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Calcutta High Court

Case No: None

Sarat Chundra Bose in his own Right and as heir of late Principal Chowdhurain		APPELLANT
	Vs	
The Kharareа Mezejula Zemindari Syndicate, Ltd. and Others		RESPONDENT

Date of Decision: July 19, 1917

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 41 Rule 33, 11

Citation: 42 Ind. Cas. 548

Hon'ble Judges: Newbould, J; Fletcher, J

Bench: Division Bench

Judgement

Fletcher, J.
This is an appeal by the defendant No. 2 against a judgment of the learned Subordinate Judge of Khulna, dated the 25th February 1915, affirming the decision of the Additional Munsif of the same place. The suit was brought by the plaintiff Company to recover a sum of Rs. 400 and interest against the defendant No. 1, who is now represented by the defendant No. 2. The plaintiff Company is entitled to a putni in 4-annas share in certain property. Before the grapt of the putni, the defendant No. 1 had obtained an ijara of certain of the property and as ijaradar she let out a part of the property, namely, a jalkar, to two people named Chandi Charan Roy and Biswanath Roy, the defend, ants Nos. 3 and 4 in the present case, who held this jalkar at a rent of Rs. 2,625 per annum. The defendant No. 1, under an agreement with the plaintiff Company, surrendered the ijara and assigned to the Company certain rents that were sail to have been in arrear including, amongst others, a sum of Rs. 400 which is said to have been the rent in arrear and unpaid with reference to the jallear and due from Chundi Charan Roy and Biswanath

Roy. The plaintiffs then instituted a suit that was in 1908) against Chundi Charan Roy and Biswanath Roy asking for rent and, in that suit, they also made the defendant No. 1 a party claiming alternatively that, in the event of rent not being due from Chundi Charan Roy and Biswanath Roy, the defendant No. 1 might be ordered to pay the same to them which had been assigned over by her on the surrender of the ijara. That case came on for trial. The Court of first instance found that Chundi Charan Roy and Biswanath Roy had not paid the same and the receipt they produced was not a genuine one. Thereupon Chundi, Charan Roy and Biswanath Roy preferred an appeal to this Court. There was no cross-appeal or cross-objection filed on behalf of the respondent. On the appeal of Chundi Charan and Biswanath, this Court, after stating that the only point for its consideration was whether the appellants had paid this sum, proceeded to allow the appeal. Nothing further was said. Although the proceedings were under the present Code, the learned Judges did not exercise the power that was given to them by Order XLI, rule 33. That suit having ended that way, the plaintiffs instituted the present suit to recover from the defendant No. 1---and now also from the defendant No. 2 who represents her---the sum of Rs. 400 with interest and damages as already stated.

2. The first point is whether the present suit is barred by res judicata. It seems to me quite clear that it is not This Court under Order XLI, rule 33, Code of Civil Procedure, had power either to decide the liability of the defendant No. 1 in the former suit or to leave it undecided. The view that Dr. Mitter puts forward that whenever a defendant appeals, the duty of the plaintiff-respondent is to file a cross-objection as against the other defendant is one, so far as I know, not supported by any authority. I think the plaintiffs were clearly entitled to assume that the decree of the Court of first instance, specially as it was founded of a consideration of the facts, was a good decree and; they were not bound to assume that that decree might or would be set aside on appeal and "that they ought to prefer cross objections in order to enable the Court, if it allowed the appellants" appeal, to settle the rights of the respondents inter se, nor do 1 agree that the mere omission to invite the Court to settle it gives rise to a case u/s 11, Code of Civil Procedure. As a matter of fact, the Court could not have settled it unless the plaintiffs had filed a cross-objection. As I have said, no case has been shown why the plaintiff, who is a respondent to an appeal in a case like this should not be content with the judgment of the Court of first instance.

3. The next point is that the suit is barred by limitation because the alleged payment was made by Chundi Charan and Biswanath to the defendant No. 1 as long ago as August 1906. The case, apart from any other question, is clearly a case of fraud, if, the facts are established; because the plaintiffs" case is that, for valuable consideration, the defendant No. 1, when she surrendered the ijara, assigned to them the back rents that were then due and owing and, they being so due and owing, the plaintiff Company gave her the value of them. Again, the point was not decided until the final decision of this Court in the former suit, when it was held that the defendant No. 1 had in her pocket Rs. 400 which represented these rents that she assigned to the plaintiffs. It 4s quite clear that a case like

this, if established by proper evidence, is a case of fraud and time would not begin to run until after the decision of the appeal.

4. The third point raised by Dr. Mitter is a good point and it has not been contested. The appeal in this Court was adjudicated on solely between the plaintiffs and Chundi Charan and Biswanath. The rights and liabilities of the present defendant No. 1 were not adjudicated on in that case. The evidence that has been given in support of the plaintiffs" case is this judgment of this Court in appeal and the facts that were held to be proved as between Chundi Charan and Biswanath and the plaintiffs in that case have been held to be proved as against the defendant No. 1: in this case, on the ground that she was a party to that appeal, although admittedly there was no adjudication on the rights of the present defendant No. 1 in that appeal at all. Of course, that cannot stand. Those facts are not conclusive against the defendant No I and the defendant No. 2 in this case. There has been no adjudication on these facts by the Court of Appeal and the-present defendant No. 2, as representing the defendant No. 1, is entitled to have the whole of the facts alleged in this case proved and proved properly against him with reference to the findings made by this Court in appeal. The Court only adjudicated on the rights Of Chundi Charan and Biswanath. That being so, it is the common ground of both the learned gentlemen engaged in this appeal that the case must go back to the Primary Court to have a new trial, Both sides will be at liberty to adduce fresh evidence. Costs will abide the result.

Newbould, J.

5. I agree.