

(1930) 03 CAL CK 0022
In the Calcutta High Court

Sailesh Chandra Sarkar

APPELLANT

Vs

Bireswar Chatterjee

RESPONDENT

Date of Decision : 28-03-1930

Acts Referred:

Bengal Tenancy Act, 1885 — Section 147A, 29

Citation : AIR 1930 Cal 559

Hon'ble Judges : Mitter, J

Bench : Division Bench

Judgement

Mitter, J.—This is an appeal on behalf of the plaintiff and it arises out of a suit for recovery of arrears of rent and cesses for the Bengali years 1327 to 1330 in respect of about 16 bighas of land mentioned in the plaint which the plaintiff alleged the defendant held under him at an annual rent of Rs. 35. The case of the plaintiff was that the defendant held this plaint land under a compromise arrived at between the parties in a previous rent suit No. 851 of 1918 and the case of the plaintiff was that the defendant had paid rent in respect of this tenancy for the years 1325 and 1326. The substantial defence raised by the defendant was that there was no separate tenancy of 16 bighas as alleged by the plaintiff at a jama of Rs. 35 but that the plaint land really appertained to the jama of Rs. 91 held by him under the plaintiff. With regard to the petition of compromise in the previous rent suit the case of the defendant was that it was an invalid, illegal and fraudulent compromise and as it was in contravention of the provisions of Sections 29 and 147-A, Ben. Ten. Act, it could not be given effect to. The Court of first instance held that the compromise was accepted by the Court and a decree was passed on the basis of the compromise. In those circumstances the Court was of opinion that although the compromise agreement operated as a lease and should have been registered as such, it was admissible in evidence inasmuch as the agreement was embodied in the decree. It was also held that the compromise agreement was for good consideration and was executed without any undue influence having been exercised by the plaintiff on the defendant or any fraud on his part. The Munsif accordingly decreed the

plaintiff's suit.

2. Against this decision an appeal was taken to the Court of the Subordinate Judge of Burdwan. The learned subordinate Judge reversed the decision of the Munsif and dismissed the the plaintiff's suit. The lower appellate Court : came to the conclusion that the solehnama was inadmissible in evidence for want of registration, because the Solehnama really operated as a lease and it had to be registered notwithstanding the fact that it was embodied in a decree. It further came to the conclusion that it had been established that the lands were included in Ex. B, the lease under which the defendant originally held the land under the plaintiff at a rent of Rs. 91.

3. A second appeal has been preferred to this Court by the plaintiff and the main contentions before me by Mr. Bose who appears for the appellant have been : (1) that even if the solehnama be regarded as inadmissible in evidence the statement in the solehnama that the 16 bighas of land for which the rent suit was brought did not appertain to the jama of Rs. 91 should have been treated as an admission and solehnama should have been accepted in evidence at least for this limited purpose (2) that the finding that the lands in suit are included in the lease Ex. B, is not a proper finding as it is not based on evidence but on a reasoning which is open to considerable criticism.

4. With regard to the first point it can not now be disputed in view of the decision of the Judicial Committee of the Privy Council in the case of Rani Hemanta Kumari Debi v. Midnapur Zamindary Co. AIR 1919 P.C. 79 that the solehnama should have been registered in order to be effective as a lease, It is pointed out by their Lordships of the Judicial Committee in that case that a lease comes within Clause (d), Section 17, Registration Act. Section 17, Sub-section (2), exempts only those instruments which come under Clauses (b) and (c) from registration provided they are incorporated in a decree. The Subordinate Judge was therefore right in excluding the solehnama from evidence and in not giving effect to it as a lease because it was not registered. At the same time the statement in the solehnama, namely that the lands did not appertain to the jama of Rs. 91, might be admitted in evidence as an admission made by the parties to the same. As such admission it would only be a piece of evidence and it would be open to the party who made the admission to show that it was made in circumstances which did not make the admission binding on him or her as the case may be. In other words it is open to the party making the admission to show that it was untrue in fact. Be that as it may the learned Subordinate Judge should have admitted the statement as an admission and considered the effect of that admission in relation to the matter in controversy in this case.

5. With regard to the second point taken, it appears to me clear that there has not been a proper finding in connexion with the point as to whether the evidence established that the suit lauds were included in the lease, Ex. B, which related to the jama of Rs. 91. The finding of the Subordinate Judge is that:

the appellant's pleader says that he has established by evidence that the lands of this suit are included in Ex. B, the lease at the rent of Rs. 101 from which a remission of Rs. 10 was obtained making the rent Rs. 91. The respondent's pleader says that he has not ascertained whether this has been proved or not, I therefore take it that he is not able to controvert that fact.

6. This finding has been rightly criticised by the learned advocate for the appellant. The mere fact that the appellant's pleader said that he had established by evidence that the lands in suit were included in Ex. B and the mere fact that the respondent's pleader said that he had not ascertained whether it was included or not were not sufficient to justify the lower appellate Court in coming to the conclusion that the appellant's pleader's statement was justified on evidence. It was the duty of the lower appellate Court which was a final Court of fact to ascertain on the evidence as to whether the case of the appellant made before him was one which could be sustained on the evidence. He should have come to a conclusion on the evidence as to whether the disputed lands were included in Ex. B and in this connexion should have considered the effect of the admission made in the solenama. I think therefore that there has not been a proper trial of the appeal and that this defect in the procedure has affected the merits of the case so as to call for an interference of this Court u/s 100, Civil P.C.

7. The result is that the judgment and decree of the lower appellate Court must be set aside and the case must be sent back to that Court in order that it may rehear the appeal in the light of the observations which I have just made. If on an examination of the evidence the Subordinate Judge comes to the conclusion that the lands in suit were included in Ex. B he must dismiss the plaintiff's suit. If on the other hand he comes to the conclusion that they are not included in Ex. B then he will proceed to determine whether the plaintiff is not entitled to damages for use and occupation of the disputed lands and for this purpose he will give an opportunity to the plaintiff to amend his plaint so as to include a relief in the plaint claiming damages for use and occupation. The leave to amend will be given subject to this that the plaintiff pays to the defendant all costs which he has incurred in the Court of first instance and in the lower appellate Court. If circumstances arise which would necessitate an investigation into the question of damages for use and occupation the Subordinate Judge will proceed to give the leave on the condition I have mentioned.

8. There will be no order as to costs of this Court.