
(1935) 07 CAL CK 0022
In the Calcutta High Court

Abdul Rahman Mullick and Others

APPELLANT

Vs

Azahar All Khan

RESPONDENT

Date of Decision : 22-07-1935

Acts Referred:

Bengal Tenancy Act, 1885 — Section 30(b)

Citation : AIR 1935 Cal 733

Hon'ble Judges : R.C. Mitter, J

Bench : Division Bench

Judgement

R.C. Mitter, J.—The plaintiffs who are mutawallis of a wakf created by one Kader Bux in Aswin 1316, have sued the defendant for arrears of rent and also for enhancement of rent under the provisions of Section 30(b), Ben. Ten. Act. The claim for arrears of rent has not been resisted, the defendants only contesting their right to enhance rent. Shortly after creating the wakf by which Kader Bux appointed himself mutawalli, he granted in favour of the defendant a mukarari mourasi lease by a registered document in the month of Magh 1316. It is this lease that has been put up by the defendant against the plaintiff's claim for enhancement. It is not disputed that the plaintiffs have become mutawallis on the death of Kader Bux. The question is whether the lease is binding on the plaintiffs, a question which is complicated by the proceedings of an earlier suit inter partes.

2. That suit was a suit instituted by the plaintiffs against the defendant for khas possession. It was instituted in 1929 and was numbered Title Suit No. 171 of 1929. The plaintiffs alleged therein that the lease granted by Kader Bux to the defendant was not binding on the wakf, being in excess of the powers of a mutawalli and that the defendant was a trespasser on the land after the death of Kader Bux. The defendant resisted the claim for khas possession on two grounds. He maintained: (1) that the said lease was a valid lease and (2) that in any event he having acquired occupancy rights could not be evicted from the lands. The appellate Court held that the lease was invalid, being in excess of the powers

of Kader Bux, as mutawalli, but that the defendant was an occupancy ryot and so could not be evicted from the lands. In this view of the matter that suit was dismissed. There was no further appeal to this Court.

3. The plaintiffs have now sued for enhancement of rent u/s 30(b), Ben. Ten. Act, on the footing that the defendant is an occupancy ryot. They contend that by reason of the final judgment passed in Title Suit No. 171 of 1929, the defendant cannot be heard to say that he is other than an occupancy ryot. The Court of first instance accepted the said contention and granted enhancement. The lower appellate Court has held that it is still open to the defendant to fall back upon the lease granted to him by Kader Bux, and set it up in defence. On the merits it has held that the said lease is binding on the wakf and accordingly has refused the plaintiffs' prayer for enhancement. The whole controversy between the parties is whether the findings in the judgment passed in Title Suit No. 171 of 1929 that the said lease is not binding on the wakf and the defendant is an occupancy ryot only are conclusive between the parties.

4. Before examining the cases which have a bearing on the question it is necessary to have in view the principle of res-judicata as embodied in Section 11, Civil P.C. For the present case that section is enough and the fact that Section 11 is not exhaustive is not material. An examination of the section shows that in order that a finding on an issue in an earlier suit inter partes may be res-judicata in the later suit between them that issue must be (i) a direct and substantial issue and (ii) it must be finally decided. I am not noting the other elements which are all admittedly present here. Having regard to the frame of Suit No. 171 of 1929 and the pleadings therein there cannot be any doubt that the issue as to whether the aforesaid lease granted by Kader Bux was binding on the wakf, and so on the succeeding matwalis, was a direct and substantial issue in the case; but the question is whether it was finally decided therein. In my judgment it was not. The tenant defendant won the suit on the finding that he was an occupancy ryot. The suit would have failed if he had at least an occupancy right. The finding, against which he could not appeal, that the aforesaid lease was invalid, did not sustain the decree made in that suit, for inspite of that finding the plaintiffs' suit was dismissed. For this reason I hold that the decision on that issue was not a final decision, and does not operate as res judicata. The cases on the point when examined, in my judgment, arrange themselves on the two sides of the dividing line on the basis of the principal which I have indicated above. In *Lilabati Misra v. Bishun Chobey* (1907) 6 CLJ 621, Sir Ashutosh Mookerjee stated the principle in the following terms:

We may further point out that an estoppel is not confined to the judgments but extends to all facts involved in it as necessary steps or ground work, and as explained by the learned Judges of the Madras High Court in *Narayanan v. Kannammai* (1905) 28 Mad 338, a judgment operates by way of estoppel as regards all the findings which are essential to sustain the judgment.

5. In *Peary Mohan Mukerjee v. Ambica Charan* (1897) 24 Cal 900, where the

earlier suit for damages for non-removal of certain offensive matter from the defendants' lands had been dismissed on two grounds, namely (1) for non-service of notice u/s 363, Bengal Municipal Act, and (2) on the finding that defendant was under no liability to remove the offensive matter, and the second finding was urged as *res judicata* in a later suit for damages between the same parties, Maclean, C.J., and Banerjee, J., held that it was so. In deciding the question Banerjee, J., analysed the cases where more questions than one arise in a suit and are decided. Referring to cases where all the points in the suit are decided by the Court, but where the result of its decision upon every such question is not embodied in the decree in the form of declarations Banerjee, J., makes the following observation:

Cases of this last mentioned description again subdivide into two classes, in one of which the decree is supported by the decision upon each of the questions determined (and the case we have to consider is one of that description), and in the other it is in spite of the decision upon some of those questions, as for instance, where a suit fails upon the question of limitation, or some preliminary issue, but the question of title is found for the plaintiff.

The case we are dealing with, not being of this latter description, it is not necessary to consider whether the Full Bench decision in *Niamat Khan v. Bhadu Buldia* (1881) 6 Cal 319 is good law, or whether it has been in effect overruled by the Privy Council in *Run Bahadur Singh v. Lucho Koer* (1885) 11 Cal 301, a question which may be taken as settled by the case of *Nandalal Bhattacharjya v. Bidhu Mookhy Debee* (1886) 13 Cal 17 and *Mugandeo v. Mahadeo Singh* (1891) 18 Cal 647.

6. The point so reserved by Banerjee, J., has now been settled by the Judicial Committee of the Privy Council in *Midnapur Zemindary Co., v. Naresh Narayan, Roy* 1922 PC 241. A case of the last mentioned type noticed by Banerjee, J., in *Peary Mohan Mukerjee v. Ambica Charan* (1897) 24 Cal 900 was *Parbati Debi v. Mathura Nath* (1913) 40 Cal 29. There a suit was first brought to enhance rent u/s 30(a), Ben. Ten. Act, of an occupancy tenancy containing undivided shares in parcels of land. In that suit it was held (1) that the plaintiff had the right to enhance rent of such a tenancy, (2) that the rent paid by the defendant was not lower than rent paid by the tenants of adjoining land. On the last finding the suit was dismissed. A second suit was brought to enhance rent u/s 30, Ben. Ten. Act, also and the question was whether the first of the aforesaid finding in the earlier suit operated as *res judicata*. It was held that it did not. In support of the contention that the said finding operated as *res judicata*. *Peary Mohan Mukerjee v. Ambica Charan* (1897) 24 Cal 900 was cited. Sir Ashutosh Mookherjee in dealing with the case made the following observations:

That case however is clearly distinguishable. There it was ruled that when a decision has been based on two grounds, either of which is sufficient to support the decree, the decision upon each of the grounds is conclusive between the parties. Here however the decision upon the question of the right of the plaintiff

to enhance the rent is not the basis of the decree ultimately made. Consequently it cannot be maintained u/s 13, Civil P.C. of 1882, that the question was directed and substantially in issue between the parties or was finally decided.

7. Whether an issue is a direct and substantial issue, in my judgment, would generally have to be determined from the nature of the suit and the form of the pleadings, but certainly, where a case is disposed of in the way as was done in *Parbati Debi v. Mathura Nath* (1913) 40 Cal 29, it can at least be said that the finding on the issue on which the decree is not based (the decree being in spite of and against the natural consequence of the said finding) is a mere expression of opinion by the Court and not a final adjudication between the parties.

8. The case in *Midnapur Zemindary Co., v. Naresh Narayan, Roy* 1922 PC 241, is of the type of *Parbati Debi v. Mathura Nath* (1913) 40 Cal 29, and of the second type mentioned by Banerjee, J., in *Peary Mohan Mukerjee v. Ambica Charan* (1897) 24 Cal 900. There in the earlier suit instituted in 1864 for khas possession by the landlord the defendants had taken two pleas namely: (1) that the suit was premature, and (2) that they were occupancy ryots. The suit was dismissed on the ground that it was premature, but the Court found that the defendants were not occupancy ryots. In the later suit for khas possession the question was whether the finding in the suit of 1864 that the defendants were not occupancy ryots operated as *res judicata*. Lord Dunedin held that it did not. Applying the principles deducible from the decisions I have noted above, my view is that the finding in Title Suit No. 171 of 1929, that the lease granted to the defendant by Kadar Bux was not binding on the wakf estate and on the mutwalis succeeding him is not *res judicata*, By the decree passed therein the said suit for khas possession was dismissed. The decree therefore was not based on the said finding, but in spite of the contrary to its natural consequence. For these reasons I uphold the decree made by "the lower appellate Court and dismiss the appeal with costs.

9. The prayer for leave to appeal u/s 15, Letters Patent, is refused.