

isap Ali Vs. Satis Chandra Roy

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Court : Kolkata

Decided On : Dec-13-1921

Reported in : 65Ind.Cas.504

Judge : Suhrawardy and ;Cuming, JJ.

Appellant : isap Ali

Respondent : Satis Chandra Roy

Judgement :

1. This appeal arises out of an action of ejectment under Section 49 of the Bengal Tenancy Act. The Court of first instance dismissed the plaintiff's claim for ejectment on the ground that the defendants are settled raiyats in respect of the homestead from which the plaintiff wanted to eject them and that as such they could not be ejected under Section 49 of the Bengal Tenancy Act. On appeal, the learned Additional District Judge held that the defendants had no occupancy right in the land in suit and were, therefore, liable to eviction under Section 49.

2. The defendants have appealed and attacked the judgment of the Court of Appeal below on the ground that the finding arrived at by it with regard to the character of the homestead is not sufficient for the disposal of the issue. The learned Judge says in his judgment that 'only a hut has been erected in this land for temporary use. It may exist from a long time as shown by Exhibit B. Still, it cannot be said to be the indispensable homestead of the defendants.' The learned

Judge seems to be under the impression that a homestead must necessarily be the only residential place of the raiyat of the village. He does not seem to be positive with regard to the character of the hut standing on this homestead.

3. It appears that in the Court of first instance a Commissioner was appointed to hold a local investigation and his report speaks of the existence of a hut on this homestead which is used for residential purposes by one of the defendants. The learned Judge does not refer to this piece of evidence. We are not sure if he has taken that into consideration in coming to a finding on this point.

4. The Court of Appeal below seems to have erred on another point. He states that an under-raiyat holding a homestead even if he happens to be a settled raiyat of the village can only acquire right of occupancy in the homestead by local custom or usage. As there is no evidence of such local custom or usage, the learned Judge has held that the defendants have failed to prove their raiyati right to the homestead. On this point there is sufficient authority of this Court for holding that a settled raiyat of the village holding a homestead, though as an under-raiyat or under a raiyat, acquires a raiyati right in that homestead, *Krishna Kanta Ghosh v. Jadu Kasya* 28 Ind. Cas. 839 : 21 C.L.J. 475 : 19 C.W.K. 914.

5. The judgment of the Court of Appeal below not being satisfactory and the Court not having come to a distinct finding with regard to the character of the hut on the homestead in consideration of the whole evidence on the point, we are of opinion that this case ought to be remanded to that Court for a re-hearing of the appeal. We accordingly set aside the decree of the Court of Appeal below and send the case back for re-hearing on the merits.

6. There is one other point to which we like to draw the attention of the lower Appellate Court. On the 22nd January 1920 the learned Judge passed the following order: 'Arguments heard. Copy of decree in T. Suit No. 210 of 1892 marked Exhibit 5 received in evidence subject to objection for the plaintiff appellant. Judgment will be delivered on 23rd January 1920.' It is not clear from this order whether the evidence was admitted by the learned Judge before or after he had heard the arguments in the case. The order as it stands indicates that the additional evidence was received after the arguments. Apart from the impropriety

of admitting evidence at that stage of the case, we may refer the learned Judge to the provisions of Order XLI, Rule 27, Civil Procedure Code, and the observation of the Judicial Committee in the case of Kessowji Issur v. G. 1.P. Railway Co. 31 B. 381 : 9 Bom. L.R. 671 : 11 C.W.N. 731 : 6 C.L.J. 5 : 4 A.L.J. 461 : 17 M.L.J. 347 : 2(sic) M.L.T. 435 : 34 I.A. 115 (P.C.). If the lower Appellate Court still thinks it necessary to admit that piece of evidence for the proper adjudication of the case he may do so in strict observance of the provisions of Order XLI, Rule 27, Civil Procedure Code.

7. Costs will abide the result.

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