

(1907) 08 CAL CK 0008
In the Calcutta High Court

Gobinda Sundar Sinha Chowdhury

APPELLANT

Vs

Sri Krishna Chakravarti and Others

RESPONDENT

Date of Decision : 12-08-1907

Acts Referred:

Citation : 3 Ind. Cas. 346

Hon'ble Judges : Vincent, J; Mookerjee, J

Bench : Division Bench

Judgement

1. This is an appeal on behalf of the plaintiff in an action for rent of putni tenure for the year 1311 and the first instalment of the year 1312. The defendants Nos. 2 to, 5 originally held the putni which was created on the 6th May 1896. On the 20th March 1901 the first defendant and his brother, Bijoy Krishna now deceased purchased, the putni from, the other defendants. They did their best to have their purchase recognized by the plaintiff and repeatedly tendered the rent as it fell due, instalment by instalment. The plaintiff, however, refused to recognize the transfer and on the 23rd April 1904 commenced an action for rent against the recorded tenants for arrears in respect of the years 1307 to 1310. It appears from an examination of the original plaint in this suit that the name of the purchaser was added as that of a party defendant and the body of the plaint contained a recital that he claimed to have acquired an interest in the putni from the original holders thereof. For some reason not explained the name of the transferee as also the reference to his purchase was crossed out before the plaint was filed. On the 3rd June 1904 the written statement was filed in that suit which was defended by the recorded tenants substantially on the ground that they were not liable for any portion of the rent, the whole of which accrued due after the transfer in favour of the present first defendant and his brother. The defendants, however, did not appear at the trial, and on the 7th June 1904 an ex-parte decree was made in favour of the plaintiff for the arrears due as also for interest and costs. The plaintiff subsequently executed this decree and purchased the tenure on the 17th July 1905. The sale was confirmed on the 19th August, and he obtained delivery of possession through the Court on the 14th September

following. On the 18th March 1907, the plaintiff commenced the present action against the first defendant as purchaser as also against the other defendant as original tenants for recovery of the rent which had fallen due between the date of the institution of the previous suit and the sale in execution of the decree made thereunder. In the plaint the plaintiff treated the first defendant as purchaser of the tenure who had acquired a valid title by the transfer and was liable for rent. He also claimed a joint decree against all the defendants if the Court should think proper to pass such a decree. The claim was resisted by the first defendant alone, substantially on the ground that the plaintiff, in view of his previous conduct and the position taken by him in the earlier litigation, could not seek to make him liable for the rent and that as he had been compelled to abandon possession of the tenure, he could not in justice be held liable for any portion of the rent. The learned District Judge has given effect to this defence and has dismissed the suit.

2. On appeal to this Court the decision of the District Judge has been assailed on three grounds, namely, first, that the first defendant was in law the purchaser of the tenure and was consequently liable for the rent, secondly, that the original tenants were liable for rent jointly and severally with their transferee, and, thirdly, that in any view of the matter, the plaintiff was entitled to damages for use and occupation.

3. In support of the first ground taken on behalf of the appellant, it has been contended that the putni was transferable, that the effect of the sale by the original tenants to the first defendant was to vest in him the tenancy right, and that consequently he was liable for the rent which accrued due between the date of the institution of the prior suit and the sale in execution of the decree made thereunder. In answer to this argument, it has been contended by the learned Vakil for the respondent that the plaintiff had deliberately taken up the position that the transferee had not acquired a valid title by his purchase, that he had omitted to make him a party to the previous suit for rent and had thus rendered it impossible for Mm to take a valid defence to the previous claim, that the defendant had been seriously prejudiced and had, in fact, lost the tenure and that consequently it was not open to the plaintiff now to take up an entirely inconsistent position and to seek to impose any liability for rent upon the defendant. In our opinion, the view, put forward on behalf of the respondent, is well-founded and must prevail. There can be no room for controversy that the transfer by the original tenant in favour of the first defendant was perfectly valid in law and that the refusal of the plaintiff to recognize the transferee was entirely indefensible. The learned District Judge has pointed out that there was no default on the part of the defendant, that he earnestly endeavoured to secure recognition from the plaintiff, and that he repeatedly tendered the rent instalment by instalment as it fell due, and was met with a persistent refusal on the part of the plaintiff. It may be conceded, as observed by the learned District Judge, that the position of the first defendant might have been different, if the plaintiff had demanded, u/s 6 of Regulation VIII of 1819, substantial security

from the purchaser and if he had failed to furnish such security. No question of security, however, was raised and we must take it as conclusively established that the plaintiff without any justification refused to treat the purchaser as his tenant and deliberately omitted to implead him as a party in the suit for rent, the whole of which had accrued due after the transfer and was payable by the transferee. The question, therefore, arises whether the plaintiff is now entitled to resile from the position which he took up in the previous suit. There is no room for reasonable doubt that the first defendant has been seriously prejudiced by the conduct of the plaintiff. If he had been made a party defendant to the earlier suit, as we hold he was entitled to be made, it would have been open to him to plead that the rent had been tendered instalment by instalment as it fell due and upon proof of such tender the claim for interest would have been disallowed, for as pointed out in the cases of *Jagat Tarini Dad v. Naba Gopal Ghaki* 34 C. 305 : 5 C.L.J. 270 and *Kripa Sindhu Mukerji v. Annada Sundari Debt* 6 C.L.J. 273 : 11 C.W.N. 983 the improper refusal of a valid tender does not extinguish the indebtedness but, when the tender is lawfully made and maintained, it discharges the debtor from the liability for interest subsequent to the tender. It is further manifest that if the defendant had been allowed to establish the plea of tender in the previous suit, the plaintiff would not only have not recovered costs as against him but the latter would have been allowed his costs, because as observed in the cases of *Dixon v. Clark* (1848) 5 C.B. 365 : 75 R.R. 747 and *Griffiths v. Ystradyfodwg School Board* (1890) 24 Q.B.D. 307 if the plaintiff cannot disprove the plea of tender, it is right that he should pay the costs, as the action ought not to have been brought. It is manifest, therefore, that by reason of the deliberate omission to make the defendant a party to the previous suit, the plaintiff managed to throw upon the tenure the burden of a larger sum than he would otherwise have been in a position to do. It is also fairly clear that as the defendant was not a party to the decree which was made against the tenure, he could not satisfy the decree so as to save the property to which, as the plaintiff now concedes, he had acquired a valid title by purchase. Under these circumstances, the question arises, whether it is open to the plaintiff to take up a position entirely inconsistent with what he had assumed in the previous litigation. In our opinion, the answer ought to be in the negative. It was pointed out by this Court in the case of *Bhaja Chowdhury v. Chuni Lal Marwari* 5 C.L.J. 95 : 11 C.W.N. 284 that litigants should not be allowed to assume inconsistent positions in Court, to play fast and loose, to blow hot and cold; having elected to adopt a certain course of action, they should be confined to that course." To the same effect is the observation in *Manindra Chandra Nandi v. The Secretary of State for India in Council* 5 C.L.J. 148 at p. 169 : 34 C. 257, where it was pointed out : "if a litigant has without mistake induced by the opposite party taken a particular position in the course of a litigation, he must act consistently with it, especially if to allow him to do otherwise would be to prejudice his opponent." Again, as was ruled in *Thomas Barclay v. Sped Hossein Alt Khan* 6 C.L.J. 601 at p. 607 "parties are estopped from denying their own statement, when the denial operates to the injury of another and when their conduct did influence the

position of that person. This doctrine of estoppel when properly understood and applied shuts out the truth in order to prevent fraud and falsehood, and imposes silence upon the party who, in conscience and honesty, should not be allowed to speak. There can be no question that an estoppel may be set up as a means to prevent injustice and if the circumstances are appropriate, the estoppel will be so moulded as to prevent fraud and injustice in whatever form it may present itself." To the same effect is the observation in *Golab Koer v. Badshah Bahadur* (1909) 2 Ind Cas. 129 at p. 142 that a litigant cannot be allowed to take up a position contradictory to his previous attitude. [See also *Bigelow on Estoppel*, Chapter 26, where the subject of inconsistent positions in Court is discussed, and it is pointed out that a plaintiff cannot treat the defendant as a trespasser for the purpose of one suit, and then subsequently treat him as holding under a contract of tenancy]. We must hold, therefore, that it is not open to the plaintiff, after his previous conduct and in view of the prior litigation, to treat the first defendant as a tenant and to make him liable for the rent. The first point taken on behalf of the appellant consequently fails.

4. The second ground urged on behalf of the appellant does not deserve serious consideration. Upon the facts as they stand it is clear that so far back as 1901 the original tenants transferred the tenure as they were entitled to do under the law. Since then their concern with the property has completely ceased. No rule of law or principle of justice has been even faintly suggested on which a decree against the original tenants can be supported. We further note that before the District Judge, the plaintiff did not ask for any relief against the original tenants as is expressly mentioned in the judgment of the Court below. These defendants are not represented in this Court, and it would, in our opinion, be an act of injustice to make an ex-parte decree against them under such circumstances. The second ground, therefore, cannot be supported.

5. In support of the third ground taken on behalf of the appellant it has been contended that as the first defendant had been in possession at least during a portion of the time for which rent was claimed, the plaintiff ought to be allowed damages for use and occupation even if it is held that he is not liable strictly for the rent. In answer to this contention, it has been argued on behalf of the respondent, that a decree for damages for use and occupation cannot be made in a suit for rent, and reliance has been placed in support of this view upon the cases of *Lukhee Kant Doss Chowdhry v. Sumeerooddi Turtar Shaikh* 13 B.L.R. 243 : 21 W.R. 208 and *Rachhea Singh v. Upendra Chandra Singh* 27 C. 239. No doubt these two decisions as also the cases of *Luchweeput Doss v. Enaet Ali* 22 W.R. 316 and *Surendra Narain Singh v. Bhai Lal Thakur* 22 C. 752 indicate that ordinarily in a suit for rent when no alternative claim is made" for use and occupation, no damages can be decreed on that footing. But the decision of the Full Bench in the case of *Lukhee Kant Doss Chowdhry v. Sumeerooddi Tartar* 13 B.L.R. 243 : 21 W.R. 208 shows that the rule is not inflexible, because, it is always in the discretion of the Court to amend the plaint or the issue and where the omission has been from inadvertence or mistake, it would generally be

proper to do so. The true test, as pointed out in the cases of *Lakshmibai v. Haribim Ravji* 9 B.H.C.R. 1 and *Bahnukund v. Dalu* 25 A. 498 is whether the defendant will be taken by surprise. No doubt ordinarily a plaintiff must be limited to the case which he puts forward in his plaint; but although an alternative case is not expressly put forward, he may have leave to amend his plaint, if the Court thinks that he has based his claim on wrong grounds from misinformation, ignorance of law or fact or mistake or misconstruction of documents. In the present case, it can hardly be suggested that the conduct of the plaintiff has been induced by mistake. It has rather been a deliberate departure on his part from the position taken by him in the previous litigation. As, however, the defendant himself admitted in the Court below that he was in possession of the property up to the date of the decree in the previous suit, we were inclined at one stage of the hearing of the appeal, to allow the plaintiff an opportunity to amend the plaint and ask for damages for use and occupation. But the records of the previous litigation, which we have called for at the request of the parties, shows that such a course would be of no avail to the plaintiff. The decree in the previous suit was made on the 17th June 1904. Even if, therefore, the defendant was made liable for damages for use and occupation for the period which intervened between the institution of the previous suit that is the 13th April 1904, and the date of the disposal of that suit that is, the 7th June 1904, upon the materials on the record any possible damages for use and occupation could be calculated only on the basis of the rent payable during that period. Now the record shows that no instalment of rent fell due during this interval, and, that the first instalment of rent, which fell due after the institution of the previous suit, was in respect of a sum of rupees one hundred, which accrued due under the putni lease on the 15th July, 1904. It is manifest, therefore, that even if the plaintiff were allowed an opportunity to claim damages for use and occupation, no decree could justly be made in his favour and, we must add that when regard is had to his previous conduct, we do not regret this conclusion. There is no evidence to show that after the institution of the previous suit for rent and during the short period of less than two months which elapsed before the ex-parte decree was made in favour of the plaintiff, the defendant did really collect any rent from the tenants. In this view of the matter, it appears to us that there is no reason to disturb the decree made by the learned District Judge. The decree of the Court below must, therefore, be affirmed and this appeal dismissed with costs. We assess the hearing fee at Rs. 150.