(1938) 05 CAL CK 0021

Calcutta High Court

Case No: Appeal from Appellate Decree No. 1475 of 1936

Ranjan Kumar Basu and Others		APPELLANT
	Vs	
Basanta Kumar Basu and Others		RESPONDENT

Date of Decision: May 19, 1938

Final Decision: Allowed

Judgement

Mitter, J.

The Plaintiffs who are Appellants before me had the good fortune of winning in the Court of first instance but equally bad fortune in losing before the lower Appellate Court. The admitted facts are these: The Plaintiffs and the Defendants are co-tenants in respect of a resumed Chakran. They were under the liability of paying Rs. 8-13 as rent every year in respect of the said resumed Chakran. No rent was however paid with the result that the landlords brought a rent suit against them, obtained a decree and in fact got the said holding sold. But within 30 days of the sale the Plaintiffs, the co-sharer tenants, deposited the decretal amount which was Rs. 73-4 and another sum of Rs. 5-13 for costs and compensation payable to the auction-purchaser under the provisions of sec. 174 of the Bengal Tenancy Act. To the plaint, it is mentioned that the Plaintiff''s and the Defendants are co-sharers in respect of that holding. The Plaintiffs have also specified the respective shares of themselves and the co-sharer Defendants and have claimed from each of the Defendants sums of money proportionate to their respective shares. Of these Defendants only the Defendant No. 1 contested the suit. Defendant No. 1 said that by reason of an arrangement the Plaintiffs were allowed to possess more land than would fall to their share and that inasmuch as they were allowed to possess more land than would fall in their share, it was agreed between the Plaintiffs and the Defendants that the Plaintiffs would pay the whole of the rent due to the landlords. This defence was overruled by the Court of first instance. That Court recorded a clear finding that there was no such agreement between the Plaintiffs and their co-sharers by which the Plaintiffs undertook to pay the whole of the landlords'' dues in consideration of their being allowed to possess and enjoy more lands. A decree

against the several Defendants for sums proportionate to their respective shares in the holding, was accordingly made by the learned Munsif. While the other Defendants remained satisfied with the decree only the Defendant No. 1 carried an appeal to the learned District Judge. The learned District Judge has not recorded any finding on this defence raised by Defendant No. 1, which had been negatived by the Court of first instance, but proceeded to dismiss the Plaintiffs'' suit on what he considered to be equitable grounds. Before I deal with the merits of the appeal, it is necessary to notice a preliminary objection raised on behalf of the Respondent who has appeared through Mr. Mitter in this Court. The preliminary point is this that the suit is of a Small Causes Court nature and being of a value less than Rs. 500 no second appeal lies in this case. The answer given by the Appellants is that the suit is not of a Small Causes Court nature, being a suit of the description mentioned in Art. 41 of the second schedule of the Provincial Small Causes Court Act. Art. 41 of the said schedule exempts from the cognisance of a Small Cause Court a suit for contribution by a sharer in joint property in respect of a payment made by him of the money due from a co-sharer of joint properties in respect of the payment made by him on account of such properties. The question is whether this suit is of this description. Mr. Mitter''s contention is that if the money had been paid by the Plaintiffs before the sale, the suit as framed would no doubt be a suit for contribution and would be exempted by virtue of the provisions of Art. 41 from cognisance of the Small Cause Court. But he says that immediately the sale takes place, the joint debt of all the tenants is extinguished and if any one annuls the sale by making a deposit made under sec. 174 of the Bengal Tenancy Act or under the provisions of Or. 21, r. 89 of the Code of Civil Procedure, he is no doubt entitled to have his money from the rest, but a suit for recovery of the money would not be a suit for contribution but it would really be a suit for re-imbursement under sec. 70 of the Indian Contract Act; and for this purpose he relies upon the decisions of this Court in Mati Chand v. Bajrang 16 C.L.J. 148, 153 (1911) and Satya. Bhusan Banerji v. Krishnakali Banerji 18 C.W.N. 1308: s.c. 20 C.L.J. 196 (1914). A distinction has been made in those cases,--and it is a well-founded one in my judgment,--between a suit for contribution and a suit for reimbursement. If the suit is really a suit for reimbursement, it would not be one for contribution. In these two cases, however, the person who had made the payment and had sued, had no common liability under the decree which was satisfied, and no liability for the Government demand. They were not co-sharers at the material point of time. They made the deposit to prevent the sale, a revenue sale in the first case and a rent sale in the second, being according to their case not liable in law to pay a single piece of the revenue demand or the decretal amount. These suits were suits in which the entire sums deposited by them to prevent the sales, were claimed on the ground that that they were not liable to contribute anything towards the deposit so made by them to avoid the sales, but the deposits had been made for the purpose of protecting their own interest which would have been affected if the sales had taken place. Those cases, therefore, in my judgment, are distinguishable. The last-mentioned case contains a

definition of the term "contribution" and supports the view I am taking of the preliminary point. I do not also see how the joint liability of the Plaintiffs and the Defendants ceased, as soon as the property was put up to sale. The setting aside of the sale by the deposit revived the decree-holders'' claim on the decree and that was also satisfied by the Plaintiffs'' deposit. In my judgment, therefore for the purpose of Art. A of Schedule (2) of the Provincial Small Cause Court Act, a judgment debt cannot be held to be extinguished the moment the hammer was struck and before the confirmation of the sale. Such being the case, in my judgment, the case comes within Art. 41, Second Schedule, of the Provincial Small Cause Courts Act, for in this suit, only a share of the deposit money has been claimed, the Plaintiffs admitting common liability and a proportionate liability for the amount falling to their sharp. They have asked the Defendants to contribute towards the payment so made by them, according to their shares. For this reason, I hold that the suit as framed is not a suit for reimbursement, but a suit for contribution falling under Art. 41. The preliminary objection is accordingly overruled.

2. As I have already stated, the learned Munsif gave relief to the Plaintiffs but the learned District Judge has not considered the defence as raised and considered by the Court of first instance and there is no finding by him on the point What he said is this that it appears from the settlement record that the Plaintiffs are in possession exclusively of one plot of land and are in possession of other lands with their co-sharer Defendants in accordance with their respective shares. He further remarked that there is a certain Khatian in respect of the said plot which has been recorded to be in the exclusive possession of the Plaintiffs and that Khatian shows that the Plaintiffs are the under-tenants in respect of that plot under their co-sharers, the Defendants, but the remark column of the settlement records shows that no rent in respect of the under-tenancy had been assessed; and there is no evidence that rent was being paid for the same. He, therefore, held that inasmuch as the Plaintiffs are in possession of a big plot of land exclusively as under-tenants of their co-sharers, the Defendants, and they are not paying rent in respect of this under-tenancy, they could not be entitled to claim anything by way of contribution on equitable considerations. That is the reasoning of the learned District Judge. If the Plaintiffs as co-sharers are in exclusive possession of the land which would on partition be more than would fall to their share, the remedy of their co-sharers lie in a suit for partition. If they are in possession as tenants under their co-sharers and no rent is being paid in respect of the same, the remedy of the other co-sharers would be to have the rent assessed. But I do not see how this fact could nullify the liability of the Defendants to contribute towards the deposit. I accordingly hold that the basis on which the learned District Judge dismissed the entire suit cannot be sustained. But inasmuch as he has recorded no finding either way on the defence raised, which defence had been considered by the Court of first instance, I think the matter should be remanded to the lower Appellate Court in order that the said defence may be considered by the learned Judge. If he agrees with the first Court in

respect of that defence the Plaintiffs'' suit would be decreed. If he reverses the finding of the learned Munsif, the Plaintiffs'' suit against the contesting Defendant would have to be dismissed. But a further question arises and I think it would be open to the lower Appellate Court to consider it, namely, whether on the defence advanced, the whole of the Plaintiffs'' claim would be dismissed or only the specific share which they claim against Defendant No. 1 should be dismissed, seeing that the other Defendants never appealed against the decree passed against them by the Munsif. This question will also have to be considered by the lower Appellate Court, The result is that this appeal is allowed, the judgment and decree of the lower Appellate Court are set aside and the case is sent back to that Court for re-hearing in the lines indicated above. The costs will abide the result.