

Srihari Jana and Others Vs Satya Charan Dulia and Others

Court: Calcutta High Court

Date of Decision: Jan. 11, 1926

Citation: AIR 1926 Cal 1040

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 leave was obtained before the institution of the suit from the Court appointing the Receiver.

2. 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 could not be

cured and that it was necessary 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 plaintiff's 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.

3. 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 of 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. 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 not 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*

[1903] 30 Cal. 593. Reliance however has been placed on behalf of the appellants on the decision in the case of *Satya Kripal Banerjee v. Satya*

Bhupal Bannerjee 18 C.W.N. 546. 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 appellant's contention.

4. 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 [1905] 32 Cal. 270. 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 case of *Banku Behary Dey v. Harendra Nath*

Mukerjee 15 C.W.N. 54, *Maharaja of Burdwan v. Apurba Krishna Roy* [1911] 14 Cri.L.J. 50 and *Sarat Chandra Banerjee v. Apurba Krishna*

Roy 15 C.W.N. 925. All these cases have been very recently reviewed in a considered judgment in the case of Rustomjee Dhunjibhai v. Frederic

Gaebele [1919] 46 Cal. 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.

5. 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

defendants-respondents of both the Courts below. There will be no order as to the costs in this Court.