CALCUTTA HIGH COURT

Rajendra Nath Mukerjee

Vs

Hira Lal Mukerjee

(Geidt, Ormond, C.J. Brett and Sharf-Ud-Din, JJ.)

11.03.1910

JUDGMENT

Geidt and Ormond, JJ.

1. The suit out of which this appeal arises relates to some resumed cliowkidari chakran lands situated in mouzah Sridharpur belonging to the Maharajah of Burdwan. This rnouzah was one of several let in patni, in which the plaintiff has a 2 annas share and the defendants Nos. 1 and 2, the remaining 14 annas.

2. The case of the plaintiff is that under the terms of the putni, the putnidars were entitled to the cliowkidari chakran lands as soon as they were transferred by Government to the zemindar and that the plaintiff offered to take settlement of his share in these lands, but that the offer was rejected without any adequate reason by the officers of the Maharajah and the lands were settled with his (the plaintiff's) co-sharers, defendants Nos. 1 and 2, who were entitled to a 14 annas share only. The suit is accordingly brought to recover a two annas-share of the cliowkidari chakran land.

3. The only ground of defence that we need notice in this appeal is this: The defendants say that the Maharajah was quite willing to settle the 2 annas share of the cliowkidari chakran lands with the plaintiff provided that the plaintiff paid his share of the assessment which the Mharajah as zemindar had to pay every year on the lands after they had been transferred to him, and it was only after the plaintiff had refused to take settlement on the terms proposed, that the Maharajah settled with defendants Nos. 1 and 2.

4. The Munsif who tried the case found that the plaintiff had refused settlement as alleged by the defendants, and he based his finding both on the oral testimony as also on a petition presented by plaintiff's servant, Hem Chandra Bose, to the Maharajah's officer. The Munsif accordingly dismissed the suit.

5. The plaintiff appealed and the Subordinate Judge who heard the appeal found that there had been no refusal on the part of the plaintiff to take settlement, and he remanded the case to the Munsif for trial on the remaining issues that were raised in the case.

6. On this appeal by defendant No. 1, it is urged that the Subordinate Judge has overlooked a most important piece of evidence in favour of the defendant. The Subordinate Judge says that the finding of the Court below that the plaintiff had refused settlement was based upon a petition, dated the 15th Sraban 1309, which the plaintiff's servant, one Hem Chandra, had filed in the sherista of defendant No. 3. The Subordinate Judge has refused to act on this petition being of opinion that Hem Chandra had no authority to sign the plaintiff's name. But it is not correct to say that the Munsif's decision was based only on that petition. The Munsif's finding was, as we have already remarked, based not only on the petition, but on the oral testimony showing that the plaintiff himself had gone to the Maharajah's Dewan, Benode Behary Dhone, and when he was offered the settlement on condition of his paying up the dues which the Maharajah had to pay, he refused that settlement. On this ground alone, therefore, the decision of the Subordinate Judge cannot be upheld.

7. Further, we may remark that the case does not fall within the provisions of Section 562 of the Code of Civil Procedure, because there had been no disposal of the suit upon a preliminary point, and it was, therefore, not competent to the Subordinate Judge to remand the case to the Munsif.

8. It has been urged by the learned Vakil who appears on behalf of the respondent that even if there had been a refusal on the part of the plaintiff to take settlement, that does not debar him from succeeding in the present case. It is contended that by law he is entitled to the settlement and the Maharajah was bound to effect a settlement with him. If the Maharajah had any claim for the assessment which he had paid, it was open to him to bring a suit to recover the amount. In our opinion, however, this suit being virtually one for specific performance of contract, the Maharajah was equitably entitled to refuse settlement with the plaintiff unless the plaintiff paid to the Maharajah the sums which the latter had paid on account of the resumed chowkidari lands and which the plaintiff would himself have been obliged to pay if the settlement had been made with him directly the lands had been transferred to the Maharajah.

9. It has also been argued that if the plaintiff was liable to pay the assessment fixed on the lands by Government, he was entitled also to receive the profits on the lands and that as these profits amounted to double the amount of the assessment, it was not the plaintiff who had to pay any sum to the Maharajah but it was really the Maharajah who was indebted to the plaintiff. This is entirely a new case set up on behalf of the plaintiff for the first time in this Court. The plaintiff denied that there had been any refusal of settlement at all. Moreover, the argument that is now put forward assumes that the Maharajah had himself been in possession of the lands and had received the profits accruing from them. For this assumption there does not seem to be any ground whatsoever. Prima facie, if the plaintiff had taken settlement of the lands at the time it had

been offered to him, he would have been in a position to recover all the profits accruing on the lands from the date on which they had been transferred to the zemindar. In our opinion, therefore, the Maharajah was entitled to settle with defendants Nos. 1 and 2 the entire chowkidari chahran lands after the plaintiff had refused settlement on the terms offered.

10. The result is that the appeal is allowed; the order of the Subordinate Judge directing a remand of the case is set aside and the case is remanded to him for decision of the appeal with reference to the observations that we have made.

11. Costs will abide the result. We assess the hearing fee at 2 gold mohurs.

[After remand by this Court, the case came up for decision before Babu Aghore Chandra Hazra, Subordinate Judge, who decreed the plaintiff's suit. The defendants thereupon preferred this second appeal (No. 1446 of 1907)].

12. Mr. Chuckerbilty and Babus Dwirka Nath Mitter and Sailendra Nath Palit (for Babu Narendra Chandra Bose), for the Appellant.

13. Babu Golap Chandra Sarkar, for the Respondent.
Brett and Sharf-ud-Din. JJ.

14. This is an appeal against the judgment and decree of the Subordinate Judge of Burdwan passed in a suit after it had been remanded to that Court for re-trial by the High Court. The plaintiff as 2 annas share-holder in a putni in Mouzah Sridharpur claimed to be entitled to a settlement from the Maharajah of Burdwan of a 2 annas share in certain resumed chowkidari chakran lands. The contesting defendants are the holders of the remaining 14 annas share in the putni, and their defence was that the plaintiff had forfeited his right to the settlement of the share in the cliowkidari chakran lands because he had refused to accept settlement from the Maharajah subject to the condition that he would pay to the Maharajah a 2 annas share of the amount which the Maharajah had been obliged himself to pay since 1306, B. S., the year of the resumption. In consequence of the plaintiff's refusal the Maharajah had settled the whole of the lands with the defendants.

15. The Munsif found that there had been a refusal on the part of the plaintiff to accept the settlement on the conditions offered by the Maharajah, that the Maharajah's demand was equitable, and that the plaintiff had forfeited his right to the settlement. On appeal the predecessor-in-office of the present Subordinate Judge held that there had been no such refusal as to constitute an estoppel against the plaintiff to obtain the settlement, and remanded the suit to the Court of first instance for trial of the other issues. On appeal to this Court the order of remand was set aside and the case sent back to the Subordinate Judge for trial.

16. After remand the Subordinate Judge has decreed the appeal and has given the plaintiff a decree. The contesting defendants have appealed and in support of the appeal the main point which has been taken is that the Subordinate Judge has misunderstood the nature and scope of the order of remand of this Court and has re-opened questions which were in fact decided by this Court in its judgment ordering the remand.

17. The previous appeal to this Court was against the order remanding the suit to the Court of first instance for trial and the main point raised in that appeal was whether the remand order of the Subordinate Judge was justified in law. The remand order was based on the finding of the Subordinate Judge that there had been no refusal of the plain-tiff to take the settlement from the Maharajah, as had been held by the Court of first instance.

18. In their judgment setting aside the order of the lower appellate Court remanding the suit, the Judges of this Court, first, found that the Subordinate Judge was wrong in holding that the finding of the Court of first instance was based only and entirely upon a petition, dated 15th Sraban 1309, which the defendant's servant, Hem Chandra, had filed in the sherista of the defendant No. 3, the Maharajah, and pointed out that there was also the evidence of the Maharajah's Dewan, Benode Behary Dhone, to the effect that the plaintiff had himself refused the settlement when it was offered to him on condition of his paying the dues, which the Maharajah had had to pay; and on that ground alone they were unable to uphold the order of remand. They went on to point out that the case did not fall within the provisions of Section 562 of the old Code of Civil Procedure. In reply to the contention advanced on behalf of the plaintiff that he was by law entitled to the settlement and that the Maharajah was bound to effect a settlement with him they held that the Maharajah was equitably entitled to refuse settlement with the plaintiff unless the plaintiff paid to the Maharajah the sums which the latter had paid on account of the resumed chowkidari lands: and finally they held that the Maharajah was entitled to settle with defendants Nos. 1 and 2 the entire chowkidari chahran lands after the plaintiff has refused settlement on the terms offered. The remand order was set aside and the appeal remanded to the lower appellate Court for decision with reference to the observations which they had made.

19. The Subordinate Judge has treated the order of this Court as a remand of the appeal for trial and for consideration of the truth or otherwise of the oral waiver set up. He has then proceeded to dispose of the plea of waiver by the petition by saying that he accepted the finding on that point of his predecessor and his reasons. As to the evidence of Binode Behary Dhone he says it could not be implicitly relied on because he could not be corroborated by any respectable witness and having thus briefly dealt with the question of waiver on these grounds he proceeds to dispose of the appeal on a point which does not appear to have been previously raised, viz., that the demand made by the Maharajah for back rents was illegal and improper, and the plaintiff was not bound to pay more than the assessment made by the Collector when resuming the lands. Holding, on this ground, that there was no valid refusal on the part of the plaintiff to take the settlement he comes to the conclusion that the plaintiff is entitled to obtain settlement of a 2 annas share of the

resumed chahran lands from defendant No. 3 on payment only of his share of the back rents according to the assessment made by the Collector. He found the other issues in plaintiff's favour and decreed the appeal, and gave the plaintiff a decree for the full relief sought in his suit.

20. The question we have to consider is whether this decision of the appeal by the lower Court is in accordance with the observations made in the judgment of this Court remanding the appeal for re-trial. The contention of the appellant is that the decision is contrary to those observations and that in fact the Subordinate Judge has decided the appeal in conflict with the findings of this Court in that judgment. In our opinion, this contention is based on substantial grounds.

21. There can be no doubt that this Court came to the conclusion that the order of remand by the lower appellate Court was bad in law because it was not supported by the facts. The Judges found distinctly that the plaintiff had refused to take settlement from the Maharajah on the terms offered, that on that ground the Maharajah was equitably entitled to refuse to make a settlement of the 2 annas share with him, and was entitled to settle the entire resumed lands with defendants Nos. 1 and 2, These are, in our opinion, distinct findings binding on the lower appellate Court.

22. The Subordinate Judge so far from accepting these findings has made for the plaintiff a fresh case. In the judgment of the Court of first instance we find it stated, There was no dispute, nor is there any dispute raised before me that the amount of such rental was not what the Maharajah was entitled to get." The rental referred to is the sum of Rs. 99.9 the payment of a 2 annas share of which from 1306 B. S., was demanded by the Maharajah from the plaintiff as a condition of his obtaining the settlement. The Subordinate Judge in spite of this statement in the judgment of the Court of first instance has allowed the question to be raised whether the rent demanded was fair, and has held that the demand was illegal and improper, and that the plaintiff was not bound to pay more than a 2 annas share of the assessment, viz., Rs. 66-6 made by the Collector on resumption.

23. In our opinion the Subordinate Judge was not competent to raise this new point and re-open after remand the question which had been decided by this Court in its judgment directing the remand of the appeal. Nor do we think that there is authority to support his decision that the plaintiff was not bound to pay more than the assessment made by the Collector. In the case of *Kazi Newaz Khoda v. Surendra Nath*[1], it was pointed out, following the principle laid down in previous cases, that the decision of the question must ultimately depend upon the mode in which the rent was assessed at the inception of the putni, and in the case of Hari Narain Mozumdar v. Mukund Lal Mundal 4 C.W.N. 814, it was held that the putnidar was bound to pay to the zemindar such rents for the resumed chowhidari chakran lands as corresponded to the proportion between the gross collections and the putni rent formerly payable by him. It is manifest that the rates of rent in the estate at the time of the resumption of the chakran lands may have been considerably higher than those prevailing when the putni lease was granted. The resumption of the chakran land is in the nature of a wind-fall to the estate, and it is certainly open to question

whether the putnidar is entitled to the whole of the profits resulting from the resumption. The grounds, therefore, on which the Subordinate Judge has arrived at his conclusion are not, as he appears to consider, beyond dispute.

24. In the present case, however, the point was never raised in the Court of first instance and the materials on which the Subordinate Judge has arrived at his conclusion are, in our opinion, insufficient and inconclusive.

25. We hold, therefore, that the finding of the Subordinate Judge on this point cannot be upheld. We are of opinion that the question was substantially determined by the decision of this Court ordering the remand and that the Subordinate Judge should not have reopened it on the imperfect materials before him.

26. The result, therefore, is that we decree the appeal, set aside the judgment and decree of the lower appellate Court and restore the judgment of the Court of first instance with costs to the appellant (defendant) in all the Courts.

Cases Referred.

1De 5 C.L.J. 33 at p. 38 : 11 C.W.N. 201 : 34 C. 109