Bankim Chandra Deb Sabkar and Others Vs Madan Mohan Deb Sarkar and Others

Court: Calcutta High Court

Date of Decision: April 4, 1935

Final Decision: Dismissed

Judgement

R.C. Mitter, J.
These four appeals are on behalf of some of the Defendants in four suits instituted by the Plaintiff. The Plaintiff and the

Sarkar Defendants are brothers. The properties which are the subject-matter of these four suits admittedly belonged to the father of the Plaintiff

and the Sarkar Defendants. The father died in the year 1921. The Plaintiff inherited a 7th share and his six brothers, the Sarkar Defendants, each

of them, inherited a 7th share. In the year 1926, there was a suit between the brothers. The suit was numbered 52 of 192G. The matter in

controversy was refer-red to arbitration. An award was given and in pursuance of the award, a decree was made in that suit. The arbitrators said

that for the purpose of better management and the preservation of the properties, two of the brothers Bankim and Suresh were to manage the

properties. They were given the power of sale and all the powers of management. But the award provided that Bankim and Suresh were to

execute a security bond in favour of the other brothers. The finding is that no security bond was executed in pursuance of the terms of the said

award. The Plaintiff instituted these four suits which are of a composite nature. He stated that in the year 1334. owing to quarrels amongst the

brothers, he separated from his brothers, left the village homestead, went away to reside with a cousin of his and from that year began separate

collection. He also states that he asked the tenants to pay his share of the rent to him and not to his brothers or to Bankim or Suresh and he also

asked Bankim and Suresh not to realise his share of the rent.

2. He institutes the suits with two prayers. He first of all wants a decree for his share of the rent against the tenant Defendants. The alternative

prayer that he makes is that in case it be found that the tenant Defendants had paid the money due to his share for the years in suit, that is, 1335 to

1337 and in two cases up to a part of 1338 also, a decree may be passed in his favour against his said brothers Bankim and Suresh. Both of his

claims, that is to say, his claim against the tenants and his claim against his brothers Bankim and Suresh were dismissed by the learned Munsif. The

learned Munsif Mr. Dhirendra Nath Bagchi was specially empowered under sec. 153 of the Bengal Tenancy Act and he had also the powers of a

Small Cause Court Judge to try suits of a Small Cause Court nature the value of which did not exceed Rs. 100. Mr. Bagchi gave effect to the

Defendants'' contentions. He held that the tenants had paid the whole of the rent for the period in suit to Bankim and Suresh and they had acted in

a bond fide manner. The claim of the Plaintiff against the tenants was accordingly dismissed on this finding. The claim against Bankim and Suresh

was dismissed on the ground that Bankim and Suresh were managers of the joint property, that the authority to receive the rent on behalf of all the

members of the family had not been terminated and they did nothing wrong in realising the entire rent from the tenants. The learned Munsif took the

view that the Plaintiff was not entitled to any relief against his said brothers without instituting a suit for account.

3. In my judgment, the learned Munsif did not decide any question which comes within the proviso to sec. 153 of the Bengal Tenancy Act. The

title of the Plaintiff to l/7th share of the properties in suit was never challenged. All the brothers were parties to the suit. There was no decision as to

conflicting title as between them to the land or to any interest in land. The award of the year 1926 which was set up by way of defence by Bankim,

and Suresh did not confer on them any such interest.

4. Suit No. 2281 of 1931 which corresponds to Second Appeal No. 2336 of 1933 was valued at over Rs. 50 that is, Rs. 73 and odd. Suit No.

2253 of 1931 which corresponds to S. A. 2337 of 1933 was valued at Rs. 22-4-5 ps. Suit No. 2503 of 1931 which corresponds to S. A. 2339

of 1933 was valued at Rs. 13-15-6 ps. and Suit No. 2504 of 1931 which corresponds to S. A. 2338 of 1933 was valued at Rs. 8-11-8 ps.

Three suits, therefore, were valued at less than Rs. 50 and the one above Rs. 50.

5. Against the decrees passed by the learned Munsif in the four suits, the Plaintiff preferred four appeals to the District Judge. These appeals were

heard by the Additional Subordinate Judge, 2nd Court, 24 Parganas. The learned Subordinate Judge after over-ruling a plea of res judicata urged

before him by Bankim and Suresh recorded the following findings. He found that the material term of the award, that is to say, the term which

required Bankim and Suresh to furnish security had not been carried out. He accordingly held that Bankim and Suresh had no right to exercise the

powers given to them by the other clauses of the said award. He recorded a finding that the Plaintiff left the ancestral house, was not receiving any

money from his brothers, that from 1334 he had started separate collection and had withdrawn the authority, if any, from us brothers Bankim and

Suresh to realise from the tenants his share of the rent by giving Bankim and Suresh and the tenants necessary notices. He also found that the

tenants had paid to Bankim and Suresh all the dues of the landlords up to the year 1337. In this view of the matter, he dismissed the suits against

the tenants for claims up to the year 1337. In two suits, there were claims for a part of the year 133S and inasmuch as the learned Subordinate

Judge came to the conclusion that the tenants had not paid anything to Bankim and Suresh for the year 1338 he made a decree against the tenants

in these suits for the claim in respect of the part of the year 1338. As I have stated, the claims of the Plaintiff against the tenants for the period 1335

to 1337 were dismissed by the Subordinate Judge. The learned Subordinate Judge, how-ever, granted decrees in favour of the Plaintiff and against

his brothers Bankim and Suresh for the amount of the money that they, the latter, had realised on account of the Plaintiff"s share for the years 1335

to 1337.

6. These four appeals before me have been filed by Bankim, Suresh and another brother Bepin Behary Deb Sarkar against whom an order for

costs had been made by the learned Subordinate Judge. Mr. Mukherjee appearing on behalf of the Defendants raises a preliminary objection in all

these four appeals. He says that a second appeal is barred, under the provisions of sec. 153 of the Bengal Tenancy Act and sec. 102 of the Code

of Civil Procedure. From my statement of the case, it is quite clear that the suits filed were of a composite nature. So far as the claims against the

tenants are concerned, these suits are suits for arrears of rent. So far as the alternative claim against Bankim and Suresh is concerned, these suits

are suits for recovery of money and if the latter claim had formed the subject-matter of separate suits, they would clearly have been cognisable by

a Small Cause Court.

7. Regarding the suits for rent, the appeals are, in my judgment, barred under the provisions of sec. 153 of the Bengal Tenancy Act because none

of the questions falling within the proviso have been raised or decided by the learned Subordinate Judge. So far as the claims against the brothers

are concerned, those claims would have been entertained by a Small Cause Court Judge and the claims being valued at less than Rs. 500 the

appeals in regard to that portion of the claim are barred under the provisions of sec. 102 of the Code of Civil Procedure.

8. The view I am taking on the preliminary point accords with the view which was taken in the two cases which came up to this Court where the

right of second appeals to this Court in suits of a composite nature and of the description which I have before me was questioned and considered.

These cases are Mohim Chunder Pal Chowdhry v. Mirza Ahmad Ali Khan 22 C.L.J. 664 (1915) and Jamadar Singh v. Raja Jagat Kishore

Acharya Chowdhury 23 C.L.J. 607 (1910). In the first of the above-mentioned cases, a suit was brought for recovery of rent. In the alternative, a

claim for damages for use and occupation was made. The suit was valued at less than Rs. 100. Sir Asutosh Mookerjee in delivering the judgment

of the Court observed thus:--

It is obvious that the appeal is incompetent. If it be treated as a suit for rent, the appeal is barred under sec. 153 of the Bengal Tenancy Act, as

none of the special questions mentioned therein has been decided by the decree. If, on the other hand, the suit is treated as one for damages for

use and occupation, it is barred under sec. 102 of the Code of Civil Procedure.

9. In the case of Jamadar Singh v. Raja Jagat Kishore Acharya Chowdhury 23 C.L.J. 607 (1910), the suit was a suit for recovery of arrears of

rent valued at Rs. 82-8-0. In the suit also, the Plaintiff claimed a sum of Rs. 50 as damages for breach of contract. Sir Asutosh Mookerjee in

delivering the judgment of the Court said that for the purposes of an appeal the claim, for arrears of rent, that is, Rs. 82-8-0 must be taken to be

the value for the purposes of deciding the preliminary objection taken under sec. 153 of the Bengal Tenancy Act. Dealing with the preliminary

objection, the learned Judge says as follows:--

But the Legislature could never have included that the bar provided in sec. 153 should be evaded by the joinder of a claim for money with a claim

for rent. The contention of the Defendant in substance is that although there would have been no second appeal. if two different suits had been

instituted for the recovery of the arrears of rent and the recovery of damages for breach of contract, by reason of sec. 153, Bengal Tenancy Act,

and sec. 102, Code of Civil Procedure, be is entitled to evade the provisions of both these sections, because the two claims have been

amalgamated in one suit. We are clearly of opinion that this argument should not prevail. The result follows that the appeal is barred under sec.

153, Bengal Tenancy Act, in so far as the claim for rent is concerned. In respect of the claim for damages for breach of contract, there can be no

question that the appeal is equally barred, under sec. 102, Civil Procedure Code.

10. Applying the above principles to the cases before me, I am clearly of opinion that the preliminary objection taken by Mr. Mukherjee must be

given effect to.

11. The result is that these appeals are dismissed. For the reasons I shall presently give in the connected Rules, I do not pass any order for costs in

Appeals Nos. 2337 to 2339 of 1933. Only Appeal No. 2336 of 1933 is dismissed with costs in favour of Plaintiff Respondent No. 1.

12. Civil Rule No. 1294 arises out of Suit No. 2253. Rule No. 1295 out of Suit No. 2503 and Rule No. 1296 out of Suit No. 2504. All these

suits were valued at less than Rs. 50. I have stated in delivering the judgment in the appeal that the learned Munsif Mr. Dhirendra Nath Bagchi was

specially empowered under the provisions of sec. 153 of the Eengal Tenancy Act and he had also the powers of a Small Cause Court Judge to try

suits up to the value of Rs. 100. It is well-settled that if a suit of Small Cause Court nature is tried by a Munsif in his ordinary file, that is to say, not

as a Small Cause Court Judge but if the Munsif has the powers of a Small Cause Court Judge to try suits of that value, his decision must be taken

to be a decision of a Small Cause Court and there would be no appeal but the remedy of the aggrieved parties would be by way of motion to this

Court under the provisions of sec. 25 of the Provincial Small Cause Courts Act. The position, therefore, is this that on the principles which have

been formulated in the two cases which I have quoted, namely, the cases of Mohim Chunder Pal Chowdhry v. Mirza Ahmad Ali Khan 22 C.L.J.

564 (1915) and Jamadar Singh v. Raja Jagat Kishore Acharya Chowdhury 23 C.L.J. 557 (1916), the appeals before the District Judge against

the decrees passed by the learned Munsif in these three suits were incompetent. The appeal, however, which was preferred by the Plaintiff to the

District Judge against the decree of the Munsif passed in Suit No. 2281 was competent because that suit was valued at over Rs. 50. All these four

suits proceeded upon common facts. The Plaintiff''s allegations in all of them are the same. Defence is also the same. These suits were tried

analogously and the evidence is the same. In the appeal which the learned Subordinate Judge was competent to entertain, namely, the appeal

arising out of Suit No. 2281, the learned Subordinate Judge''s findings cannot be disregarded. He had the power to arrive at those findings in the

appeal preferred against the decree passed in Suit No. 2281. These findings are very strong findings against Bankim and Suresh. Having regard to

those findings, I have to consider whether I should exercise my discretion in interfering with the judgment and decree of the learned Subordinate

Judge passed in the appeals against the decrees passed in Rent Suits Nos. 2253, 2503 and 2504. I have already held that the appeals against the

decrees passed by the learned Munsif in those suits were incompetent. But still I am not bound to interfere under the provisions of sec. 115 of the

CPC and 1 think I should not exercise my discretion in favour of the Petitioners in Rules Nos. 1294, 1295 and 129G on the following grounds.

13. The claim in those suits are very small. The findings are that the Plaintiff had to leave his ancestral homestead, that during the time that he was

away and that was for a considerable number of years, no allowance was paid to him by Bankim and Suresh, that he had started separate

collections in the year 1334 and had given express notice to his brothers not to realise any share of the rent due to him from the tenants and he had

also notified the said fact to the tenants and although by the award plenary powers had been conferred upon Bankim and Suresh they were

required to give security for their management, which they did not furnish.

14. The facts found are that they have evaded giving security. My further reason in not "interfering is that by holding that the appeal against the

decree passed in Suit No. 2281 to the learned Subordinate Judge was competent and Second Appeal No. 2336 which arises out of that suit is

incompetent, I have to maintain the decree in favour of the Plaintiff against Bankim and Suresh passed in that suit, namely, Suit No. 2281. If I am

to set aside the decree of the learned Subordinate Judge passed in the appeals directed against Rent Suits Nos. 2253, 2503 and 2504 which were

tried analogously with the other suit, there would be inconsistent decrees on the same facts. I am further not inclined to exercise my discretionary

powers in favour of the Petitioners because from the year 1338, the Petitioners admitted in the course of proceedings that the Plaintiff is realising

his share of the rent separately and that they have no objection to his so realising rent falling due from the year 1338.

15. For the above reasons, I refuse to interfere in Civil Rules N03. 1294, 1295 and 1296. As in these Rules I have held that the appeal before the

learned Subordinate Judge was incompetent and as these Rules are alternative to appeals Nos. 2337 to 2339, I discharge these Rules without

costs and do not also make any order for costs in favour of the Respondents in those three appeals, namely, appeals Nos. 2337 to 2859.

16. Regarding Civil Rule No. 1293, I have already held that the appeal to the learned District Judge in the suit out of which this Rule arises was

competent, as the value of the suit was above Rs. 50. The learned Subordinate Judge, if he is wrong, has committed at most an error of law. He

had jurisdiction to entertain the appeal and if in deciding the appeal, he has committed an error, it is an error of law. I do not say that he has

committed an error but I proceed upon the assumption that he may have committed an error. Sec. 115 of the CPC is accordingly a bar to my

interfering in revision in this Rule. As I have already dismissed the appeal to which this Rule is alternative with costs, I do not make any order for

costs in this Rule.

17. The result is that all the appeals are dismissed and all the Rules are discharged. There will be an order for costs in favour of Plaintiff

Respondent No. 1 only in Second Appeal No. 2336 of 1933. Let the counter-affidavit be kept on the record.