(1869) 03 CAL CK 0030

Calcutta High Court

Case No: Special Appeal No. 2063 of 1868

The Collector of Bogra on behalf of Government		APPELLANT
	Vs	
Krishna Indra Roy		RESPONDENT

Date of Decision: March 4, 1869

Judgement

Norman, J.

A decree had been obtained in 1855 by the original defendant, Anand Mayi Dasi, now represented by Krishna Indra Roy, against Mr. Payter, for one anna six ganda share in four villages, in Pergunna Sagura, called Bolupara, Joypore, Khijrun, and Kholapara. The Government was made a co-defendant. The decree went against Mr. Payter, directing him to give possession of the villages with mesne profits, to pay the plaintiff"s costs, and also the costs of the Government. In execution of that decree, after the death of Payter, viz., in 1864, the defendant applied for possession of a village called Putooria and other lands, now alleged to belong to the Government. Delivery of these lands appears to have been made by planting a bamboo, and a proclamation issued to the occupants of the property, u/s 224 of Act VIII of 1859. Subsequent to this, on the 5th of June 1867, the Collector of Bogra, on behalf of the Secretary for India, presented a petition, u/s 230 of Act VIII of 1859, alleging that the Government had been dispossessed of the village and lands in question in execution of the decree; that the same were in the possession of the Government, and not included in the decree. An order was passed that the case should be taken up on the 28th of the same month of June. On the 28th of June, the Principal Sudder Ameen made an order, that as it appeared from the decree that the petitioner, that is to say the Government, represented by the Collector of Bogra, was a defendant in the suit, and as the case was decided between the parties, the petition could not be entertained. From that decision there was an appeal to the Judge, Mr. Tucker. The Judge held, that Government stood in the position of a person "other than the defendant, within the meaning of Section 230." The Government was, in fact, a mere formal party to the suit, not the party against whom the decree had passed or against whom execution was

sought. Upon that ground, the Judge reversed, and we think rightly reversed, the decision of the Principal Sudder Ameen, and remitted the case to him, with directions to dispose of it u/s 230. The Principal Sudder Ameen took up the case again, tried and decided it partly in favour of Government, and from this decision there was an appeal to the Judge, Mr. Browne. Mr. Browne was of opinion that no appeal lay from the original order of the Principal Sudder Ameen, and he referred to a case, Goluck Narain Dutt v. Bistoo Prea Dossee (1 W.R., 140). That case, however, appears to have been followed by two later cases which have been brought to our notice, one being dated the 2nd of March in this year, by Bayley and Hobhouse, JJ.* and which, if not in conflict with it, at least materially qualify the rule which it is supposed to lay down. For myself I am bound to say, that it appears to me, that without impeaching the decision in Goluck Narain Dutt v. Bistoo Prea Dossee (1 W.R., 140.) which may possibly have been correct on the facts, in the present case the Principal Sudder Ameen did raise and try an issue in law, and did pass a decision under the 230th section, when he determined that the application of the Collector, on behalf of the Government, to be restored to possession, must be rejected upon the ground, that he had no jurisdiction upon point of law to try the case, because the Government was not a person other than the defendant, within the meaning of the section. We need not consider whether it is necessary to refer he question to a Full Bench, because, if the decision in Goluck Narain Dutt v. Bistoo Prea Dossee (1 W.R., 140) is correct, and no appeal lies from an order refusing to entertain an application under the 230th section, we should, on application made to us for that purpose, probably have compelled the Principal Sudder Ameen to exercise his jurisdiction, under the powers vested in us by the 15th section of the Charter Act. Therefore, as the defendant acquiesced in the order of remand, and the objection was not taken in proper time, and if taken, an equivalent order might have been passed, we think it is now too late for the special respondent to take this objection. Upon the two principal points in the case, the decision of the Judge is erroneous; first, he considered that the Government had not been dispossessed by the delivery of possession of the land in dispute to the decree-holder, u/s 224, or by the planting of the bamboo. We think it clear that a landlord must be taken to be in possession of land which is occupied by his tenants from whom he is receiving rents. If a bamboo be planted, and proclamation made to the occupants of the property under the 224th section, that the land has been adjudged to some other person, we think the landlord is dispossessed in execution of the decree, or at least that he is so far put out of possession as to have a right to come in and ask for redress under the 230th section.

Upon the other point adverted to by the Judge, viz., that a Mr. Payter (who appears by the way to be a different person from the original defendant) is now in possession as a farmer of Government of the lands in dispute, it does not, in our opinion, tend to show that the Government was not in possession. We are unable to understand the argument of the Judge on this point. The case must be remanded to the Judge for a decision on the merits. The respondents must pay the costs of this appeal.

Jackson, J.

2. I concur in the order which my colleague would pass in this case.

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PRESENT

Mr. Justice Bayley and Mr. Justice Hobhouse.

Rasul Bibi.....Decree-holder

versus

Sheikh Mobarik Ali and another.ï¿½

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[= 11 W.R. 186]

Baboo Srinath Banerjee and Akhil Chandra Sen for appellant.

Mr. Twildale and Girish Chandra Ghose for respondents.

Bayley, J.--IN this case the decree-holder obtained a decree, in the first Court, on the 9th December 1862, which was confirmed on appeal, on the 28th April 1862.

In the original plaint, the plaintiff sued one Mobarik Ali Chowdhry as defendant.

The plaintiff obtained a decree, and at the heading of the decree the name entered was simply Mobarik Ali, and in the body of the decree, the name written was Mokur Ali.

In execution of the decree, one Mobarik Ali Chowdhry applied to the Court, u/s 380, Act VIII of 1859, praying that the paper, under which possession of certain lands was given to the decree-holder, might be rectified, as the lands were the lands of the applicant, and he was no party to the suit in which the decree was obtained. It was further alleged by this Mobarik Ali Chowdhry, that the said lands were not covered by the decrees.

On the 21st of September 1867, the Principal Budder Ameen rejected the application of Mobarik Ali, that Court holding that he was a party to the original suit, and that the words Mokur Ali were by mistake entered in the decree instead of Mobarik Ali.

The Judge, in the lower Appellate Court, has come to a conclusion of fact on the evidence, that Mobarik Ali Chowdhry, the applicant to the first Court, u/s 280, Act VIII of

1869, was not a party to the original suit. The Judge, however, goes on to say, that he had no power to interfere with the order of the Principal Sudder Ameen, so far as he rejects the applicant''s application u/s 230 of Act VIII of 1869, and that the applicant was at liberty to institute a regular suit, if he liked, for recovery of the land in question. The Judge, therefore, gave a partial decree to the above effect to the petitioner, and awarded Rs. 50 as his vakeel''s fees payable by the decree-holder.

Against this order, the decree-holder appeals specially before us, and urges:

Firstly.--That the lower Appellate Court was going beyond its jurisdiction to entertain an appeal from an order rejecting the application of Mobarik Ali, u/s 230, Act VIII of 1859.

Secondly.--That even if he could entertain the appeal, he ought to have remanded the case to the first Court to make Mobarik Ali a plaintiff, and the decree-holder a defendant, as in a suit with reference to Sections 280 and 231, and dispose of the case on merits.

There is a cross appeal by Mobarik Ali Chowdhry to the effect, that the order of the Judge does not go far enough; inasmuch as the Judge ought to have decided whether the lands were covered by the decree, and whether the applicant held possession of them or not.

I am of opinion that, to some extent, these pleas are valid. It is quite true that no appeal lies against an order of the Court refusing to entertain an application u/s 230, Act VIII of 1859, and that the proper remedy for the petitioner is to proceed in a regular suit, but if the case is admitted and investigated by the Court, then it gives the Appellate Court jurisdiction [Goluck Narain Dutt v. Bistoo Prea Dossee (1 W.R., 140.)], and it is clear that in this case there was an investigation into the fact of Mobarik Ali being a party to the original suit or not, and that the Principal Sudder Ameen found that he was a party, and the lower Appellate Court that he was not so. The proper course for the Judge to have adopted, under the above circumstances, was to have remitted the case to the first Court, with directions that Mobarik Ali Chowdhry, the applicant u/s 280, should be made a plaintiff, and the decree-holder, a defendant in the case, and that the case be registered and tried as a suit between the two parties.

This being done, the defect in the order of the Judge in not finding as to whether Mobarik Ali Chowdhry had possession of the lands, or whether they were covered by the decree or not, would have been cured.

I think, therefore, that this course should be now followed; and that the case should be remanded to the lower Court, accordingly.

Hobhouse, J.--The respondent, Mobarik Ali, applied for an enquiry, under the provisions of Section 230, Act VIII of 1859.

The first Court decided that the applicant, i.e., Mobarik Ali, was a party to the decree; and although that Court did, after coming to that decision, in so many terms, refuse to

exercise jurisdiction, under the provisions of Section 280, yet, when upon the evidence the first Court found that Mobarik Ali was a party to the decree, it did virtually exercise that jurisdiction. It did, in fact, investigate the case within the meaning of the decision quoted by Mr. Justice Bayley, and although that investigation was only a partial investigation, yet it was an investigation sufficient to give the Judge jurisdiction in appeal.

Then having jurisdiction, the Judge found, as a fact, that Mobarik Ali was not a party to the decree, and so far, therefore, the enquiry and investigation u/s 230 was complete, and cannot, being a finding of fact, be disturbed by us.

But there was then another point remaining to be decided by the Judge in the case, and it was this, viz., whether the property was bond fide in possession of the applicant on his own account or on account of some person other than the defendant. I agree that on this point the case must be remanded to the Court below. If it is found that the property was in possession of the applicant, the Court will give him a decree; if it is found that it is not in his possession, the Court will dismiss his suit.

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Miscellaneous Special Appeal, No. 482 of 1868, from a decree of the Judge of Chittagong, dated the 1st August 1868, reversing a decree of the Principal Sudder Ameefi of that district, dated the 31st September 1867