
(1925) 12 CAL CK 0057**Calcutta High Court****Case No: None**

Radhabinode Mondal

APPELLANT

Vs

Naba Kishore Mondal
and Others

RESPONDENT

Date of Decision: Dec. 3, 1925**Citation:** AIR 1926 Cal 578 : 94 Ind. Cas. 244**Hon'ble Judges:** Cuming, J; B.B. Ghose, J**Bench:** Division Bench

Judgement

B.B. Ghose, J.

These two appeals arise out of two different suits for rent brought by the plaintiff against a number of defendants. Defendant No. 12 is the appellant before us; and the only point that requires consideration is whether the plaintiff's suits are maintainable as framed. The plaintiff claims 1/6th share of the rent alleging that that is due to him on account of the holdings.

2. The finding of the lower Appellate Court is that the co-sharers who own 2/3rd share in the estate were collecting their share of the rent separately for a considerable time, and the plaintiff and his brother were collecting their 1/3rd share jointly. But the plaintiff and his brother started collecting their shares separately from the beginning of 1321 B.S. The claim is for the rent of the years 1319 to 1322 B.S. Both the Courts below decreed the plaintiff's suit for the rent of his 6th share.

3. The principal ground urged on behalf of the appellant is that the plaintiff is not entitled to maintain his suit for his 1/6th share of the rent. It is urged that the fact that the plaintiff and his brother Gopi Kishore were collecting their 1/3rd share jointly might raise an inference that the defendants had agreed to pay the rent for the 1/3rd share belonging to the two brothers jointly and the rent for the other 2/3rd share to the other co-sharer, but there is nothing to show that the defendants ever consented to pay the plaintiff the rent for his 1/6th share separately. The question, therefore, is whether the plaintiff and his

brother being joint proprietors with regard to the 1/3rd share of the rent payable to them the plaintiff is entitled to enforce his claim to the 1/6th share of the rent as against the defendants without their consent. Obviously he is not so entitled. The plaintiff alone may sue for the enforcement of the entire contract between him and his brother by making his brother a party defendant. But he is not entitled to enforce a part of the contract between himself and his brother on the one hand and the tenants on the other.

4. It is argued on behalf of the respondents that the defendants are not in anyway prejudiced by this procedure and it is supported by the case of Raj Narayan Mitra v. Ekadasi Bag 27 C. 479 : 4 C.W.N. 494 : 1 Ind. Dec. 315 which has been cited by the learned Subordinate Judge. It is difficult to say that the defendants would not be prejudiced by such a claim of the plaintiff, because the defendants would be liable to be harassed by two suits where one could only have been brought. Moreover if the defendants had succeeded in establishing in the present suit their other plea that they were not liable to pay any rent on account of the jama being non-exist and obtained a decree in their favour the brother of the plaintiff would not be bound by such a decree. The case of Raj Narayan Mitra v. Ekadasi Bag 27 C. 479 : 4 C.W.N. 494 : 1 Ind. Dec. 315 was a different one in which the parties prayed for apportionment of rent by a decree of the Court in the presence of all the parties.

5. The result, therefore, is that it must be held that the suit as framed by the plaintiff in which he does not show under what circumstances he is entitled to enforce a portion of the claim as maintainable must be dismissed.

6. A belated prayer was made that the plaintiff should be allowed to amend his plaint. But we are not inclined to grant that application in second appeal having regard to the fact that this objection had been taken by the defendants in the Trial Court as well as in the Court of Appeal below and no application for amendment of the plaint was made at all except at the close of the arguments here.

7. Another point was urged on behalf of the appellant that by a decree of this Court passed since the decision of the appeal in this case in the lower Appellate Court it has been declared that defendant No. 12 is not liable to pay any rent for the jama. We are unable to decide the question in the present appeal as the proper materials have not been placed before us with regard to the identity of the lands concerned in the declaratory decree.

8. On these grounds the appeals must be allowed and the suit dismissed with costs in all the Courts.

Cuming, J.

9. I agree.