

(1914) 05 CAL CK 0051

Calcutta High Court

Case No: None

Srimati Jagat Tara Debya
Chowdhurani

APPELLANT

Vs

Narmada Kanta Bakerji
Chowdhury and Others

RESPONDENT

Date of Decision: May 19, 1914

Citation: AIR 1914 Cal 741 : 24 Ind. Cas. 801

Hon'ble Judges: Mullick, J

Bench: Single Bench

Judgement

Mullick, J.

The length of the arguments and the present appeal appears to be disproportionate to the value of the subject-matter, which is a piece of land worth Rs. 40. The plaintiff prays for declaration of title "and khas possession.

2. Defendants Nos. 1 and 6 are admittedly under-raiyats inducted into the land by plaintiff's husband. They state that they have been dispossessed by defendants Nos. 7, 8 and 9 and that they have no further interest in the land. The contesting defendants Nos. 7 and 9 claim to be co-sharers in the holding with the plaintiff's husband and allege that plaintiff being a mere benamidar, for them and her husband, is not entitled to sue. Defendant No. 8, who is the brother of defendants Nos. 7 and 9. does not enter appearance. The Munsif and the Subordinate Judge have both dismissed the suit on the ground that the plaintiff is a benamidar and has no right to maintain the suit. The plaintiff prefers this second appeal against the Sub-Judge's decree.

3. The first point urged is that a benamidar in a suit for possession of Immovable property is entitled to sue. Although there are decisions in other High Courts to support this view, I think that so far as this Court is concerned it is a settled law that no such suit can be maintained. It is sufficient to cite the latest case upon the subject Mohindra Nath Mookerjee v. Kali Prashad (Sic) 30 C. 205 : 7 C.W.N. 229.

Bhola Pershad v. Ram Lal 24. C. 34. and. Sachitananda Mohapatra v. Baloram Gosain 24 C. 614. are authorities for the pro-preposition that a benamidar mortgagee can sue : but on the other hand the contrary view has been taken in Munshi Basiruddin Ahmed v. Mahomed Jatish Patwari 12 C.W.N. 409 and in any event the distinction between suits based on mortgage and those based, on sale has been clearly recognised in this Court. I hold, therefore, that the plaintiff, if she is a benamidar, is not entitled to maintain the suit. It is necessary therefore, to consider whether she is a benamidar or not. On this point the plaintiff's contention is that the Sub-Judge has committed an error of law in asking the plaintiff to prove that she is not a benamidar. The plaintiff has not deposed in the suit. The only oral evidence adduced by her is that of her husband who states that she is the owner of : the property. She" has proved the deed of sale by which the property was originally purchased by her alleged benamidar, Krishna, Thakur, and also the deed of release executed by the latter in her favour. She has also proved that these deeds come from her custody. She has also filed documentary evidence showing that in a previous suit regarding another portion of the holding in dispute the present defendant No. 8 admitted that the present plaintiff was the true owner of the property. The lower Appellate Court has disbelieved the whole of this evidence and has believed that adduced by the defendants. I think on a perusal of the judgment of the Subordinate Judge that it is clear that he has disposed of the case on a consideration of the evidence of both sides and that he has not wrongly placed the burden of proof wholly upon the plaintiff. In spite of an isolated passage in the judgment to the effect that it is for the plaintiff to prove that she is not a benamidar, I am satisfied that the Subordinate Judge has correctly applied the law. He has in view of Section 310, Evidence "Act, and the decision of Hari Ram v. Ray Coomar Opadhya 8 C. 759. called upon the plaintiff to make out a prima facie] case, and having found that the plaintiff's evidence does not disclose a prima facie case he has rightly dismissed the suit.

4. The next contention is that the question of the plaintiff's title is res judicata between the parties. It appears that in Suit No. 640 of 1906 certain new tenants inducted by the plaintiff's husband into the holding sued the old tenants, namely, defendants Nos. 1 and 6 of the present suit, for " declaration of title and possession joining as defendants the plaintiff, who was defendant No. 10, and present defendants Nos. 7, 8 and 9, who were defendants Nos. 2, 1 and 3 respectively. The Munsif in that suit found that the defendant No. 10 was the true owner and decreed the suit. In appeal the suit was dismissed on the ground that the tenants-defendants had not relinquished their holding and that, therefore, the plaintiffs were not entitled to possession. It is clear from the judgment of the Subordinate Judge that the question of title as between defendant No. 10 and defendants Nos. 1, 2 and T was not directly and substantially in issue, and was not determined by the Court. This being so the decree of the Subordinate Judge does not in any way operate as res judicata, on the question of title between the defendants in that suit, therefore", the appellant's third contention in the present

appeal also fails.

5. Fourthly, it is urged that I should now permit the plaintiff's husband to be joined with her as co-plaintiff and remand the case for trial : but having regard to the time which has elapsed and to the fact that the aspect of the suit will be completely changed, I am not prepared to accede to this request at this stage.

6. Finally, it is pointed out that before the Subordinate Judge defendants Nos. 7 and 9 preferred a cross-appeal on the ground that it was the duty of the Court to find whether the plaintiff was or was not their beinamdar. Defendant No. 8 did not prefer any cross-appeal and it is contended, that so far as he is concerned, the decree of the Subordinate Judge operates as res judicata upon the question whether the plaintiff was his benamidar. I do not think that there is any substance in this contention and in my opinion it was perfectly open to the Subordinate Judge to dismiss the whole suit. The result is that the appeal is dismissed with costs.