(1925) 11 CAL CK 0028

Calcutta High Court

Case No: None

Majid Mia		APPELLANT
	Vs	
Munshi Mia		RESPONDENT

Date of Decision: Nov. 17, 1925

Citation: AIR 1926 Cal 860 : 94 Ind. Cas. 255

Hon'ble Judges: Mukerji, J

Bench: Single Bench

Judgement

Mukerji, J.

This Rule has been issued at the instance of the defendant No. 3 in a suit tried by a Court of Small Causes. The plaintiff claimed wasilat from certain defendants of whom the defendant No. 3 was one. Previous to the institution of this suit the plaintiff had instituted a suit to establish his title to an undivided 5-annas share in a certain land and also for recovery of possession and mesne profits. The claim for mesne profits was subsequently withdrawn. That suit ultimately ended in a decree in favour of the plaintiff as regards a 4-annas and 10-gunda share in the lands and a decree for joint possession of the lands with the defendants. Thereafter the present suit was instituted. It is not necessary to refer to all the proceedings in connection with this suit: It is said that at first it was instituted as a suit for compensation in the Court of the Munsif but ultimately it was found that the Munsif had no jurisdiction to entertain it as it really was a suit for recovery of mesne profits and it was filed in the Court of Small Causes. The suit was ultimately tried by a Subordinate Judge vested with the powers of a Judge of Small Cause Courts. He decreed the suit and the present application is directed against that decree.

2. Two points have been urged on behalf of the petitioner in this Rule. I propose to deal with the second point first as, in my opinion, having regard to the defence which the petitioner took in the Courts below he is not entitled to succeed on that point. His contention is that mesne profits which have been awarded in the present case should have been, if at all, allowed to the plaintiff not on the basis of the

produce but only on the basis of the rents which were being actually realized from the tenants. It appears that in the plaint in the title suit previously instituted, the plaintiff made an allegation to the effect that he was in possession of his 5-annas share (that was the share which he claimed in the suit) by realizing rent from the tenants that the defendants had mutated their names notwithstanding the plaintiff''s objection and had dispossessed the plaintiff from his share. It is said that as the land was in the occupation of tenants, the learned Judge should have awarded mesne profits not on the basis of the produce but on the basis of rent. The proposition is perfectly a sound one and it has abundant authority in support of it. But in the present case looking in the written statement of the defendants, and I have looked into it very carefully, I do not find the slightest suggestion of this contention anywhere in it. On the other hand the defence avers that the produce of the lands was not really at the rate alleged in the plaint but at a different rate. That was the only objection with regard to the mode in which the mesne profits were to be calculated. My attention has been drawn to the cross-examination of some of the plaintiff''s witnesses and it has been argued before me that the cross-examination has been directed to bring out the fact that the plaintiff was realizing paddy rent from his tenants. It is argued that the cross-examination shows that the defendant''s contention in the Court below on this point was what is now argued before me. I am, however, unable to say that the question as to whether mesne profits should be assessed on the basis of produce or on the basis of rent was seriously disputed on the side of the defence. The learned Judge says in his judgment "the defendants are liable on the produce basis according to the definition of mesne profits. He is not a tenant but a trespasser. I accept the plaintiffs evidence of the value and the quantity produced as it appears to be reasonable". I understand from this passage that the learned Judge found that in so far as the share which did not belong to the defendants they were trespassers. In this the learned Judge may or may not have been right. But to determine the question which has now been urged before me would require an investigation of. disputed facts which the Court below was, in my opinion, never asked to investigate. I am unable to accede to this contention inasmuch as to do so would be to allow the defendants to make out a case which does not appear to have been made in the Court below.

3. The other contention which has been urged on behalf of the petitioner is to the effect that the decree of the learned Judge cannot be sustained as admittedly the plaintiff and the defendants were co-sharers having different shares in the property and inasmuch as there is no finding either in the title suit, or in the present suit for mesne profits, that there was any dispossession by the defendants in respect of the plaintiff''s share. It is urged on behalf of the opposite party that the fact that a decree for joint possession was passed taken in conjunction with the fact that in the plaint in the original suit there was an averment as to dispossession by the defendant should be considered to mean that the defendants had actually dispossessed the plaintiff. I am unable to say that this is a sufficient answer to the

defendant''s contention. There may have been more reasons than one as to why the decree for joint possession was passed and it does not follow from the mere fact that such a decree was passed that the Court meant to find that there was dispossession by the defendants. In the judgment in the present case also there is absolutely no finding with regard to this matter. It is well-settled that in case of co-sharers if a decree for mesne profits or for compensation is to be passed it must be found that there was dispossession. If any authority is needed for the proposition reference may be made to the unreported decision in the case of Gora Chand Chatterjee v. Keshab Chandra Khawas, (L.P.A. No. 164 of 1911 decided by Jenkins, C.J. and Chatterjea, J.), where it was held that in order to award mesne profits as against a co-sharer, there must be a finding of actual ouster and that mere excess of enjoyment does not in itself amount to an ouster. In the present case there is no finding of ouster and inasmuch as in the absence of a finding to this effect the decree cannot possibly be sustained, I set aside the decree against which the present Rule is directed and direct the case to be sent back to the Court of the learned Judge in order that he may arrive at a proper finding on this question It will be open to the learned Judge if he thinks necessary to do so to allow the parties to adduce fresh or further evidence on this point. Having regard to the circumstances of this case I am of opinion that each party should bear his own costs of this Rule.