(1933) 08 CAL CK 0033

Calcutta High Court

Case No: None

Jogesh Chandra Mukherjee		APPELLANT
	Vs	
Rai Beharilal Mitra Bahadur and Others		RESPONDENT

Date of Decision: Aug. 15, 1933

Citation: AIR 1934 Cal 799

Judgement

1. This is an appeal by the plaintiff in a suit for recovery of possessions of the lands specified in Schedule (gha) and for confirmation of possession of the lands of Schedule (ga) of the plaint, on declaration of his title to the same. The plaintiff''s claim in suit was based upon the solenamas in terms of which a previous suit, No. 63 of 1913, was disposed of as between the plaintiff''s father and the two sets of landlords, representing the entire interest in the lands in suit. The contesting defendants, defendants 1, 4 and 5 in the suit, resisted the claim of the plaintiff as made in the suit. Defendant 1 was the landlord, while defendants 2, 4 and 5 were persons claiming to be in possession of the lands in suit, holding the same under the landlords. The solenama on which the plaintiff''s title was based, and under which the plaintiff claimed howla right in the lands in suit, were characterised by the defendants as documents fraudulently obtained by the plaintiff''s father; they were not acted upon and given effect to; and they would not create any howla right in favour of the plaintiff''s father. It was asserted that the lands were in the landlord''s khas possession and from 1298 B. S. defendants 4 and 5 have been holding the same as tenants under the landlords. On the pleadings of the parties, various issues were raised for trial in the suit: and the most material of those issues for the purpose of this appeal are issues 9 and 6 raised in the case:
Is the solenama alleged to have been entered into in T. S. No. 63 of 1918 of this Court, between the plaintiff''s father and the zamindar defendants, legally admissible in evidence in this suit? Is it bona fide, valid or binding between the parties? Is the suit barred by the principle of res judicata?

2. The Court of first instance gave its decision in favour of the plaintiff. The plaintiff''s howla right to the lands in suit was declared and the plaintiff was held entitled to get khas possession of schedule (gha) lands: and his possession in regard to (ga) schedule lands was confirmed. On appeal by the contesting defendants, the decision and decree passed by the trial Court in favour of the plaintiff were reversed. The plaintiff''s suit was dismissed by the Court of appeal below. The plaintiff has appealed to this Court. In view of the nature of the controversy between the parties it is unnecessary at the outset to refer to the facts and circumstances relating to the solenamas filed in suit No. 63 of 1913, brought by the plaintiff''s father against the landlords, the Chakrabarties, and against Hari Charan and Ledu, amongst others. The plaintiff''s claim in that suit was based on esat howla and nim howla right and it was asserted that the entry in the Record-of-Rights showing that the lands were the maliks'' khas lands was incorrect. The Chakrabarti defendants in that suit alleged that the lands appertained to a different estate altogether, thus denying the title of the landlord defendants in the suit. Hari Charan and Ledu, defendants 4 and 5 in the present litigation were made defendants in the suit of 1913, as pro forma defendants on the allegation that they had manufactured a kabuliat from a co-sharer landlord. The suit was dismissed, so far as Hari Charan and Ledu were concerned, on the ground that the plaintiff in suit No. 63 of 1913 had no cause of action against them. The plaintiff''s suit so far as it was directed against the Chakrabarti defendants was dismissed, and the dismissal of the suit against the Chakrabarties appears to have been finally upheld by this Court, on 4th February 19l9. As has been already indicated, the solenamas were filed in Court determining the rights of parties so far as the plaintiff landlord, defendants in suit No. 63 of 1913, were concerned. The howla right of the plaintiff in that suit was to be declared in the lands in suit. It was specifically stated in the solenamas that the lands shall continue to be in possession of the plaintiff in howla right under the zamindar defendant.

3. It was provided in the solenamas that if separate kabuliyats were not executed the petition of compromise "shall be operative against the plaintiff as a kabuliyat," The trial Court in its judgment, dated 10th September 1914, stated that the solenama will govern the plaintiff and defendants 1 to 3, representing the zamindary interests at the time. It was distinctly mentioned that as regards defendants 1 to 3 it is ordered that the compromise made be recorded and a decree bo drawn up in terms of the same, so far as they relate to the subject matter of this suit.

4. It may be mentioned in this connexion that the subject matter of suit No. 63 of 1913, so far as the lands claimed in the suit was the same as the subject matter of the present litigation. A decree followed upon the judgment, and in the decree drawn up in the suit which was signed on 18th September 1914, by the Subordinate Judge who tried suit No. 63 of 1913, it was ordered fihat the plaintiff''s osat howla and nim howla rights be declared as provided by the solenamas:

The plaintiff shall remain bound by the tarms of the solenamas filed by defendants 1 to 3.

5. There were appeals to the District Judge and to this Court, directed against the decision of the trial Court, but there is no indication whatsoever in the judgments of the appellate Courts that the rights of parties recognized by the solenamas between the plaintiff in the suit and the landlord defendants, was challenged or controverted. The compromise between the parties concerned had been recorded by the trial Court, and there is nothing contained in the judgment of the District Judge or in the judgment of this Court, which bears the interpretation that the compromise arrived at by the parties was not to be treated as valid and binding, as between the parties to the same. It is no doubt true that the terms of the compromise were not in accordance with the decision of the Court, dismissing the plaintiff''s suit as against the Chakrabarti defendants. Keeping the above position in view could it be said that the compromise was not recorded and was not given effect to either by the District Judge or by this Court as the final Court of appeal.

6. In our judgment, in view of the fact that the compromise was recorded in so many words by the Court of first instance, in which it was filed and there being nothing in the judgments of the appellate Courts which in any way affected the rights of parties as recognized by the landlords in favour, of the plaintiff''s father, it could not be said that the compromise was not recorded, and that it was not given effect to by the appellate Courts. The question of compromise being given effect to by the appellate Courts could not arise, seeing that the parties to the compromise did not in any way attempt to challenge the same.

7. The learned Additional District Judge has characterised the solenama in suit No. 63 of 1913 as "mere frauds," and he has held that they could not confer any title on Protap, the father of the plaintiff in the present case. It appears to us that the landlord defendants having suffered a compromise decree to be passed in suit No. 63 of 1913, by which he acknowledged the title of the plaintiff''s father to the lands in suit in the manner mentioned therein he could not be allowed to raise the question of the compromise decree being invalid or not binding on him. The Chakrabarti defendants were not bound by the compromise decree, and they are not parties to the present litigation ; but as between the plaintiff and the landlord defendants the terms of compromise must be held to be binding and operative on the question of title of the plaintiff to the lands in suit. The compromise decree was not challenged by any one, much less by the landlord defendant at any previous stage as fraudulent, and it was not established in this case to be in any way fraudulent excepting that in the course of argument it was sought to be made out that the compromise was in fraud of third parties, and therefore invalid and inoperative. It may be taken to be well established that a party to a decree, even if it were a collusive decree, was bound by it, and neither of the parties to the compromise decree, even though it were collusive, could escape its consequence. It

may be open to a third party affected by a collusive decree to challenge the same, but not any other parties to the decree. In the case before us the Chakrabarti defendants whose interest was affected by the compromise decree, are not the parties challenging the same: it is the landlord who entered into the compromise with the plaintiff''s father who wants to resile from it. As indicated above, we are unable to give effect to the defence raised by the landlord defendant in the suit out of which this appeal has arisen, that the compromise decree in suit No. 63 of 1913 was not binding and operative as between him and the plaintiff.

8. The question of the effect of nonregistration of the solenamas filed in suit No. 63 of 1913, was raised, on behalf of the contesting defendants in the suit. It was contended that a permanent tenure, in the shape of a howla could not be created in favour of the plaintiff by a solenama which was not registered. It is necessary to consider in this connexion that the solenamas filed in Court relate to the subject matter of the litigation in which they were filed: and a decree was passed incorporating the terms of the solenamas. If the decree related to the subject matter of the suit, as it undoubtedly did, it is difficult to appreciate how the solenamas required registration in the matter of recognizing the title of the plaintiff to the lands in suit, as a howla right. The decree passed in the suit of 1913 did not operate to create a howla lease, but it merely declared the howla right in the lands in suit. On the recitals contained in the solenamas filed in Court there can be no doubt that there was no present demise; the lands were in the possession of the plaintiff in the suit, as mentioned in the solenamas, and they were to remain in his possession as before. There was no permanent tenancy created by the solenamas: there was the preexisting tenancy, and it was recognized by the landlord according to the decree passed by the Court which incorporated the terms of solenamas filed by the parties concerned. The decree passed in terms of compromise evidenced by solenamas filed in Court, which related to the subject matter of the litigation, did not require registration to be valid and operative in law, and there is therefore no substance in the contention raised on behalf of the defendants that the solenamas creating a howla required registration, and non-registration of the solenamas made it impossible for the plaintiff to assert his title to the lands as appertaining to a howla.

9. The plaintiff in the suit, has, in our judgment, succeeded in establishing his title to the lands, by virtue of the Compromise decree passed in suit No. 63 of 1913, and it was not open to the landlord defendants to question that title. The question was raised on behalf of defendants 4 and 5, that the dismissal of suit No. 63 of 1913, so far as it was directed against them, operated as a bar to the plaintiff''s claim in this suit, so far as they were concerned. The plea of res judicata appears to have been raised on behalf of defendants 4 and 5. As has been mentioned above, the suit No. 63 of 1913 was dismissed so far as those defendants were concerned for want of cause of action against them. No issue was raised as between the plaintiff in the suit of 1913 and these defendants, and there was no decision which could operate as res

judicata against the plaintiff in the present suit. We are therefore unable to appreciate how the question of res judicata could be raised on behalf of defendants 4 and 5, seeing, that suit No. 63 of'' 1913 was dismissed so far as they were concerned, for want of cause of action. It appears however that defendants 4 and 5 claimed to be in possession of the lands in suit from 1298, B. S., holding the same as tenants by virtue of settlement obtained from the landlords. This part of the case requires investigation by the Court of appeal below: and the case has therefore to be sent back to the lower appellate Court for a decision of the question whether defendants 4 and 5 had such a title in them to be on the lands in suit, as could stand in the way of the plaintiff''s recovering possession of the same as claimed in the suit.

10. In the result the appeal is allowed. The decision of the Court of appeal dismissing the plaintiff''s suit is set aside. The plaintiff is held to have established his howla right in the lands in suit as against the landlord defendants, and is entitled to a decree to that extent, the plaintiff''s howla right to the lands in suit being declared, as a consequence of the decision arrived at by us on the question of title as between the plaintiff and the landlord defendants in the suit. The case is remanded to the lower appellate Court for decision on the question as to whether the plaintiff is entitled to recover possession of the lands in suit from defendants 4 and 5. The decision on remand is to be given on the materials already on the record. The appeal is allowed, the case is remanded. The plaintiff appellant is entitled to his costs against the landlord defendants in the suit in all the Courts. Costs as between the plaintiff and defendants 4 and 5 in the suit will abide the result on remand.