(1914) 05 CAL CK 0054

Calcutta High Court

Case No: None

P. Chowdhury, Esqr., Receiver of The Estate of Deity Kali Krishna Jogeswar Sivas of Dakhi-Neswar		APPELLANT
	Vs	
Jafar Mahammad and Another		RESPONDENT

Date of Decision: May 27, 1914

Citation: 24 Ind. Cas. 739

Hon'ble Judges: Holmwood, J; Chapman, J

Bench: Division Bench

Judgement

1. This second appeal arises out of a suit for rent brought by the Receiver of a certain estate against defendants Nos. 1 and 2 for a jama of Rs. 32-11. The jama is admittedly registered in the name of defendant No. 1 alone. The plaintiff'' had-brought a previous suit for 1308 to 1310'' against these defendants for this very jama. The defendant No. 2 filed a written statement in that suit denying the existence of the relationship of landlord and tenant, but lie did not appear at the hearing and the suit was decreed ex parte. The decree is before us and it merely shows that the plaintiff having appeared by Pleader and the defendant not having appeared, the plaintiff''s claim, that is the amount of rent, was decreed ex parte. There is nothing in this decree to show that the question of the relationship of landlord and tenant was agitated or decided in that suit. The Munsif decreed the plaintiff''s suit holding that the ex parte decree followed by realization in execution had the effect of a contested decree. The learned Judge in the lower Appellate Court found that the evidence as to payment in execution was not to be relied upon and held that there had been no such payment and that as the ex pa-He decree, the terms of which we have already given, was the-only evidence of the relationship of landlord and tenant, it was not sufficient.

2. The plaintiff appeals to us upon two grounds, first, that the ex parte decree operates as res judicata upon the question of the relationship of landlord and

tenant and secondly, that the lower. Court was wrong in holding that there was no evidence that the land in suit was held by the defendant No. 2 inasmuch as defendant No. 2 in his own evidence admits that he has held the plaint land, but says that it appertains to another jama in which the defendant No. 1 has no concern whatever.

3. As regards the first point there is no doubt, its was decided in the case of Raj Kumar Roy Chowdhury v. Alimaddi 16 Ind. Cas. 911 : 17 C.W.N. 627. that an ex parte decision in a suit for rent would operate as res judicata upon the question of the relation of landlord and tenant. But we must hold that a decree, which merely states that the money claimed by the plaintiff was decreed because the defendant did not appear, is not sufficient to bring him under the operation of the rule of res judicata, but for this reason it is settled law that the decision as to the claim of the plaintiff, that is as to the amount of rent, is not res judicata, and in the case to which We have referred the learned Judges had before them the judgment in the cases in which an ex parte decree had been passed, and it was shown to them that the case was decided upon evidence and that the Court held upon that evidence that the relationship of landlord and tenant did exist. It is true that in a later passage in the judgment the learned Judges say : In a suit for rent, an ex parte decree would operate as res judicata upon the question of relation of landlord and tenant, because a decree for rent can only be passed upon a determination that such a relation does" exist. Even if the defendant does not appear at all, the general issue whether such a relation exists must be determined before the Court can pass a decree for rent." If the learned Judges mean by this to go beyond saying what ought to be the case as epposed to what may be the case, owing to mistakes of law to which all Courts are liable, we should be obliged to respectfully dissent from this general proposition. The presumption omnia (?)sumuntur rite esse acta applies to procedure only. There can be no presumption that the Court will always be correct in its decision on points of law or that it will raise and decide the necessary issues in every case. We are every day confronted with cases where the necessary issues have not been raised and decided. In the cases that have been cited to us in this connection the judgment was before the Court and the Court was able to see whether the point had been at issue between the parties and whether it had been decided. In this case we have no such evidence and we are, therefore, unable to say that the matter is res judicata. No doubt both the lower Courts are wrong in saying that the effect of an ex parte decree rests upon the question whether it has or has not been executed. But this is neither here nor there.

4. Then the second question which is raised by the learned Vakil rather lands him on the horns of a dilemma, for if the defendant gave evidence in this case and admitted that he held the plaint lands under the plaintiff he did not deny the relation of landlord and tenant and there can be no res judicata. The pleadings and evidence in the two cases are on a totally different basis and if what the defendant says is true, it appears to us to be perfectly just and equitable that the plaintiff should not

recover rent from the defendant No. 2 jointly with defendant No. 1 in this suit. The defendant No. 1 is the registered tenant of this particular jama. The defendant No. 2 says that ho holds the plaint lands in two other jamas under the plaintiff with which the defendant No. 1 has no concern whatever. It would obviously be unequitable in this case to hold that the plaintiff can bind defendant No. 2 to a tenancy joint with defendant No. 1 which he does not admit and which the lower Court has held has not been proved.

5. We, therefore, think that this appeal must be dismissed with costs.