95 Ind. Cas. 961

Calcutta High Court

Case No: None

Sriharijana and Others		APPELLANT
	Vs	
Satya Charan Dulia and Others		RESPONDENT

Date of Decision: Jan. 11, 1926

Citation: 95 Ind. Cas. 961

Hon'ble Judges: Suhrawardy, J; Mukerji, J

Bench: Division Bench

Judgement

1. The suit out of which this appeal has arisen was brought by the plaintiffs-appellants for a declaration that they had occupancy right in the jote in suit and that defendants Nos. 2 to 6 were their under-raiyats: and for rectification of certain entries in the Record of Rights which recorded the plaintiffs as tenure-holders and the defendants Nos. 2 to 6 as occupancy raiyats. The defendant No. 1 was the Receiver of the estate of the landlords. No lease was obtained before the institution of the suit from the Court appointing the Receiver. In the written statements of defendants Nos. 2 to 6 an objection was taken that the suit could not proceed in the absence of such leave, but no issue was framed on the point. The Receiver appeared in the suit and contested that the plaintiffs were not occupancy raiyats but tenure-holders. But he raised no objection with regard to the absence of leave to institute the suit against him. At the time of the argument before the Trial Court the Receiver submitted that the suit must fail as it was brought without the permission of the Court appointing him. The Trial Court overruled the objection on the ground that it- was taken too late. On appeal, the learned: Additional District Judge was of opinion that the defect sould not be cured and that it was necessery that leave should have been obtained from the Court appointing the Receiver before instituting the suit. After holding that the suit was incompetent in the absence of leave for institution of the suit against the Receiver, the learned Judge expressed his opinion that the declaration with regard to the plaintiffs'' status in the presence of the landlord having failed, there was not sufficient evidence on the record to rebut the presumption raised by the Record of Rights.

2. The plaintiffs appeal and it is argued, in the first place, on their behalf that the Receiver was not a necessary party and, therefore, no leave need have been taken before the institution of the suit. This ground must fail on the facts of this particular case. The plaintiffs wanted a declaration that they were not tenure-holders under the landlord and also for an alteration of the Record or Rights. So far as this question is concerned, namely, the declaration that they were not tenure-holders, the landlords were vitally interested and it could not have been decided in their absence. The Receiver, therefore, representing the landlords was a necessary party in whose absence the suit as framed could not have proceeded. But it is argued that so much of the relief as could be given to the plaintiffs as between themselves and the defendants Nos. 2 to 6 should have been allowed to them. This, we do not think is the correct view of the law on the facts of the present case. The plaintiffs'' claim for an alteration of the Record of Rights depends firstly, on the declaration that they were not tenure-holders and that must be obtained in the presence of the landlord. If they succeed there, their next declaration would follow, namely, that defendants Nos. 2 to 6 are under-raiyats. We do not think that it would be proper to make such a declaration in the absence of the landlord.

3. The learned Additional District Judge has dismissed the suit on the ground that no such leave was obtained by the plaintiffs before bringing the suit against the Receiver. The learned Judge has rightly overruled the objection by the plaintiffs that as the ground was not taken by the Receiver in his written statement, nor was the Receiver, an appellant before the lower Appellate Court, it could not be given effect to. The absence of an objection on this ground will pot entitle the Trial Court to pass a decree against the Receiver as the proceedings initiated must be invalid on the basis of the decision of this Court in the case of Dunne v. Kumar Chandra Kisore 30 C. 593 : 7 C. W. N. 390. Reliance however has been placed on behalf of the appellants on the decision in the case of Satya Kripal Banerjee v. Satya Bhupal Bannerjee 22 Ind. Cas. 623 : 18 C. W. N. 546 : 19 C. L. J. 191. That case is clearly distinguishable as it is based on the special powers granted to the Receiver under his order of appointment, though there may be some expressions in it supporting the appellants'' contention. The appellants complain that as no issue was raised upon this point and as the Receiver who was directly affected did not raise this point in his pleadings, the plaintiffs did not get an opportunity of curing the defect by obtaining leave from the proper Court. We think that this contention should prevail. It was at one time held that leave of the Court must be obtained before the institution of the suit, See the case of Pramatha Nath Gangooly v. Khetra Nath Banerjee 32 C. 270 : 9 C. W. N. 247. But subsequently this view has been dissented from and it has been held that such leave can be obtained after the institution of the suit if a proper case is made out in this behalf, see the cases of Banku Behary Dey v. Harendra Nath Mukherjee 8 Ind. Cas. 1 : 15 C. W. N. 872 : 14 C. L. J. 50.; Maharaja of Burdwan v. Apurba Krishna Roy 10 Ind. 527 : 15 C. W. N. 872 : 14 C. L. J. 50. and Sarat Chandra Banerjee v. Apurba Krishna Roy (6). All these cases have been very recently reviewed in a considered judgment in the case of Rustomjee Dhunjibhai v. Frederic Gaebele 51 Ind. Cas. 486 : 23 C. W. N. 496 : 46 C. 352.; where it has been held that it is competent for

the Court to grant leave to continue a suit against a Receiver of the Court instituted without such leave, provided a proper case is made out. We accordingly think that on the facts of this case, the plaintiffs should be given an opportunity of obtaining the leave of the proper Court. The result is that we set aside the decrees of the Courts below and remit the case to the Trial Court for a re-trial of the suit on the plaintiffs obtaining the sanction of the proper Court to continue the suit against the Receiver, on the evidence on the record and such further evidence as the" parties may choose to adduce. On the failure of the plaintiffs to secure such permission the suits will fail. The appellants will pay the costs of the defendant-respondents of both the Courts below. There will be no order as to the costs of this Court.