

(1961) 07 CAL CK 0019
In the Calcutta High Court
Case No : A.F.A.D. No. 121 of 1959

Anadi Mohon Ghose and Others

APPELLANT

Vs

Rabindra Nath Dutta and Others

RESPONDENT

Date of Decision : 20-07-1961

Acts Referred:

Bengal, North- Western Provinces, Agra and Assam Civil Courts Act, 1887 — Section 8(2)
Civil Procedure Code, 1908 (CPC) — Order 41 Rule 25, 100(1), 24
Evidence Act, 1872 — Section 35

Citation : AIR 1962 Cal 265 : 65 CWN 1165 : (1962) 2 ILR (Cal) 228

Hon'ble Judges : R.S. Bachawat, J;P. Chatterjee, J

Bench : Division Bench

Advocate : P.N. Mitter, Amarendra Mohan Mitra and Arunendra Nath Basu, for the Appellant; Nirmal Chandra Sen and Prafulla Kumar Roy (Jr.) for Respondent Nos. 1-5, for the Respondent

Final Decision : Dismissed

Judgement

Bachawat, J.—This second appeal arises out of a suit for ejectment between landlord and tenant. The appeal raises questions as to the limits of the power of transfer by the District Court u/s 24 of the Code of Civil Procedure, 1908. The second appeal has been referred by the learned single Judge to the Division Bench for disposal.

2. On September 4, 1953 Shri T. M. Mukherji, the First Additional Munsif, Sealdah decreed the suit. On the 24th November, 1953, the tenant preferred from this decree Title Appeal No. 1176 of 1953 to the Court of the District Judge, 24-Paraganas. On the 24th May, 1954 the District Court transferred the appeal to the Court of Sri Mullinath Mukherjee, an Additional District Judge 2nd Special Court of 24-Paraganas. On the 28th May, 1954, Sri Mullinath Mukherjee allowed the appeal, set aside the decree for ejectment and remanded the suit to the Trial Court for a fresh decision after framing an issue on the question of the minority of the plaintiffs Nos. 4 and 5. On the 1st February, 1950, the High Court on

second appeal set aside the judgment of the lower Appellate Court and passed the following directions.

""(The) case (be) sent back on remand for disposing of the appeal according to the procedure laid down in Order 41 Rule 25. When the records reach the lower Appellate Court it should pass an order according to Order 41 Rule 25 and refer the issues set forth below to the Court of first instance and direct that Court to take additional evidence in regard to those issues. After the trial Court has tried the issues, the additional evidence together with the findings of the trial Court thereon will be returned to the lower appellate Court and then the latter Court will dispose of the appeal according to law."

The issues to be so remitted were set out in the order of remand. After receiving the records of the appeal from the High Court, the District Court passed an order dated the 27th March, 1956. transferring the appeal "to the Court of Shri G.S. Chatterjee, 1st Additional District Judge, as Shri M.N. Mukherjee has been transferred from the station." By an order dated the 29th March 1956, Shri G.S. Chatterjee acting under Order 41 Rule 25 C. P. C. remitted the aforesaid issues to the Court of first instance for trial. On the 23rd June, 1958, the Court of the first instance, after faying the issues returned to the appellate Court the evidence together with its findings thereon. By an order dated the 25th June, 1958, the District Court withdrew the appeal to its own file and transferred the same to the Court of Shri Bijayesh Mukherjee, an Additional District Judge designated as the 4th extra. Court 24-Paraganas. On behalf of the tenants it was contended before the Court of Sri Bijoyesh Mukherjee that the District Court was not competent to pass the order of transfer dated the 27th March, 1956, and the 25th June, 1958 and that those orders and the subsequent proceedings are nullities. Sri Bijoyesh Mukherjee repelled this contention and dismissed the appeal. Before us in second appeal the tenants have again pressed that objection. In my opinion the objection is baseless.

3. The power of the District Court to transfer a case u/s 24 C. P. C. 1908 is very wide. By Sub-section (3) of Section 24 the Courts of Additional Judges are deemed to be subordinate to the District Court. The Courts of the Additional Judges, Shri Mallinath Mukherjee, Shri G.S. Chatterjee and Sri Bijoyesh Mukherjee, were competent to dispose of the appeal and were subordinate to the District Court Under Sub-section (1) (a) of Section 24 the District Court may at any stage transfer any appeal pending before it for disposal to any Court subordinate to it and competent to dispose of the same. The order dated the 24th May, 1954, transferring the appeal to the Court of Shri Mallinath Mukherjee was therefore lawful. Under Sub-section (1) (b) of Section 24 the District Court may at any stage withdraw any appeal pending in any Court subordinate to it and transfer the same for disposal to any Court subordinate to it and competent to dispose of the same. Prima facie therefore the District Court would withdraw the appeal pending in the Court of Shri Mallinath Mukherjee and transfer the same to the Court of Shri G. S. Chatterjee and could again withdraw the appeal

pending in the Court of Shri G.S. Chatterjee and transfer the same for disposal to the Court of Shri Bijoyesh Mukherjee. The order of remand -passed by the High Court and dated the 1st February, 1956, did not limit this power. That order remanded the appeal to "the lower appellate Court"" and directed "the lower appellate court" to pass orders under Order 41 Rule 25 C. P. C. and to dispose of the appeal according to law. The expression "the lower appellate court" in that order means the Court authorised to hear the appeal and includes a Court to which the appeal is subsequently transferred for disposal by an order of the District Court u/s 24 C. P. C. The order of remand passed by the High Court did not specifically direct that the appeal must be disposed of only by the Appellate Court which originally heard the appeal and that the District Court would not be at liberty to transfer the appeal to another Court u/s 24 C. p. C. In the absence of any direction express or implied in the order of remand limiting the power of the District Court u/s 24 C. P. C. to transfer the case, the District Court may in exercise of its powers under that section transfer to another Court a suit remanded to the District Court for re-trial : see *Protap Chandra Roy v. Judhister Das* 19 Cal LJ 408 : (AIR 1914 Cal 638), *Pandohi and Another Vs. Sheo Bharos and Others*, *Valiakath Kunhi Seethi Koya Thangal Vs. Kizekkitathi Kovilakath Ravi Varma alias Veera Varma Raja Avergal and Others*, , *K. Seshagiri Rao v. K. Somasundaram* AIR 1949 Mad 65 : ILR (1949) Mad 94 as also an appeal remanded by the High Court to the District Court, see *Venkatiah v. Chirrana* AIR 1915 Mad 446 (2), *Rajkali and Another Vs. Gopi Nath Naik*, . In *Pran Krishna Shaini v. Kunja Behari Das* 9 Cal LJ 572 it was held that the District Judge in exercise of his powers u/s 22 of the Bengal and North Western Provinces Civil Courts Act (XII of 1827) was competent to transfer to a subordinate Judge an appeal which had been originally heard by the District Judge and which had been remanded by the High Court to the lower appellate Court for disposal after re-hearing. There can be no doubt therefore that in spite of the order of remand made by the High Court the District Court was fully competent to pass the order of transfer dated the 27th March, 1956.

4. The question stall remains whether the District Court was competent to pass the second order of transfer dated the 25th June 1958. In *Udit Narain Singh v. Jhanda* ILR 15 All 315, a case governed by the CPC of 1882 the Allahabad High Court held that where the Appellate Court has made an order of reference u/s 566 of the Code of 1882 corresponding to Order 41 Rule 25 of the Code of 1908 the return to such order must be made to the same court and that such court was not competent to transfer the appeal for disposal elsewhere. In that case the Allahabad High Court construed the expression "the Appellate Court" in Section 566 and 567 of the Code of 1882 as meaning only the Appellate Court which had referred the issues for trial to the court of first instance. I am not disposed to give the same construction to the expression "the Appellate Court"" in Rules 25 and 26 of Order 41 of the Code of Civil Procedure, 1908. In my opinion "the Appellate Court" means the Court authorised to hear the appeal. If subsequent to the order of the Appellate Court remitting the issues for trial to the Trial Court,

the appeal has been transferred to another court by an order of the District Court the return of the Trial Court may be filed in the Court which is authorised to hear the appeal by the order of transfer and the memorandum of objections to the findings of the Trial Court may also be filed in such Court. The power of the District Court u/s 24 C. P. C. 1908 to transfer the appeal may be exercised at any stage and is in no way fettered by the fact that the Appellate Court has framed issues and referred them for trial court under Order 41 Rule 25 C. P. C. nor by the fact that the Trial Court has returned its findings to the Appellate Court. It is no doubt a wholesome principle that the Court which considers it necessary to refer the issues for trial under Order 41 Rule 25 C. p. C. should normally be the Court to dispose of the case on the return and the District Court should not lightly transfer the appeal in such a case. This principle touches the question of the propriety of the order of transfer and not of its vires. The District Court was therefore competent to pass the order of transfer dated the 25th June, 1958. Besides the error, defect or irregularity, if any, in the order did not affect the merits of the case and is not a ground for reversing the decree appealed from. The objections to the orders of transfer dated the 27th March 1956 and the 25th June 1958 are therefore rejected.

5. The appellants urged before us two other subsidiary points. The plaintiffs Nos. 4 and 5 had instituted the suit as majors. One of the points in the case is whether they were minors on the date of the institution of the suit. The Appellate Court has held that they were majors on that date. In arriving at this finding of fact it relied upon the statements as to their age contained in the Matriculation Certificates issued in their favour by the Calcutta University. It is contended that those certificates are not admissible in evidence. This contention must be rejected. In *Hrishikesh Banerjee and Others Vs. Sushil Chandra Moulik*, at p. 214 a Bench of this Court held that those certificates are admissible u/s 35 of the Indian Evidence Act. This Bench is bound by the decision. The appellant also contended that the Appellate Court should have decreed partial eviction. This contention also is baseless. The Appellate Court has clearly found that nothing short of the entire accommodation of the premises from which the tenants are sought to be evicted can substantially meet the reasonable requirement of the landlord. The finding is not vitiated by any error of law.

6. No other contention was urged in this Court.

7. There is no merit in this appeal. I propose that the appeal be, and is hereby dismissed. There will be no order as to costs.

8. The appellants will have three months" time to vacate the premises in suit. The respondents will be at liberty to execute the decree for khas possession on the expiry of three months from to-day.

Chatterjee, J.

9. I agree with my Lord that on the question of transfer there was nothing irregular in the case and the District Judge had jurisdiction to transfer or

retransfer the case. Apart from that, I would consider the case from another point of view. It was Mr. Mitter's case that it was a transfer within the meaning of Section 24 of the Code of Civil Procedure, whereas Mr. Sen's case was that it was merely an assignment of business within the meaning of Section 8 (2) of the Bengal, Agra and Assam Civil Courts Act, 1887. I consider this aspect of the matter.

10. At one time there was some doubt in our High Court as to whether Section 8 (2) of the Bengal, Agra and Assam Civil Courts Act, 1887, refers to assignment of the business of the District Judge or to assignment of a particular case. It was held by one Bench that it only related to assignment of the entire business of the District Judge's Court another Bench came to a contradictory conclusion and the result was that the matter was referred to a Full Bench. The decision of the Full Bench is reported in *Rup Kishore Lal v. Neman Bibi*, I. L. R. 42 Cal 842 : (AIR 1916 Cal 561). There it was held that the District Judge had powers to assign any single case from his file to the file of any Additional District Judge.

11. While considering the meaning of the same word "assign" in Section 13 (2) of the Bengal, Agra and Assam Civil Courts Act, 1887, a series of Division Bench cases of our High Court held that the assignment u/s 13 (2) of the Bengal, Agra and Assam Civil Courts Act, 1887, was not the same thing as a transfer of business within the meaning of Section 150 of the Code of Civil Procedure. The distinction that they found is that in a case of assignment the original Court i. e. the Court where the case was instituted, had still jurisdiction over the case even in spite of such assignment. Here the appeal was filed before the District Judge. So though the District Judge assigned the case to an Additional District Judge, he will have, however, jurisdiction over the matter.

12. The last decision on the point is *Masrab Khan Vs. Debnath Mali alias Abhu Mali and Others*, . The same case is I. L. R. (1942) 1 WN 289--a judgment of B.K. Mukherjee, J. sitting with Biswas, J. The point for decision there was certainly a different one viz. the powers of the executing Court in question to execute a decree but they considered the effect of assignment; the same word "assign" appears in Section 13(2) of the Bengal Agra and Assam Civil Courts Act, 1887, as well as in Section 8 (2) of the Act. Therefore the same word "assign" must be understood in the same sense in the same statute though used at different places. Refer *K.N. Guruswamy Vs. The State of Mysore and Others*, . The result is that as there is nothing to indicate the contrary, the meaning of the word "assign" u/s 8 (2) of the Bengal, Agra and Assam Civil Courts Act 1887, is the same as in Section 13(2) of the same Act and that means that the District Judge merely distributes the case as a matter of convenience and as matter of expediency and even after such distribution the District Judge had still jurisdiction over the matter. If this is the position, then there is no doubt that the District Judge could assign this particular case to an Additional District Judge after the case came back from the High Court and then, when the file of Mr. Bejoyesh Mukherjee another Additional District Judge, required assignment of

some other business, if he had assigned this case to him, there was nothing irregular and nothing illegal in it. He had complete powers to do that. I, therefore hold in agreement with my learned brother that on the basis of assignment u/s 8 (2) of the Act as well, the District Judge had ample powers to assign it first to Mr. G.S. Chatterjee, and then to withdraw it from his file and send it to the file of Mr. Bejoyesh Mukherjee both of whom were Additional District Judges of Alipore.

13. I believe, the case can be considered from a third point of view and that is this : The appeal was filed before the District Judge and the District Judge had complete jurisdiction over it. The appeal was properly instituted in a Court competent to hear the appeal. Thereafter when it was sent to Mr. G.S. Chatterjee, he had the same powers and functions as the District Judge. He had jurisdiction to hear the appeal and there was no want of jurisdiction. He had complete jurisdiction to send the case to the Trial Court under Order 41 Rule 25 of the Code. Similarly, when Mr. Bejoyesh Mukherjee heard the appeal as an Additional District Judge of Alipore, apart" from anything else he had jurisdiction to decide the matter finally. Supposing that the order of transfer was an irregular order, that would not affect the inherent jurisdiction of the Additional District Judge to hear the appeal nor would affect the decision of the case on merits. Here, there is no and there cannot be any of question of inherent lack of jurisdiction of any of the Courts of Additional District Judges to hear the appeal. Both the Additional District Judges were completely and had sufficient jurisdiction to hear appeal and if One of them heard the appeal, there was nothing wrong so far as jurisdiction of the Court is concerned. Even if the case was not regularly transferred to him that would be an irregularity not affecting the merits of the case and would, therefore, not come u/s 100(c)(1) of the Code of Civil procedure.

14. I do not propose to consider the aspect of transfer as my Lord has considered the matter in details and agree not merely with his conclusions but with the reasons given by my Lord.

15. The result is that I agree with the order proposed.