

(1910) 01 CAL CK 0027
In the Calcutta High Court

Gour Mohan ghose and Others

APPELLANT

Vs

Chandi Charan Ghose and Others

RESPONDENT

Date of Decision : 11-01-1910

Acts Referred:

Bengal Tenancy Act, 1885 — Section 153, 193
Civil Procedure Code, 1908 (CPC) — Section 115

Citation : 5 Ind. Cas. 158

Hon'ble Judges : Chatterjee, J

Bench : Single Bench

Judgement

Chatterjee, J.—This was a suit for recovery of rent of six annas share in a tank. The defendants pleaded that they were co-owners of the plaintiffs in respect of four annas, the remaining two annas being the share to which the plaintiffs were entitled. They denied, therefore, that at least as regards this four annas share they were the tenants, but the co-sharers of the plaintiffs. As regards the other two annas, their plea was that the lease was a mere paper transaction and that in that view of the case they were not the tenants of the plaintiffs. There was an application in the first Court to treat this suit as a title suit. The Munsif declined to do so. Upon the pleas, however, he had to frame an issue as to whether the relationship of landlord and tenant existed between the parties. In a rent suit that is one of the most essential issues and must be tried. It, was so treated and the Munsif found that the relationship was made out.

2. There was an appeal to the Subordinate Judge, but the Subordinate Judge did not entertain the appeal being of opinion that the Munsif having final jurisdiction u/s 153 of the Bengal Tenancy Act, the appeal did not lie.

3. On second appeal before me, it is contended that the lower appellate Court was wrong in not entertaining the appeal and that on three grounds, first, that the question of title was decided in this case, although the Munsif by an express order said that he was not going to treat this suit as a title suit, secondly, that the suit being for a fractional share of the rent by fractional co sharers, Section

153 of the Bengal Tenancy Act has no application, and, thirdly, that the suit being for rent of a tank and not of agricultural or horticultural land, Section 153 of the Bengal Tenancy Act has no application and that the appeal to the Subordinate Judge was not barred by any provisions of law.

4. A preliminary objection was made to the competency of this second appeal on the ground that the claim being below Rs. 100, the appeal was barred by Section 153 of the Bengal Tenancy Act, The point raised in appeal and this preliminary objection will be decided together.

5. With regard, to the first point urged by the appellants, I find upon a close examination of Section 153 that it does not say that the question of title decided in a rent suit must be decided as an issue substantial and material to the case. I think, therefore, that if an issue as to title is decided even incidentally between parties having conflicting claims, Section 153 would not bar either a first appeal or a second appeal. In this case there can be no doubt; that the question of title raised by the defendants was decided at least incidentally; when the defendants pleaded that they were co-sharers of the plaintiffs and that they possessed a title co-ordinate to that of the plaintiffs and in opposition to the title claimed by the plaintiffs, I think they were making a claim which conflicted with the interest of, the plaintiffs and as they were parties to the suit the decision in the case was one which was within the mischief of the proviso to Section 153.

6. On the second point, there are decisions on both sides of the question. The later cases, however, seem to be against the contention of the appellants see the case of Bhagabati Bewa v. Nanda Kumar Chuckerbutty 12 C.W.N. 835. It is, however, not necessary to decide this point in this case as the consideration of the first point and the third point raised by the appellants would suffice for its decision.

7. Coming to the third point, then, I think that upon a consideration of the terms of the lease, in this case it cannot be said to be a lease of an agricultural or horticultural land.

8. It has been argued on behalf of the respondents that Section 193 of the Bengal Tenancy Act provides for a suit of this kind, and that, therefore, the present suit attracts the provisions of Section 153. The lease in this case is of a share of the tank. Upon a, prima facie construction of the document, it must be held that it is a lease in respect not only of the water but of the land underneath. As regards the banks of the tank, there is no doubt a restrictive covenant as to the lessees being entitled to the fruit of the trees growing and hereafter grown, although they would not be entitled to cut down the trees; but that, I think, does not take away from the general, intent of the whole document which does not restrict the rights of the lessees with regard to the land of which, the boundaries are given at the foot of the lease. It is, therefore, a lease in respect of the land, the fruits and the right to rear fish. I do not think that it comes within the saving provisions of Section 193. The rent is not deliverable in respect of pasturage. It

is not deliverable in respect of forest rights nor is it I think deliverable in respect of a fishery Which in the ordinary acceptation of the term, applies to cases where the right is to rear and to catch fish without any reference to or connection with the land underneath or bordering on the water. It has been held, in the case of Mahananda Chakravarti v. Mongala Keotani 31 C. 937 : 8 C.W.N. 804, that a suit for recovery of arrears of rent of a tank is not cognizable by a Revenue Court under Act X of 1859, because the provisions of the Act apply to agricultural lands only. In the Case of Umrao Bibi v. Mahomed Rojabi 27 C. 205 : 4 C.W.N. 76, it was held that the Bengal Tenancy Act and its provisions applied only to agricultural and horticultural lands and did not apply to the lease in that case which was for the Collection of rents from shop-keepers. I am inclined to think that the present suit being in respect of the rents of a tank is not one governed by the provisions of the Bengal Tenancy Act and that the provisions of Section 153 are not applicable. The appeal, therefore, did lie to the Subordinate Judge and he ought to have decided the case on the merits.

9. It is contended, however, that this is not a matter which ought to be considered as a legitimate subject of decision in an appeal, but that the proper remedy of the defendants was by an application for revision u/s 115 of the new Civil Procedure Code, on the ground that the Subordinate Judge refused to exercise a jurisdiction vested in him by law. There is no doubt that there is some force in this contention. I find, however, that the lower appellate Court passed a decree in these terms "that the appeal be dismissed with costs as not maintainable under the provisions of Section 153 of the Bengal Tenancy Act and the decree of the lower Court be considered as final and the appellants pay costs." I think that although the appellants might have applied u/s 115, there is nothing to prevent their coming in appeal on the question of jurisdiction, specially when a decree was passed in the terms I have quoted.

10. Upon these considerations, I Set aside the judgment and decree of the lower appellate Court and send the case back for a decision in accordance with law.

11. Costs will abide the result.