

(1916) 01 CAL CK 0039
In the Calcutta High Court

Choudhury Bhagaban Mahapatra and Another APPELLANT
Vs
Palturam Singh and Another RESPONDENT

Date of Decision : 06-01-1916

Acts Referred:

Bengal Tenancy Act, 1885 — Section 113
Civil Procedure Code, 1908 (CPC) — Order 41 Rule 20

Citation : 32 Ind. Cas. 749

Hon'ble Judges : Mullick, J;Chapman, J

Bench : Division Bench

Judgement

1. These two appeals arise out of two suits, which were tried together. The first suit out of which Appeal No. 1108 of 1913 arises, was instituted by the landlords for rent at the rate of Rs. 48 odd. The second suit which has given rise to Appeal No. 1109 of 1913, was a suit brought by the tenants asking for a declaration that the rental was Rs. 14 and that the entry in the Record-of-Rights to the effect that the rental was Rs. 48 odd was incorrect. The landlords succeeded in both suits in the first Court. In appeal the learned District Judge has held that the rental is Rs. 14 as alleged by the tenants and not Rs. 48 odd as alleged by the landlords and has decided the two suits accordingly. The landlords now appeal to this Court.

2. It appears that at the Orissa Settlement, the rental was recorded as Rs. 14 in or about the year 1897. In the year 1905, a proceeding was instituted in the Collectorate by the landlords asking for the creation of a rental of Rs. 48 odd with effect from the ensuing year. The tenants appeared in that proceeding; but the final decision was made ex parte in favour of the landlords, the decision being to the effect that from the following year the rental should be at the rate of Rs. 48 odd. Thereafter a suit was instituted by the tenants to set aside this decree upon the ground of fraud. This suit failed. In 1910-1911, the landlords instituted a suit for rent at the rate of Rs. 48 odd but succeeded in obtaining a decree at the rate of Rs. 14 only and this decision was upheld in appeal. At the recent Provincial Settlement, the rental was entered as Rs. 48 odd. From these facts the learned District Judge has drawn the conclusion that the rental is Rs. 14

and not Rs. 48 odd. His judgment has been assailed by the landlords-appellants mainly upon the ground that the learned District Judge has fallen into an error in the view he has taken of the decree of 1905, which created a rental of Rs. 48 odd from the ensuing year. Shortly stated the ground on which the learned District Judge has refused to give any effect to that decree is that that decree involved an illegal enhancement, being an enhancement from Rs. 14 to Rs. 48 odd within fifteen years from the settlement. In taking that view, the learned District Judge fell into an error. The rental appears to have been settled by that decree with reference to the prevailing rate and a settlement with reference to the prevailing rate is not illegal merely for the reason that it involves an enhancement of more than two annas in the rupee. There is no limit to the amount of enhancement which can be effected on the ground of prevailing rate. As regards the period of fifteen years from the date on which Rs. 14 was entered at the Provincial Settlement as the rent payable, we are not satisfied that the learned District Judge really directed his mind to the, essential question, whether that entry of Rs. 14 was merely an entry declaring the existing rate or whether it was an entry resulting from a settlement of rent. Under the law as it stood when the Provincial Settlement was made, a settlement of rent could only have been effected upon the ground of difference in area or upon the application of the landlord or of the tenant. No reference to these matters appears to have been made by the learned District Judge and this makes it clear that he did not direct his mind to the point. The importance of the matter is this that if the entry of Rs. 14 was merely an entry of the existing rate, then there was no bar to a proceeding for settlement within fifteen years. It is only if the entry resulted from an actual settlement of rent that the bar of fifteen years u/s 113 of the Bengal Tenancy Act would be applicable. The learned District Judge has also somewhat confused the question of the importance of the decree of 1905 by taking it as a question of *res judicata*. It was really a decree creating a new relationship between the landlord and the tenant and the question was, whether the Revenue Officer who made that decree had the power to make it and whether he did, in fact, make it and whether the effect of that decree had subsequently been modified. There is another matter as to which there is some confusion, and as the documents are not before us, we have not been able to elucidate it. The Revenue Officer who tried the tenants' suit states in his judgment that the decree for rent, which is the latest in date, is in favour of the landlords. No reference is made to this decree in the judgment of the learned District Judge in the case brought by the tenants; but, in his judgment in appeal in the suit brought by the landlords, he appears to say that the latest decree is adverse to the landlords' case. This is a matter which requires clearing up and will have to be considered by the learned District Judge when the case is remanded to him.

3. In the suit brought by the tenants (Suit No. 298 of 1911-12), there was a mistake in the memorandum of appeal (Special Appeal No. 133 of 1912) to the District Judge. The landlords, defendants in that suit, were named as Bhagawan, Trilochan and Narahari; but in the memorandum of appeal by the tenants to the

District Judge, the respondents were named as Bhagawan, Parasuram and Narahari. The defendant Trilochan's name was omitted and, in the place of that name, the name Parasuram was given, Parasuram who is now dead being the father of Trilochan. This mistake was not noticed by either party or by the Court during the hearing of these appeals by the learned District Judge. It would seem, therefore, that Trilochan was not affected by the adverse decision of the learned District Judge in appeal. Trilochan, however, did join Bhagawan and Narahari in the appeal to this Court, although subsequent to the filing of the appeal a Rule was obtained on the tenants to show cause why his name should not be removed upon the ground that he was not bound by the adverse decision of the learned District Judge. The argument of the landlords now is that the tenants' appeal to the learned District Judge should stand dismissed upon the ground of non-joinder of Trilochan.. Upon the law as it stood before the recent amendment of the Code of Civil Procedure, the non-joinder of Trilochan would have been fatal to the appeal; but we feel pressed by the recent amendments of the Code which have been directed to the avoidance, if possible, of the defeat of litigation merely upon the ground of non-joinder. Our consideration of the case upon the law has led us to the conclusion that there must be a remand to the learned District Judge; and, as there has to be a remand and as this point was not taken at the first hearing before the District Judge, we think it desirable that the learned District Judge, on remand, should consider whether Trilochan cannot now be added as a party under Order XLI, Rule 20, of the Schedule to the CPC so that an adjudication may be come to between the parties. We accordingly set aside the judgment and decree of the learned District Judge in the tenants' suit (Special Appeal No. 183 of 1912) and direct the learned Judge to consider whether he cannot under Order XLI, Rule 20, Civil Procedure Code, now add Trilochan as a party to the tenants' appeal. We say nothing in regard to the application of the law of limitation or any other law which may prevent such a course being taken. If Trilochan cannot be added, then the tenants' appeal must stand dismissed. If Trilochan can be added, the learned District Judge will proceed to dispose of the tenants' appeal in the light of the remarks we have made. The judgment of the learned District Judge in the landlords' suit (Rent Appeal No. 26 of 1912) is a judgment which depends entirely upon the decision of the tenants' suit. As this judgment in the tenants' suit has been set aside and the said case has been remanded, it is necessary now for us to set aside the judgment and decree of the learned District Judge in Rent Appeal No. 26 of 1912 also and direct him to decide that appeal afresh after deciding the analogous appeal arising out of the suit by the tenants (Special Appeal No. 133 of 1912).

4. Costs of both cases will abide the result.

Rule No. 767.

5. This Rule is discharged. We make no order as to costs.