(1924) 03 CAL CK 0078

Calcutta High Court

Case No: None

Joad Ali		APPELLANT
	Vs	
Raikeshore Saha and Others		RESPONDENT

Date of Decision: March 18, 1924

Citation: AIR 1925 Cal 949 : 85 Ind. Cas. 753

Hon'ble Judges: Mukerji, J

Bench: Division Bench

Judgement

Mukerji, J.

This appeal arises out of a suit instituted by the plaintiff as a co-sharer landlord for recovery of possession from the defendant of a plot of land which the defendant alleges to have purchased from a former tenant of the plain-till'' named Wazuddi. The defence of the defendant is that the holding to which this plot of land appertains was not the holding of Wazuddi alone but belonged to Wazuddi and several others, the same having devolved on them on the death of Wazuddi''s father Asanullah, and that, inasmuch as the other heirs of Asanullah are still living, the sale of the holding by Wazuddi did not operate to transfer the entire holding such as would give the landlord the right of re-entry. It is unnecessary to refer to the other allegations in the pleadings of the parties. The learned Munsif dismissed the plaintiff''s suit being of opinion that it had bean proved that the holding originally belonged to Asanullah, that there were heirs of Asanullah other than Wazuddi, that they bad not abandoned the holding, that the possession which Wazuddi exercised in respect of the holding was one exercised not merely on his own behalf but on behalf of the other co-sharers as well and that by the transfer by Wazuddi in favour of the defendant, the entire holding did not pass. On appeal by the plaintiff, the learned Subordinate Judge came to certain findings which it will be necessary for me to examine more closely presently. In the result, he decreed the plaintiff''s suit. Against that decision the present appeal has been preferred by the defendant.

2. The contentions put forward on behalf of the defendant-appellant are principally two. The first contention is that the learned Subordinate Judge has given the plaintiff a decree upon certain findings of fact which are inconsistent with the case set up by her and the learned Vakil appearing on behalf of the appellant contends that it is not permissible for a Court to make a new case to that which has been put forward in the pleadings of the parties and to pass a decree in favour of the plaintiff thereupon. The second contention is that the findings, which the learned Subordinate Judge has arrived at in the present case, are not sufficient for the purpose of holding that the tenancy of Asanullah has terminated or that the interest of the other heirs of Asanullah in the holding in question has come to an end so as to enable the plaintiff to take possession of the holding.

3. Now, with regard to the first contention, it is a settled proposition of law that Court is not entitled to make a case inconsistent with or different from that which is presented to it on behalf of the parties, and that it is not permissible for a Court to pass a decree in favour of in plaintiff upon the basis of a case which is inconsistent with the case which he himself has put forward. This rule is based upon the question of prejudice and, if in the present case there was anything to show that the defendant had in fact been prejudiced by reason of the learned Subordinate Judge basing his decree upon the findings at which he arrived, I would certainly have held that the decree could not be sustained in law. Furthermore, if it appeared to me on a consideration of the pleadings as set out in the plaint that the case which the lower Appellate Court found was inconsistent with that which was put forward on behalf of the plaintiff, I certainly would have held that the plaintiff was not entitled to a decree on the basis of those findings in support of this contention, reliance has been placed by the learned Vakil appearing on behalf of the appellant upon certain decisions which it will be necessary for me to refer to. The first ease relied upon by him is the case of Eshanchunder Singh v. Shamachuran Bhutto [1866] 11 M.I.A. 7. The Judicial Committee in that case observed that it was incorrect to conclude parties by inferences of fact, not only inconsistent with the allegations in the plaint, constituting the case the defendants had to meet but which were in reality contradictory to the case made by the plaintiff in the Court below. Now applying the principle laid down in that case to the facts of the present case, if upon the facts found by the learned Subordinate Judge it could be said that those facts were inconsistent with the case which the plaintiff put forward, the appellant certainly would have succeeded so far as this contention is concerned. Now, what is the case that was presented in the plaint? It was a plain and simple case to the effect that Wazuddi was the tenant in respect of the holding, that he had transferred the holding to the defendant and that the defendant had not acquired any interest by such transfer and upon that ground relief was sought for in the shape of ejectment. The defendant in the present case set up the plea that, although Wazuddi was the person whose name was recorded in the plaintiff''s sheristha as the tenant of the holding) not only he but other persons also who were his co-sharers were tenants in

respect of the holding, all of them having derived their interest from Asanullah, the father of Wazuddi. This allegation, in my opinion, is not inconsistent with the allegation which the plaintiff has made in the plaint and, if the Court found, as it has done in the present case, that, although Wazuddi was the recorded tenant the original tenant in respect of the holding Was his father and that ha had other heirs who might or might not have acquired an interest in the holding and who were at the date of the suit not co-sharers in respect of this tenancy with Wazuddi, and if, upon those findings, the Court passed a decree in favor of the plaintiff, I am unable to say that those are findings which are inconsistent with the plaintiff''s case. In that view of the matter, I think the first case relied upon by the learned Vakil on behalf of the appellant has no application to the facts of the present case.

4. The next case relied upon by the appellant is the case of Mukhoda Sundary Dasi v. Ram Churan Karmokar [1883] 8 Cal. 871. In that case the learned Judges laid down this proposition of law: " When a plaintiff sues to recover possession of property on the allegation that he had purchased it with his own money, and the suit is dismissed in the Court of first instance, the Court of appeal is not justified in giving the plaintiff a decree for a portion of the property, on the ground that the whole was the property of a joint Hindu family in which the plaintiff was a co-sharer." This proposition of law necessarily follows from the facts which appear to have been the facts of that case. There the plaintiff came to Court with the allegation that certain property had been purchased by himself with his own money. On that ground he claimed to recover possession of the property. He failed to establish that claim in the Court of first instance. In the Court of appeal he relied upon the fact that he was a member of a joint Hindu family and that, as the property belonged to that family he was entitled to a share of it upon the ground that he was a member of that family. This new allegation which he put forward before the Court of appeal, if found, would be the basis of a decree which must in its very essence be a decree of an entirely different character from the one that was sought for originally in the plaint. I, therefore, think that the facts of that case are entirely different from the facts of the present case.

5. The next case relied upon in support of the first contention of the appellant is the case of Shibkristo Sircar v. Abdul Hakeem [1880] 5 Cal. 602. That was a suit on the Original Side of this Court before Wilson, J. The suit had been instituted to recover a specified sum of money for the hire of cargo boats and no other relief was claimed by the plaintiff. The defendant alleged and proved that he was merely the agent of the plaintiff to find hirers for the boats and that he was not liable for the hire of the boats. Upon that the plaintiff sought to amend his plaint by abandoning his own story and adopting that of the defendant and asking relief on that footing. It was held by Mr. Justice Wilson that to allow the plaintiff to adopt the allegations made by the defendant in his written statement would be to make the plaintiff to seek quite a different relief upon a state of fact which would be inconsistent with the facts set forth in the plaint, and that such amendment was not permissible under the law

upon the ground that it would be to the prejudice. of the defendant. This case, therefore, also is not applicable to the facts of the present case.

6. As I have stated above, the difference between the case put forward on behalf of the plaintiff and that put forward on behalf of the defendant is this: Whereas this plaintiff alleged that Wazuddi was the sole tenant in respect of the holding, the case which was found by the Court was that though at the date of the institution of the suit he was the sole tenant, the holding originally belonged to his father from whom ha and possibly some other persons had inherited, but that by subsequent conduct on the part of those heirs Wazuddi alone became entitled to the holding as tenant. What was ultimately found by the Court was what was alleged by the plaintiff in her plaint as being the state of affairs at the time when the cause of action arose and, although the defendant''s story as to the origin of the tenancy and as to other persons being co-sharers with Wazuddi therein was accepted to some extent by the Court, it cannot be said that the findings on those questions are so inconsistent with the plaintiff''s case as would disentitle him to the relief that be has asked for. In my opinion, therefore, there is no substance in the first contention which has been put forward on behalf of the appellant

7. With regard to the second contention, I quite agree with what the learned Vakil appearing on behalf of the appellant has said that the findings of the learned Subordinate Judge ate no very satisfactory. They are scattered and diffused, and it does not seem to me that he has recorded those findings keeping in view the points which it was necessary for him to decide, I have, however, carefully examined those findings in order to see whether they do really dispose of or not the facts found by the Court of first instance, and whether they do in law amount to findings sufficient be enable the Court be award a decree to the plaintiff. Now, the way in which the learned Judge dealt with the matter was this: He held that the tenancy originally belonged to Asanullah that Asanullah left certain heirs along with Wazuddi and that it might be that the other heirs of Asanullah also inherited an interest in the tenancy. He was doubtful whether occupancy holdings were heritable before the Bengal Tenancy At came into operation; but he thought that it was immaterial whether the other heirs of Asanullah acquired a title to the holding by inheritance because he thought that the evidence was that those other heirs had long ceased to cultivate the lands and pay rent to the holding. He observed further that the holding stood abandoned by them, and Wazuddi was regarded as the sole owner of the holding. This last finding of his which has been so ably criticised by the learned Vakil for the appellant), is undoubtedly not sufficient for the purpose of coming to the conclusion that there was abandonment by the other heirs of Asanullah. ft Asanullah had left other hairs, and if they had inherited an interest in the holding, the mere fact that they ceased to cultivate the lands and also ceased to pay rent for the holding while Wazuddi was in occupation of the holding, and was paying rent all the time, would not be sufficient in law to prove that there was abandonment on the part of those other heirs. The learned Judge, however, proceeded to record certain

further findings in respect of this matter. He found that it was proved that Wazuddi was in sole occupation of the holding for more than twelve years, that it was not proved on behalf of the defendant as it was his duty be prove that the other heirs of Wazuddi''s father also inherited the property, that the defendant had also failed to prove that the inheritance opened after the passing of the Bengal Tenancy Act and further that the other heirs of wazuddi''s father had not been proved to have been the tenants of the holding. The learned Vakil appearing on behalf of the appellant urged that it was the duty of the plaintiff to prove that the other heirs of Asanullah did not inherit any interest in the holding or that the other heirs bad abandoned the holding. In that, I am unable to agree with him. The case put forward on behalf of the defendant was not that Wazuddi was in possession of the holding on behalf of himself and the other heirs; for, if that was the case, the sale by Wazuddi alone of the entire holding would operate to the prejudice of the interests of the other heirs as wall, but it was to the effect that the other heirs were living and, therefore, they also had an interest in the holding. If the defendant wanted be show that the other heirs had an interest in the holding notwithstanding that Wazuddi was the ostensible holder thereof-his name being recorded in the zemindari''s sheristha and he himself paying the rent all the time, it was for him to prove that fact and the learned Judge was, in my opinion, perfectly right in holding that in the absence of any evidence on the side of the defendant to show that the other heirs were co-tenants of the holding, it must be taken that it was Wazuddi alone who was the tenant in respect of this holding. Then the learned Judge also took into consideration the presumption which arose from the "Record-of-Rights, there being as entry in the Record-of-Rights to the effect that Wazuddi was the tenant in respect of this holding. Furthermore, the learned Judge, relied upon the fact that the defendant purchased the holding from]Wazuddi by a document in which Wazuddi admitted that the entire holding belonged to him. All these findings, taken together, leave no room for doubt that the learned Subordinate Judge, on a consideration of the facts and circumstances, and the entire evidence in the case came to the conclusion that, although, there were other heirs of Asanullah living, they had no interest whatsoever in the holding and that it was Wazuddi alone who was the tenant) in respect of it. If that was his finding the consequence logically followed that the transfer made by him to the defendant No. I operated to extinguish his rights in the holding and constituted abandonment such as would enable the landlord to re-enter. In this view of the matter I think the second contention put forward on behalf of the appellant by his learned Vakil also fails.

8. The result is that the appeal is dismissed with costs.