(1928) 12 CAL CK 0027

Calcutta High Court

Case No: None

Monmatha Nath Dutt and Others		APPELLANT
	Vs	
Matilal Mitra and Others		RESPONDENT

Date of Decision: Dec. 10, 1928

Citation: 122 Ind. Cas. 220

Hon'ble Judges: Panton, J; B.B. Ghose, J

Bench: Division Bench

Judgement

B.B. Ghose, J.

These two appeals are by the defendants against the final decree made by the Subordinate Judge of Khulna assessing the amount of mesne profits in two suits brought by the vendor of the present respondents. The suits were instituted in 1908 by one Nag for recovery of possession of certain lands and for mesne profits from Assar 1314 till the date of the suits and also subsequent mesne profits till the date of recovery of possession. The suits were originally brought in the Munsif''s Court : then they were re filed in the Court of the Subordinate Judge as the Munsif found that the value of the subject-matter of the suits was beyond his jurisdiction. During the pendency of the suite, the original plaintiff executed a conveyance in favour of the present respondents on the 10th December, 1911, and the contesting respondents were substituted for the original plaintiff. They carried on the suits and obtained decrees in the trial Court. There were appeals to the District Judge and then second appeals to this Court in both of which the respondents were successful. Subsequently the respondents applied for assessment of mesne profits. In November, 1925, the amount of mesne profits assessed by the Subordinate Judge in the two suits was about Rs. 8,000. The same arguments were addressed in both the appeals and it will be sufficient to give reasons with regard to one of them,

2. A preliminary objection has been taken on behalf of the respondents as to the forum of the appeal. Their contention is that the appeals ought to have been preferred in the Court of the District Judge, the reason being that the original value

of the lands in suit and the mesne profits claimed up to the date of the suit fall below Rs. 5,000, although the value of the lands added to the amount of mesne profits now decreed exceeds Rs. 5,000. Reliance is placed upon certain expressions in a judgment of myself in the Full Bench case of Bidyadhar Bachar and Others Vs. Manindra Nath Das and Others, and it is contended that the appeals should lie to the District Judge. The observations referred to were, however, made with reference to the jurisdiction of a Munsif to make a decree in excess of his pecuniary jurisdiction for mesne profits pendente lite and no question was involved in that Full Bench case as to the forum of appeal from a decree of the Subordinate Judge under the present circumstances. The observations with regard to an appeal in that case referred to the provisions in the Bengal Civil Courts Act, Section 21 (2), about an appeal from the decision of a Munsif. The question as to the forum of appeal in a case such as this was decided in the previous Full Bench case of Ijjatulla Bhuian v. Chandra Mohan Banerjee 31 C. 954 : 6 C.L.J. 255 : 11 C.W.N. 1133 (F.B.). The appeal, therefore, to this Court is competent and the preliminary objection taken on behalf of the respondents must, accordingly, be overruled.

3. On the merits a large number of objections has been taken by the learned Advocate for the appellants.

4. The first is that there is no direction in the decree made previously under Order XX, Rule 12 of the CPC for the assessment of mesne profits and, therefore, no enquiry could be made by the Court at any subsequent stage of the hearing. What happened at the trial was that a distinct issue was raised in the trial Court as regards the right of the plaintiff to mesne profits. That issue was issue No. 14, In deciding that issue the Subordinate Judge made the following observations: "The plaintiff is entitled to get mesne profits, the principal defendants being found to be in possession of the disputed properties without any title. The amount of mesne profits will be determined hereafter." These words, however, were not in the ordering portion of the judgment and in the decree no specific mention was made with regard to mesne profits. The ordering portion of the decree only states: "The suit is decreed on contest against the defendant who appeared" and then there was the provision for taking khas possession and so forth. This decree, as already stated, was affirmed by the District Judge on appeal and by the High Court in second appeal. It is clear that the decree was not drawn up in accordance with the judgment. At a subsequent stage of the proceedings the Subordinate Judge, who was a different official from the original Judge who made the decree, construed the decree as allowing mesne profits as claimed by the claimant in the plaint. To give effect to the contention of the appellant would only result in this, that the plaintiffs would have to apply to the Court to make the decree in accordance with the judgment. There is no limitation for such an application and, therefore, the objection raised on behalf of the appellants is not a substantial one. The Court below was right in assessing the mesne profits as if an order was distinctly made in the decree in terms of Order XX, Rule 12 of the Code of Civil Procedure.

5. The second objection is based upon the fact of transfer of the interest of the original plaintiff to the present respondents It is contended that by virtue of that transfer the substituted plaintiffs are not entitled to claim mesne profits for the period before the date of such transfer, that is to say, before the 10th of December 1911. The objection is based on the ground that the right to claim mesne profits was a mere right to sue and there fore the transfer of the right is within the mischief of s 6 (e) of the Transfer of Property Act which forbids the transfer of a mere right to sue. The question, there-fore, for decision with reference to this objection is whether the original plaintiffs transferred a mere right to sue in favour of the present respondents. Reliance has been placed by the learned Advocate on behalf of the appellants to the case of Jewan Ram v. Ratan Chand Kishen Chand 70 Ind. Cas. 498 : 26 C.W.N. 285 in support of his contention. That case however, seems to me to have no bearing on the present controversy. In that case it was held, upon a true construction of the terms of the assignment, that there was not anything more than an assignment of a mere right to sue. Sir Lencelot Sanderson, C.J., stated that the assignment did not in terms purport even to assign the contract or the benefit thereof. Richardson, J., also held that what was assigned was not anything more than a mere right to sue! a right which is not incidental to property. In this case the question is whether what was assigned was a mere right to sue or property with an incidental remedy for its recovery and consequential benefit An assignment of a mere right to sue does not convey any property, e.g., if any person out of possession of Immovable property makes an assignment to the effect that the assignee would have a right to sue, without conveying any interest in the property, the assignee would not be entitled to maintain any suit for the recovery of the property. But it would be otherwise if the property itself is transferred. The first thing that strikes me with regard to this objection is that when the present plaintiffs were substituted in the place of the original plaintiff on the ground of the entire interest having been assigned, then no question was raised by the defendants that the assignees could not carry on the litigation with regard to any part of the claim, that is, the claim which had accrued due for past mesne profits. The entire suit was decreed in favour of the substituted plaintiffs in the trial Court as well as in the two Courts of Appeal. But assuming such an objection could be raised now, I should say that the assignment by the original plaintiffs was not an assignment of a mere right to sue with regard to any part of the claim. Certain English cases have been cited before us but they cannot be used as direct authority on the question in this country, because the rule in England is more stringent than here, as certain transfers in England are not allowed as savouring of champerty or maintenance. Many conveyances which would not be allowed in England may be allowed in this country, because there is no rule against champerty or maintenance in this country. But the decisions of English Courts may serve as a guide as regards the question as to whether an assignment is one merely of a right to sue or, as it is terned in England in many cases, a bare right of action, or a right in the property with incidental rights. On this question the observations of the Court of Appeal in the

case of Ellis v. Torrington (1920)1 K.B. 399 : 89 L.J.K.B. 369 : 122 L.T. 361 : 36 T.L.R. 82, which was cited before us on behalf of the respondents are of considerable help. Lord Justice Secretion at page 412 observes as follows: "So in this case when the respondent who had bought the freehold, took also an assignment of the right to recover damages for dilapidations against the first lessee, he was not buying in order merely to get a cause of action; he was buying property and a cause of action as incidental thereto." In that case the plaintiff purchased a leasehold interest with the right to recover damages which accrued previously to the date of purchase for nonrepair by the lessees under a covenant, I find that Mr. Justice Seshagiri Ayyar made certain observations with regard to that case in Venkatarama Aiyar v. Ramasami Aiyar 62 Ind. Cas. 305 : 44 M. 539 : 40 M.L.J. 204 : 13 L.W. 199 : (1921) M.W.N. 137 : 29 M.L.T. 92. I entirely agree with those observations. The transfer in this case was of the properties and all the interest which, the original plaintiff had in the suits. I am of opinion that in this case there was no transfer of a mere right to sue which is prohibited u/s 6 (e) of the Transfer of Property Act. This argument of the appellant also fails.

6. The third point raised was with regard to an alleged purchase by a person named Sashi Bhusan Maulik of the properties in. question in execution of a decree against the plaintiffs. It is said that Sashi Bhusan. purchased the properties on the 17th November, 1916. The agreement is that the present plaintiffs were not entitled to recover any mesne profits subsequent to that date. Whether the purchase by Sashi Bhusan was real or not, we need not discuss. Assuming that it was a good purchase, it does not appear that he ever took possession. On the other hand, it has been proved that the plaintiffs themselves took possession in execution in Chaitra 1326 (1920), Sashi Bhusan did not get himself substituted in place of the plaintiffs and whatever he purchased it was made pendente lite and he would be bound by the decree that is made in the suit. This objection of the appellant also fails and cannot stand.

7. The fourth objection urged was that the rent payable on account of the properties in suit should have been deducted in, calculating the mesne profits. The Subordinate Judge has not allowed that on the ground that the defendants themselves being the landlords had dispossessed the tenants and they were, therefore, not entitled to get rent. That seems to me to be an erroneous view to take. If the landlord dispossess the tenant, there would, no doubt, be a suspension of rent; but when the tenant gets mesns profits from the landlord for such dispossession, the land-lord is entitled to deduct the amount of rent payable to him on account of the lands in question. The respondent does not seriously object to this proposition. There-fore, the amount of mesne profits should be deducted to the extent of the amount of rent payable each year.

8. The next objection, taken on behalf of the respondent is with regard to collection charges. The Commissioner allowed ten per cent, and the Subordinate Judge

reduced it to five per cent. Having regard to the circumstances of the case, we are not inclined to increase the collection charges allowed by the Subordinate Judge.

9. The sixth point taken was that a pre-decessor-in-interest of the plaintiff let out certain lands to the tenants on paddy rent by taking kabuliyats from them and in those kabuliyats it was stipulated that if the tenants did not pay paddy rent, a certain sum of money should be payable. The objection taken by the appellant is that the plaintiffs are not entitled to claim the market price of the paddy, Rut the evidence in this case appears to be that the defendants actually collected paddy from some of the tenants and, therefore, they are bound to pay the market rate.

10. The seventh and the last objection that was pressed was that the Commissioner found that three jamas were not in existence; but the defendants have been made liable for the profits of the three jamas. What the Commissioner said was that the plaintiffs could not point out these jamas. The plaintiffs were strangers to the properties. Those jamas appear in the papers of the defendants and, therefore, the Commissioner took into account the profits of the jamas, There is nothing wrong in it. It appears that defendants produced collection papers for only one year, that is, 1314 B. S., and the mesne profits have been assessed with reference to the papers of the. defendants them-selves. If they have not produced papers of subsequent years and if they have been charged with more than what could be reasonably received from the property, it was their own fault and, therefore, they cannot complain. This disposes of the questions raised by the appellant.

11. The plaintiffs-respondents, however, complain that they have not been allowed costs of the commission and the appellants say that that has not been allowed rightly because the plaintiffs claimed altogether a very excessive amount to the extent of Rs. 17,000 as mesne profits. It does not appear that on account of the inflated claim of the plaintiffs, the Commissioner had to undertake any lengthy enquiry. It is the general rule that when commissions for taking accounts and so forth are directed, if the plaintiff succeeds to any extent, he is entitled to the costs of the commission and there is no reason why this rule should be departed from here. The plaintiffs are entitled to costs of the commission. They will also get the value of Court fees paid in the lower Court from the defendants. This disposes of the cross-objection preferred by the plaintiffs. We make no order as to costs of the cross-objection.

12. The result is that the decree of the Subordinate Judge is varied to this extent that the mesne profits is reduced by the amount of rent payable on account of the lands in question every year. Costs of the commission and amount of Court-fees paid by the plaintiffs in the lower Courts should be added to the decretal amount.

13. Having regard to the fact that the defendants have been made liable for a large amount of mesne profits, although to a great extent due to their own fault and that they have succeeded in part with regard to their appeal, we make no order as to the

costs of this appeal.

Panton, J.

14. I agree.