(1867) 09 CAL CK 0005

Calcutta High Court

Case No: Regular Appeal No. 236 of 1866

Koylash Chunder Paul Chowdhry and Others		APPELLANT
	Vs	
Prosonno Coomar Paul Chowdhry and Another		RESPONDENT

Date of Decision: Sept. 23, 1867

Judgement

Glover, J.

It appears to me that we ought to answer both the questions submitted by the Divisional Beach. It may be that they were not raised in the Courts below, and that the objection was not taken here when the appeal was first heard. But it cannot be said that the points are not deducible from the pleadings, and it is clear that they were taken and argued at considerable length before the Division Bench which heard the case after remand. It appears to me, further, that that Bench would have been justified in referring the question to the Full Bench of this Court, whether it had or had not been opened by the parties to the appeal, if it considered the point to be one of importance, and concerning which contradictory rulings of Division Benches were in existence. A Full Bench of this Court is, I conceive, bound to afford every possible assistance to the Division Benches, and to give them the benefit of its authoritative opinion on all points referred, which are in any way deductible from the case sent up. Indeed, I am by no means certain that it ought not to take into consideration any and every question of law which a case might involve, whether it were apparent on the pleadings or not. However, there is no necessity for my going so far in the present case, as the points at issue, though not directly raised, are certainly to be found in the pleadings.

2. I think that the first question should be answered in the negative, and that the Collector had no jurisdiction, under Act X of 1859, to decide as to the amount of beneficial interest, if any, possessed by the three co-defendants. The proper Court to decide the equities between them, and to fix their liability to pay rent, would be the Civil Court, and that Court would have to find the relationship of landlord and

tenant, and the extent of each person''s interest, before the Collector could come in and adjudicate the rent due under Act X.

3. On the second question proposed, there cause, I think, be no doubt whatever that a person suing a zemindar in the first instance is not estopped thereby from hereafter suing those whom a more correct and searching enquiry has shown to be the real beneficial owners. This question, therefore, should be answered in the affirmative.

Macpherson, J.

4. The first of the questions raised on this reference is one upon which it appears to me that this Court ought not to give an answer (to the full extent of the question) inasmuch as the points raised do not properly arise in the case. Being of opinion that the question does not arise in the case, I am only following the practice which has been acted upon frequently by Full Bench Courts, if I decline to return any answer to it.

5. In the case of Girishchandra Lahury v. Fakir Chand Ante, p. 503 a reference was made to a Full Bench by Loch, J., and myself upon a most important question in which we differed from a judgment of another Division Court. We referred a general question as to the position of the assignee of a decree. "In the event of there being cross-decrees, and one of these decrees being transferred by the decree-holder to a third party in a bona fide sale, without any special notice to the purchaser of the existence of the cross-decree, whether the purchaser does not take it with all the liabilities and equities of the vendor which attached to it." The case came on before the Full Bench, and the Court declined to answer the question which we put upon the ground that that question did not arise upon the facts as stated by us. The Court (of which I myself was a member) held that upon the facts as stated by us, it was unnecessary to answer the question, remarking, "it is, therefore, unnecessary for us to determine whether the assignment made any difference or not. If we were to determine that point, our decision would be a mere obiter dictum."

6. In that case, the fact that a decision upon the particular point referred was not absolutely necessary appeared from the statement of the case sent up by the Judges who referred it. So in the present instance, a decision on this first question (to its full extent) appears upon the face of the statement of the referring Judges to be unnecessary. The plaintiffs are, in the order of reference, stated to be suing, "alleging that the estate was purchased by Prosonno Coomar Paul Chowdhry and his wife in the name of Gopanl Chunder Mookerjee benamee for them." It appears to me that upon a plaint setting up such a cause of action, the various issues as to remote beneficial interests and equities which have been suggested in the first question referred to us do not arise. And, as a matter of fact, no such issues ever were raised by any of the parties, whether plaintiffs or defendants, in their pleadings, or before the lower Court, or before Loch, J., and myself when the case

was before us in January last, and we sent it back in order that further evidence might be taken on behalf of one of the defendants.

7. Again the case of Gopal Chunder Roy v. Gooroo Doss Roy [(1)], in which the Full Bench was of opinion that the point which had been referred did not arise under the circumstances, and the Court declined to give any opinion. There the case, as stated by the referring Judges, did not disclose such a state of facts as showed that the question referred did not arise. In the case of Ram Kanth Chowdhry v. Bhubun Mohun Biswas Ante, p. 25 the Chief Justice, upon the ground that it did not arise in the case, did not answer the question referred, but the rest of the Court did answer it.

8. Upon these authorities, I think that we ought not to decide the first question to its full extent. But some part of the question does arise in the case, and that part I am prepared to answer. I think there is no doubt whatever, both on the authority of the decision in the case of Heeraloll Bukshee v. Rajkishore Mozoomdar Hay''s Rep., 449 and of the other cases referred to, and on the general construction of Act X of 1859, that the Collector has power to try the question raised in the plaint in this suit, that is to say, to try the question whether or not Prosonno Coomar and his wife, or either of them, purchased this putnee benamee in the name of Gropaul Chunder. I have no doubt the Revenue Courts have jurisdiction to try whether these defendants or either of them, by reason of their own possession, or that of their agent, are in the position of tenants towards the plaintiffs, whether, in short, they are substantially the tenants of the land and, as such, liable for the rent now sued for.

9. As regards the second question, whether or not the plaintiffs are estopped in the present suit from proceeding against the defendants who are said to be principals, on the ground that they formerly took proceedings against the defendant, their agent in order to recover rent for a period different from that the rent for which is now sued for, it appears to me that the former proceedings are no bar whatever.

10. The present suit is no doubt wrongly brought, in so far as it is brought against both the principals and their agent, and the plaintiffs ought to have been put to their election as to whether they would proceed against the agent or against the principals. This is the only point (bearing on the second question) that was decided in the case of Sheikh Kamyab v. Mussamut Omda Begum W.R., January to July 1864, Act X Rul., 88. That case does nor decide that, because the agent was formerly proceeded against, the defendants who are now discovered to be the principals cannot be sued for rent for a different period; it merely decides that a suit is bad where the principal and the agent are sued together as jointly liable.

11. An unreported decision of the late Sudder Court, dated 6th June 1862, in Special Appeal No. 336 of 1861, was referred to as showing that the present suit is barred. But it appears to me that the ruling in that case is not correct: and however that may be, the circumstances of that case are very different from those now before us.

12. As regards the second question, I would answer that the present suit is not barred by the proceeding under Regulation VIII of 1819.

Jackson, J.

13. I am of opinion that both the questions proposed to as by the Division Court ought to be answered. I entirely agree with Macpherson, J., in thinking that the Full Bench, on having a question referred to it for the decision of a particular law point, if, on looking into the case as far as it is necessary for the purpose, it should find that that law point does not arise, ought to desist from answering it. Very serious inconvenience arises from following an opposite course. For instance, not very long ago a question was referred by a Division Bench to a Bench of five Judges, namely, whether a decision inter alias was admissible in evidence, and was conclusive evidence against parties in a suit before the Division Bench. The Full Bench went very fully into the whole matter and decided that the judgment in question was not conclusive evidence, and was not admissible in evidence at all. Subsequently the question of admissibility arose before a Division Bench, and that Division Bench looking into the question which had come before he Full Bench, came to the conclusion that the point whether or not such a judgment was admissible in evidence had not fairly arisen upon the case in which the reference took place, and consequently declined to accept the decision of the Full Bench as conclusive authority upon that point, and went on to decide the point on its own view of the law in the opposite sense to the decision of the Full Bench In Gopeenath Singh v. Anundmoye Debia, 8 W.R., 167.

14. It is quite clear to me that decisions of a Full Bench, if they are to be useful, must be conclusively binding on future Division Benches of this Court until they are afterwards set aside by the authority of the full Court or of a Court composed of a larger number of Judges. Therefore I would abstain from giving an opinion on any point unless I saw that it clearly arose in the case referred, as in the present state of the law there seems to be no power to state cases for the opinion of a Full Bench.

15. The question referred, now is, (His Lordship road the first question, and continued).--Now, it is said, that this question does not actually arise upon the plaint. That, no doubt, is so. The plaint has been framed entirely upon the allegation that those two defendants, Prosonno Coomar and his wife, had employed the defendant Gopanl Chunder to purchase the talook for them, and that they had since been in possession of the talook, that is to say, a question of agency. But I observe that the Collector has gone into the question of beneficial interest. He has raised, though not very distinctly, the issue whether the other two defendants were beneficially interested in the talook or not. I also observe, as far as I had an opportunity of looking into the evidence, that evidence upon such an issue was adduced before the Collector. Now I presume the Collector is authorized to frame the issues, under Act VIII of 1859, not only from the plaint, but from the written statements and from the examination of pleaders or persons who appear before him. I would, therefore,

rather prefer to presume that the Collector had found, in some examination taken before him, or in the written statements, an allegation that these defendants were beneficially interested in the talook; and I the more readily do so, because the plaintiff adduced evidence to support such an allegation. The question being to that extent raised, I think fairly enough arises in the case before us to justify the Full Bench in giving an answer.

16. As to the particular answers to be given to the questions, I am quite clear that the Collector would not be competent to decide such a question as that involved in the first put to as by the Division Bench. This appears to be precisely such a case as in England would oblige a plaintiff to resort to a Court of Equity to obtain relief, and in which he would have no remedy at common law; and in like manner it seems to me to be such a case as is not within the jurisdiction of the Collector, who is restricted to try questions between a landlord and his actual tenants, persons between whom directly or indirectly some engagement has been entered into. But where the landlord seeks to make other persons liable by reason of their having a beneficial interest in the tenure, he must resort to the assistance of the regular Civil Courts, which take cognizance of all causes of action of which their cognizance is not expressly taken away.

17. As to the second question, it appears to me also perfectly clear, that the plaintiff is not estopped by reason of his former proceedings against Gopanl Chunder, from now suing in the proper Court the defendants whom, upon further information, he has discovered, and whom he now declares to be beneficially interested.

18. I would, therefore, answer the first question in the negative, and the second question in the affirmative.

Kemp, J.

19. I am of opinion that the first question put to this Bench is one that does not arise in the pleadings, or in the case as the parties put the case in the Court below. I think, therefore, that we should decline answering the question. I also observe that neither in the plaint, nor in the written statements, nor in the case made by the parties before the Court below, was any question of remote liability or equities raised; nor does any such question appear in the Collector''s proceedings, as is quite clear on referring to the decision of the Collector, who says:--"The defence, therefore, set up is that the purchase in Gopanl''s name was benamee, he being merely the servant of the other defendants who are solely liable for the rent. The purchase not having turned out so profitable an investment as was believed, the real proprietors are now anxious to disclaim all connexion with the under tenure, and represent the ostensible proprietor as solely responsible to the zemindar. This is the only issue in the case, and it is an issue which, it has been ruled, the Revenue Courts must try." Therefore, in my opinion, the first question put before us does not arise either in the written statements or in the case made by the parties before the

Court below, and I would therefore decline to answer it.

20. As to the second question, I am of opinion that the plaintiff is not barred by any proceeding which was taken against Gopanl Chunder under Regulation VIII of 1819.

Peacock, C.J.

21. I quite agree as to the second question that the plaintiff''s having treated Gopanl Chunder as the tenant when he was not aware of the whole circumstances of the case, would not estop him from treating other persona as his tenants afterwards when he knew of those circumstances, if the facts showed that the other parties, and not Gopanl Chunder, were the tenants.

22. With respect to the first question, it appears to me that it ought to be answered, and that it was one upon which the Division Court might fairly and properly ask the opinion of a Full Bench in order to enable it properly to deal with the whole case with reference to other decisions which have been passed by Division Benches. The object of referring cases to a Full Bench is to prevent conflicting decisions between Division Benches, so that one Bench shall not be deciding question one way on one day, a second Bench deciding the same question another way on another day, and a third Bench probably deciding it differently from the other two on a third day; and that when a Court finds two conflicting decisions, or a decision conflicting with its own view of the case, instead of overruling the decision of a Bench having concurrent jurisdiction, it should refer the matter to a Full Bench, so that the public should not be subject to have conflicting decisions issued from the High Court. In carrying out that rule, I have always endeavored, as far as it has been in my power, to assist the Division Benches by which questions have been referred, by examining the authorities bearing upon the point and by explaining the law upon the subject to the best of my ability and giving reasons for my opinions so as to settle the point as far as possible for cases in which it might arise in future.

23. In the case which has been referred to--Girishchandra Lahury v. Fakir Chand Ante, p. 503--the case was this, A. had recovered a judgment against B. in the Judge''s Court, B. recovered a judgment against A. in the Court of the Principal Sudder Ameen, B. sold his judgment to C. who wished to enforce it against A.A. asked to be allowed to set off the judgment which he had recovered against B. in the Judge''s Court, notwithstanding the sale by B. to C., who was a bona, fide purchaser of the judgment recovered by B. against A. The question which was asked of the Court was this: "In the event of there being cross-decrees, and one of these decrees being transferred by the decree-holders to a third party by a bona, fide sale, without any special notice to the purchaser of the existence of the cross-decree, whether the purchaser does not take it with all the liabilities and equities of the vendor which, attached to it." In the statement of the case referred for the opinion of this Court, it was shown that the judgment which A. had recovered against B, was in the Judge''s Court, whereas the judgment which B. had recovered against A. was

in the Principal Sudder Ameen''s Court, and the Court came to the conclusion, whether right or wrong, that the two judgments, not being in the same Court for execution, could not be set off one against the other, Under the terms of Act VIII of 1859. Being of opinion, therefore, that one of those judgments could not be set off against the other, and could not have been set off even if it had not been transferred, the Court answered the question, and pointed out that those two judgments could not he set off one against the other, whether transferred or not, and it did not go into the other question which became unnecessary. The Court said:-- "In this case the decree of the Judge''s Court was not sent to the Principal Sudder Ameen for execution, nor was the decree of the Principal Sudder Ameen sent to the Judge''s Court for execution. The case, therefore, does not fall within the provisions of s. 209. It is therefore unnecessary for us to determine whether the assignment made any difference or not." The question as to the effect of the assignment did not arise in that case, and the Full Bench would have misled the Division Bench if it had simply answered the question propounded, without pointing out to the Division Bench that, in their opinion, the judgments were not judgments which could be set off against each other, independently of the question as to the assignment. I, therefore, think that the Court was right in that case in not going on to determine the second question, especially as some Division Benches do not consider themselves bound by what they call obiter dicta of a Full Bench.

24. In another case--Kanhya Lall v. Radha Churn Ante, p. 662--the following question was asked, whether a decision upon the question of adoption was admissible in a suit between different parties. I was one of the Judges, and the learned Judge beside me (D. Jackson, J.) was the other Judge who referred the question. We asked a Full Bench whether the judgment was admissible against the plaintiff who was not a party to the former suit; and, if so, whether it was conclusive, or merely prima facie, evidence against him. It was an important question whether it was admissible at all even if it should be held that it was not conclusive as a judgment in rem. Two questions were referred: 1st, was the judgment admissible and conclusive; 2nd, was it admissible at all for any purpose whether as prima, facie evidence, or in any other way. The two questions were distinctly raised, and they were distinctly answered. But in a subsequent case it was held by a Division Bench that the answer that the judgment was not admissible at all, was an obiter dictum In Gopeenath Singh v. Anund Moye Debia, 8 W.R., 167. If that ruling is to be acted upon, and if Judges of a Division Bench are to go into each case, and see whether the answer of a Full Bench is an obiter dictum or not, great difficulties will constantly arise. I say after careful reflection that the two questions were absolutely necessary to be determined. If uniformity of decision in the High Court is desirable, as it undoubtedly is, one Division Bench ought not to decide contrary to a dictum of another Division Bench, without referring the question to a Full Bench. Still less ought it to decide contrary to a dictum of a Full Bench, at any rate without referring the question.

25. In the other case--Gopal Chunder Roy v. Gooroodoss Roy Ante, p. 764--the question asked was, "whether, where a pottah purporting to be of a date anterior to the Decennial Settlement is filed, and is found as a fact to be a forgery, the party propounding such forged pottah can have the benefit of the presumption arising from paying fixed rents for twenty years, under s. 4, Act X of 1859." The Full Bench might have said that the party was entitled to the benefit of that presumption and have answered that question affirmatively. If they had done so, they would have led the Division Bench into a most serious error, for it was admitted on the argument before the Full Bench that the suit was brought before Act X of 1859 was passed; and therefore the Full Bench pointed out to the Division Bench that the question did not arise under the circumstances of the case. The Full Bench did not wish to mislead the Division Bench, as it would have done if it had merely answered the question; but, finding that the Division Bench was under a mistake in supposing that Act applied to the case, when the words of s. 4 were "whenever, in any suit under this Act, it shall be proved" &c., said, "It being admitted that this suit was brought before Act X of 1859 came into operation, the question does not arise whether a party who has propounded a forged pottah could have the benefit of the presumption arising from paying a fixed rent for twenty years, s. 4, Act X of 1859, applying only to suits commenced under the provisions of that Act. Therefore the point which has been referred to us does not arise." Instead of answering the question, the Full Bench pointed out to the Division Court that the case was not one in which s. 4, Act X of 1859, was applicable, or could be taken into consideration. I cannot think that the Bench was wrong in giving judgment in that way. For my own part, I can only say that I am always most desirous to give every assistance in my power to a Division Bench, by answering every question which is propounded for the opinion of a Full Bench, when it can be done without leading the Court which asks the question into error.

26. Another case--Ram Kanth Chowdhry v. Bhubun Mohun Biswas Ante, p. 25--has been cited. In that case the suit was brought to fix the rent of certain land, and to obtain a kabuliat from the defendant. It appeared to the Full Bench that the defendant was a mere trespasser, and not a tenant; and that the plaintiff could not therefore sue him to obtain a kabuliat under Act X of 1859. The question whether a zemindar could sue for a kabuliat at an enhanced rent without giving notice of enhancement, did not arise. If the Full Bench had answered the question, they would have misled the Division Bench; as under the circumstances of the case, the zemindar could not, even if he had given notice of enhancement, have sued for a kabuliat.

27. I have made this explanation, because I think it ought not to go forth that a Full Bench is disinclined to answer any question that properly arises out of a case before a Division Bench, or that it has ever intentionally declined to answer any such question which has been referred for its opinion. It has always to the best of its ability answered such questions, and endeavoured to throw as much light upon the

case, and to give the Division Bench as much assistance, as possible. The only cases in which a Full Bench has not answered directly questions which have been raised for its opinion, are those in which, by giving direct answers to the questions it would have been likely to mislead the Division Benches by which the questions were asked.

28. In this case, finding that there were conflicting decisions, the Division Bench, of which I was one of the Judges, felt bound to refer the case to a Full Bench. The Division Bench, before sending the case back to the Collector to be determined finally, wished to know whether the parties were bound by equities, and whether the Collector had jurisdiction in such a case, or had power to determine mere matters of equity.

29. Three of the Judges of the Full Bench have answered the question; but the other two Judges think that they ought not to answer it. I regret exceedingly that the Division Bench will not have the weight and benefit of the opinions of those two Judges; but when the case goes back, the Division Bench will have the opinion of only a majority of Judges of the Full Bench, and it will have to deal with the case in the best manner it can under the circumstances, regretting that it has been deprived of the valuable opinions of the two Judges who have declined to express any opinion upon the case.

30. In my own opinion, the Collector had no jurisdiction in the case. I am of opinion that, when the legislature took away from the regular Civil tribunals of this country the right of determining questions with regard to rent, they intended to take away from them, and to vest in the Collectors, jurisdiction in those cases only in which the question might arise between a landlord and his tenant. Two persons may be joint tenants, and, as such, may be jointly liable for rent. A., and not B., may be the tenant of certain lands. There may be circumstances under which B. may be equitably liable to pay the rent legally due from A. But the liability of B. does not arise from the legal relationship of landlord and tenant.

31. I apprehend it was never the intention of the Legislature to empower the Collector to try questions relating to rent depending upon equitable rights and liabilities arising from circumstances other than those of the relationship of landlord and tenant.

32. An Act by which the jurisdiction of the ordinary Courts of Judicature is taken away must be construed strictly. The jurisdiction of the ordinary Courts of Judicature is not to be taken away by putting a construction upon an Act of the Legislature which does not clearly say that it was the intention of the Legislature to deprive such Courts of their jurisdiction.

33. Looking at Act X of 1859, I hold that it was not the intention of the Legislature to take away the jurisdiction of the ordinary Courts of Judicature of trying whether, under particular circumstances, other persons than the actual tenants of the land might not, according to the rules of equity, be liable to pay the rent of that land.

That is the question which I wished to have answered when the Division Bench put the question in the form in which it was submitted. It appears to me that the question must be answered in the negative, and that the Division Bench should be informed that the Collector was not competent to try the points involved in the first question.

34. The case will go back to the Division Bench for the purpose of being determined by them, and I shall avail myself of the benefit which I have had of learning from my colleague (Kemp, J.) what the plaint actually states. The Division Bench may possibly have asked this question unnecessarily, and may have been the cause of fruitlessly and unnecessarily wasting the time of two of the Judges of this Court for four or five hours on a matter which may ultimately turn out to be immaterial. I endeavour to be as accurate as I can. But a preliminary question having been raised that the Collector could not deal with matters of equity, I wished to know, before I went into the whole case, both as to the plaint and the evidence, whether the Collector had jurisdiction to deal with mere equitable rights and liabilities, and whether the Division Bench, sitting in appeal from the judgment of a Collector, was entitled to deal with such matters before they had been tried in the first instance by a Court of ordinary civil jurisdiction. It appeared to ma that the Collector had no such jurisdiction, and that the case ought to have been brought before the proper Court of civil jurisdiction. Having new obtained the opinion of a majority of the Judges of a Full Bench, I shall be able to express my own judgment upon it when the case goes back to the Division Bench.

Kemp, J.

35. The majority of this Bench is against me; and the learned Judges constituting that majority have thought it right to answer the first question. I may add that, if I could bring myself to think that the question was raised, I should have answered it in the same manner as they have done.

Macpherson, J.

An the majority of the Court hold that the first question (in its full extent) does arise in this case, I think it right to add that, us regards the point of law involved, my opinion is the same as that which is expressed in the answer which the majority of the Court propose to give. I am of opinion that the Revenue Courts have no jurisdiction to try a suit for rent when the issue is not merely whether the defendants are, by reason of their own possession or that of their agent (e.g., one who holds for them benamee), in the position of tenants, and as such liable for the rent, but whether by reason of their having a beneficial or equitable interest of some sort in the tenure they are in equity liable to be charged with the rent.

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(1) Before Sir Barnes Peacock, Kt., Chief Justice, Mr. Justice Trevor, Mr. Justice Norman, Mr. Justice Loch, and Mr. Justice Pundit.

The 10th February 1867.

Gopal Chunder Roy (Defendant) v. Gooroo Doss Roy (Plaintiff).*

Question referred not arising in Case.

Question referred not answered on the ground that it did not arise in the case.

This case came on in special appeal before Bayley and E. Jackson, JJ., when the following question was raised:--

Whether, where a pottah, purporting to be of a date anterior to the Decennial Settlement, is filed, and is found as a fact to be a forgery, the party propounding such forged pottah can have the benefit of the presumption arising from paying fixed rents for twenty years under s. 4, Act X of 1859.

The ruling of Pundit and Morgan, JJ., on this point, in Sreenath Doss Moonshee v. Shibkristo Bose 1 W.R., 159 being in conflict with that of Steer and Levinge, JJ., in the case of Omeshchunder Biswas Unreported, their Lordships referred the case for the opinion of a Full Bench.

Baboo Bhugobutty Churn Ghose for the appellant.

Baboos Kissen Kishore Ghose and Sreenath Doss for the respondent.

The opinion of the Full Bench was delivered by

Peacock, C.J.--It being admitted that this suit was brought before Act X of 1859 came into operation, the question does not arise whether a party who has propounded a forged pottah could have the benefit of the presumption arising from paying a fixed rent for twenty years, s. 4, Act X of 1859, applying only to suits commenced under the provisions of that Act. Therefore the point which has been referred to us does not arise.

The case will go back to the Division Bench which referred it.

* Special Appeal, No. 3067 of 1864, from a decree of the Officiating Additional Judge of Jessore, dated the 13th August 1864, reversing a decree of the Sudder Ameen of that district, dated the 28th December 1861.