Musst. Umasundari Dasi Vs Birbul Mandal and Others

Court: Calcutta High Court

Date of Decision: May 31, 1869

Judgement

L.S. Jackson, J.
It appears to me that neither of the two Courts, before whom this case has been tried, has given a decision in which we

can quite concur. That of the Assistant Collector, who tried the case originally, is manifestly and seriously wrong. The suit was brought by Birbal

Mandal, who described himself as a dar-mokurraridar of the Mauza Khyrabad Chiranjora against Ananto Sen and others, who are ryots of that

mauza, for some portion of the rent of the year 1273, and the full rent of 1274. The defendants admitted that rent was due to the plaintiff for the

year 1273, but they alleged that they were not liable to pay anything to the plaintiff for the year 1274, because the rights of the superior holder, the

mokurraridar, having been sold under Act VIII of 1865, Bengal Council, in execution of a decree against that person, the rights of the plaintiff as

dar-mokurraridar had been extinguished by operation of section 16 of the Act just quoted, and they further allege that they had paid the rents for

1274 to Umasundari Dasi, who accordingly intervened in this suit u/s 77, Act X of 1859, and was made a party. After examining the plaintiff and

the agent or gomasta of the intervenor, the Assistant Collector laid down the issue in these words ""the only issue between the intervenor and the

plaintiff is whether the plaintiff''s mokurrari was annulled or not u/s 16, Act VIII of 1865, B.C. It is for him to show that ha is included in the

exception, or that the grantor of his mokurrari had the power under his title to create such an incumbrance:"" and the view which the Assistant

Collector took of the case, is still further shown by a passage in his judgment in which I find these words ""the issue fixed in the case was whether

the plaintiff''s lease was annulled or not u/s 16, Act VIII of 1865, by the transfer of the leasor''s rights, and the plaintiff was directed to prove that

he came within the exception named in the section, or that the lessor had the power to grant such leases. He has proved neither."" Now the only

evidence adduced by the parties under the issue framed, was the allegation of the plaintiff himself, who on solemn affirmation filed his own patta. In

this state of things the Assistant Collector ordered that the case be decreed for 9 rupees, being the rent of 1273, and that the plaintiff was to pay all

the costs. Why the plaintiff should have to pay the whole of the costs in these circumstances, does not appear; but that is of minor importance.

2. This case going before the Zilla Judge on appeal, he observed rightly enough, that as between the plaintiff and the intervenor in this case the sole

issue which the Assistant Collector had to try, was the question of the actual receipt and enjoyment of the rent by such third person, and as

between these parties the suit ought to have been decided according to the result of that enquiry. The Judge then found that the intervenor had

given no proof whatever of such receipt by her. He therefore reversed the decision of the Assistant Collector, and went on to give a decree for the

plaintiff in full.

3. The party whom we might have expected to come before us in appeal from this judgment, is perhaps the defendants, because while the

intervenor at all events had a remedy by civil suit, left to establish her right, and moreover alleges that she has already got the rent for 1274, it is

rather difficult to see how she is injuriously affected by the decision, whereas the defendants find themselves in the position of persons having to

pay over again to the plaintiff the rent which they say they have already paid to the intervenor. But the defendants neither appeared before the Zilla

Judge nor before us. We have therefore to consider what, in the present state of things, is the order that we ought to make.

4. Clearly, the decision of the Assistant Collector was wrong, and I am not certain but that, on the default of the defendants to appear either in the

lower appellate Court, or in this Court, we might hold that they had been rightly adjudged to pay. But seeing how entirely the case has miscarried

in the Court of the Assistant Collector, and how unsatisfactory it would be to allow a final decision upon such imperfect materials to stand, I think it

is our duty to remit this case in order to an entirely new trial, the proper issues being fixed between the parties.

5. I think this is the more necessary, because it seems to me, looking to the facts that have appeared, and to the efforts made by the intervenor to

secure a decision in this case, that there is something more than appears upon the record. It would be very lamentable if parties in the position of

the plaintiff in this case holding a dar-mokurrari (supposing that to have been granted for good consideration) should altogether lose their rights in

consequence of proceedings on the part of the mokurraridar which have, to say the latest, a somewhat suspicious appearance.

6. I do not think it will be advisable that we should give any express directions, whether the new trial should take place in the Court of the Judge or

in that of the Assistant Collector, but in whichever Court it takes place, the issues to be framed will be, in the first instance, between the plaintiff

and the intervenor whether the one or the other has in the words of section 77, ""been in the actual receipt and enjoyment of the rent before and up

to the time of the commencement of the suit;"" and upon that issue it seams to me, that the Court which tries it will have carefully to consider what is

the meaning of ""the receipt of rent before and up to the time of the commencement of the suit."" Supposing that a plaintiff sues to recover rent for

the year 1274, and commences his suit on the first day of the year 1275, and supposing also that the plaintiff should have been in unquestioned

enjoyment of the teat down to the end of 1273, can it be supposed that the Legislature intended that by an understanding between the defendant

and a third party by which the defendant should pay his rent to such third party just before the commencement of the suit, such third party should

be at liberty to intervene and to be held to prove the previous receipt of rent up to the time of the commencement of the suit so as to put the

plaintiff out of Court? If seems to me that if that were the case, a very wide door for fraud would thereby be opened.

7. Now in this case the facts are very nearly such as I have supposed. The plaintiff had received rent down to the end of 1272, a great part of the

rent of 1273; and the defendant did not deny his right to receive the balance of 1273, and the plaintiff accordingly obtained a decree for such

balance. Can it be held, that supposing the fact to be proved that a payment shortly before the commencement of the suit, of the very rent in

respect of which the suit is brought, to the intervenor, would constitute the previous bona fide enjoyment which the intervenor is required to prove-

under section 77 before the plaintiff"s suit can be dismissed? Without wishing to pronounce any final opinion upon the point, I am inclined, at

present, to think it could not.

8. This, however, is the issue which will have to be tried between the plaintiff and the intervenor. If the intervener fails to prove his receipt of rent

within the true meaning of section 77, be will be out of Court, and there will remain the issues to be tried between the plaintiff and the defendants,

that is, whether the relation of landlord and tenant continues to exist between the plaintiff and the defendant, and whether, if so, the defendant has

paid his rent. If he succeeds in these two issues it is hard to see bow the plaintiff is not entitled to a decree.

9. It is probable that upon these points various questions may arise. The defendant in this case and the intervenor, who manifestly has made

common cause with him, claimed the operation of section 16, Act VIII of 1865, B.C., and it appeared to be assumed on their side, that under that

section the purchaser not merely acquired the under-tenure which he purchased free of all incumbrances, but that he was entitled to consider all

such incumbrances as ipso facto annulled, to ignore the holders of such under-tenures, and to proceed to recover rent from the ryots as if they had

no existence. Now, it is quite clear that section 16 recognises the case of certain incumbrances which might survive, not withstanding the sale of the

superior tenant''s rights. At first sight, it does not appear to me how the purchaser can arrogate to himself the right of determining whether the

incumbrances in question are of the excepted kind or not, and if he could not arrogate to himself such a right, it is difficult to see, how, when such

incumbrances or under-tenures exist, he could in good faith receive and enjoy the rents of the cultivators, setting such incumbrances aside. But

these are questions which will have to be considered upon the remand by the Court below. I merely suggest them as amongst the difficulties of the

case. I think the case will have to be remanded for a new trial upon the issues which I have stated.

10. I would only add, that Mr. Money, at the outset of his argument, thought that be might insist upon an unconditional reversal of the decision of

the Judge who went upon the ground that the intervenor had given no evidence whatever of his allegation, whereas, in fact, there was such

evidence. It seems to me that upon that part of the case the Judge was right, because the only thing wearing the semblance of evidence which has

been recorded by the Assistant Collector, is the examination of the intervener''s agent previous to the framing of the issues, and even if it be

conceded that what that agent said in respect of the payment of rent, was matter which if submitted at the proper time would have been evidence, I

do not think it could be treated as evidence at all, inasmuch as it was merely a statement of the case which the intervenor intended to make, and

upon which the issues had to be framed, and not evidence adduced after framing the issues.

Markby, J.

I am of the same opinion.

(1) Section 16, Act VIII of 1865.--""The purchaser of an under-tenure sold under this Act shall acquire it free of all incumbrances which may have

occurred thereon by any act of any holder of the said under-tenure, his representatives or assignees unless the right of making such incumbrances

shall have been expressly vested in the holder by the written engagement under which the under-tenure was created, or by the subsequent written

authority of the person who created it, his representatives, or assignees, Provided that nothing herein contained shall be held to entitle the purchaser

to eject khoodkast ryots or resident and hereditary cultivators nor to cancel bona fide engagements made with such class of ryots or cultivators

aforesaid late incumbent of the under-tenure or his representatives except it be proved, in a regular suit to be brought by such purchaser for the

adjustment of his rent, that a higher rent would have been demand-able at the time such engagements were contracted by his predecessor. Nothing

in this section shall be held to apply to the purchase of a tenure by the previous holder thereof, through whose default the tenure was brought to

sale.