

(1893) 05 CAL CK 0008
In the Calcutta High Court

Khiroda Dasi and Others

APPELLANT

Vs

Moni Lal Bandopadhyaya and Others

RESPONDENT

Date of Decision : 05-05-1893

Acts Referred:

Citation : (1893) ILR (Cal) 740

Hon'ble Judges : W. Comer Petheram, C.J.; Ghose, J

Bench : Division Bench

Judgement

W. Comer Petheram, C.J.—This action was brought to recover possession of 9 cottahs of land at Agarpara, which the plaintiff's say was homestead land and had been held by two persons called Mala as tenants of Maharajah Norendro Kristo. which they, the plaintiff's, had purchased from them, and of which they say the defendants have forcibly taken possession in December 1889.

2. The defence was that the 9 cottahs had been held by Shyama Sundari Dasi under the Maharajah; that 5 cottahs of it had been held by the Malaa, and the other 4 cottahs by other persons, as her tenants; that she sold the land to defendant No. 4 and, that since the sale the Malas and the other tenants paid their rent to the defendants, and that the Malas had no saleable or transferable interest in the land which they could transfer to the plaintiffs.

3. After a good many postponements, the case came on for hearing before the Munsif of Sealdah on the 30th of December 1890, on which occasion the defendants applied for a further postponement, on the ground that their witnesses were not present; but their application was refused, the evidence for the plaintiffs taken, the defendant No. 4 himself, we are told, examined, and the case fixed for the next day, the 31st, for delivery of judgment.

4. On the 31st the defendants appeared and produced the witnesses, to obtain whose attendance they had on the day before requested that the case might be adjourned, and applied to the Munsif, before judgment was given, to be allowed to examine them; this the Munsif refused, and on the same day gave judgment

for the plaintiffs. The decision was appealed to the Subordinate Judge, who dismissed the appeal on the ground that he was not satisfied that the Munsif was wrong in his procedure. The matter now comes before us in second appeal.

5. It is clear that the defendants were in fault in not being prepared with their witnesses on the 30th, which was the day fixed for the hearing of the case, and if judgment had been given for the plaintiff's on that day, or before their witnesses had in fact been produced, the case would have been the ordinary one, and I do not see what could have been said in support of this appeal; but here the defendants' witnesses were produced and tendered for examination whilst the case was pending, i.e., before judgment had been given, and I am unable to think that a judgment given under such circumstances without knowing what the witnesses actually tendered had to say, can be satisfactory or indeed safe; and if the provisions of the Code are sufficient to enable us to set aside this judgment, and direct that these witnesses shall be heard, I think that this is a case in which we ought to do so.

6. The question is whether the refusal by the Munsif on the 31st to examine the witnesses then tendered to him by the defendants, was a substantial error or defect in the procedure, which might possibly have produced error or defect in the decision of the case on the merits. There cannot be a doubt that, having regard to the character of the dispute between the parties, the decision of the case on the merits may have been affected by the fact that the Munsif did not hear the defendants' witnesses, and so the question becomes narrowed to the one point, whether his refusal to do so on the 31st was a substantial error or defect of procedure on his part. I think it was. There can, I think, be no doubt that a Judge is quite acting within his powers in declining, in the exercise of his discretion, to postpone the decision of a case beyond the day fixed for the trial to enable the parties to produce further evidence, and it may be--though as to this I do not wish to express any decided opinion--that if each party had announced that his case was complete and closed, and after such announcement the case had been postponed for the delivery of judgment only, the Judge might, in the exercise of his discretion, refuse on the day fixed for the delivery of judgment, and before giving judgment, to examine any witnesses who might then be tendered to him; but that was not the case. So far from announcing on the 30th that their case was complete and closed, the defendants on that day announced that it was not, and that they wished to call more witnesses, and on the 31st they actually produced the witnesses whom they desired to call.

7. I do not think that in refusing to hear them when produced under these circumstances the Munsif exercised a sound discretion; and as it is obvious that it may (whether it did or not it is of course impossible to say) have affected the decision on the merits, I think the case is one in which we ought to interfere in second appeal.

8. I think the appeal should be allowed, the judgment set aside, and the case remanded to the Munsif, who should reinstate it on his file, and after hearing all

the evidence form an opinion upon the whole of it, and give judgment in accordance with such opinion. As, however, the whole difficulty has been occasioned by the fault of the defendants in not being prepared with their witnesses on the 30th, I think that they should pay the whole of the costs from that day down to the time when the fresh inquiry before the Munsif commences.

Ghose, J.

9. I agree in the order of remand which the Chief Justice proposes to make, but I must confess that I do so after some hesitation. The hesitation has been owing to this : The Court of First Instance, upon the application made by the defendants on the 30th December for adjournment, and that made on the 31st for examination of certain witnesses, was called upon to exercise a discretion. And it exercised that discretion by disallowing the application. The Lower Appellate Court on appeal has held under the circumstances of the case that the Munsif did not exercise his discretion improperly. The doubt that I feel is whether in second appeal we are at liberty to interfere with the decree of the Lower Appellate Court upon the ground that the Munsif improperly used his discretion in not complying with the request of the defendants. It is not a case where the Court, under the Code of Civil Procedure, was bound to allow the adjournment on the 30th or to examine the witnesses tendered on the 31st, because I take it that the defendants should have produced their witnesses on the 30th December, and they had no right to ask that their witnesses should be examined, after the order recorded on the former date that the case is closed. This order was recorded after the evidence such as the defendants tendered had been taken. There was no irregularity in the procedure followed by the Munsif. That being so, the question is reduced simply to one of proper or improper exercise of discretion, and I doubt whether in a matter like this we can determine in second appeal whether that discretion was rightly or wrongly exercised.

10. But I find that in a case which was decided in appeal under the Letters Patent (No. 2 of 1888) by Petheram, C.J., and O'Kinealy and Banerjee, JJ., where a similar question of improper exercise of discretion was raised, the learned Judges in second appeal examined the proceedings in order to see whether the Courts below had exercised their discretion properly or not.*

11. So far as the proceedings in this case are concerned, there is nothing to indicate that the application made by the defendants on the 30th was otherwise than bona fide. I am rather disposed to think that the defendants were in earnest in proving their case if they could, and that the Munsif would have exercised a sound discretion if he had examined the witnesses that were tendered on the 31st. The refusal of the Munsif to examine the witnesses then tendered may have prejudiced the defendants.

12. The doubt that I feel, whether this Court is entitled to interfere in a matter like this, is not so strong as to justify me in differing from the learned Chief Justice, and I am glad that he is of opinion that the case should be remanded to

the Court below, because I think the ends of justice require that the defendants should have another opportunity of proving their case if they can.

* Taylor v. Sarat Chunder Boy Chowdhry, Letters Patent Appeal 2 of 1888, on appeal from Appellate Decree No. 1090 of 1887, decided on the 5th December 1888. In this case the defendant, Taylor, applied (after several former applications on the same ground had been made and granted) for a further postponement of the case to enable him to produce his witnesses. The Court of First Instance refused the application, and the Lower Appellate Court on appeal was of opinion that the postponement had been rightly refused. On second appeal the only question was whether the first Court had properly exercised its discretion in refusing it, and the Judges of the High Court who heard the appeal (Norris and Ghose, JJ.) were divided in opinion, Norris, J., thinking that the postponement ought to have been granted, and Ghose, J., being of opinion that the Court acted rightly in refusing it. On appeal under the Letters Patent the Judges (Pethebam, C.J., O'Kinealy, J., and Banerjee, J.,) upheld the judgment of Ghose, J., being unanimously of opinion that the Court of First Instance in refusing the postponement had properly exercised its discretion.-Ed.