

(1928) 02 PAT CK 0001
In the Patna High Court

Satya Narayan Chowdhury

APPELLANT

Vs

Mahadeo Prasad Sahu

RESPONDENT

Date of Decision : 17-02-1928

Acts Referred:

Citation : AIR 1929 Patna 395

Hon'ble Judges : Das, J

Bench : Division Bench

Judgement

Das, J.—I confess that I have had some difficulty in understanding the judgment of the learned District Judge.

2. The facts appear to be these:

On 27th November 1919, the plaintiff who is the respondent in this Court conveyed a certain property to the defendant. It was provided that the back rents would belong to the vendor, but it was agreed that an account would be made of the arrears of rent due to the outgoing landlord and that on such account being made, to quote the language, of the plaintiff:

the defendant would have a deed of assignment executed by the plaintiff in respect of the arrears of rent which would be found properly due to the plaintiff from the raiyats after deducting the claims barred by limitation and making an allowance of 10 per cent, for collection charges, and would pay the consideration, therefore to the plaintiff.

3. The plaintiff does not suggest in the plaint that the account as to the arrears was in fact made. But his complaint is, to quote again the words of the plaintiff in para. 3 of the plaint:

the defendant did not get the deed of assignment in respect of the aforesaid arrears, executed by the plaintiff, nor did he pay even a a farthing out of the same, nor is he inclined and prepared to pay.

4. There is no suggestion in the plaint either that an account as to the arrears of rent was made or that the plaintiff executed a deed of assignment in favour of the defendant in respect of such arrears. But the plaintiff claims a decree against the defendant for the sum of Rs. 430-0-7 on the footing of what would be payable by the defendant to the plaintiff if the deed of assignment had in fact been executed by the plaintiff in favour of the respondent.

5. The suit was resisted by the defendant first on the ground that the account as to the arrears was never made by the plaintiff, and, secondly that the plaintiff did not execute the deed of assignment in favour of the defendant. The suit was also resisted on the ground that notwithstanding the agreement between the parties the plaintiff went on collecting the back rents from the tenants and that, in the circumstances, the plaintiff was not entitled to succeed in the suit.

6. The Court of first instance dismissed the suit.

7. The learned Judge in the Court of appeal below has come to the conclusion, first, that the plaintiff

gave clear details of the arrears outstanding from each one of the raiyats of the village and produced also the jamabandi (Ex. 2) said to have been prepared on the occasion;

secondly, that the defendant did not get the deed of assignment executed by the plaintiff; and, thirdly that the plaintiff has in fact collected some of the back rents from the tenants. In the result he decreed the claim of the plaintiff. But having regard to "his finding that the plaintiff did collect some of the back rents from the tenants he deprived the plaintiff "of any right to get an interest on the dues as per the terms of the agreement." I may say at once that there was no justification for the learned District Judge to deprive the plaintiff of the interest on the dues if he thought that the contract had been substantially performed by the plaintiff. On the other hand, if his view was that the contract had not been substantially performed by the plaintiff, then there was no option an him but to dismiss the plaintiff's suit.

8. Now, in my view on the allegations made in the plaint there was no cause of action in favour of the plaintiff. There is no suggestion made in the plaint that that which had to be performed by the plaintiff had in fact been performed. As I have said, there is no suggestion in the plaint that the accounts were in fact taken as to the arrears due from the tenants to the plaintiff nor is there any suggestion that the plaintiff executed the deed of assignment in favour of the defendant.

9. I will, however, proceed on the findings of the learned District Judge. Although there is some difficulty in understanding what his finding on the question of account is, I will assume that he has found that an account of the arrears due to the plaintiff was in fact made by the plaintiff and brought to the notice of the defendant. The question then arises, what was the next step to be taken in the

matter. Clearly a deed at assignment had to be executed by the plaintiff in favour of the defendant investing the defendant with the authority to collect the back rent from the tenants. But it is admitted that the deed of assignment was in fact not executed by the plaintiff. The learned Judge says:

There is no evidence to show that the defendant-respondent did make any effort in that direction.

10. He does not condescend to say in what direction the defendant-respondent was to make any effort. The preceding sentence in his judgment deserves to be quoted. He says as follows:

It has to be noticed that the plaintiff-appellant was not in a position to enforce the dues any longer as the claim to recover the arrear rent would be barred by limitation, and this result is mainly due to the laches on the part of the defendant-respondent to get an account of the arrears prepared within a reasonable time after the execution of the kabala.

11. It would appear from this sentence that the learned District Judge did intend to find that an account of the arrears was not in fact prepared. But if it was not prepared, it is difficult to understand how it could be due to any laches of the defendant. The defendant was not in a position to say what the arrears due to the outgoing landlord were. The outgoing landlord was the only person who was entitled to collect the arrears of rent due to him up to the date of the kabala in favour of the defendant.

12. As I say, I have found great difficulty in understanding the judgment. But the short point is that on the admission of the plaintiff that a deed of assignment was not in fact executed by him in favour of the defendant, he is not entitled to maintain a suit for what would be due to him if he had in fact executed a deed of assignment in favour of the defendant. It is manifestly unjust to give a decree to the plaintiff for what would be due to the plaintiff on the footing of the deed of assignment without compelling the plaintiff to execute the deed of assignment in favour of the defendant. The plaintiff is the actor in the suit and it, is for him to show that all times have lapsed and all conditions have been fulfilled entitling him to the remedy which he seeks. It is his duty to execute the kabala and it is idle to contend that the defendant was to blame for not getting the kabala executed by the plaintiff.

13. It was faintly suggested before me that it was the duty of the defendant to pay for the stamp in respect of the assignment. But the argument does, not deserve any serious consideration, for the deed of assignment would in substance be a deed entitling the defendant to collect the back rent as the agent of the outgoing landlord. It would be absurd to suppose that on a such a deed the defendant would be called upon as the agent to pay the stamp duty.

14. Then there is another point which the learned District Judge has altogether ignored. In spite of the clear agreement between the parties, the defendant has

established to the satisfaction of the learned District Judge that the outgoing landlord did collect some rent from the tenants. What he actually collected it is impossible for me to say, because his case was that he did not collect anything from the tenants. That part of the case has been found to be false by the learned District Judge. But the learned District Judge suggests that.

the defendant-respondent was in a position to produce all the raiyats from whom such rents had been realized by or on behalf of the plaintiff-appellant.

15. It is impossible to take the view which the learned District Judge has taken in this matter. The facts as to the realization of rent by the outgoing landlord was within the knowledge of the landlord, and I cannot act upon the view that it was the duty of the defendant to call each raiyat of the village to prove how much has been collected by the landlord in respect of the back rents.

16. I hold that the plaintiff has failed to show that he performed his part of the contract. That being my view, the appeal must be allowed, the judgment and the decree of the learned District Judge must be set aside and the judgment and the decree passed by the learned Munsif must be restored.

17. The result is that the plaintiff's suit must be dismissed with costs in all the Courts.