
(1874) 02 CAL CK 0003

Calcutta High Court

Case No: Special Appeal No. 1899 of 1872

Lukhee Kanto Dass
Chowdhry

APPELLANT

Vs

Sumeeruddi Lusker and
Others

RESPONDENT

Date of Decision: Feb. 24, 1874

Judgement

Sir Richard Couch, Kt., C.J.

Whether the landlord is entitled to this, or not, depends in our opinion upon the claim which is stated in the plaint. If the claim is in the alternative, and thus the ryot has notice that the landlord, if he fails to prove the execution of the kabuliat, will claim rent for the occupation of the land, we think an issue ought to be framed to try whether any rent, and how much, is due on account of the occupation, and that the landlord is entitled to have that issue tried. If any rent is due, the landlord ought to be allowed to recover it. It is not forfeited by his making a false claim upon a kabuliat, and he should not be made to bring two suits when the questions between him and the ryot can be determined in one. But where a claim for rent on account of the occupation of the land is not made in the plaint, we think the landlord is not entitled to have the question tried whether any, and how much, rent is due. "The determinations in a cause should be founded on a case either to be found in the pleadings, or involved in, or consistent with, the case thereby made."--Eshen Chunder Singh v. Shamachurn Bhutto 11 Moore's I.A., 20. "The state of facts, and the equities and ground of relief originally alleged and pleaded by the plaintiff, are not to be departed from Id., 24."

2. It is in the discretion of the Court to amend the plaint or the issues and to allow it to be tried. And where the omission to make the claim in the plaint appears to have been from inadvertence or by mistake, it would be proper to do so. "If by inadvertence or other cause the recorded issues do not enable the Court to try the whole case on the merits, an opportunity should be afforded by amendment, and, if need be, by adjournment, for the decision of the real points in dispute."--Hunooman Persaud Panday v. Mussamut Babooee Munraj Koonwaree 6 Moore's I.A., 393, at p. 411.

3. But where there is reason for thinking that the omission was deliberate, it would generally not be proper. The landlord may then be justly left to bring a fresh suit, and to lose any part of the rent, the suit for which would be barred by the law of limitation. This appears to be the opinion of the High Court at Bombay in *Lakshmibai v. Hari bin Ravji* 9 Bom. H.C. Rep., 1.

4. When a Court of first instance in the exercise of its discretion allows the question to be tried, the reason for doing so should be distinctly stated. An arbitrary exercise of the power might be a ground of appeal. In the suit in which this reference has been made, the landlord was clearly not entitled to have the question tried. An issue raising it had, indeed, been framed by the first Court, but the issue whether the co-sharer ought to have been made a defendant was decided in favor of the landlord on the ground that his suit was based on the *kabuliat*. The two claims could not be properly joined in the suit as upon the second claim other persons ought to have been made defendants. We wish also to remark that where, as in *Rookhinie Kant Roy v. Sharikatunissa Bibee Ante*, p. 246, the defendant admits a sum to be due for rent, the Court may rightly in our opinion give a decree for it, irrespectively of the claim made in the plaint. This is all that was decided in that case. It was there said by the pleader for the appellant in a general way that there were decisions in *Marshall's Reports* against this being done, but the references to them were not given, and it now appears that none of the decisions go so far as this. We think in this appeal the questions put to us should be answered in the negative; and the appeal should be dismissed with costs.

¹ Before Mr. Justice Kemp and Mr. Justice E. Jackson.

Phoolabuttee Kooer (Plaintiff) v. Gopal Mundur (Defendant) and Another (Intervenor).*

*Special Appeal, No. 3413 of 1867, from a decree of the Officiating Judge of Zilla Tirhoot, dated the 19th August 1867, affirming a decree of the Assistant Collector of that district, dated the 28th December 1866.

The 26th June 1868.

Act X of 1859 s. 77--Suit for Rent--Variance between Pleading and Proof--Admission.

Baboos Chunder Madhub Ghose and Sib Chunder Chatterjee for the appellant.

Baboos Hem Chunder Banerjee and Anundo Gopal Palit for the respondents.

The judgment of the Court was delivered by

Jackson, J.--This was a suit for arrears of rent. The plaintiff, alleging himself to be the proprietor of an 8-anna share of Mauza Gedwah, sued one of the ryots in the village for rent. A third party intervened and alleged that he had been in possession and enjoyment of the rents of 4 annas out of the 8 annas which the plaintiff had claimed. The ryot

supported the intervenor. The Judge on appeal has found that the plaintiff has not proved his possession and enjoyment of the rents of the 4 annas, and he goes on also to state that he is of opinion that the intervenor has not proved his possession and enjoyment of that 4 annas of the rent.

On these two findings the Judge has dismissed the plaintiff's suit.

On behalf of the special appellant it is said that the question that the Judge had to try was as to the actual receipt and enjoyment of the rents by the intervenor, and that the Judge having found that the intervenor was not in receipt and enjoyment of the rents, the Judge should then, in accordance with s. 77 of Act X of 1859, have decided the suit according to the result of such inquiry. It is said that by the words of that section the Judge was bound under his finding to give a decree in favor of the plaintiff. The words of the law, we think, support this contention of the special appellant, and that, as between the claim of the plaintiff and that of the intervenor, the Judge having found against the intervenor, was bound to decree for the plaintiff.

We therefore reverse the decision of the Judge and decree this appeal with costs.

As between the ryot and the plaintiff, we observe that there is also a point in dispute as to rates of rent. The document under which the plaintiff claims a higher rate than the defendant admits, namely, a sharhnama, had been held not to have been proved. The decree in favor of the plaintiff will therefore be only to the extent and at the rate admitted by the ryot.

² Before Mr. Justice Dwarkanath Mitter and Mr. Justice Birch.

Kishen Mohun Mookerjee (Plaintiff) v. Rajoo Dey and Others (Defendants).*

*Special Appeal, No. 868 of 1872, from a decree of the Judge of Zilla West Burdwan, dated the 16th August 1872, reversing a decision of the Munsif of Bissenpore, dated the 31st January 1872.

The 1st March 1873.

Variance between Pleading and Proof--

Suit for Rent--Failure to prove Kabuliat.

Tars was a suit to recover Rs. 185-7-3, being the value, in money, of arrears of rent for the years 1275 to 1277 B.S. (1868 to 1870), which the plaintiff alleged to be payable in produce at the rate of 17 maps of paddy per year under a kabuliat executed by the defendants' father. The defendants denied that rent was payable in produce. They stated that the kabuliat had been set aside some years before the present suit, and a subsequent arrangement made between the parties, by which the annual rent payable by

them was fixed at Rs. 29-11-5, and that the plaintiff had sued them on a previous occasion for rent in money, and not in grain, and had obtained a decree at that rate; and further that they had paid a portion of their arrears to the plaintiff's landlord. The Munsif disbelieved this last statement, and, finding against the defendants on the other facts, gave the plaintiff a decree. The defendants appealed to the Judge against the Munsif's decree, but not against the finding as to the alleged payment to the plaintiff's landlord. The Judge reversed the Munsif's decision, holding that the facts alleged by the defendants were fully made out, but he said nothing as to the alleged payment of a portion of the arrears by the defendants. The Judge accordingly dismissed the plaintiff's suit observing, "the plaintiff having brought a false claim, is not entitled to any decree."

The plaintiff then preferred a special appeal to the High Court.

Baboo Nil Madhub Sen for the appellant.

Baboo Kali Kishen Sen for the respondents.

The judgment of the Court was delivered by

Mitter, J.--In this case we are not in a position to interfere with the finding of the lower Appellate Court that the rent of the defendants' tenure was payable in cash, and not in kind, as alleged by the plaintiff. But accepting that finding as far as it goes, we see no reason whatever why the plaintiff should not obtain a decree at the rate fixed by the former decree as the proper rate of rent demandable from the defendants. The learned Judge says in his judgment that the plaintiff is not entitled to obtain a decree at that rate, because he, the plaintiff, has brought this suit upon a false ground. But whatever responsibility the plaintiff might have incurred by instituting an action upon a false ground, we do not see any reason why he should lose his civil rights, particularly when it is clear that any future suit brought by him for the arrears of the period involved in this suit would be certainly liable to be dismissed under the provisions of s. 2, Act VIII of 1859.

The defendants, in their written statement, pleaded that they had paid a portion of the rent due from them to the plaintiff's landlord. The Munsif, who tried the case in the first instance, came to the conclusion that this allegation was not proved, and he further held that the alleged payment by the defendants to the plaintiff's landlord without the plaintiff's permission or authority was not binding against the plaintiff. The defendants did not appeal to the Judge against either of these findings, and it is therefore clear that the plaintiff is entitled to obtain a decree for arrears of rent at the full rate of Rs. 29-11-5 per annum, the defendants' plea of payment having fallen to the ground. A decree will therefore be entered for the plaintiff for the sum of Rs. 89-10-3, that being the amount due for the three years for which this suit was brought.

We think that, under the circumstances of this case, each party ought to bear his own costs both in this Court and in the Courts below.

³ Before Sir Richard Couch, Kt., Chief Justice, and Mr. Justice Glover.

Rookhini Kant Roy and Another (Plaintiffs) v. Sharikatunissa Bibee and Another (Defendants).*

*Special Appeal No. 945 of 1872, against a decree of the Subordinate Judge of Zilla Backergunge, dated the 12th February 1872, modifying a decree of the Munsiff of Burrisal, dated the 31st July 1871.

The 15th May 1873.

Variance between Pleading and Proof --Suit for Rent--Failure to prove Kabuliat--Admission.

Baboo Kashi Kant Sen for the appellant.

Baboo Rash Behari Ghose for the respondents.

THE judgment of the Court was delivered by

Couch, C.J.--This suit was brought to recover arrears of rent from 1274 to 1276 (1867 to 1869); the plaintiffs claiming a balance of Rs. 222-7 for principal and Rs. 70-9 for interest, making a total of Rs. 293.

The judgment of the Subordinate Judge, which is appealed from, is not altogether clear, and it might at first sight appear that he had held that, because a part of the land had been washed away, and it could not be shown what the quantity was, the plaintiffs were entitled to receive the rent which was admitted by the defendants; but his decision was really founded upon the plaintiffs having failed to prove the kabuliat which fixed the amount of rent, and he has stated that there was no evidence on the part of the plaintiffs which would show that they were entitled to the amount at the rate they had estimated it at. Under those circumstances the Judge was right in taking the amount which was admitted by the defendants to be due as rent.

I must say I do not concur in those cases, if, as is said, there are any such, which have decided that, where a man sues for arrears of rent as due under a kabuliat, and the defendant denies the kabuliat, but admits that a certain amount of rent is due to the plaintiff, if the plaintiff fails to satisfy the Court that the kabuliat is a genuine one, the suit is to be dismissed altogether, and that the plaintiff is to be obliged to bring a fresh suit to recover the balance of the rent admitted to be due. I think it would be unreasonable to hold that, because he has been guilty of setting up a forged kabuliat, he should be obliged to bring a fresh suit to recover an admitted balance of rent. I think in this case the plaintiffs are entitled to recover the balance which was admitted.

Then what sum was admitted to be due? The defendants' admission was that Rs. 123-8 remained due from them to the plaintiffs, but in making that the balance, they took credit for Rs. 100 which they said they had paid. It is found that they had not paid the Rs. 100, and therefore, if their admission be taken with this, they are really shown to be indebted to the plaintiffs for rent in the sum of Rs. 223-8. That is the sum for which a decree ought to have been given by the lower Appellate Court. The decree must be altered accordingly. Each party must pay their own costs of this appeal.

⁴ Before Mr. Justice Kemp and Mr. Justice Markby.

Bonomalee Churn Mytee (Plaintiff) v. Sheikh Hafizuddeen (Defendant).*

*Special Appeal, No. 1251 of 1869, against, a decree of the Judge of Zilla Midnapore, dated the 17th March 1869, reversing a decree of the Deputy Collector of that district, dated the 5th September 1868.

The 18th August 1869.

Admission--Variance between Pleading and Proof--Remand--Act VIII of 1859, s. 162--Neglect to obey Summons.

Baboos Hem Chunder Banerjee and Bhoyrub Chunder Banerjee for the appellant.

Baboo Beepin Behary Dutt for the respondents.

The judgment of the Court was delivered by

Markby, J. (Kemp, J., concurring).--It will perhaps be most convenient in this case to dispose of the fifth ground of appeal first; the plaintiff sues to recover rent for several years for 13 bigas and 4 katas at Rs. 29-11-15 a year; he says that the defendant holds under an instrument, which he calls a jamabandi, which he says was signed by all the ryots on the estate when he came into possession; he therefore sues, in fact, upon that jamabandi as his cause of action.

The defendant denies the jamabandi, or at any rate he denies that he was a party to it; he admits that he holds some land of the plaintiff, but he says that it only amounts to 3 bigas and a fraction, with an annual rent of Rs. 4-13, and that the only balance due by him to the plaintiff is Rs. 5-15. The fifth ground taken before us is that, even supposing the lower Appellate Court was right in finding that the jamabandi was not established, the plaintiff was entitled not only to a decree for Rs. 5-15, the balance admitted to be due by the defendant, but that he was entitled to a decree for all the years which he claimed at the full admitted rent of Rs. 4-13 per annum, subject only to such deductions as the defendant was able to establish. Now I think it is quite clear that this contention is erroneous; had the defendant admitted the jamabandi and pleaded payment, it of course would have been incumbent upon him to prove those payments, but here the plaintiff has

altogether failed to prove his cause of action as alleged by him in his plaint, and the only thing left him is the relation of landlord and tenant which is admitted to exist between him and the defendant. Now I am by no means sure that the first Court, under such circumstances, would not have been justified in dismissing the suit altogether, but I am quite clear that the utmost to which the lower Courts could go would be to give the plaintiff a decree for the sum which was admitted to be due by the defendant. That sum was due on a different cause of action than that set forth in the plaint; the cause of action set up by the plaintiff arose upon a special agreement to pay rent at a certain rate, while this was due on a totally different agreement, the nature of which is not disclosed, or simply for use and occupation. Therefore, as the plaintiff relies entirely upon the admission of the defendant both as to the amount due and for proof of his cause of action, he must accept this admission as a whole, and can only have a decree upon it for the balance admitted to be due.

Then upon the other points in the case it seems that when this suit was before the first Court (and I take this from the finding of the lower Appellate Court when it made the order of remand), that a request was made by the defendant that his landlord should be summoned and examined upon the question of the making of the jamabandi, and the first Court did not then pass any order upon that application. When the case came before the lower Appellate Court upon the appeal of the defendant, and this omission on the part of the first Court was brought to its notice, the Judge directed the first Court to entertain that application and consider whether or no it ought to be granted, and if it ought to be granted, then to summon the plaintiff into Court and record his evidence. The first Court failed in its attempt to cause the attendance of the plaintiff, but apparently thought that it was an application which ought to be granted, for it issued a summons to bring the plaintiff into Court. The Deputy Collector then informed the lower Appellate Court of the issue of the summons and the failure to serve it.

Now the first complaint made before us in special appeal is that that was wrong in point of procedure. It has been argued before as not precisely upon the first ground taken in special appeal, but upon one which in substance comes within it, namely, that the Judge ought himself to have disposed of the application, to examine the plaintiff, and himself to have summoned the plaintiff, if he thought it was a case in which that application ought to be granted. Now there is not possibly in the CPC any exact provision applicable to this case; for I do not think it was a case in which the lower Appellate Court intended to act under the provisions of s. 351, or of s. 354, which relate to remands, or under s. 355, which relates to the taking of fresh evidence; but I take it that the view which the lower Appellate Court took of this matter was this, that the application brought to its notice being one entirely undisposed of by the first Court, the lower Appellate Court thought, and in my opinion properly thought, that the best course to take was to refer that point back to the first Court for disposal, for there are many cases, and this may well have been one of them, in which the first Court is in the best position to decide whether or no it is actually necessary to summon the plaintiff. I see nothing irregular in taking this course, although

there is nothing which provides specially for it in the Code of Civil Procedure. It seems to me that an Appellate Court, when it finds an application of this nature wholly undisposed of by the Court of first instance, may, if it thinks it desirable to do so, send back the case and order the first Court to dispose of that application instead of disposing of it itself. It seems to me, therefore, that the proceeding of the Judge was perfectly regular so far as concerns his sending back this application to be disposed of by the first Court. As to the other part of this ground of special appeal, it has not been relied on before us, and in fact it has been admitted that it was competent for the Judge, when once it was decided that the plaintiff ought to be examined, either to direct the first Court to examine him, or to summon and examine him himself under the provisions of s. 356.

The next ground taken is the fourth, namely, that there was no proper application made to the first Court under s. 162. The application made was probably one which we find inserted with some incongruity together with some objections taken to the report made by an Ameen; but I do not think that s. 162 requires that any special formalities shall be observed in making the application; it simply directs that an application shall be made, and points out the proper manner of disposing of that application. The lower Appellate Court has found on this point that there was a request, and that that request has not been disposed of, and I think we ought to act upon that finding. If the application had been objected to as informal, the Court might have accepted a fresh one: and at all events it is now too late to make any objections to its informality.

The next ground argued was that no legal summons was served upon the plaintiff, and that, therefore, no inference ought to have been drawn against him from his non-appearance by the lower Appellate Court. The lower Appellate Court says, "that after the failure on the part of the first Court to serve the summons personally on the plaintiff, and as the summons had actually not been served, the case could not be decided against the plaintiff under the provisions of s. 170 of Act VIII of 1859: although the fact of his absenting himself when he was summoned must, to some extent, add strength to the defendant's case; for considering the processes that have been issued, it must be presumed that the talookdar was aware of the issue of the summons." I do not think there can be any doubt as to what the Judge meant to say, though there is a very slight discrepancy in the language. I think it is quite clear that he means to say that as a legal summons has not been served upon the plaintiff, he cannot take advantage of the provisions of s. 170, and, on the ground of that party's non-attendance alone, dismiss the suit against him; but he says, nevertheless, I am satisfied that he must have known that his attendance in Court was desired, and I am perfectly justified to take the circumstance of his neglect to attend into consideration when deciding the case upon the facts. I think that the lower Appellate Court was perfectly justified in taking that course and drawing the inferences which it has drawn; for although the law provides most necessary and proper precautions to protect parties from being summoned wantonly and for purely vexatious purposes, the Courts have full discretion in a matter of this kind to decide whether or no the parties are making use of that protection which the law affords them for the purpose

of evading the giving of evidence which might be fatal to their case; in the latter view any Court is perfectly justified in using the absence of the party most strongly against him.

As therefore all the grounds taken in special appeal fail, the appeal ought to be dismissed with costs.