

(1920) 03 CAL CK 0013

Calcutta High Court

Case No: None

Kristo Das Roy and
Another

APPELLANT

Vs

Behari Lal Sikdar and
Another

RESPONDENT

Date of Decision: March 24, 1920

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 2 Rule 2

Citation: 57 Ind. Cas. 900

Hon'ble Judges: Newbould, J; N.R. Chatterjea, J

Bench: Division Bench

Judgement

1. This appeal arises out of a suit for recovery of certain sums of money as rent and damages.

2. It appears that the plaintiff and the defendants Nos. 1 to 3 were co sharers in certain property, and that under an arrangement between them the defendants Nos. 1 and 2 were to remain in possession of the entire property as tenants. In 1911, a suit for partition and accounts was brought by defendant No. 3 against the plaintiff and the defendants Nos. 1 and 2, and at that time the defendants Nos. 1 and 2, gave up the tenancy. The suit was referred to arbitration and a decree was made on the 24th May 1913 upon the award made by the arbitrators. Under that decree the defendants Nos. 1 and 2 were liable to pay to the plaintiff Rs. 801 annas 3.

3. The present suit was instituted on the 28th January 1915, and one of the items claimed in the suit was the sum of Rs. 801 annas 3, which the defendants were found liable to pay to the plaintiff under the award of the arbitrator.

4. The next item relates to the rent or compensation for the period during which the suit was pending in Court, that is, from Aswin 1318 to Baisakh 1320.

5. The third item was the claim for damages for Rs. 1,000 from Jaishta 1320 to Pous 1321.

6. The Court of first instance disallowed the claims for the first and third items altogether, and with regard to the second item, that Court held that the claim for the period from October 1911 to January 1912 was barred.

7. On appeal the learned District Judge held that as there was an appeal pending against the final decree upon the award in the partition suit, "the plaintiff's claim for Rs. 801 annas 3 would be considered as remaining pending until the decision of the appeal by the Hon'ble High Court." He agreed with the finding of the Subordinate Judge as regards the third item and with regard to the claim for the second item, he held that the plaintiff was entitled to get compensation for the period from Aswin to Pous 1318 corresponding to October 1911 to January 1912. The claim for damages subsequent to Chait 1913 was dismissed by the learned District Judge.

8. The defendants Nos. 1 and 2 have appealed to this Court.

9. So far as the first item is concerned, we do not see how the claim can be considered "as remaining pending." The decree in the suit for partition and accounts directed the defendants Nos. 1 and 2 to pay the said sum of Rs. 801 annas 3 to the present plaintiff (defendant No. 3 in that suit) and a fresh suit cannot be maintained for recovery of the said sum. It is true that the present plaintiff was not the plaintiff in that suit, he having been a defendant (defendant No. 3) in that suit. But it was a suit for partition and amounts between co-sharers, the liability of the defendants Nos. 1 and 2 was determined, and a decree was passed against them not only in favour of the person who was the plaintiff in that suit but also in favour of the present plaintiff, then defendant No. 3. The decree in a suit for partition under these circumstances was a decree not only in favour of the plaintiff in that suit but in favour of the present plaintiff as well, subject to the result of the appeal then pending against the decree. The parties were bound and must be governed by that decree. The remedy of the present plaintiff was by way of execution of the decree in that suit and not by another suit.

10. We are accordingly of opinion that the order of the Court below, namely, that the claim for Rs. 801 annas 3 will be considered as remaining pending till the decision of the appeal should be set aside.

11. We may add that that appeal has already been disposed of and that the award has become final.

12. With regard to the second item, namely, the rent or compensation for the period during which the partition Suit was pending in Court, we do not think that the claim is barred by the provisions of Order II, Rule 2, Civil Procedure Code, as contended on behalf of the appellants. The amount which was claimed in the previous suit up to the date of the institution of the suit was on the basis of rent payable by the

defendants Nos. 1 and 2 as tenants. That tenancy ceased according to both sides from the date of the institution of the suit. The claim for the period after the date of the institution of the suit, therefore, would be one for damages. But apart from these considerations, the claim for the period subsequent to the institution of that suit cannot be barred by the provisions of Order II, Rule 2, because the present plaintiff was not the plaintiff in that suit and as one of the defendants in that suit, he could not have included the present claim in that suit although it was one for partition. The claim, therefore, is not barred by Order II, Rule 2 of the Code.

13. The claim, however, for the period from Aswin to Pous 1318 is barred by limitation.

14. It is true that the rent (if there was a tenancy) would fall due during that period, but upon the case of both parties, the defendants Nos. 1 and 2 ceased to hold the land as tenants from the date of the institution of the suit. That being so, the amount to be recovered from the defendants was not rent and the plaintiff is entitled only to the amount of damages which fell due within 3 years of the suit. The order of the Court of first instance on these points, therefore, should be restored, the claim for the period from Jaishtha 1320 to Pous 1321 having been disallowed by both the Courts below.

15. The result is that the decree of the lower Appellate Court is set aside and that of the Court of first instance restored.

16. No order as to costs.