CALCUTTA HIGH COURT

Jasimuddin Biswas

Vs

Bhuban Jelini

(Brett and Sharfuddin, JJ.)

11.01.1907

JUDGMENT

Brett , J.

1. The present appeal arises out of a suit brought by the present plaintiffs appellants to recover rent for a certain fishery from the defendants respondents at a rental, which it was alleged was agreed to in a solenama executed by both the parties in suit No. 263 of 1893 in the Court of the Munsiff of Bongong in the year 1893; or, in the event of their not being found entitled to recover the sum claimed from the defendants as tenants, then on the allegation that the plaintiffs are entitled to recover the same sum from the defendants as compensation for use and occupation of the jalkar.

2. It appears that in 1893 the plaintiffs brought a suit against some of the defendants claiming damages from them for fish, which they had wrongfully caught in the jalkar. The claim was fixed at Rs. 200. Before the case was disposed of both the parties came to a compromise, and certain other persons, including others of the defendants in the present suit, were made parties in that suit. Afterwards a decree was passed in that suit on the basis of the compromise, and under the terms of the compromise it was agreed that the plaintiffs should recover the sum of; Rs. 60 only as compensation, and that the plaintiffs would give, and the defendants would accept, a permanent lease of the fishery at a fixed rent of Rs. 413 a year. The allegations in the plaint were that the defendants since 1893, when the decree was passed in that suit on the terms of the compromise, had been in possession of the jalkar, and had been realising profits from the same. The defence was that the defendants had never been jointly in possession of the jalkar under the terms of the compromise, but that some of them had been in separate possession of portions of the fishery as they had been before that suit, and
had been paying rent to the plaintiff in the same way as they had been paying before.

3. The Subordinate Judge, who tried the suit, has recorded a very careful judgment in
which he has gone very exhaustively into the evidence adduced by both the parties, and has

come to the conclusion that after the suit in 1893 was decreed in accordance with the terms of the compromise the defendants have been in possession of the jalkar as tenants, and that therefore they are liable to pay the rent claimed by the plaintiffs in the present suit. He accordingly gave the plaintiffs a decree.

4. On appeal the District Judge set aside the judgment and decree of the Subordinate Judge, and dismissed the plaintiffs suit.

5. The plaintiffs appealed to this Court and, when the appeal came up for hearing before another Bench, the learned Judges of that Bench, being of opinion that the findings of the lower Appellate Court wore extremely unsatisfactory, directed that the case should be sent back to the lower Appellate Court in order that that Cour might arrive at distinct findings on two points, namely, first, whether the defendants, any or either of them, had exercised at any time rights as lessees or acted as lessees of the jalkar under the plaintiffs on the strength of the solenama, which was incorporated in the decree of December 1893, and, secondly, if not, whether the defendants, any or either of them, had been in use and occupation of the jalkar since 19th December 1893.

6. The appeal on remand went before another District Judge and now comes before us with his findings on those two points.

7. We have considered the findings and all we can say with reference to them is that they are open to the same criticism as that which was passed by the learned Judges on the findings of the previous District Judge, namely, that they are very unsatisfactory. The District Judge's judgment runs as follows:--"I am of opinion that the solenama was not acted upon and that the defendants or any one of them did not exercise rights as lessees of the jalkar under the plaintiffs on the strength of the solenama, which was incorporated in the decree of December 1893. Some of the defendants were individually in occupation separately from each other of the panchita baor, that is to say, they used to fish, separately there and pay separately a rent of Re. 1 or Rs. 2 each before the suit No. 262 of 1893 in the Bongong Munsiff's Court Was instituted, and they have continued to do the same since the 19th June 1893, and the solenama does not seem to have affected their possession or exercise of it in any way since."

8. This finding is not in our opinion a legal rinding on the issues raised, It is merely an expression of opinion of the District Judge, and does not indicate on what evidence or grounds it is based. It is, therefore, in our opinion of no value whatever as assisting us in the disposing of the suit, and certainly fails satisfactorily to displace the findings of the Court of first instance. The District Judge goes on to say that "the evidence of the plaintiff No. 2, who has been examined as a witness, does not show that the defendants had anything to do with other parts of the jalkar Jamti Gachi than the panchita baor, and the whole evidence tends to show that there was never any joint possession of any part of the jalkar by the defendants either under the solenama or otherwise." This finding in this statement is not one which was called for by the order of remand,

as in that order the question was not raised whether there had or had not been joint possession of the jalkar by the defendants. The question raised was whether the defendants, any or either of them, had been in occupation of the jalkar as lessees or otherwise since the 19th December 1893 under the terms of the solenama. We have therefore in disposing of this appeal to consider the findings of the District Judge, who originally disposed of the appeal. We must observe at once, with reference to his judgment, that he does not appear to have correctly grasped the nature of the case brought by the plaintiffs. The plaintiffs' case was that the defendants entered into possession of the jalkar with their consent under the terms of the agreement embodied in the solenama. It was never suggested in the plaint, nor was there any claim against them based on the ground, that they had entered into possession of the jalkar as trespassers. That part of the judgment of the District Judge, therefore, which treats the suit as though it was a suit for damages for trespass may be removed from consideration. In dealing with the case of the plaintiffs the District Judge came to the conclusion that the solenama could not be admitted in evidence and used to support the case of the plaintiffs, unless it could be treated as a lease. In this view the Judge is clearly in error, and his finding that the solenama was not admissible in evidence because it was unregistered cannot therefore be supported under the law. He also found that the plaintiffs were not entitled to recover rent from the 28 defendants, because there was no evidence to prove that all those defendants stepped jointly into the plaintiffs' right as regards the fishery, or that they had been jointly exercising, those rights. The case for the plaintiffs was not that there had been an introduction of the defendants jointly at the same time into the fishery, but that the defendants, being apparently residents of the village, had accepted the terms of the solenama and had agreed to hold the jalkar on those terms under the plaintiffs and to exercise their rights of fishery in it as occasion arose, and to pay rent to the plaintiffs. The more fact that there was no evidence to prove that they had all jointly and simultaneously entered into possession was not sufficient to support the conclusion that the plaintiffs were not entitled to recover rent in the present suit.

9. The real questions for determination in the suit were whether the defendants were bound by the terms of the solenama executed in the suit in 1893, and whether after that solenama they were in possession as tenants of the jalkar, or in any other capacity, under the plaintiffs.

10. It has been argued on behalf of the defendants that the solenama as embodied in the decree would be valid as against the defendants in so far only as it covered matters directly in issue in the suit of 1893, that is to say, so far as it determined the damages to be paid to the plaintiff's in that suit, and that the defendants were not bound by those terms of the solenama under which it was agreed that the defendants would take a permanent lease of the jalkar at a yearly rental of Rs. 413.

11. We think that in execution of the decree itself the amount agreed to be paid as damages could alone be recovered from the defendants. The Court executing that decree would not have been empowered under it to compel the defendants to execute a kabuliat in favour of the plaintiffs or to accept a lease on the terms agreed to. At the same time we are of opinion that, as the solenama

embodied the agreement entered into by the two parties on the basis of which both parties entered into the compromise in that case, and as the agreement on the defendants' part, to take the permanent lease at the rental fixed must be taken to have formed one of the grounds or reasons which induced the plaintiff to accept as damages a sum less than he claimed in the suit, the defendants must be held to be bound by that agreement embodied in the solenama.

12. There is no suggestion that the agreement was not voluntarily entered into by the defendants. It was embodied in a solemn document, executed for the purpose of the disposal of the civil suit, and the defendants are bound by that agreement.

13. The next question is, whether under the terms of this solenama the defendants can be regarded as having entered into possession of the jalkar as lessees or in any other capacity. We think that from the terms of the solenama it is clear that under that agreement it was intended that the defendants should enter into enjoyment of the fishery as lessees. No doubt the solenama contains a provision that within 7 days from the date of its execution the two parties should register and exchange pattas and kabuliats. But it further provides, and this seems to us to be the most important provision for the purposes of the present case, that "so long as the said contract be not completed or perfected both the parties will for ever be bound by all the terms mentioned in this deed of compromise." It goes on to say that the defendants will be at liberty to use the jalkar in any manner they think fit, that the plaintiffs will regularly pay the rent due to the superior maliks, and the defendants will be bound to pay rents from the beginning of 1300 B.S. We think that these terms in the solenama leave no doubt that, if the defendants after 1893 were in occupation of the jalkar, they were so in occupation as tenants under that agreement embodied in that solenama.

14. It was then necessary for the Courts to determine whether in fact the defendants were in occupation of the fishery after 1893. The Subordinate Judge deals very carefully with this point in his finding on the 5th issue. He refers in detail to the evidence of all the witnesses, and on it he finds that after the execution of this solenama the plaintiff ceased to have a khas baich, i.e., to have a big haul of fish, once every year, as they had done prior to the execution of the solenama, that the tenants, who previously to 1893 used to fish in the jalkar and pay rent to the plaintiff, had since that date been paying rent to the defendants instead of to the plaintiff, and that some of the defendants had since 1893 sold to a dealer in fish certain quantities of fish, which had been caught at a khas baich, which had been held by the defendants. These findings certainly support the conclusion at which the Subordinate Judge arrived that the defendants were in possession after 1893 of the fishery in accordance with the terms of the agreement, which was embodied in the solenama. The findings of the lower appellate Court fail to displace at all these findings of the Court of first instance. Mere expressions of opinion of a Judge of an Appellate Court, which are not shown to be based on any evidence, are not in law findings sufficient to displace the findings of the Court of first instance, which are based on a careful review of the evidence; and this is all that we can find in the judgments of the two District Judges, who heard the appeal.

15. We find that the findings of the Court of first instance are based on the evidence, and are supported by it, and that they fully substantiate the case of the plaintiff that the solenama, was acted upon and that the defendants were in occupation and enjoyment of the fishery as lessees after the execution of the solenama.

16. We think therefore that the conclusions at which the Subordinate Judge arrived are correct, and that the plaintiff was entitled to a decree, and we think that the judgment of the lower Appellate Court is bad in law and cannot be maintained. We therefore set aside the judgment and decree of the lower Appellate Court and restore the judgment and decree of the Court of first instance.

17. Plaintiff will be entitled to recover costs from the defendants in all the Courts.