

(1873) 04 CAL CK 0001

In the Calcutta High Court

Case No : Special Appeals Nos. 1035 and 1036 of 1870

Chunder Coomar Mundul and Another

APPELLANT

Vs

Nunnee Khanum and Others

RESPONDENT

Date of Decision : 01-04-1873

Acts Referred:

Citation : (1873) 04 CAL CK 0001

Judgement

Sir Richard Couch, Kt., C.J.—The case illustrates the defects of the present system of special appeal. There is a very strong probability, to say the least, that, if the Judge had determined the question whether the potta is genuine, he would have found it to be so; and that, if this Court had power to decide the question of fact, it would find to; but the special appeal is brought for an error in law in holding that the previous decision is conclusive. The Division Court has been unable to come to a decision upon this question, and the Full Bench has to decide it under a better procedure, the case would be decided on its merits, and this question would most probably be an immaterial one. It must, however, now be answered. The rule applicable to it is laid down in The Duchess of Kingston's case (4):--first, that the judgment of a Court of concurrent jurisdiction, directly upon the point is, as a plea, a bar, or as evidence, conclusive, between the same parties upon the same matter, directly in question in another Court; secondly, that the judgment of a Court of exclusive jurisdiction, directly upon the point, is, in like manner, conclusive upon the same matter, between the same parties, coming incidentally in question in another Court for a different purpose. Mitter, J., in his judgment, after calling this an estoppel, says:--"The late learned Chief Justice of this Court seems to have thrown considerable doubts upon the propriety of introducing the doctrine of estoppel in this country, in the judgment delivered by him in the case of Mussamut Edun v. Mussamut Bechun 8 W.R., 175. That doctrine, it was observed, is one peculiar to the law of England. It is intimately connected with the English law of pleadings which has no existence in our Courts, and as its tendency is to shut out the truth, it may well be doubted whether those Courts, which are by their very constitution Courts of equity and

good conscience, would be justified in adopting a doctrine which has such a tendency." These remarks oblige me to quote from the judgment of the Judicial Committee in *Khugowlee Sing v. Hossein Bux Khan* 7 B.L.R., 673, at p. 678. After quoting the well-known passage from *The Duchess of Kingston's case* 2 Smith's L.C., 6th edit., 679 their Lordships say:--"There is nothing technical or peculiar to the law of England in the rule as so stated. It was recognized by the Civil law, and it is perfectly consistent with the second section of the Code of Procedure under which the case was tried, which says: (reads)." I have carefully read the report of the case of *Mussamut Edun v. Mussamut Bechun* 8 W.R., 175, and I have not found it anywhere stated that the doctrine "is one peculiar to the law of England." Upon the remark that it is intimately connected with the English law of pleadings (meaning, I presume, common-law pleadings), and that it may well be doubted whether our Courts would be justified in adopting it, I will only observe that the English Courts of equity have adopted it, as may be seen in *Barrs v. Jackson* 1 Phil., 582; S.C. in Court below, 1 Y. & C., Ch. R., 585. Vice-Chancellor Knight Bruce, in his judgment in that case, quotes various passages from the Civil law, showing the reason of the rule. That the judgment of a Court of competent jurisdiction upon a question directly raised before it shall be accepted between the parties to the suit as true, seems to me to be a rule which should be adopted in our Courts. S. 23 of Act X of 1859 gave jurisdiction to the Collectors in certain suits, and amongst them, by cl. 6, in all suits to recover the occupancy or possession of any land, farm, or tenure, from which a ryot, farmer, or tenant, has been illegally ejected by the person entitled to receive rent for the same. Mr. Woodroffe, who appeared for the appellants, relied upon the decision of a Full Bench in the case of *Gooroodoss Roy v. Ramnarain Mitter* B.L.R., Sup. 628, and also argued that "illegally ejected" means ejected otherwise than by due form of law. In the Full Bench case, the Chief Justice, delivering judgment, said:--"We think that the words "suits to recover the occupancy or possession of any land," &c., in cl. 6, s. 23 of Act X of 1859, refer only to possessory actions against the person entitled to receive the rent, and not to suits in which the plaintiff sets out his title, and seeks to have his right declared and possession given him in pursuance of that title." Backer Ali's suit was to recover possession, and he alleged that he had been dispossessed by the plaintiffs by proceedings taken in execution of a decree against another person, which would be clearly illegal. I have no doubt that it was a suit within cl. 6 of s. 23; and as the plaintiff alleged that he held under a murasli lease, it was necessary for the Deputy Collector to determine whether the lease was genuine. I must here observe that concurrent jurisdiction in my opinion refers to the matter decided upon, and it is not necessary, as Mitter, J., seems to think, that the Court whose judgment is to be conclusive should have been able to entertain the suit in which it is to be used. If it were so, a person who had sued another in the Small Cause Court of Calcutta for a debt, and obtained a judgment, could not use it in a suit in the High Court against the same person as proof that the latter was indebted to him, if the suit in the High Court was of such a nature as not to be cognizable by the Small Cause Court.

2. It appears to me that the question referred to us must be determined by considering what the point upon which the judgment in the suit before the Deputy Collector was given was. The suit was to recover possession of land from which a tenant had been illegally ejected. The Deputy Collector had to determine two questions:--Was the plaintiff a tenant of the land? Had he been illegally ejected by the person entitled to receive rent for it? To determine the first of these it was necessary for him to find whether the alleged lease was genuine: but the real judgment in the suit was that the plaintiff was a tenant, the potta being the proof of it. The Deputy Collector had no jurisdiction to give effect to the potta as a permanent title; he could only use it as showing that, at that time, the plaintiff had a right to the possession of the land. It was laid down by Lord Ellenborough in *Outram v. Morewood* 3 East., 357 that a judgment is final only for its own proper purpose and object, and no other. The suit now before the Court is against the heirs of Backer Ali, whose case is that he had a maurasi potta; but the Deputy Collector had not power in the suit before him to adjudge that the tenancy was hereditary, and if his judgment is to be taken as being directly on that point, his is not a Court of concurrent jurisdiction. His finding upon the potta, except so far as it established the right of Backer Ali to the possession of the land when he was ejected, must be considered a finding upon a collateral matter.

3. In my opinion, therefore, the question referred ought to be answered in the negative.

Jackson, J.

4. I desire only to say that I do not dissent from the conclusion arrived at in the judgment which has just been delivered. The inclination of my own mind has been, as the observations which I made in referring the case would show, in the other direction, and I confess that I have not yet felt sufficiently confirmed in the opinion which is now that of the majority of the Court to state it in language of express assent.

Phear, J.

5. This case is so nearly parallel with the case of *Mussamut Edun v. Mussamut Bechun* 8 W.R., 175, that the reasons which I then gave for my judgment would, by the substitution of the word "potta" for "bond," serve to explain almost precisely the view which I take on the present occasion.

6. The cause of action upon which the present plaintiffs sue is that the defendants are wrongfully in possession of the plaintiffs' land, and are wrongfully withholding it from them. The answer of the defendants is that they are holding the land under a potta which is maurasi in its terms, and was granted to them by the plaintiffs. Thereupon the plaintiffs wholly deny the genuineness of the alleged potta, and require that an issue on this point be raised and tried between them and the defendants. The defendants maintain that this cannot be done, because an issue as to the genuineness of this very document was raised

between them and the present plaintiffs in a former suit, which was brought in a Court competent to decide the issue, and that it was then determined against the present plaintiffs. It is admitted by the plaintiffs that this was so, and the question before us is whether or not in view of the former determination of the issue, the same issue can now be raised and tried a second time between the same parties.

7. It appears that the former suit, which is referred to, was a suit in the Collector's Court, wherein the relative situation of the parties was reversed; the ancestor of the present defendants, namely, Backer Ali, sued the present plaintiffs, the Munduls, alleging that he was entitled to possession of the land (which is now the subject of suit) as their tenant under the potta now in question, and that they had illegally ejected him; on this ground he sought the aid of the Collector to restore him to possession. The Munduls denied the genuineness of the potta: the question thus raised, whether or not the potta was genuine, was decided against them, and the Collector gave Backer Ali possession.

8. Now it must be observed at the outset that the Collector's Court was a Court of limited jurisdiction, and that it had no power to determine between the parties a question of right to the land larger than the bare right to possession. It so happened that the plaintiff's right to possession, as he alleged it, was clothed with murasid incidents, but the Collector's Court had no authority to determine whether such incidents existed or not; and indeed it is for this very reason that the Munduls are undoubtedly entitled, notwithstanding the Collector's decision against them in the former suit, to come into the Civil Court to have the question as to the murasid right tried in the present suit. If they are here to be successfully met with the objection that the Collector has already finally determined the question of the validity of the potta, then, it is obvious, the result is that the Collector has indirectly, if not directly, determined a question between the parties which was beyond his powers, and has in effect ousted the Court of superior jurisdiction; for the latter will have nothing left to it, but to, in effect, register the Collector's decision. This clearly cannot be right. And the explanation is to my mind furnished by the discussion of the matter, which I offered in *Mussamut Edun v. Mussamut Bechun* 8 W.R., 175. I will not now go over the same ground again. I will simply confine myself to saying very shortly that I think the decision of the Collector upon the issue which is now before the Court, although he was unquestionably competent to try that issue for the purposes of the suit before him, did not effect a *res adjudicata* between the parties for all other purposes, and this for both the reasons given by Sir W.D. Grey in *The Duchess of Kingston's case* 2 Smith's L.C., 6th edit., 679; first, the Collector had not concurrent jurisdiction with the Civil Court to the full extent of the matter involved in that issue; second, the issue as to the execution and authenticity of the potta was a question of evidence collateral to the matter which the Collector had to determine.

9. I will add that, while it is no doubt most important in this country, as in every

other, to give as much finality as possible to judicial determination of matters of dispute between parties, it is specially necessary, in view of the inefficiency very generally displayed by our Indian Courts in the investigation and ascertainment of facts, that we should be watchful not to shut out a litigant, without good reason, from an opportunity of showing the truth of his case.

10. I think the question put to us should be answered in the negative.

Markby, J.

11. In this case I also would answer the question put in the negative; but I base my opinion entirely upon the peculiar character of the Court in which the former suit was tried. It was a Court the jurisdiction of which is defined by s. 23 of Act X of 1859. In some of the suits enumerated in that section, it is obvious that questions of title must sometimes arise; and it also appears from s. 103 that the Legislature contemplated that these questions would arise, and made special provisions in case they should arise, that an appeal should lie to the ordinary Civil Court. It might, therefore, have been thought that the Legislature considered that questions of title could be finally adjudicated upon by suits instituted in these Courts. But the Privy Council have held, in the case of *Khugowlee Sing v. Hossein Bux Khan* 7 B.L.R., 673, that the decision of a Collector in such a Court upon a question of title in a suit brought under cl. 2 of s. 23 of Act X of 1859 is not a decision of a Court competent to adjudicate on a question of title. It is true that this is only one of the reasons given for not treating the Collector's decision as conclusive in that case. It is true also that the suit which the Collector had tried in that case was for rent under s. 2, whereas this was to recover possession under cl. 6. But the expression of opinion as to the competency of the Collector is clear and distinct, and is in accordance with the opinions of high authority which have been expressed in this Court, as is shown in the judgment of Mitter, J. Nor is it possible to say that the Court which is incompetent to adjudicate upon questions of title in a suit for rent, is competent to do so in a suit for possession. The ground of incompetency of these Courts, as pointed out by the Privy Council, is the special and summary character of their jurisdiction. Upon these grounds, I answer the question put in the negative.