

Khatemannessa Bibi Vs. Upendra Chandra Mandal and ors.

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Court : Kolkata

Decided On : Sep-05-1928

Reported in : AIR1928Cal804

Appellant : Khatemannessa Bibi

Respondent : Upendra Chandra Mandal and ors.

Judgement :

B.B. Ghose, J.

1. In this appeal a preliminary objection was taken on behalf of the respondents that no appeal lies as the order of the Subordinate Judge was an interlocutory one. This question is settled by the decision of the Privy Council in Bhup Indar Bahadur Singh v. Bijai Bahadur Singh [1901] 23 All. 152, where their Lordships held that an order limiting the right of the decree-holder to recover mesne profits for a certain period is of the nature of a final decree as defined in Section 2, Civil P.C., and is appealable, as such. A second, preliminary objection has been taken that after the order of the Subordinate Judge and subsequent to the appeal of the decree-holder preferred to this Court the Subordinate Judge required the decree-holder to put in the commissioner's fees for making enquiry according to the terms of his order. The decree-holder failed to put in the money and, therefore, the execution case was dismissed. As, the execution case has been dismissed this appeal is incompetent. This objection does not commend itself to me. The decree-holder did

not accept the decision of the Subordinate Judge on the points mentioned in his judgment and he did not want to proceed with the execution on the terms directed by the Subordinate Judge. If his appeal succeeds the mere fact that the Subordinate Judge dismissed the application for execution subsequently would not debar him from maintaining his appeal. If his appeal succeeds the whole of the judgment of the Subordinate Judge goes and the execution will be proceeded with in accordance with the judgment of this Court. This preliminary objection also fails.

2. The Subordinate Judge decided several questions in his judgment. It seems from the issues he framed and decided that he went behind the High Court decree. The decree of the High Court, with reference to which the appellant sought for ascertainment of mesne profits runs thus:

It is ordered and decreed that the plaintiff-appellant do get khas possession against the tenant defendants, and joint possession with the dar-patnidar defendants 38 and 39 viz., Makhan Chandra Mandal and Ishan Chandra Mandal to the extent of 12 annas and 16 gandas share of the land in dispute as in the plaint mentioned; and it is further ordered and decreed that the plaintiff-appellant do realize mesne profits for three years prior to the institution of the suit, the amount to be determined in execution proceedings.

3. The Subordinate Judge upon other materials placed before him found that the plaintiff had entered into a compromise with certain persons regarding certain lands and he came to the conclusion that as the compromise was not brought to the notice of the High Court, the High Court had made the decree as I [have stated above. The Subordinate Judge may be right in his conclusion. It may be that if the compromise had been brought to the notice of the High Court the decree might have been made otherwise. But the Subordinate Judge has acted absolutely without jurisdiction in modifying the decree of the High Court in the way he thought that the High Court should have made its decree. If the defendant judgment-debtors have suffered in any way by reason of anything which the plaintiff had done and which was not brought to the notice of the High Court when the case was heard, the proper way was to have the decree amended either by way of review or by some other legal proceeding. The defendants not having done that

cannot ask the Subordinate Judge to amend the decree of the High Court in the manner which the Subordinate Judge thought just and to execute the decree in that way. There is no ambiguity in the decree and the clear duty of the executing Court was to execute the decree as it stands.

4. The Subordinate Judge has again fallen into an error in saying that there cannot be a joint decree for mesne profits of all the lands of the plaintiff but each set of the tenant defendants who are bound by the decree is liable for the profits of only those lands of the solenama that were held by them. The decree of the High Court does not make any such discrimination, and here again the Subordinate Judge's order is absolutely without jurisdiction.

5. There is a third point on which the Subordinate Judge has also fallen into an error, and it is in holding that the plaintiff decree-holder could not claim mesne profits exceeding Rs. 901. This matter has been settled by this Court : see *Bidyadhar Bachar v. Manindra Nath Das* : AIR1925 Cal1076 .

6. The Subordinate Judge is in error with regard to the heirs of defendant 30 Sitanath Muchi. It is admitted by both parties here that his heirs were brought on the record of the suit and they are bound by the decree made by the High Court.

7. The Subordinate Judge's order is set aside with regard to all these points stated above. The other questions decided by him are affirmed. The Commissioner should be directed to execute the decree of the High Court according to the view set forth above. In ascertaining mesne profits payable by the defendants for any lands to the decree-holder the Commissioner will of course enquire up to what date the defendants were in possession as trespassers of which particular lands as against the plaintiff decree-holder. If the tenants had given up possession to any person whose right the plaintiff had acknowledged even before the decree of the High Court either by giving up possession to such third persons or by paying rent to them, then the defendants would not be liable for mesne profits to the plaintiff over again for those lands. This is a matter for enquiry by the Commissioner subject to his finding being revised as usual by the Court. The case therefore is sent back to the Court of the Subordinate Judge for the appointment of a Commissioner for ascertaining mesne profits due to the decree-holder.

8. I cannot fail to observe that the decree-holder has made a very inflated claim, and if on account of that the Commissioner's enquiry is prolonged the Court will consider what costs the decree-holder would be liable to pay on account of this inflated claim.

9. The decree holder is entitled to the costs of this appeal. The hearing-fee is assessed at five gold mohurs Defendant 29 will not be liable for any costs.

Bose, J.

10. I agree.

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