

(1868) 07 CAL CK 0019

Calcutta High Court

Case No: Regular Appeal No. 809 of 1867

Roy Mohanlal Mittra

APPELLANT

Vs

Bishnu Chandra Chatterjee

RESPONDENT

Date of Decision: July 11, 1868

Final Decision: Dismissed

Judgement

Loch, J.

This is a suit to recover mesne profits. It appear? that the property in question was mortgaged by the defendants in the names of Mahesh Chandra and Gopinath to the father of Bishnu Chandra Chatterjee. A suit for possession after notice of foreclosure was brought against the defendants, in the names of the parties who appeared as mortgagees in the mortgage-deed, and a decree for possession was given in their favour. In lint suit, it was hotly contended, that the ostensible plaintiffs were not really interested, and that the real mortgagee was the father of Bishnu Chandra. This was denied by the plaintiffs, and the Court rejected this objection to the hearing of the suit.

2. The present action is brought to recover the mesne profits of the land decreed in the suit referred to above. The Principal Sudder Ameen gave a decree the plaintiff, but on appeal the case was remanded that the Lower Court (sic) take more reliable evidence than was then on the record, and that an (sic) might be deputed to ascertain the amount of wasilat, in the usual manner.

3. While the case was before the Principal Sudder Ameen, under the order of re-(sic) Behari Lal, whose guardian, Bhava Sundari Devi, had brought this action, (sic) petition in Court, on 29th April 1867, stating that he had nothing to do with (sic) property, that the real owner was Bishnu Chandra Chatterjee; that he was the (sic) beneficially interested; that the former litigation [102] had been carried on his expense, and for his benefit; that he was in possession, and that he, the petitioner, now that he had come of age, had given an ikrarnama to that effect to Bishnu Chandra. A petition to the same purport was filed by Bishnu Chandra, who filed the

ikrarnama; and on 4th May 1867, the Principal Sudder Ameen directed that his name should be entered as a joint plaintiff with the original plaintiffs to the suit. Two petitions of objection on the part of the defendants, dated respectively the 7th May and 10th July, were presented, but the Principal Sudder Ameen appears to have passed no orders upon them.

4. The appeal before us may be divided into two heads : 1st, as regards the admission of Bishnu Chandra as a co-plaintiff; and, "-end, as to the mode of determining the amount of mesne profits. These two heads embrace every thing that was argued before us.

5. We think both the grounds taken by the appellants must be given against them. The mortgage, for some reason best known to the parties, was drawn up in the names of Mahesh Chandra and Gopinath, from whom the defendants had professed to take the loan. It was necessary, therefore, that both the suit for possession after foreclosure, and the present suit, should be brought in the names of the persons in whom the legal title was vested. For some reason also best known to the parties, it appeared advisable, in the course of this suit, to drop the (sic) querre, and to disclose the real mortgagee ; and, accordingly, petitions by Behari Lai and Bishnu Chandra were presented, acknowledging that the former was only ostensibly the mortgagee, he representing his father, Mahesh Chandra, and that the latter was the person beneficially interested. It is urged, that on such a disclosure being made, the suit should have been dismissed, for Bishnu Chandra had not verified the plaint, which by law he was required to do; and the present statement was directly at variance with the statement made in the former case, in which the plaintiffs, who then represented Behari Lai, had successfully contended that Mahesh and Gopinath were the real mortgagees.

6. No doubt, the party beneficially interested has put himself into difficulty by the contrary statements made by him in the [103] two suits. As the mortgage bond was in the name of Mahesh Chandra and Gopinath, the suits were, as is customary, brought in their names, and it would have been prudent for Bishnu Chandra to have kept quiet and abstained from declaring himself till the present suit was determined, and we have now to (sic) whether, in consequence of his having made this disclosure, the suit should be dismissed. It is clear that the defendants are in nowise prejudiced by the disclosure. They cannot pretend that they were ignorant of the, real party with whom they were dealing. The money claimed in this suit is justly due by them to the party who has foreclosed the mortgage and taken possession of the property, and it is not denied that this person is Bishnu Chandra. It is true that he has not complied with the requisition of the law, which requires the party instituting a suit to verify the plaint; but there is no allegation that the claim is false or unfounded, and it would be a denial of justice, were the suit to be dismissed on the technical ground now taken by the pleader for the appellant. The parties in whose names the suit was brought may be considered in the light of trustees for the

person beneficially interested. There is no doubt an evasion of the law by the party really interested in the suit, for he has failed to verify the plaint as required by the law, and it is open to question whether suits brought in such a form should not be dismissed as defeating the object of the law, which is to enable a Court to have before it, and to deal with the parties actually concerned in the matter brought before it for trial. In the present case, however, there can be no doubt that the defendants, appellants, have not been injured by the course taken by the respondents ; and that they knew with whom they were dealing, and, therefore, I reject this ground of appeal.

7. On the second objection taken to the judgment of the Lower Court, it appears to me that the estimate of mesne profits has been formed on the best evidence before the Court, and though in the remand order the High Court was not satisfied "with the mode in which the account had been prepared, under the impression that other and better evidence could be procured, yet, as it is clear that nothing better has been brought forward by the [104] appellants, who could have proved the real assets of the estate, and there is on the record sufficient, though meagre data upon which the Court can come to a conclusion, and upon which it has based its decree, we think there are no grounds for disturbing that judgment; and X dismiss the appeal with costs.

Glover, J.

8. I think, on the whole, that this appeal should be decided on its merits. I admit fully that the policy of the law is against secret trusts; and that parties beneficially interested should be made to disclose themselves. But in the present case no one has been deceived, nor has any injury been done to the defendant. Mesne profits have been adjudged to be due from him, and so far as he is concerned, it matters nothing whether or not the name of the beneficial owner is joined to that of the legal owner as co-plaintiff.

9. There would be, undoubtedly, a want of verification on the plaint as amended. The new co-plaintiff not having been called upon to verify, and in ordinary cases this would, I conceive, be a fatal objection to the alteration, but here there is really no second verification required, for the facts are undisputed; and the only question for decision was the amount of mesne profits collected. That mesne profits were collected by the defendants, and that those mesne profits were rightly payable to the party beneficially interested in the foreclosure decree, there is no doubt. In this country, when transactions are so commonly "benami," it would, I think, be hard measure to visit a case like the present, when there is no suspicion of fraud, with dismissal. The defendant knew of the "benami," from the first; indeed, he tried to prove it in the foreclosure suit, but failed, and cannot, therefore, say, that he was, or is, any way damaged by the fact, that the ostensible mortgagees were not the real plaintiffs. In fact, he does not say so, but seeks to escape the consequences of a claim put in itself, on a technical objection which has nothing to do with the merits

of the case.

10. This being so, I do not think that the defect in the judgment of the Principal Sudder Ameen, that is to say, his not adjudicating on the effect of the disclosure by the beneficial owner, is one which affects the merits of the case; and, therefore, u/s 350, * Act VIII of 1859, the appeal on this point should be disallowed.

11. As to the amount of mesne profits, it appears to me that the Lower Court's order proceeded on sufficient evidence, and that no ground is shown for an interference. I would dismiss the appeal with costs.

*[Sec. 350:--The judgment may be for confirming or reversing or modifying the decree of the Lower Court. But no decree shall be reversed or modified, nor shall any case be remanded to the Lower Court on account of any error, defect, or irregularity either in the decision or in the interlocutory order passed in the suit not affecting the merits of the case or the jurisdiction of the Court.]

No decision to be reversed for irregularity.