(1928) 09 CAL CK 0001

Calcutta High Court

Case No: None

Tarini Charan Bhattacharjee and Others		APPELLANT
	Vs	
Kedar Nath Haldar		RESPONDENT

Date of Decision: Sept. 12, 1928

Acts Referred:

- Bengal Tenancy Act, 1885 - Section 153
- Civil Procedure Code, 1908 (CPC) - Section 11

Citation: AIR 1928 Cal 777 : 115 Ind. Cas. 593

Hon'ble Judges: George Claus Rankin, C.J; Zahhadur Rahim Zahid Suhrawardy, J; Mukherji, J; Charu Chunder Ghose, J; B.B. Ghose, J

Bench: Full Bench

Judgement

Rankin, C.J.
The present reference to the Full Bench has been made by a Division Bench in a second appeal arising out of a rent suit. Two questions of law have been formulated for our opinion, but under Rule 2, Ch. 7 of the appellate side rules, the whole case is submitted to us for final decision.

2. The first point taken before us was not taken at the hearing before the Division Bench, but as it goes to jurisdiction it must be entertained and decided.

3. The contention is that no second appeal lies in this case by reason of the provisions of Section 153, Ben Ten. Act. The claim in the suit was (1) for arrears of rent of four years 1327-1330 B.S. at Rs. 16 per annum, i.e., Rs. 64; (2) cess for four years at''8 annas per annum, i.e., Rs. 2; (3) interest on rent in arrear at 75 per cent, per annum, i.e., Rs. 108-2-0, making a total claim of Rs. 174-2-0. The tenant nevertheless contends that the case comes within Clause (a), Section 153, in that "the amount claimed in the suit does not exceed Rs. 100." The terms of the section are well known:

An appeal shall not lie from any decree or order passed whether in the first instance or in appeal in any suit instituted by a landlord for the recovery of rent where (a) the decree or order is passed by a District Judge, Additional District Judge or Subordinate Judge and the amount claimed in the suit does not exceed Rs. 100...unless the decree or order has decided...a question of the amount of rent annually payable by a tenant.

4. The contention is that the section contemplates a suit "for the recovery of rent" and that "the amount claimed in the suit" cannot be read so as to include interest at a high contractual rate such as 75 per cent. It is conceded that a claim for statutory interest at 12 1/2 per cent, u/s 67, Ben. Ten Act, or a claim for statutory damages not exceeding 25 per cent, on the amount decreed as provided for by Section 68 of the Act, are ordinary incidents of a rent suit and must be taken into consideration in ascertaining for the purposes of Section 153 whether the amount claimed in the suit does not exceed Rs. 100. But it is contended that a claim to interest at 75 per cent, made upon the basis of an agreement evidenced by a kabuliat is not within the contemplation of the section. Reliance is placed upon decisions which hold that the statutory restriction upon, appeals cannot be evaded by adding a separate cause of action to the claim for rent.

5. In my opinion this objection fails. We are here concerned not with the words "a question of the amount of rent annually payable by a tenant" which occur in the clause of exception, but with the words "the amount claimed in the suit" which occur in Clause (a). Such cases as Kripasindhu v. Jogendra [1907] 5 C.L.J. 78 and Koylash Chandra De v. Tarak Nath Mondal [1897] 25 Cal. 571 are, therefore, not in point. In Jamadar Singh v. Jagat Kishore [1916] 23 C.L.J. 557 the plaintiff in addition to the ordinary claim for rent had added as claim for damages for breach of a contract to furnish certain documents. It was held that this claim for damages was not a claim of such a character that it could be added to the claim for rent in order to ascertain the amount claimed in the suit for the purposes of Section 153. The Court, however, was of opinion that "sums ancillary to rent, such as interest on rent in arrears or statutory damages" might require to be taken into consideration before it could be said of a suit for rent that the amount claimed in the suit does not exceed Rs. Rs. 100. In my opinion this is the only reasonable and correct view.

6. In the present case both rent and interest have been fixed by contract. The claim for interest, if it is to be made at all, must be made in the same suit as the claim for rent. If two separate suits had been brought, one for rent and one for interest, the tenant would not only have had a legitimate grievance but could, in my opinion, have taken advantage of the defence afforded by Order 2, Rule 2, Civil P.C. The preliminary objection, therefore, fails.

7. The question at issue before the Division Bench had reference to the claim for interest on arrears of rent at 75 per cent, per annum. This claim was made upon the basis of a kabuliat executed in 1880 by the then tenant, one Sitala Dasi in favour of

the predecessor of the plaintiff. In 1898 the plaintiff''s predecessor caused this ryoti holding to be sold in execution of a decree for rent and it was purchased at auction by the defendant''s father. The plaintiff purchased the superior interest in 1920 and the present suit was brought in 1924 for rent due in respect of the years 1920-23.

8. In 1915 the plaintiff''s predecessor brought a suit against the present defendant for rent and for interest thereon at the rate of 75 per cent, per annum on the basis of the kabuliat of 1880. That suit was contested, inter alia upon the ground that the kabuliat was not valid or binding upon the defendant. In support of this defence it was maintained that Sitala was an ignorant person and not in her right mind, that the contract as to interest was hard and unconcionable and in the nature of a penalty and that the defendant being an auction purchaser was not bound by its terms, the plaintiff not having caused those terms to be stated in the sale proclamation. The judgment of the Munsif who tried the case discloses all these defences and that they were all overruled. He held that there was no evidence that Sitala Dasi was not in her right mind; he held that there was no obligation upon the landlord to specify in the sale proclamation the rate of interest stipulated for in the event of rent falling into arrear; he held further that as the kabuliat was executed before the passing of the Bengal Tenancy Act the parties were bound by the contract and accordingly that the plaintiff was entitled to get the interest claimed.

9. No appeal was taken from this decision and it is not contested that the Munsif who tried the suit in 1915 was competent to try the present suit of 1924 within the meaning of Section 11, Civil P.C.

10. Now, the ''tenant''s only contention in the present case is that the plaintiff is not entitled to get interest at the kabuliat rate. The trial Court rejected this contention on the ground that this very question was concluded by the previous decision. The Additional District Judge reversed this finding and proceeded on the principle that 75 per cent, per annum was an exorbitant and unusual rate of interest and that the obligation to pay it would not pass with the tenancy unless it were publicly notified in the sale proclamation. For this view he regarded the case of Anandamoyi Deby v. Saudamini Debya AIR 1923 Cal. 559 as an authority. He has brushed aside the contention that the matter is res judicata and has allowed only simple interest at 12 1/2 per cent.

11. The plaintiff contends in second appeal that the decision in the suit of 1915 as to the rate of interest is conclusive in the present suit.

12. In my opinion the plaintiff is clearly right. The matter which is "directly land substantially in issue" in this ease is the very same that was directly and substantially in issue in the former suit, namely, whether one of the terms upon which this defendant holds his ryoti is that he is liable to pay 75 per cent per annum interest on arrears of rent. In the previous suit the plaintiff''s predecessor alleged and the defendant denied that this term was binding upon the defendant. The

defendant, in support of his denial, raises the very same contentions which he raises now and certain others. It was held that the term was valid and binding upon him as one of the terms of his tenancy.

13. In these circumstances, it matters nothing whether the decision was right or wrong and it matters nothing whether the error, if any, was an error on a point of fact or on a point of law. The matter directly and substantially in issue was a sensible and concrete question as to the rights of the parties and the conditions and terms of the defendant''s tenancy. To decide it correctly it was necessary to find the facts and to apply the law. If the Munsif did not succeed in ascertaining the exact facts or in applying the law correctly, the remedy of the defendant, if he had a remedy, was to challenge the Munsif''s decision in a superior Court. But Section 11, Civil P.C. and the principle which it embodies would be brought to nothing if it were held that it was open to him to litigate again the question of the validity of the terms as to interest, or his obligation to comply with it.

14. The arguments which have been addressed to us on behalf of the defendant are really three:

In the first place it is said that the Munsif''s decision in the previous case was erroneous upon a pure question of law and cannot therefore conclude the matter, The idea seems to be that the matter directly and substantially in issue in the previous suit was a pure question of law and that the doctrine of res judicata would not apply, at all events if it could be made out that the cause of action in the present suit was different from the cause of action in the previous suit. I see nothing but misconception in this line of argument. In order to decide whether the terms of the defendant''s tenancy include a valid an binding term to the effect that he should pay interest on arrears of rent at 75 per cent per annum in accordance with the kabuliat of 1880, the Munsif had to consider questions of law as well as questions of fact. But the matter which was directly and substantially in issue, and which was heard and finally decided, was not an abstract question of law. The Munsif decided that the landlord had a right to 75 per cent, per annum and that the tenant was bound to pay it as a term of his holding.

15. The second contention of the defendant was supported by a reference to the decision in Alimunissa v. Shama Charan [1905] 32 Cal. 749. The contention is that since the decision in 1915 the law upon the question whether special and unusual terms of tenancy are binding upon an auction purchaser without any mention in the sale proclamation has been altered by subsequent decisions of the Court, and that as the law has changed in the meantime, the previous decision no longer governs the rights of the parties. The case cited does certainly proceed upon the principle contended for. Maclean, C.J., reasoned thus:

Cases must be decided upon the law as it stands when judgment is pronounced and not upon what it was at the date of a previous suit the law having been altered in

the meantime. It has been conceded that if the law had been altered meanwhile by Statute, the objection (of res judicata) could not prevail. It is difficult to see why it should prevail because She law has been since determined to be otherwise by judicial decision.

16. In that case it may be noticed, a Fall Bench decision had overruled a decision regarded as good law at the time of the previous suit.

17. Now in the present case I am by no means satisfied that there has been any change in the current of decisions comparable with the change which was considered in the case cited. But I am clearly of opinion that the reasoning which Maclean, C.J., and Holmwood, J., adopted in the case mentioned is erroneous. The legislature by statute, may alter the rights of parties and when it does so, it makes such provision as it thinks proper to prevent injustice. Courts of law are in no way authorized to alter the rights of parties. They profess, at all events, to ascertain the law, and if the binding character of a decision upon a concrete question as to the terms of a particular holding is to fluctuate with every alteration in the current of authority the Courts will become an instrument for the unsettlement of rights rather than for the ascertainment thereof. The principle relied upon is abhorrent to Section 11, Civil P.C. and to the general intention of the doctrine of res judicata, If authority be wanted for its rejection a very plain authority can be found in the case of Gowri Koer v. Audh Kuar [1884] 10 Cal. 1087.

18. The third point argued for the defendant is that while the previous decision may be conclusive as to the binding character upon the defendant of the stipulation in the kabuliat for interest at 75 per cent, per annum, it is open to the defendant to contend in this appeal that the stipulation, though binding, is a stipulation for a penalty and that it is accordingly open to the Court u/s 74, Contract Act, or the principle embodied therein, to refuse to give judgment for more than a reasonable compensation to the plaintiff for the defendant''s failure to pay his rent when due.

19. It is not impossible that the stipulation in this kabuliat in the absence of evidence showing that 75 per cent per annum is a reasonable or usual rate of interest upon arears of rent, might be regarded as a stipulation by way of penalty. It has been translated as follows:

In default of kist I shall pay interest at the rate of one anna per rupee per month with the arrears of rent.

20. I find, however, that this very question was raised in the previous suit and it is reasonably clear to me that the Munsif by his judgment overrules this contention. His view was that the parties were bound by the contract and that the plaintiff was entitled to get the interest claimed. I do not think therefore that this contention can succeed.

21. For these reasons I am of opinion, that the second appeal to this Court should be allowed, that the decision of the Additional District Judge should be set aside and the decision of the Munsif restored with costs in all the Courts.

22. It remains now to deal with the two questions formulate by the Division Bench.

23. These are:

(1) Whether an erroneous decision on a pure question of law operates as res judicata in a subsequent suit where the same question is raised.

(2) Whether the case of Anandamoyi Dasi v. Saudamini Debi [1905] 32 Cal. 749 has been correctly decided.

24. The second of these questions is a matter of considerable importance but as in my view it does not arise in the present case, I do not think that we ought to express our opinion upon it.

25. As regards the first question, I am not of opinion that any categorical answer can be given to the question as framed and I do not think that it would be wise for a Full Bench to attempt an exhaustive exposition of all the considerations which are relevant in determining whether a previous decision does or does not operate as res judicata. I think, however, that it may be useful, if it is not exactly necessary, to make the following observations:

(1) The question whether decision is correct or erroneous has no bearing upon the question whether it operates or does not operate as res judicata. The doctrine is that in certain circumstances the Court shall not try a suit or issue but shall deal with the matter on the footing that it is a matter no longer open to contest by reason of a previous decision. In these circumstances it must necessarily be wrong for a Court to try the suit or issue, come o its own conclusion thereon, consider whether the previous decision is right and give effect to it or not according as it conceives the previous decision to be right or wrong. To say, as a result of such disorderly procedure, that the previous decision was wrong and that it was wrong on a point of law, or on a pure point of law, and that therefore it may be disregarded, is an indefensible form of reasoning. For this purpose, it is not true that a point of law is always open to a party.

(2) In India, at all events, a party who takes a plea of res judicata has to show that the matter directly and substantially in issue has been directly and substantially in issue in the former suit and also that it has been heard and finally decided. This phrase "matter directly and substantially in issue" has to be given a sensible and businesslike meaning, particularly in view of Ex. 4, Section 11, Civil P.C., which contains the expression "grounds of defence or attack." Section 11 of the Code says nothing about causes of action, a phrase which always requires careful handling. Nor does the section say anything about points or points of law, or pure points of law. As a rule parties do not join issue upon academic or abstract questions but

upon matters of importance to themselves. The section requires that the doctrine be restricted to matters, in issue and of these to matters which are directly as well as substantially in issue.

(3) Questions of law are of all kinds and cannot be dealt with as though they were all the same. Questions of procedure, questions affecting jurisdiction, questions of limitation, may all be questions of law. In such questions the rights of parties are not the only matter for consideration. The Court and the public have an interest. When plea of res judicata is raised with reference to such matters, it is at least a question whether special considerations do not apply.

(4) In any case in which it is found that the matter directly and substantially in issue has been directly and substantially in issue in the former suit and has been heard and finally decided by such Court, the principle of res judicata is not to be ignored merely on the ground that the reasoning, whether in law or otherwise of the previous decision can be attacked on a particular point. On the other hand it is plain from the terms of Section 11 of the Code that what is made conclusive between the parties is the decision of the Court and that the ireasoning of the Court is not necessarily the same thing as its decision. The object of the doctrine of res judicata is not to fasten upon parties special principles of law as applicable to them inter se, but to ascertain their rights and the facts upon which these rights directly and substantially depend; and to prevent this ascertainment from becoming nugatory by precluding the parties from reopening or recontesting that which has been finally decided.

C.C. Ghose, J.

26. I agree.

Suhrawardy, J.

27. I agree.

B.B. Ghose, J.

28. I agree.

Mukherji, J.

29. I agree.