1332-1335 at the rate of rent to be so imposed by the Court.

2. The lands in suit appertain to Touzi No. 4406 of the Faridpore Collectorate. At one time Kedar Nath Roy and others and Jayanti Kumar Roy

and others were proprietors of the said Touzi, having 13 as.-4 pies and 2 as.-8 pies shares therein respectively. The two groups of proprietors

appear to have been in separate and exclusive possession of some parcels of lands. In 1288=1881, Kedar Nath Roy and others settled with the

Plaintiffs some specific parcels of lands. The Plaintiffs in their turn settled the same to a tenant named Aloka Barui in the year 1292 at a rent of Rs.

32. The lands, so settled, are said to have been recorded in Khatian No. 14 of Mouza Beel Baghia and comprise Dags Nos. 181 to 185, 187 and

190 with an area of 24.92 acres--about 75 bighas odd.

3. In 1294=1888, Jayanti Kumar Roy and others settled some lands with Nobin Barui at a rent of Rs. 9. These lands have been recorded in

Khatian No. 5 of the said village and comprise Dags Nos. 188,189 and 200 with an area of 33.40 acres=100 bighas odd. In the kabuliyat which

Nabin Barui executed on the 26th Pous, 1294 (January, 1888), in favour of Jayanti Kumar Roy and others, the area is stated to be only 29 bighas.

In the year 1912, however, Nobin Barui sued the Plaintiffs and their tenant Aloka Barui for possession of the lands recorded in Khatian No. 14,

his case being that these lands appertained to his tenancy held under Jayanti Kumar Roy and others under the aforesaid kabuliyat and he

succeeded in, the suit. In the meantime the right of Jayanti Kumar Roy and others in the Touzi devolved upon Beni Madhab Pal and at the time of

this suit was vested in Rani Hemanta Kumari Debya. Proceedings under the Estates Partition Act were started and the lands included in Khatians

No. 5 and No. 14 were allotted to Beni Madhab Pal. As a result of these proceedings Nabin Barui became the tenant under Beni Madhab Pal in

respect not only of the lands recorded in Khatian No. 5 but also of the lands recorded in Khatian No. 14. The area covered by the said Khatians

was much in excess of 29 bighas and it may be assumed that Beni Madhab Pal would have been able to impose additional rent on the excess area.

4. In 1920, Beni Madhab sued the Plaintiffs for possession of the lands recorded in Khatian No. 14 (Title Suit No. 46 of 1920) and in the

alternative prayed for assessment of rent. He proceeded upon the footing that the lease granted to them, the Plaintiffs, by Kedar Nath Roy and

others was not binding on him who got the lands allotted to his Shaham at the partition under the Estates Partition Act. The Court refused to give

Beni Madhab Pal a decree for possession, but granted him his alternative prayer and assessed rent on the Plaintiffs in respect of the lands of

Khatian No. 14. Thereafter, in 1926, the Plaintiffs sued Nabin Barui for damages for use and occupation of the lands of Khatian No. 14. The

judgment given by the Appellate Court in that suit (Money Appeal No. 28 of 1927) is important. The Court held that the claim for damages for use

and occupation was not maintainable, as the Plaintiffs had become the landlords of Nabin Barui by reason of the decree passed in suit No. 46 of

1920. The Court held that the effect of the said decree was to create an intermediate tenure in favour of the Plaintiffs between the proprietor, Beni

Madhab Pal, and the tenant, Nabin Barui, in respect of the lands of Khatian No. 14. According to the decision in this Money Appeal, the Plaintiffs

and Beni Madhab Pal were joint landlords from the date of the decree passed in Title Suit No. 46 of 1920, and that the Plaintiffs could only claim

to recover the rent from Nabin Barui either jointly with Beni Madhab Pal, or separately, after apportionment. The Plaintiffs have now brought this

suit against the heirs of Nobin Barui for recovery of their share of the rent after increasing the same on account of more lands being found to be in

their possession. Rani Hemanta Kumari has been joined as a pro forma Defendant, and the finding of the learned Subordinate Judge is that there is

no evidence that she refused to join as co-Plaintiff. The suit was filed on the 1st September, 1928, before the amendment of sec. 188 of the Bengal

Tenancy Act by Act IV of 1928 came into'' force. The case has to be taken in two parts, namely, (a) whether the Plaintiffs can claim any portion

of the sum of Rs. 9 reserved in the kabuliyat which Nobin Barui had executed in favour of Jayanti Kumar Roy and others on the 26th Pous, 1294,

and (b) whether in the suit as framed they can get additional rent imposed and get a decree for their share on that basis. The Court of first instance

by a judgment dated the 30th March, 1931, decreed both the claims, finding the Plaintiffs'' share to be 2492/5832. The second claim was decreed

on two grounds, namely,

(1) that the Plaintiffs were entitled to get additional rent on the basis of the contract embodied in the kabuliyat of Nobin Barui dated the 26th Pous,

1294, and the suit was maintainable without Rani Hemanta Kumari being a co-Plaintiff,

(2) that the amended sec. 188 of the Bengal Tenancy Act which came into force during the pendency of this suit (21st February, 1929), was

applicable and as Hemanta Kumari had been made a Defendant, the Plaintiffs'' claim in this respect was maintainable.

5. The Subordinate Judge dismissed the Plaintiffs'' suit in its entirety. He even held that the Plaintiffs were not entitled to claim any portion of Rs. 9.

The Subordinate Judge took this view on the ground that the decree passed in the suit which Nabin Barui instituted against the Plaintiffs and Aloke

Barui in 1912 was res judicata. I do not think that this part of the decree of the Subordinate Judge can be supported. In the suit of 1912, the

Plaintiffs, who were Defendants in that suit, were litigating under a title derived from Kedar Nath Roy and others and they have brought the present

suit, not on the basis of the title derived from Kedar Nath Roy and others but under a different title acquired through Beni Madhab Pal, the

successor-in-interest of Jayanti Kumar Roy and others, after the year 1920. The learned Subordinate Judge in deciding the point of res judicata

against the Plaintiffs has overlooked this fundamental point. He has moreover failed to give proper effect to the judgment passed in Money Appeal

No. 28 of 1927 which was also a judgment inter partes. I hold accordingly that the Plaintiffs are entitled to a decree for the years 1332 to 1335 at

the rate of 2492/5832 of Rs. 9 per year together with cesses at 6 pies per rupee and damages at 25 per cent.

6. With regard to the claim for additional rent, the Subordinate Judge overruled it on the ground that sec. 188 of the Bengal Tenancy Act before

the amendment of 1928 was applicable and I agree with the Subordinate Judge. The claim for additional rent is based in the plaint, not on contract

but expressly on sec. 52 of the Bengal Tenancy Act (prayer gha). Besides, there is no definite contract to pay additional rent. In the kabuliyat it is

only stated that the tenant would be bound to pay additional rent for excess lands found on measurement (jarip, jamabandi, etc.). The rate at which

additional rent is to be imposed is not stipulated for in the kabuliyat. There being no agreement accordingly on an essential element, there is no

definite contract on the point and the landlords have to fall back upon the statutory provisions enacted in sec. 52, Bengal Tenancy Act, for getting

additional rent imposed.

7. The question therefore reduces itself to one point, namely whether sec. 188 of the Bengal Tenancy Act, as amended by Act IV of 1928, has

restrospective effect, it being admitted, and it is also clear, that the Plaintiffs cannot claim additional rent under sec. 52 without Rani Hemanta

Kumari as co-Plaintiff, if old sec. 188 applies.

8. The whole question is whether sec. 188 is a rule of procedure or not. If it is, it would apply to pending actions. There cannot be any doubt that a

statute which creates a right of action or takes away one, has no retrospective effect. A statute which takes away a right of action really takes

away a vested right, for a right which cannot be enforced in a Court is no right at all. So also where a statute gives a right of action, it creates in

effect a right in the Plaintiff and impairs or affects correspondingly the Defendant. Dealing with the question as to whether the amended sec. 109 of

the Bengal Tenancy Act applied to a suit instituted before but pending at the time of the amendment, Suhrawardy, J. held. The reference is

obviously to Gosta Behari Pramanik v. Nawab Bahadur of Murshidabad. 35 C. W. N. 1147--Reporter that the immunity for action gained by a

Defendant is a substantive light and when that immunity, which existed under certain circumstances under the old Act, was taken away by the

amending Act, a substantive right of the Defendant was affected. In the case of In re Joseph Suche & Co., Limited [1875] 1 Ch. D. 48, Sir

George Jessel observed as follows :""I so decide because it is a general rule that where the Legislature alters the rights of parties by taking away or

conferring any right of action, its enactments, unless in express terms they apply to pending actions, do not affect them."" This principle in my

judgment ought to govern the point before me.

9. The learned Advocate for the Appellant, however, contends that these principles have no application to the present case. He argues that the

right to get additional rent has all along been recognised by the Legislature. Section 52 of the Bengal Tenancy Act was there in the old Act and it is

also in the amended Act almost in the same form. Section 188 of the Act, he says, merely defines the mode in which the right, so conferred upon

landlords by sec. 52, has to be enforced. Under the old Act it had to be enforced by all the landlords joining together as Plaintiffs and under the

amended Act by some of them coming in as Plaintiffs, the rest being made Defendants. He argues accordingly that sec. 188 of the Bengal Tenancy

Act is a rule of procedure, a rule which defines merely the form of action. This argument at first sight seems to be attractive, but I cannot give effect

to it--for, in my view, the amended section goes further than merely defining the form of action for enforcing the landlords'' right under sec. 52. The

decree for enhancement and for additional rent passed by the Court at the suit of some of the co-sharer landlords binds the other co-sharer

landlords who have been made Defendants, but the section does not stop there. By the proviso to sub-sec. (2) the Court is empowered to

distribute the amount by which the existing rent had been increased between all the landlords in proportion to their respective shares. This proviso

confers a valuable right on the co-sharer landlords, namely, to have the rent of the tenancy distributed. I hold accordingly that by sec 188, as

amended by Act IV of 1928, a new right of action has been conferred, and the action which at its inception was a bad one, was not made a good

one, simply because it had lingered on and was disposed of after the amendment came into force. I hold accordingly that the claim for additional

rent is not maintainable by the Plaintiffs. The result is that this appeal is allowed in part, and the decree made by the Subordinate Judge is modified

to this extent : The Plaintiffs will get a decree for rent for the years in suit at the rate of 2492/5832 of Rs. 9 per year with cesses at 6 pies per rupee

and damages at 25 per cent. The Plaintiffs will get costs of the two Courts below in proportion to their success. There will be no order for costs of

this Court.