
(1935) 08 CAL CK 0050
In the Calcutta High Court

Secy. of State

APPELLANT

Vs

Hiru Mondal and Others

RESPONDENT

Date of Decision : 13-08-1935

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 20 Rule 12(2)

Citation : AIR 1935 Cal 752

Judgement

1. This is an appeal preferred by the Secretary of State for India in Council from a final decree for mesne profits passed in accordance with Order 20, Rule 12(2), Civil P.C. In order to appreciate the contention that has been urged on behalf of the appellant in this appeal it is necessary to set out a few facts. The plaintiff Hiru Mandal instituted a suit in 1920 for recovery of possession of 138 bighas of land together with mesne profits against the Secretary of State for India in Council as the first defendant and four other persons as defendants 2 to 5. The allegations in the plaint were that the plaintiff was the owner of a holding bearing No, 17 in the rent roll prepared according to the rules and orders of the Board of Revenue; that the said holding consisted of about 200 bighas of land and the rental thereof had been fixed at Rs. 237-8-0 exclusive of cesses which were fixed at Rupees 7-6-9 pies; that he was in possession of the lands but that a Kanungo of the Government had forcibly taken away straw from the lands in the month of Pous 1324 B.S. and thereafter had dispossessed the plaintiff on the 1st Magh 1324 B.S. and had put the other defendants in possession.

2. Two written statements were filed in the suit, one on behalf of the Secretary of State for India in Council and the other by defendants 2 to 5. The defences taken were practically on the same lines in both the written statements. It should be stated here that it was not suggested in the written statement that was filed on behalf of the Secretary of State for India in Council that the action of the Kanungo which was complained of in the plaint was something beyond or in excess of his authority. Defences on the merits were taken and these defences being considered, the Munsiff made a decree in plaintiff's favour in respect of a quantity of 113 odd bighas of land. An appeal was taken from the said decree by

the Secretary of State for India in Council to the Court of the District Judge but the appeal was dismissed. From the decision last mentioned, a second appeal was taken to this Court, that appeal being No. 1312 of 1925. The contention, that was urged in this second appeal turned upon the question of limitation. But this Court, on considering the findings of fact at which the learned District Judge on appeal had arrived, came to the conclusion that the suit was not barred. It was held by this Court that the allegations as regards the cutting and taking away of straw in Pous 1334 that had been made in the plaint related only to stray acts committed by the Kanungo but that in point of fact the real cause of action arose in the month of Magh 1324, when the dispossession actually took place. On this point, it was observed thus:

He (that is, the District Judge) found that the real dispossession took place when the settlement was made by Government with defendants 2 to 4 and when in pursuance of that settlement they entered into possession of the disputed land.

3. Now, having held that the suit was not barred by limitation and taking into consideration the other findings of fact at which the Court of appeal below had arrived, this Court dismissed the second appeal and the result was that the decree the trial Court had made was confirmed. It is necessary here to set out the terms of that decree. The decree was in these terms:

It is hereby ordered and decreed that this suit be decreed on contest against defendants 1 to 4 and be dismissed against defendant 5. Plaintiff's raiyati right in the disputed land be declared and the plaintiff do get khas possession of the same. Plaintiff do also get mesne profits (to be hereafter determined) from the date of dispossession to the date of recovery of possession with annual interest up to the date of realization. Plaintiff do get costs with interest at the rate of 6 per cent per annum from defendants 1 to 4. Defendant 5 do bear his own costs.

4. In pursuance of this decree, an inquiry was held under the provisions of Order 20, Rule 12, sub-R. 1 of the Code. The Commissioner who held this investigation made a report on 18th November 1930. This report was considered by the learned Judge and he eventually made his decision on 31st July 1931 reducing the amount of mesne profits which the Commissioner had assessed at Rs. 11,859-10-9 to Rs. 8,215. The period for which the mesne profits was awarded was from 1325 to the end of 1334. The contention that has been urged on behalf of the appellant in this appeal is that the Secretary of State for India in Council was not jointly liable with the other defendants for the entire amount of mesne profits that was awarded by the learned Judge but that his liability should be confined to such rents as he may have realised from the other defendant. At the outset it may be observed that the liability was determined by the preliminary decree, and so it cannot be challenged in this appeal from the final decree. But on the merits it may be pointed out that in the decisions of the several Courts in the original suit itself, it had been found that there was a combination amongst the several defendants, the result of which, according to the said Courts, was that the plaintiff was dispossessed. "These findings have been referred to by the

learned Judge in his judgment. The learned Judge has observed that under issue 6 it had been found by his predecessor that the Kanungo had entered into an unholy combination with defendant 3 to wrench away the land from the plaintiff and that the District Judge had also accepted the same view. The learned Judge held inasmuch as such a combination existed amongst the several defendants, the test of joint liability in a matter of this description had been satisfied and that, therefore, defendants 1 to 4 were all jointly liable for the claim for mesne profits. It cannot be disputed that, so far as this Court is concerned, the view, which the learned Judge has taken of the question of joint or several liability with regard to mesne profits, has been adopted and applied in a number of cases. Amongst these cases the one to which it would be sufficient to refer is the judgment of Mookerji, J., in *Ramratan Kapali v. Aswini Kumar Dutt* (1910) 37 Cal 559. The learned Judge observed in that case as follows:

It cannot be laid down as an inflexible rule, that in every case of tort, the Court is bound to pass a joint decree against the wrongdoers, making each jointly and severally liable for the whole amount decreed, In case, therefore, in which the controlling general principle, namely that where acts of several persons, by design or by conduct tantamount to conspiracy, contribute to the commission of a wrong, they are jointly liable, is not applicable, the rule of joint liability also ceases to be applicable.

5. These observations clearly indicated that where a number of persons actuated by design or as a result of conspiracy combine together and dispossess the plaintiff, the plaintiff is entitled to look to all of them jointly for recovery of mesne profits. If this principle be correct, then there can be no question that upon the facts found in the present case, the learned Judge's decision is right because the case, as far as we have been able to understand it was this: that the Kanungo at first committed stray acts of trespass upon the plaintiff's land and that thereafter entering into a combination with the other defendants went upon the land, gave them a settlement and got the plaintiff dispossessed. We also understand that it was the case for the Government at the time that the lands did not appertain to the plaintiff's holding No. 17 but were khas lands of which the Kanungo was entitled to take possession on behalf of the Government. It is clear that the action of the Kanungo was never repudiated by the Government at any stage. It has to be stated here that although the observations quoted above from the judgment of Mookerji, J., in *Ramratan Kapali v. Aswini Kumar Dutt* (1910) 37 Cal 559 were not specifically dissented from in any later decision of this Court, there was a decision of Page, J., in *Pramada Nath Roy v. Secy, of State* 1927 Cal 182 in which another part of that decision was dissented from, namely that part of the decision wherein Mookerji, J., had laid down certain principles which according to him were to be followed in apportioning the liability of the different grades of tenants or under-tenants. The decision in *Ramratan Kapali v. Aswini Kumar Dutt* (1910) 37 Cal 559 above cited, however, has since been reversed by the Judicial Committee in *Gurudas Kundu Choudhury v. Hemendra Kumar Roy* 1929 PC 300. Dr. Basak appearing on behalf of the

appellant has contended that the principle above referred to should no longer be treated as correct and that the pronouncement of the Judicial Committee in *Gurudas Kundu Choudhury v. Hemendra Kumar Roy* 1929 PC 300 has shaken the authority of *Ramratan Kapali v. Aswini Kumar Dutt* (1910) 37 Cal 559 and of other cases on which it was founded. He has drawn our attention first of all to the definition of mesne profits as given in the Code in Section 2, Clause 12. Mesne profits is there defined as meaning

those profits which the person in wrongful possession of the property actually received or might with ordinary diligence have received therefrom, together with interest on such profits.

6. It is not necessary to refer to the rest of the definition. This definition has been emphasised by the Judicial Committee in *Gray v. Bhagu Mian* 1930 PC 82 in which their Lordships have said:

Under the definition of mesne profits u/s 2, sub-S 12, Civil P. C, 1908, the sum to be awarded is not what the plaintiff has lost by his exclusion from the land but what the defendant has made, or might with reasonable diligence, have made, by his wrongful possession.

7. There can be no dispute whatsoever that is the meaning of the expression "mesne profits" such as has been, used in the Code and with regard to which the plaintiff is entitled to a decree in the present case. If that definition is applied to the mesne profits with regard to which the plaintiff is entitled to a decree in the present case and if the finding be, as it is that all the defendants acted jointly and in pursuance of a combination, then it is difficult to see how this definition is not satisfied if calculation is made of such profits as the defendants who acting together and in combination with each other purported to dispossess the plaintiff and were in wrongful possession of the property might with ordinary diligence have received therefrom. When a combination of this character exists, the plaintiff is justly entitled to say that it is not for him to find out what exactly is the amount which each of the trespassers has received from the property, but that he would make them all jointly liable for the entire amount of profits which they had received or which they might with ordinary diligence have realised from the property. The decision of the Judicial Committee in *Gurudas Kundu Choudhury v. Hemendra Kumar Roy* 1929 PC 300, as has already been stated, has been relied upon by Dr. Basak.

8. Now the facts of the above case were that a quantity of land to which three families of zamindars were entitled in certain shares became diluviated. On reformation the Government took possession of the lands and let them out on a putni lease. One of the three families recovered the land from the Government and allowed the putnidar to continue in possession. Subsequently, members of the other two families sued the family which had recovered the land the Government and the putnidar claiming to recover possession of the lands and the mesne profits. A decree was passed in certain terms to which we need not refer

here. One of the questions which arose upon that decree was on what basis the mesne profits should be computed. On that question, it was held that mesne profits recoverable from the principal defendants who had recovered the land would be on the basis of the rents they had received from the putnidar and not upon the produce value of the land. The distinguishable element of that case was that the land was in occupation of a putnidar and that the putnidar was not a trespasser and in those circumstances their Lordships held that it was not obligatory on the part of the trespasser to remove the putnidar from the land. On the construction of the decree it was held that it was not a joint and several decree against all, and indeed such a decree could not be made because the different defendants came into possession at different times.

9. The facts of the present case are entirely different. Here, if the findings be correct, and we have got to go upon the findings such as have been recorded in the concurrent judgments of the several Courts which disposed of the original suit, there were no tenants on the land excepting the plaintiff who claimed to be in occupation of it as a tenant. The lands were claimed on behalf of the Government as khas lands and the Kanungo presumably acting on behalf of the Government, put the other defendants into possession and if the findings be correct he did so mala fide. "We are of opinion that the decree that has been passed in this case is a decree which is amply supported on principle and by authority. Another decision of the Judicial Committee has been referred to by Dr. Basak, namely the case of *L.P.E. Pugh v. Asutosh Sen* 1929 PC 69. But we do not think that anything that has been said in that case can be of any assistance to the appellant in the present case. That case was an action of trover and the distinction was pointed out by their Lordships of the Judicial Committee in their judgment. As has been observed in *Basanta Kumar v. Ram Shankar* 1932 Cal 600,

In the case of claim of mesne profits two courses are left open to the Court. A decree for mesne profits may be passed jointly and severally against all the trespassers who may have jointly kept the plaintiffs out of possession of any particular property leaving them to have their respective rights adjusted in a separate suit for contribution or the respective liabilities of such trespassers may be ascertained in the plaintiff's suit against them, and a decree on the basis of such several liabilities may be passed as against the respective trespassers in plaintiff's favour.

10. In the present case, as has been pointed out by the learned Judge in his judgment, there was no claim and no averment made in the statement filed,, on behalf of the different defendants, alleging that they were separately liable for mesne profits as amongst themselves. The different defendants all pleaded that they were not liable for mesne profits at all. We are of opinion that the decree which the Court below has made is right. We accordingly dismiss this appeal with costs to the plaintiff-respondent.