
(1939) 07 CAL CK 0007
In the Calcutta High Court

Radhashyam Choudhury and Others

APPELLANT

Vs

Gourinath Roy and Others

RESPONDENT

Date of Decision : 03-07-1939

Acts Referred:

Bengal Tenancy Act, 1885 — Section 148B

Citation : AIR 1940 Cal 9

Hon'ble Judges : Sen, J

Bench : Division Bench

Judgement

Sen, J.—This is an appeal by the defendants in a suit for rent. The plaintiffs sued four persons, namely, defendants 1 to 4, for rent. Defendants 1 to 3 are the Choudhurys and defendant 4 is Nagendra Nath Banerjee. The Choudhurys filed a written statement but Banerjee did not file any. The defence taken by the Choudhurys was inter alia that the plaintiffs did not sufficiently describe the land in the tenancy and therefore it offended against the provisions of Section 148-B, Ben. Ten. Act. On 3rd December 1935, the plaintiffs represented to the trial Court that they did not intend to prosecute the suit as against the Choudhurys. The suit was accordingly dismissed as against these, defendants with costs. As defendant 4 had not filed a written statement the suit was decreed as against defendant 4 ex parte. From this ex parte decree defendant 4 filed a motion in the Court of the District Judge on 23rd December 1935. It is now established that the Choudhury defendants, that is to say defendants 1 to 3 were not parties to this motion. After hearing the motion the learned District Judge passed the following order:

The only point urged before me is that as the khatian numbers and the plot numbers are not given in the plaint though Record of Rights has been prepared there has been violation of the mandatory provisions of Section 148, Ben. Ten. Act, and hence the decree is bad. With the consent of both parties the decree of the learned Court below is set aside and the case remanded for retrial according to law. The plaintiffs will be permitted to make suitable amendments in the plaint

and all the defendants will be allowed to contest the suit if they so desire. No order is made as to costs.

2. After the case had been thus remanded summonses were issued not only on defendant 4, but also on defendants 1 to 3. After the plaint had been amended by inserting therein certain dag numbers as a description of the lands of the tenancy the case was heard. The trial Court decreed the plaintiffs' suit against all the defendants. It held that the plaintiffs had failed to connect some of the plots mentioned in the plaint with the alleged tenancy but it decreed the suit inasmuch as the plaintiffs had succeeded in establishing that there was a relationship of landlord and tenant between the parties and that the defendants used to pay rent at the rate claimed by the plaintiffs. The defendants appealed to the District Judge and the learned Judge came to the same findings and dismissed the appeal. Against this decision the present appeal has been filed. The arguments urged on behalf of the appellants may be divided into two parts. On behalf of defendants 1 to 3 it is contended that the suit having once been dismissed as against them no decree could be passed against them in the present suit. It was pointed out that they were not parties to the motion before the District Judge and that they were not bound by any order passed therein. On this ground they contend that the decree, in any event, cannot be binding on defendants 1 to 3.

3. The next branch of the argument is that as the land of the tenancy has not been identified no decree for rent should be passed as against any of the defendants. I should consider first the argument regarding the contention that no decree should be passed against defendants 1 to 3. In my opinion this contention must prevail. The suit was dismissed as against these defendants. In the motion they were not parties. Both the Courts below seem to have been under an erroneous impression that the order upon the motion was passed with the consent of these defendants. They also expressed the opinion that as these defendants had not appealed from that order they were bound thereby. Both these views are wrong. These defendants did not consent to any order passed in the motion inasmuch as they were not parties therein. These defendants further could not have appealed against that order for the same reason, namely that they were not parties to the motion.

4. It was open to them to take any objection they chose and to ignore the order passed on the motion. They were in no way bound by that order. The learned advocates on behalf of the respondents point out that this point was not taken in the Courts below and that it should be held that these defendants waived this objection. A perusal of the judgments of both the Courts and of the written statement of these defendants satisfy me that in substance this objection was taken. It is true that in the written statement the objection was not taken in so many words but there was an objection taken to the effect that the suit having already been dismissed against them no suit lay. From the judgments it appears that these defendants did object to the suit proceeding as against them. As to the precise manner in which this objection was taken it is not possible to come to

any definite conclusion because the arguments have not been set down in full in either of the judgments. But this much is clear, that the defendants were objecting that the order passed in the motion did not affect their rights which they had acquired by virtue of the fact that the suit had been dismissed as against them. I hold therefore that inasmuch as the suit had already been dismissed against defendants 1 to 3 no decree could be passed against them in the present suit.

5. I now come to the next point, namely whether any decree could be passed as against defendant 4. It is admitted that the plaintiffs have not been able to identify at least two of the seven plots mentioned in the plaint as forming land of the tenancy. "The learned Judge seems to have attached too much importance to the fact that a (tenancy existed at a rental of Rs. 6-10-0. It is not sufficient for a plaintiff to establish merely that the defendant is liable to pay a certain amount of rent. He must establish also the identity of the lands of the tenancy. This was laid down in *Indu Bhusan Basu v. jatindra Nath Roy* (1928) 32 C.W.N. 244. I would also refer in this connexion to the case in *Ram Deo Rai v. Newaj Prosad Singh* (1909) 10 C.L.J. 196. The learned Judge says that he is not in a position to express a definite opinion in regard to the identity of certain plots of land mentioned in the plaint as appertaining to the tenancy. He adds that he leaves this point open. Now, in my opinion, no decree for rent should be passed until the Court is satisfied regarding the identity of the land with respect to which the rent is payable. The Court cannot leave the question of identity open because there can be no tenancy except with reference to a definite piece of land. In these circumstances, I am of opinion that the plaintiffs' suit is liable to be dismissed on the ground that they have not been able to describe the land of the tenancy with sufficient precision. I accordingly set aside the decree passed by the Court below and dismiss the plaintiffs' suit with costs. The appeal is allowed with costs.