
(1928) 04 CAL CK 0012
In the Calcutta High Court

Kiran Chandra Roy and Others

APPELLANT

Vs

Jagannath Banik and Others

RESPONDENT

Date of Decision : 19-04-1928

Acts Referred:

Bengal Tenancy Act, 1885 — Section 105
Evidence Act, 1872 — Section 13

Citation : AIR 1928 Cal 472 : 114 Ind. Cas. 670

Hon'ble Judges : Mukerji, J

Bench : Division Bench

Judgement

Mukerji, J.—This appeal arises out of a suit for rent. The plaintiffs claimed rent for their 13 annas 4 pies share of a certain jama which they alleged consisted of ten plots of land and bore a rental of Rs. 11-6-0 per year as settled in a proceeding u/s 105, Ban. Ten. Act. Their case was that the rent due for their share was Rs. 9-7-8 per year. They claimed rent for the years 1326 to 1329 B Section at the said rate together with cesses and damages. The defence that was taken was of a two fold character. In the first place it was alleged that the rent of the jama in the 16 annaa share was Rs. 4-10-6 and that the rent due for the plaintiff's share was Rs. 3-14-1 per year. Nextly, it was contended that the jama consisted not of ten plots of land as alleged on behalf of the plaintiffs but of three plots only and that the remaining seven plots did not appertain to Mudafat Govindadas Bairagi which, according to the plaintiffs, was the mudafat to which the jama appertained, but to Mudafat Kamala Kanta; and it was further pleaded that the holder of Mudafat Kamala Kanta had instituted a title suit against the parties to this suit and that, in that suit, which was decreed in 1920, it was declared that the said seven plots appertained to Mudafat Kamala Kanta and the possession of the holders of that mudafat was confirmed in respect of the said seven plots. The Courts below concurrently accepted the contention that was urged on behalf of the defendants and, holding that the decision u/s 105, Ben. Ten. Act, did not purport to decide the question as regards the plots of which the jama consisted, expressed the view that it was open to the defendants,

notwithstanding the said decision, to establish that the jama really consisted of three plots of land and that the rental thereof was not what was recorded in the decision u/s 105, Ben. Ten. Act, but something else. Those Courts also found concurrently, that the decree passed in 1920 was not vitiated by fraud and, relying on the said decree, they held further that the jama in respect of which the suit for rent was brought consisted of only three plots of land as was alleged on behalf of the defendants. In that view of the matter, they were of opinion that the plaintiffs' suit as laid could not succeed, but relying on the admission of the defendants that the rent in the plaintiffs' share for the said three plots of land was Rs. 3-14-1, decreed the suit at the said rate. The plaintiffs have thereupon preferred this second appeal.

2. The first contention that has been urged in support of this appeal is to the effect that, in view of the decision in the proceedings u/s 105, Ben. Ten. Act, it was not open to the Courts below to go into the question as to the rent of the holding; in other words, it is urged that the decision u/s 105, Ben. Ten. Act, has the force and effect of a decree of a civil Court and that it should have been given effect to in that way. The answer to this contention, however is that the principle of constructive res judicata cannot be applied to a decision u/s 105, Ben. Ten. Act, and that, although it was open to the revenue officer to have arrived at a decision as regards the plots of which the jama consisted, inasmuch as no decision with regard to that matter had, in point of fact, been arrived at, it cannot be said that the decision that was actually passed, namely, that Rs. 11-6-0 was the fair rental for the ten plots of land of which the jama was alleged to consist, would in any way operate as res judicata with regard to the point that has now been raised. If any authority is needed in support of this proposition, reference may be made to the case of Nawab Bahadur of Murshidabad v. Ahmed Hossein [1917] 44 Cal. 783. This contention of the appellants, therefore, must be overruled.

3. The next contention that has been urged in support of the appeal, analyzed critically, reduces itself to the question of the legal effect that should attach to the decree of 1920. The finding of the learned District Judge is to the effect that there is no evidence of service of summons in the title suit which resulted in that decree. The finding falls somewhat short of a finding to the effect that there was in fact no service of summons at all. But assuming that the finding may be regarded as one of non-service of summons at all upon the defendants in the suit, in the absence of a finding that the decree was vitiated by fraud, it cannot be urged that the said decree may not be used as a piece of evidence in the case. It is a decree, though passed ex-parte, passed by a Court having jurisdiction and, although it may be that the summonses were not properly served or not served at all, it cannot be urged that the Court had no jurisdiction to pass the decree. In any event, it is a decree that has not been set aside by a competent Court and indeed there is nothing to show that any attempt was ever made to have it set aside. So long, therefore, as it stands, it can certainly be used as a piece of evidence with regard to the matters dealt with by it. It would

be evidence undoubtedly u/s 13, Evidence Act. But the use that has been made of the decree, as far as one can gather from the judgment of the learned District Judge, is to treat it not merely as a piece of evidence in the case but rather as operating as res judicata with regard to the question whether the seven plots of land appertain to Mudafat Kamala Kanta or to Mudafat Govinda Das Bairagi. It should be remembered that the plaintiffs and the defendants in the present suit were in the position of defendants in the suit which culminated in the decree of 1920. The difficulty of using this decree as operating as res judicata is that the exceptional facts and circumstances which have got to be established in order that a decision may operate as res judicata as between co-defendants in a suit will have to be established. But it does not appear that any of those facts and circumstances are present in the present case. The proper way, therefore, to deal with the matter is to treat this decree only as a piece of evidence and to go no further. The learned Judge has, as I have already stated, regarded this decree as binding between the parties and operating as res judicata on this particular question. The result, therefore, is that the decision arrived at dealing with the decree in this way cannot be supported. In this view of the matter I am of opinion that the decree passed by the learned District Judge should be set aside and that the case should be sent back to his Court so that the appeal may now be re-heard and, after treating the decree of 1920 as a piece of evidence in the case and taking into consideration the other materials on the record, the question as to whether the seven plots of land appertain to the jama which forms the subject-matter of the suit may be decided. Upon the decision that is arrived at with regard to this question will depend the final decision of the Judge as regards the rent which the plaintiffs may or may not be entitled to in the present suit. The appeal is allowed and the case is sent back to the lower appellate Court to be dealt with in the manner indicated above. Costs, will abide the result.