

(1913) 01 CAL CK 0051
In the Calcutta High Court

Surjug Saran Lal and Others

APPELLANT

Vs

Dukhit Mahto and Others

RESPONDENT

Date of Decision : 26-01-1913

Acts Referred:

Bengal Tenancy Act, 1885 — Section 147
Evidence Act, 1872 — Section 44

Citation : 18 Ind. Cas. 809

Hon'ble Judges : N. Chatterjea, J;Coxe, J

Bench : Division Bench

Judgement

1. This appeal arises out of a suit for rent. The plaintiffs' case is that the tenants are Dukhit, Ram Autar, and Ramyad and that on a compromise arrived at in a former suit, they agreed to pay the somewhat considerable rent of Rs. 77 odd for 6 bighas and 24 seers a maund on the produce of the rest of the land. The suit has been dismissed and the plaintiffs appeal.

2. The first point taken is that as the decree which embodied the compromise has not been set aside, it is still binding on the parties. We think that this contention must be upheld. It is not apparently disputed that the three defendants were parties to the former suit. It was found by the Court of first instance that Ram Autar entered into the compromise without the knowledge of the other two. But the Munsif has not considered the fact that they raised no objection to it. A party to a suit must be presumed to know what is the result of it, when it is not suggested that he was ignorant of its existence. Even if the actual compromise was entered into by Ram Autar alone, his brothers must have asked him what had happened in the suit and if they did not object, that in itself renders it very difficult to accept the theory of fraud. Of course, the defendants could show that the decree had been obtained by fraud, without asking to have it set aside, and that would be a finding of fact with which we could not interfere. But the Munsif himself does not find that the decree was obtained by fraud against Ram Autar and the learned District Judge comes to no finding on the point. He recites the Munsif's finding and adds: "Apart from the above, there is,

I think, another very strong ground for holding that the compromise was illegal and ineffective" but he does not say whether he agrees with the Munsif's finding. Later on, he says: "It is very doubtful how far it (the compromise) can bind Dukhit and Rampal. On the whole, therefore, I am inclined to attach very little importance to it." This is not a finding of fraud.

3. A point much discussed in the Courts below was whether the three respondents were the original tenants of the land or whether, as they assert, their father, Imrit, who was no party to the compromise, was interested in it. Reliance was placed on a certain tiskhana paper, the admissibility of which has been attacked. But as Imrit is now dead and has been succeeded by the respondents, these questions no longer arise.

4. Lastly, it is urged that the defendants admitted more rent than has been decreed. That is a point that can be dealt with by the Court below.

5. The appeal must, therefore, be decreed and the case go back to the District Judge for re-hearing and decision after a distinct finding on the point whether the compromise decree was obtained by fraud against all or any of the defendants. If the finding is in the affirmative, the suit must be decreed as against the defendants, in whose favour it is so found, at the rates admitted by those defendants and the Court will decide what rates they do admit. If the finding is in the negative, the Court will have to decide the second issue and dispose of the case accordingly. Costs will abide the result.

Appeal allowed and case remanded.

Second Appeal No. 1954 of 1910.

6. The judgment delivered in Appeal No. 2041 applies also to this appeal. But there is another point raised in the appeal, namely that the compromise decree which fixed a money rent is bad u/s 147 A of the Bengal Tenancy Act.

7. It cannot be disputed that that decree was wrong. It was enacted by that section that the Courts should not pass any decree on a compromise which was not a lawful contract under the Act, and as it had been often held that Section 29, which restricts these contracts, did not apply when the compromise settled uncertain and disputed rents, it was further enacted that in such cases the Court should record evidence to show what the rent was before the dispute arose, in order to enable it to ascertain, if Section 29 had any application or not. This provision of law the former Court entirely disregarded.

8. It is argued, however, that the decree is binding until it is set aside and that the defendants cannot impeach it in this case but should have sued to set it aside. We have, therefore, to decide whether the decree was merely irregular or whether the Court was not competent to deliver it within the meaning of Section 44 of the Evidence Act.

9. Now in the case of Nusserwanjee Pestonjee v. Mynodeen Khan 6 M.I.A. 134 it

was held that wherever jurisdiction is given to a Court by an Act and such jurisdiction is only given upon certain specified terms contained in the Regulation itself, it is an universal principle that these terms must be complied with in order to create and raise the jurisdiction, for if they be not complied with, the jurisdiction does not arise. That was a case in which the time for submitting the award was not specified in the reference to the arbitration in accordance with Bombay Regulation VII of 1827. The Bombay Court originally held (and the view seems to have found favour with the Privy Council) that the Legislature had enacted this provision in order to put a stop to the delays that were apparently at that time incident to arbitrations. Their Lordships considered it impossible to construe this provision as purely directory and held that the award, however good it might be, could not have the force of an award in accordance with the regulations.

10. Now in this case, it is evident from Section 29 of the Act that in the opinion of the Legislature, tenants, cannot safely be trusted to make for themselves contracts for enhancement of their rent. And Section 147A must have been enacted in order to prevent landlords and tenants doing through the instrumentality of the Court what they could not do themselves. Now clearly if as in this case the provisions of this section are disregarded and unfortunately we cannot hold that such a contingency is improbable, but the decree is held to be good and binding unless the tenant sues to set it aside within the period of limitation, the intention of the Legislature will be wholly defeated. The tenant will not sue to set aside the decree because, on the hypothesis, he consents to the decree, and thus if the decree is held to be good unless it is set aside, the tenant will be enabled to do precisely what the Legislature desired to make impossible for him, namely, to contract himself out of the Act.

11. As was pointed out by Mookherjee, J., in *Asutosh Sikdar v. Behari Lal Kirtunia* 6 C.L.J. 320 :11 C.W.N. 1011 (F.B.) : 35 Q. 63 no hard and fast line can be drawn between a nullity and an irregularity and a useful test is that laid down in *Holmes v. Russell* 9 D.P.C. 487 "it is difficult sometimes to distinguish between an irregularity and a nullity, but the safest rule to determine what is an irregularity and what is a nullity is to see whether the party can waive the objection. If he can waive it, it amounts to an irregularity; if he cannot, it is a nullity." Now in the present instance, it was evidently the intention of the Legislature to remove the whole matter from the tenant's control, and the possibility of a waiver by him is part of the mischief against which the enactment is aimed.

12. In these circumstances, we think that the principle laid down in the decisions we have quoted applies, and that the compromise decree is without jurisdiction. Accordingly, the appeal will be dismissed with costs.