(1863) 06 CAL CK 0004

Calcutta High Court

Case No: Special Appeal No. 2463 of 1862

Harihar Mookerjee		APPELLANT
	Vs	
Gumani Kazi		RESPONDENT

Date of Decision: June 1, 1863

Judgement

Sir Barnes Peacock, Kt., C.J., Steer, Kemp and Seton-Karr, JJ.

The plaintiff sued for rent at enhanced rates after notice. The suit was commenced on the 25th March 1859, before Act X of 1859 came into operation. The defendant, among other defences, set up, that 11 bighas 7 katas of the land was lakhiraj. The Moonsiff, after considering all the defences, and the report of the Ameeu, by whom a local enquiry was made, found that the defendant was entitled to deduct from the lands mentioned in the plaint 4 katas as golaghar land, and that the remaining lauds amounted to 37 bighas 7 katas 7½ chittaks; and he said "the correctness of this decision is not impugned by any of the parties." He also found that 1 bigha 15 katas 5½ chittaks were lakhiraj; and after releasing that quantity of the land, he assessed the remainder at 85 sicca rupees 3 annas 2 gandas 2 kauris. The Moonsiff found that notice of enhancement had been served, and decreed that the plaintiff should recover from the defendant the annual jumma of sicca rupees 85-3-2-2 upon a quantity of 35 bighas 12 katas 2 chittaks of land from the commencement of 1265 (1858), the time when the notice was served. Upon appeal by the defendant, the Principal Sudder Ameen found that no notice of enhancement had been served. He held that the rate awarded by the first Court was not excessive, but that the appellant ought to be allowed the value of his labor; and he amended the decree of the first Court, and decreed that the plaintiff''s rent should be rupees 85 from the date of action.

2. It is now contended by the defendant upon appeal that, as the Principal Sudder Ameen had decided that notice of enhancement had not been served, he could not award to the plaintiff rent at an enhanced rate. But it is urged, on behalf of the plaintiff, the respondent, that he was entitled to a decree declaring his right to enhance the rent. The point being considered doubtful was referred to a Full Bench,

in order to settle the question.

3. Several decisions of the late Sudder Court, viz., Golam Ruhman v. Rajah Radakaunath S.D.A., 1847, 196, In the petition of Dwarkanath Sing S.D.A., 1848, 812, Joykishen Mookerjee v. Sheikh Cazee Golam Sufder S.D.A., 1858, 1001, Kasshessurree Debia v. Chunderkanth Mozoomdar S.D.A., 1858, 318, Kazee Abdool Hamed v. Ramkoomar Mundul S.D.A., 1859, 831, Jogessur Singh v. Syed Lootf Ali Khan S.D.A., 1860, II, 225, and one decision of this Court, Poulson v. Mudhoosoodun Chowdhry 2 Hay''s Rep., 172 were cited in support of that contention. We think it is clear that the plaintiff could not, in this suit, which was brought to recover arrears due before the 25th March 1859, recover any rent which became due after the suit was commenced; and consequently that the Principal Sudder Ameen was wrong in giving him rent at an enhanced rate from the date of the commencement of the action. But we further think that when the question as to the liability of a tenure to enhancement has been fully tried, a plaintiff is entitled to a declaration of his right to enhance. It was contended on the part of the appellant, that as the plaintiff did not by his plaint ask for a declaration of rights, but simply for arrears at an enhanced rate, the Court cannot, in this suit, declare what his rights are. But we must not hold parties too strictly to their pleadings; and when a plaintiff asks for that to which he is not entitled, there is no good reason why the Court, in refusing the relief prayed for, should not give that to which they see he is fairly entitled upon the evidence and the finding of the issues raised in the suit. In this case one of the issues raised for decision by the Principal Sudder Ameen was, whether the land was liable to enhancement, and at what rate; and by decreeing rent to the plaintiff at an enhanced rate, he substantially decided that the plaintiff had a right to enhance, and a right to recover at the enhanced rates. Although the plaintiff is not entitled to recover in this suit rent at the enhanced rates, there is no good reason why that part of the finding which is implied in the decree,--viz., that he is entitled to enhance, should not stand. We think that we ought to follow the decisions of the late Sudder Court, which are founded on good sense, and hold that the plaintiff is entitled to a decree that he has a right to enhance.

4. The principal ground urged by the defendant why the plaintiff was not entitled to enhance, was that the defendant held under a mokurari patta. His reason why the plaintiff was not entitled to recover rent at enhanced rates, was that he had not given notice of his intention to enhance. The issue as to the mokurari patta was found against the defendant, and if the plaintiff is not entitled to the benefit of that finding by having his right to enhance declared, that question will have to be tried over again, and all the costs and expenses incurred in consequence of that issue, to say nothing of the time of the Court, will be wasted. In this case the Court had no power to try the validity of alleged lakhiraj tenure to entitle the plaintiff to recover enhanced rent for that portion of the land: he ought to have shown that it was his mal land, and that the defendant had paid rent for it. But no evidence of the kind appears to have been given. The lakhiraj was assumed by the Judge to exist, though

it was declared invalid for want of registration. We therefore think that no right to enhance the rent of that land can be made in this suit. The validity or invalidity of that tenure must be previously tried and determined in a suit to resume or to assess. The 11 bighas 7 katas of land claimed to be lakhiraj, must, therefore, be deducted from the 37 bighas 7 katas 7 chittaks, which has been found to be the total amount of the plaintiff''s mal land.

5. The decree of the Principal Sudder Ameen must be reversed, and it must be declared to have been established that the plaintiff has a right to enhance the rent of the 37 bighas 7 katas 7 chittaks, less the 11 bighas 7 katas claimed to be lakhiraj. As this suit was brought to recover the arrears, and not for a declaration of right, we think that each party should pay his own costs of this appeal, and in both the lower Courts. If the plaintiff had sued merely for a declaration of right, we do not think we should have given him his costs. The defendant was, however, wrong in setting up a mokurari patta, which, according to both the lower Courts, was a false document. The declaration of right will be merely that the defendant held the land upon a tenure liable to enhancement. That will be no declaration as to the rates to which the plaintiff was entitled to enhance; or whether there are sufficient grounds for enhancement. These questions must be tried and determined when the plaintiff seeks to enforce the right he is declared to have.

Norman, J.

I concur in the decision of the Court on all the points, Had the question been left with me, I should have preferred to have laid down a rule that, if the plaint is framed specifically for the purpose of obtaining a declaration that a mokurari or other alleged title to hold at a fixed jumma is invalid, or ought to be set aside, a declaratory decree may be passed. But if, to an ordinary suit for enhancement alleging notice, and praying to recover arrears at an enhanced rate, the defendant set up two answers, such as want of notice, and the existence of a mokurari, the establishment of the truth of either plea is sufficient to entitle him to have the suit dismissed. The plaintiff fails to prove that on which his suit is based. He may be entitled to have the finding on the issue negativing the mokurari recorded, and to make such use of such finding as he may be able. But I should have preferred not to have given a decree which is not specifically asked for by the plaintiff, fearing that cases may occur in which the defendant may be prejudiced by being estopped by the finding on an issue on which he may not have had full warning that it was necessary to put out his whole strength. However, in deference to the opinion of my learned brothers, and to the authority of the cases referred to, I waive my own opinion, as I concur in thinking that the rule now laid down is a reasonable one.