
(1980) 07 CAL CK 0033
In the Calcutta High Court
Case No : Civil Rule No. 3123 of 1979

Nrisingha Maitra

APPELLANT

Vs

Shyam Sundar Chattopadhyay and Others

RESPONDENT

Date of Decision : 14-07-1980

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 20 Rule 12

Citation : AIR 1981 Cal 65

Hon'ble Judges : Dhires Chandra Chakravorti, J

Bench : Single Bench

Advocate : Abinash Chandra Bhattacharjee and Subhas Bhattacharjee, for the Appellant; Nirendra Nath Mitra and Mrityunjay Goswami, for the Respondent

Judgement

Dhires Chandra Chakravorti, J.—In the matter of an application for Stay u/s 115 of the Code of Civil Procedure, 1908.

2. And in the matter of Judgment and decree dated 14-6-1979 and 21-6-1979 respectively passed by the learned 2nd Additional District Judge, Nadia in M. A. No. 12/78 affirming those dated 6-6-1978 and 10-6-1978 respectively passed by the learned Munsif, Ranaghat, Nadia in M. S. No. 36/76.

3. And in the matter of ad interim stay of execution of the decree complained against, as referred to in the petition till the disposal of the Rule.

4. This Rule is directed against an order of the Additional District Judge, 2nd Court, at Krishnagar dismissing an appeal from the order of the learned Munsif at Ranaghal decreeing a money suit instituted for the purpose of recovering mesne profits.

5. The facts necessary for purposes of disposal of this Rule are as follows: The opposite party herein brought a suit being title suit No. 306 of 1973, against the present petitioner praying for a decree for eviction, recovery of possession and mesne profits. The title suit was decreed on December 10, 1975 and the delivery of possession was obtained on June 1, 1976. Be it noted here that the claim for

mesne profits was refused. Thereafter the present money suit was brought with a view to recovering mesne profits for the period from the date of institution of the suit till the date of delivery of possession and such mesne profit was assessed at Rs. 2,030/-.

6. The defence was that the money suit was barred by principles of res judicata inasmuch as in the said earlier title suit, the relief was claimed and the court rejected the prayer for such a relief.

7. Both the learned Munsif and the learned Additional District Judge came to the finding that the suit was not barred by principles of res judicata and the suit was accordingly decreed.

8. Mr. Abinash Chandra Bhattacharjee, the learned Advocate for the petitioner contends that when by the decree passed in the said earlier title suit, the claim for mesne profits was refused and that decree has become final, the present suit for recovery of mesne profits would be barred by the principles of res judicata. The court of appeal below relying on the decision in *Bhourilal Agarwalla Vs. Ashutosh Roy*, held that Explanation (v) to Section 11 of the CPC includes only those cases where it is mandatory on the part of the court to pass a decree and it does not include cases where the court has a discretion to pass or not to pass a decree. Order 20, Rule 12 of the CPC provides as follows :--

(1) where a suit is for the recovery of possession of immovable property and for rent or mesne profits, the court may pass a decree-

(a) for possession of the property;

(b) for the rent or mesne profits which have accrued on the property during a period prior to the institution of the suit or directing an enquiry as to such rent or mesne profits;

(c) directing an enquiry as to rent or mesne profits from the date of institution of the suit until-

(i) the delivery of possession to the decree holder.

This provision has been considered as an enabling provision which entitles the court either to pass a decree for mesne profits or not to pass such decree. In such circumstances, it was held in the case referred to above that the refusal on the part of the court in the said prior suit for eviction to pass a decree for mesne profits would be no bar to the institution of the present suit for recovery of mesne profits. The reasons advanced for such a view is, as already indicated, that in the said earlier title suit it was not incumbent on the court to pass a decree for mesne profits. Order 20, Rule 12 of the CPC gave a discretion to the court and because of such discretion the court could have or could not have passed a decree for mesne profits. A later Division Bench judgment of this Court also takes the same view as was taken in the case of *Bhourilal* (supra). This was a decision rendered in *Makhan Lal Modak v. Girish Chandra Jana* (1962) 66 Cal

WN 692. I am bound by the decisions referred to above Accordingly I cannot but hold on the basis of the decisions referred to above that the contention of Mr. Bhattacharjee is of no substance.

9. But left to myself I would have taken a different view. Order 2, Rule 2 of the CPC requires that every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action; but the plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of the court. It however provides that where a plaintiff omits to sue in respect of, or intentionally relinquishes, any portion of his claim, he shall not afterwards sue in respect of the portion so omitted or relinquished. This Rule therefore does not require that a plaintiff in suit for eviction is under an obligation to include the prayer for mesne profits. But Order 2. Rule 4 of the CPC enables the plaintiff in such a case to include a claim for mesne profits. In a suit for eviction when there is no prayer for mesne profits there can be no doubt that a separate suit for mesne profits will lie. But in a suit for eviction where mesne profit is prayed for and the same is refused there is no reason why the plaintiff should be allowed to sue afresh for mesne profits. In cases where even though the prayer for mesne profits was included but the court concerned did not decide that question and remained silent so far as the mesne profits are concerned there can be no bar to the filing of a fresh suit, for, the provisions of Order 20, Rule 12 gave the court a discretion to pass a decree for mesne profits in a suit for recovery of possession of immovable property and for rent or mesne profits. In such a suit it was not obligatory on the part of the court to pass a decree for mesne profits. The court may leave that question without taking decision thereon.

10. However, in view of what is stated above, I consider it proper to discharge the Rule. I make no order as to costs.