(1925) 07 CAL CK 0041

Calcutta High Court

Case No: None

Rajendra Nath Chatterjee and Others		APPELLANT
	Vs	
Moheshata Debi and Others		RESPONDENT

Date of Decision: July 23, 1925

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 41 Rule 20, Order 41 Rule 22

Citation: AIR 1926 Cal 533 : 91 Ind. Cas. 649

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

Bench: Division Bench

Judgement

Cuming, J.

In the suit out of which this appeal has arisen the plaintiff sued for khas possession of 4 bighas pi land on the ground that the tenant who transferred them had no transferable interest in them and the transferees were mere trespassers.

2. The plaintiff''s case was that the defendant No, 3, Haridas Ghose, held as under raiyati under her in respect of the land in suit and had no transferable interest in it. The defendant No. 3 executed two mortgages in respect of these lands, one in favour of defendant No. 7 and the other in favour of defendant No. 8. Their united mortgages covered the whole of the lands in suit. Both these persons sued on, their mortgages and obtained decrees and purchased the lands. Hence the plaintiff contended that the defendant No. 3, the original raiyat, had abandoned the lands and that she was entitled to re-entry. The defendant''s case was that the plaintiff was not a raiyat but a tenure-holder, that he was a raiyat at a fixed rate of rent and further that the entire holding had not been purchased by defendants Nos. 7 and 8 but that 2 cottahs of this holding was still in the possession of the original raiyat Haridas Ghose and, therefore, there had been no abandonment.

3. The Court of first instance held that the plaintiff was a tenure-holder and the defendant was an occupancy raiyat and for reasons which I need not detail he held that the plaintiff was not entitled to khas possession as against defendant No. 3, but that he was entitled to khas possession against defendants Nos. 1, 2, 4, 5, 6, 7 and 8. The suit was decreed in the Court, of first instance on the 18th of August and on the 31st of August defendants Nos. 7 and 8 appealed to the District Court. The sole respondent in that appeal was the plaintiff. Defendant No. 3 was not a party to the appeal. On the 30th September the plaintiff filed certain cross-objection against defendant No. 3 who was not a party to the appeal and also along with this cross-objection filed an application asking the Court to make defendant No. 3 a party to the appeal and this was done on the 18th of April 1922. The lower Appellate Court held that defendant No. 3 was only an ordinary occupancy raiyat and was not as he claimed a raiyat at fixed rate and had no transferable interest in the property. He further held that defendant No. 3 had abandoned the holding and that, therefore, the plaintiff was entitled to eject defendant Nos. 7 and 8 who were only trespassers. He, therefore, rejected the appeal of defendants Nos. 7 and 8 and decreed what he described as the cross-appeal of the plaintiffs. The result being that the whole of the plaintiff''s suit was decreed and it was held that he was entitled to khas possession of the entire plot by ousting all the defendants therefrom.

4. Defendants Nos. 3, 7 and 8 have appealed to this Court. The learned Advocate who has appeared for the appellants contends first of all that so far as defendant No. 3 is concerned the cross-objection must be held, to be barred by limitation and further that defendant No. 3 not being a party to the appeal it was not open to the plaintiff to make a cross-objection against him. Some discussion ensued whether this was a cross-objection or a cross appeal. It is perfectly clear, I think, from all the circumstances in the case that the parties intended it to be cross-objection. Obviously if it was a cross-appeal there would be no object in filing an application asking the Court to make defendant No. 3 a party, because clearly defendant No. 3 would have been made a party by a cross-appeal being filed against him. Therefore, I think it is quite clear ''that this was a cross-objection. Now Order XLT, Rule 22 provides that "Any respondent though he may not have appealed from any part of the decree, may not only support the decree on any of the grounds decided against him in (he Court below, but take any cross-objection to the decree which he could have taken by way of appeal" and Sub-clause (3) of the rule provides that unless the respondent files with the objection a written acknowledgment from the party who may be affected by such objection or his Pleader of '' having received a copy thereof the Appellate Court shall cause a copy to be served on such party of his Pleader at the expense of the respondent. It, therefore, seems to me quite evident that the Code does not contemplate filing of cross-objection against a person who is not a party to the appeal, and it is quite clear that the plaintiff herself realized this difficulty, because she made an application that defendant No. 3 should be added as a respondent to the appeal and this application was granted by the lower Appellate

Court on the 18th of April in spite of the strenuous objection of defendant No. 3. Now, the only rule under which defendant No. 3 could have been added as a party to the appeal is Rule 20 of Order XLI which runs as follows: "Where it appears to the Court at the hearing that any person who was a party to the suit in the Court from whose decree the appeal is preferred, but who has not been made a party to the appeal, is interested in the result of the appeal, the Court may adjourn the hearing to a future day to be fixed by the Court and direct that such person be made a respondent". The order of the learned Subordinate Judge making defendant No. 3 respondent to the appeal is clearly wrong.

5. In the first place defendant No. 3 was not a person who was in the least interested in the result of the appeal. The suit had been dismissed against him and it was quite immaterial to him what happened in the appeal. Secondly, the rule contemplates a person being made a party to the appeal at the time of the hearing of the appeal obviously because it contemplates that the Court must be in full possession of the facts so that it may be in a position to say whether or not any person is interested in the result of the appeal. I do not think for one moment that the Code contemplates that a person should be made a party to an appeal simply in order to enable one of the respondents to prefer a cross-objection against him, I am, therefore, of opinion that it was not open to the lower Appellate Court to make defendant No. 3 a party to the appeal simply for the purpose of allowing the plaintiff to make a cross-objection against him.

6. The second contention if the learned Advocate is that on a construction of the patta, Ex. A, it is quite clear that defendant No. 3 was a raiyat at fixed rate. The patta, Ex. A, has been placed before me. On reading the patta there is no doubt but that it purports to grant a tenancy at a fixed rate of rent in perpetuity. The document begins by saying. A permanent lease in favour of Haridas Ghose and states as follows "As you have prayed to me for a document in the form of a permanent lease I grant this written deed of lease in accordance with your aforesaid prayer, and this deed of lease is to the effect that you will pay me the said rent annually in kists as stated in the Schedule given below and shall receive proper receipts for the same." The document further states "There will be no reason or decrease over and above or below the rent that is fixed now only in due payment of the fixed rent you will be in possession of the said land by cultivating the same from generation to generation". These terms are clearly those of a permanent tenancy at a fixed rate of rent. There is, however, in the lease the following clause "you will hare no right to sell your right in the land held under the lease." From this the respondent has argued that the lease does not contain all the elements necessary to constitute a permanent tenancy because there is a restriction on transferability. Apparently this is the clause in the lease which weighed with the lower Appellate Court in holding that the lease was not a permanent lease at a fixed late of rent. But the learned Judge in the Court below apparently ignored the fact that there was no re-entry clause in the event of the breach of this particular covenant in the lease and in the absence of this re-entry

clause this particular covenant restricting the transferability of the land is inoperative.

7. The result is, therefore, that the appeal must succeed and the plaintiff''s suit is entirely dismissed with costs both here and in all the Courts.

Chakravarti, J.

8. I agree.