Santosh Kumar Ghosh Vs Sachindranath Mukherjee

Court: Calcutta High Court

Date of Decision: May 27, 1958

Acts Referred: Civil Procedure Code, 1908 (CPC) â€" Order 11 Rule 4, Order 2 Rule 2, Order 2 Rule 4, 43, 44

Citation: 62 CWN 759 : (1959) 2 ILR (Cal) 476

Hon'ble Judges: B.N. Banerjee, J

Bench: Single Bench

Advocate: Amarendra Nath Gupta, for the Appellant;Rameswar Saha and Amarnath Banerjee, for the Respondent

Judgement

B.N. Banerjee, J.
This Rule is directed against a judgment of the Judge, Small Cause Court at Sealdah, decreeing the claim made by the

Plaintiff opposite party for mesne profits.

2. The Petitioners and opposite party No. 2 were tenants, under the opposite party No. 1, in respect of premises No. 5, Nakuleswar

Bhattacharya Lane, Calcutta, at a monthly rent of Rs. 62-6-6p. By a notice to quit, the opposite party No. 1 terminated the tenancy of the

Petitioners and the opposite party No. 2 with the expiry of the month of February, 1953. On March 31, 1953, the opposite party No. 1, as

Plaintiff, instituted a suit against the Petitioners and opposite party No. 2 (Defendants Nos. 1 to 4) for recovery of possession of the premises, on

the plea that they were defaulters. In the said suit claim was made by the opposite party No. 1 for arrears of rent but not for mesne profits.

3. In their written statements the Defendants in the said suit (Petitioners and opposite party No. 2 herein) alleged that the entire premises were in

possession of two subtenants, viz., Lalmohan Choudhury and Jyotish Chandra Mitra.

4. On November 17, 1953, the said suit was decreed ex parte. The decree was put to execution in T. Ex. Case No. 356 of 1953 and the

opposite party No. 1 decree-holder realised from the Petitioners the amount decreed as arrears of rent. The decree-holder, however, could not

recover possession of the premises because Lalmohan and Jyotish abovenamed resisted.

5. Thereafter, Lalmohan and Jyotish each instituted a suit, in the first court of the munsif at Sealdah, for a declaration of their respective tenancy

rights, in the premises in dispute, and obtained interim injunction restraining the opposite party No. 1 from taking possession. The learned munsif,

however, directed, while issuing the order of interim injunction, that both Lalmohan and Jyotish must deposit the monthly rent payable by them in

court.

6. The suit filed by Lalmohan ultimately ended in a compromise by which Lalmohan gave up possession of the portion occupied by him and the

opposite party No. 1 was allowed to withdraw all sums of money deposited by the said Lalmohan. It was agreed that the said opposite party No.

1 will not make Lalmohan liable for any other sum of money. The aforesaid compromise was entered into on May 19, 1955.

7. It is now admitted that the opposite party No. 1 sold his interest in premises No. 5, Nakuleswar Bhattacharya Lane, to somebody, whose name

does not appear, on or about January 20, 1955.

8. On March 16, 1955, the opposite party No. 1, as Plaintiff, instituted a suit, out of which this revision case arises, claiming damages for use and

occupation from the month of March, 1953 (that is to say, from immediately after the termination of the tenancy by a notice to quit) to January 20,

1955 (when the opposite party parted with his right, title and interest in the property in dispute) totalling Rs. 870-15-0 calculated in the following

manner:

Rs. a.P.

For the period from 1st March, 1,410150

1953 to 19th January, 1955, at

Rs. 62-6-6 per month

Less realised by withdrawal of 540 0 0

rent deposited by Lalmohan and

Jyotish

870 150

9. The aforesaid suit was decreed by the Judge, Court of Small Causes, Sealdah.

10. Mr. Amarendra Nath Gupta appearing for the Petitioners argued before me that the decree passed by the Small Cause Court Judge was

erroneous on twofold grounds:

(a) The court below should have held that the second suit was barred under the provisions of Rule 2 of Order II of the Code of Civil Procedure.

(b) Inasmuch as the sub-tenants have, under the Rent Control Act, 1950, statutory right to be counted as direct tenants after the eviction of the

tenant of the first degree, the quondam tenant does not remain liable for damages for use and occupation after the termination of his tenancy, even

though the landlord fails to recover possession of the premises from the sub-tenants.

11. Elaborating his argument Mr. Gupta submitted that under Order 2, Rule 4 of the CPC claim for mesne profit can be joined with a claim for

recovery of immovable property. This is so allowed because the causes of action of two are the same. If anybody omits to join a claim for mesne

profits along with a claim for recovery of possession, Mr. Gupta argued, he shall not afterwards sue in respect of mesne profits, omitted to be

claimed by him in the earlier suit, because of the bar under Order 2, Rule 2, of the Code of Civil Procedure.

12. In support of his proposition that the causes of action for recovery of possession and mesne profits are the same Mr. Gupta relied, in the first

instance, on a decision in the case of Naba Kumar Hazra v. Radhashyam Mahis (1931) 35 C.W.N. 977. In the case relied on by Mr. Gupta, a

suit for reconveyance of certain properties sold in execution of a mortgage decree succeeded and a second suit for an account of rents and profits,

received by the purchaser in the execution sale, was thereafter brought. At the date when the former suit was instituted the Appellants before the

Privy Council (who were Defendants in the former suit) had purchased only the mortgage decree. The execution purchase of the properties by

them was made a few months later. During the pendency of the suit in the trial court the Respondents before the privy Council (who were Plaintiffs

in the first court) had not in the first instance asked for the assignment of the mortgage decree but had asked only for declaratory relief, based on

the ground that the purchase by the Defendants had been made for the benefit of and in the interest of the Plaintiffs. They subsequently amended

their plaint and prayed for its assignment to them. This prayer was granted by the trial Judge but being dissatisfied with the decree they appealed to

the High Court and by their memorandum of appeal specifically asked also for reconveyance of the properties ""with necessary account"". The High

Court varied the decree of the lower court by including in it a direction that the properties should also be conveyed to the Respondents but made

no order for accounts, the claim for which seemed to have been abandoned or found not to have been pressed. The judgment of the High Court

was affirmed by the Privy Council. The next suit by the Respondents before the Privy Council was based upon the allegation that after execution

purchase of the properties by the Appellants in that case, they were for some time in receipt of the rents and profits as trustees for the Plaintiffs

Respondents, which they did not account for and the prayer in the plaint was for account and payment. There was a claim for damages which was

subsequently abandoned. The trial court held that the matter was res judicata by reason of the decision in the previous suit. The High Court, on

appeal, was of opinion that as the profits claimed had not been received at the time the previous suit was instituted, there could be no question of

res judicata and in that view of the matter decreed the claim for account. On appeal to the Privy Council their Lordships declined to express any

opinion as to whether or not the second suit was barred by the principle of res judicata because their Lordships were of opinion that the claim was

barred under Order II, Rule 2 of the Code of Civil Procedure. The cause of action in the second suit was, their Lordships thought, clearly the same

as in the previous suit; the right to the rents and profits vested on the same foundation of facts and law as the right to have the purchases of the

decree, and of the properties declared to be purchases for the mortgagors. It is noteworthy that in the case of Nabakumar Hazra v. Radhashyam

Mains (supra), their Lordships of the Privy Council were not considering any question of liability to pay profits but were concerned with the liability

of trustees to account for rents and profits received by them. In the facts of the particular case, their Lordships came to the conclusion that; the

cause of action of the second suit was the same as the cause of action in the previous suit and the right to the rental and profits vested on the same

foundation of facts and law as the right to have the purchases of the decree and of the properties declared to be the purchases for the mortgagors

Plaintiffs Respondents before the Privy Council. I am, therefore, of opinion that the decision in the case of Nabakumar Hazra v. Radhashyam

Mahis (supra) is no authority for the proposition of law raised by Mr. Gupta.

13. Mr. Gupta also relied on a decision of the Bombay High Court reported in the case of Channappa Girimalappa Jolad Vs. The Bagalkot Bank

and Shankardas Vishnudas Darbar, in which it was held that right to rents of properties wrongfully alienated by the adoptive mother rested exactly

on the same facts and law as the claim to the corpus of those properties and hence where a claim for mesne profits was not included in a previous

suit for possession of the property a second suit for such mesne profits was barred under Order II, Rule 2 of the Code of Civil Procedure. That

decision undoubtedly supports the contention made by Mr. Gupta. To the same effect as in the Bombay case is a decision of the Indore Bench of

the High Court of Madhya Bharat in the case of Gangabai v. Kanhaiyalal AIR [1953] M.B. 161 also relied on by Mr. Gupta.

14. There is, as I find, a conflict of opinion amongst different High Courts on the point as to whether a suit for possession bars a subsequent suit for

mesne profits. I am, however, bound by the decisions of this Court and there are several authorities which have dealt with the matter. In the Full

Bench decision in the case of Kishori Lal Roy v. Sharvt Chunder Mozumder ILR (1882) Cal. 593 arising out of a reference under the Court Fees

Act, Garth, C.J., observed as follows:

Having regard both to the practice of the courts and to the language of the legislature, it seems to me that in this country the policy of the law has

always been to allow a Plaintiff to enforce a claim for possession of land and mesne profit either in one suit or two, as he may think proper; but at

the same time to induce if there is no reason to the contrary, to dispose of his whole claim in one suit only.

15. In a later decision in the case of Monmohan Sirkar v. Secretary of State ILR (1890) Cal. 968 O''Kinnely and Ameer Ali, JJ., reiterated the

same principle as herein below quoted:

Again a claim for mesne profit is distinct from a claim for recovery of immovable property and it is only under the statutes that such claims may he

joined in one (Schedule 44, Rule A of Act XIV of 1882). The cause of action in respect of continuing trespass after the institution of the suit arises

from day to day and it is only by express enactment, and in order to avoid multiplicity of suits that the courts have been vested with the discretion

of awarding damages during the continuance of trespass and until its cessation.

16. In delivering the judgment of the Court in the case of Lallessor Babul v. Janki Bibi ILR (1891) Cal. 615, Ameer Ali, L, observed as follows:

In the view that we take of the Sections 43 and 44 of the CPC claims to recover possession of immovable property and mesne profits are distinct

claims and there has been no alteration of the law in this respect between Section 10 of Act VIII of 1859 and the present Code although no doubt

the terms of the law of 1859 were more precise.

17. None of the three above cases was decided under the Code of Civil Procedure, 1908. Examining the language of Order II, Rule 2, and Order

II, Rule 4 of the CPC I find that the changes introduced by the Code of 1908, in so far as they are material for present purpose, are as follows:

(a) In the explanation to Order II Rule 2, Code of Civil Procedure, the words ""and successive claims under the same obligation"" have been added.

(b) The rule contained in Section 44 of the Code of 1881 (now Order 11, Rule 4) applied to (1) suits for recovery of immovable property and (2)

to suits to obtain declaration of title to immovable property. The present present rule (Order II, Rule 4, Code of Civil Procedure) is confined only

to those cases where cause of action is sought to be joined with a suit for recovery of immovable property. Clause (c) of the present rule providing

for joinder of claims in which the relief sought was based on the same cause of action is new.

18. Taking into consideration the changes introduced by the present CPC to the old law, there is nothing to indicate that the changes have taken

away the force of the old decision hereinbefore referred to. A claim for mesne profits is not a claim under the same obligation compelling a

trespasser to restore possession. A claim for mesne profits is also not based on the same cause of action as the claim for possession. A person

may be in wrongful possession but even then may not be obliged to pay mesne profits, if he has not received or might not have received with

ordinary diligence profits from the property in wrongful possession. The liability to pay mesne profits arises from the profits a person has or might

reasonably have made by his wrongful possession. Thus the obligation to pay mesne profits arises from a cause of action completely different from

the obligation to restore possession of the immovable property to the rightful owner.

19. Then again in this case the claim for damages for use and occupation is for a period subsequent to the institution of the first suit for possession.

20. In the following cases, viz., Equitable Coal Company Ltd. v. Bagla Sundari Devi AIR [1929] Cal. 442 Bipul Behari Chakravarty Vs. Nikhil

Chandra Chakravarty and Others, . 566 Kalidas Rakshit Vs. Keshablal Majumdar, it was held that a claim for mesne profits subsequent to the

filing of a suit for possession was not barred by the principle of res judicata.

21. In the view of law that I take in this matter, I hold that there is no substance in the objection taken by Mr. Gupta under Order II, Rule 2 of the

CPC and I reject it.

22. The second objection raised by Mr. Gupta may be disposed of on a short ground. The court below came to a finding that it was not proved

whether there were really sub-tenants in the premises in respect of which damages for use and occupation were claimed. I agree with the court

below that it is so.

23. It is not necessary, therefore, for me to examine the further question raised by Mr. Gupta, namely that the liability of the tenant of the first

degree to pay damages ceases as soon as some sub-tenants become statutory entitled to be counted as direct tenants of the landlord.

24. Both the contentions raised by Mr. Gupta thus fail and this Rule is discharged.

25. In the circumstances of the case, I make no order as to costs.