

# CALCUTTA HIGH COURT

Dwarkanath Chakravarti

Vs

Atul Chandra Chakravarti

(Greaves and Newbould, JJ.)

05.03.1919

## JUDGMENT

### Greaves, J.

1. This is an appeal by the plaintiff against a decision of the Subordinate Judge of the 3rd Court of Mymensingh, dated the 30th April 1917. The plaintiff's suit was for rent of a certain tenure formerly held by the defendants but which was sold for arrears of rent on the 8th Falgoun 1320, as appears from the judgment. The lower Court gave the plaintiff a decree for a sum of Rs. 2,191-12-6 and for cesses at the rate of Rs. 286-11-2 per year, or in all for a total sum of Rs. 5,900-14-3.

2. The plaintiff appeals on two grounds. First of all he says that the Subordinate Judge should not have confined the decree, as he has done, to the security referred to in the plaint, but that he should have passed a personal decree against the defendants; and secondly, it is said that the Subordinate Judge erred in disallowing the plaintiff's claim for the Ashar Kist of 1318 as being barred by limitation.

3. The necessary facts for the purpose of deciding this appeal are shortly as follows:--The father of one Annada Mohan Roy on the 12th April 1892 by a document of that date demised the tenure to the defendants at a rental of Rs. 2,192. Annada Mohan, on some date which is not material, commenced a suit for rent against the defendants, and on the 23rd February 1909 the suit was compromised on appeal, and it is upon one of the terms of the compromise that one of the questions that arise on this appeal turns. Clause (6) of that compromise decree, which was effected in Appeal No. 516 of 1907, provides that, the terms of the Mirash Ijara Pattah, dated the 1st Bysakh 1299, in respect of the properties mentioned in Schedule A were to be modified in the following manner, but that save and except such modification all other terms of the Pattah were to remain intact; and sub Clause (1) of Clause (b) which is the material clause, provides that Annada Mohan or his heirs should have the option of realizing the amount of any decree which he might in future obtain for the rent of the Mirash Ijara either by attachment and sale of the Mirash Ijara or by attachment and sale of the right, title and interest of the defendants Nos. 1 to 3 or their heirs, representatives or assignees in the property described in Schedule B; but that Annada Mohan Roy and his heirs, representatives or assignees should have no right to levy process of execution against the persons of the defendants Nos. 1, 2 and 3 or their heirs,

representatives or assignees, or against any other property belonging to them save and except either of the properties described in the Schedule A or B in execution of any decree for rent in respect of the Mirash Ijara which Annada Mohan or his heirs, representatives or assignees might in future obtain against the defendants Nos. 1 to 3 or their heirs, representatives or assignees. On the 7th February 1910, the plaintiff in the present suit purchased Annada Mohan's interest in the Zemindari, and on the 28th July 1911 he sued for rent in respect of the tenure from the month of Chaitra 1316 to the month of Ashar 1318. On the 23rd July 1912, he obtained a decree and the sale of the tenure or security was directed. On the 12th March 1913, an appeal was presented by the defendants against the decree. The judgment was affirmed with this modification, that it was held that the Ashar Kist of 1318 should not have been allowed inasmuch as the suit was premature in respect of that Kist. On the 18th March 1915, the plaintiff appealed to the High Court but he withdrew his appeal. On the 29th November 1912, the plaintiff sued for the rent from Kartik to Chaitra 1318. He obtained a decree, and on the 21st February 1913, so we are told, the plaintiff purchased the tenure in execution of the decree, and on the 7th April 1916, the present suit was commenced by the plaintiff in respect of the rent which I have already stated, including the Ashar Kist of 1318 which had been disallowed in one of the previous suits. The Subordinate Judge has held that the Ashar Kist was time barred, but he has granted a decree for the amount which I have already stated, but he has limited the execution of the decree to the securities referred to in the compromise in Appeal No. 516 of 1907.

4. I will deal with the second point first, namely, with regard to the Ashar Kist of 1318. This is clearly barred by limitation, unless the plaintiff is entitled to rely upon the provisions of Section 14 of the Limitation Act. We do not think that he is entitled to rely upon this section, because we do not think that he was in the former suit prosecuting his case in a Court which for defect of jurisdiction or other causes of like nature was unable to entertain it. The reason for the Court refusing to entertain the claim for the Ashar Kist was, not that it had not jurisdiction in respect of it, but because the claim was, premature as the plaintiff's claim for this Kist had not matured at the date of that suit. Therefore, we think that the present plaintiff cannot call in aid those former proceedings and say that time did not run against him while these proceedings were being prosecuted. This being so, it is admitted that the decision of the Subordinate Judge was correct upon this point and that the Ashar Kist is barred by limitation.

5. I now come to the other point. It is said that as the position of landlord and tenant had ceased to exist at the time the suit was instituted and at the time the decree was passed, the decree was not a decree for rent which could be executed as such but was in the nature of a money-decree and that this being so, the clause in the Solenama to which I have already referred was no bar to the present plaintiff obtaining a personal decree against the defendants in respect of the decretal amount. I confess myself that if the matter had been *res integra* I should, as at present advised, have been inclined to hold that the clause, in the Solenama was a bar to obtaining a personal decree against the defendants in the present suit, and that the fact that they had ceased to be tenants did not make the decree any less a decree for rent, although it could not be executed as a rent decree. But the question of the construction of the Solenama came up for decision under circumstances which appear to me to be identical *mutatis mutandis* with the circumstances of the present case in R.A. No. 534 of 1913, in respect of which the decree of this Court was passed on the 18th July 1916. In that suit the plaintiff was Annada Mohan Roy and the defendants were Atul Chandra Chakravarty Chowdhuri, Rajendra Nath Chakravarty Chowdhuri and Harendra Narain Chakravarty Chowdhuri and the present appellant was a pro forma defendant in the suit.

6. It was there contended on behalf of the respondents to that appeal that by virtue of the Solenama Annada Mohan Roy could not obtain a personal decree against the contesting defendants. But it was held that inasmuch as by virtue of the decision in *Forbes v. Maharaj Bahadur Singh*<sup>1</sup> the decree could not be executed as a rent-decree as Annada Mohan was no longer the Zemindar, consequently the decree must be treated as a money decree which did not fall within the provisions of the Solenama. With all respect to that decision I do not think that the decision in *Forbes v. Maharaj Bahadur Singh*<sup>2</sup> to which I have referred, decided any more than that by virtue of the provisions of Section 65 of the Bengal Tenancy Act a person who had ceased to be the Zemindar at the time he sued for rent could not enforce his decree as a rent-decree in accordance with the provisions of Section 65 of the Bengal Tenancy Act. I do not myself read it as deciding that the decree was not a decree for rent for other purposes. I should have thought myself that the present decree would have fallen within the terms of the provisions of the Solenama. But it seems to me that the decision of the 18th July 1916 applies to the circumstances of this case. If a decree obtained by a landlord who had ceased to be the landlord against his tenants is not a decree for rent within the meaning of the Solenama, then it seems to me that it must follow from that decision that a decree obtained by a landlord against the tenants who had ceased to be tenants cannot be called a decree for rent within the meaning of the Solenama. That being so, I think that we are bound sitting here by the decision of the 18th July 1916 upon the construction of the Solenama itself.

7. It is urged on behalf of the respondents that that was a decision between different persons to this appeal and that it is, therefore, not binding upon us. It seems to me, however, that it was a decision on a question of law (for a question of the construction of the Solenama must be of the legal effect of the terms and provisions of the Solenama) and that being so, it seems to me that this part of the appeal is concluded by the decision of the 18th July 1916.

8. One further question was urged before us on behalf of the respondents. It was said, that by virtue of the decision, which is printed at page 5 of the respondents' portion of the paper-book, the question is *res judicata*. I do not think that in any sense it can be said that this is so, for at the time that that decision was given the position of landlord and tenant still existed, whereas, as already said, at the present time the tenants have ceased to be in possession of the land.

9. For these reasons we think that the appeal must succeed to this extent, that the appellant is entitled to a personal decree against the defendants. We, therefore, modify the order of the Subordinate Judge to this extent that the decree will be realized first of all by the Bale of the security mentioned in the plaint and in default of the realization of the decretal amount or any part thereof from that security, the plaintiff will be at liberty to enforce his decree as a personal decree against the defendants, and if, as is suggested here, the security has already been realized, then the plaintiff will be entitled to at once enforce his decree as a personal decree.

10. The plaintiff is entitled to his costs of the hearing in this Court. We assess the hearing fee at 100 rupees.

Cases Referred.

<sup>1</sup>23 Ind. Cas. 632 ; 41 C. 926 ; 25 C.L.J. 434 ; 18 C.W.N. 747 ; 27 M.L.J. 4 ; (1914) M.W.N. 397 ; 15 M.L.T. 380 ; 1 L.W. 1059. 12 A.L.J. 653 ; 41 I.A. 91

<sup>2</sup>23 Ind. Cas. 632 ; 41 C. 926 ; 25 C.L.J. 434 ; 18 C.W.N. 747 ; 27 M.L.J. 4 ; (1914) M.W.N. 397 ; 15 M.L.T. 380 ; 1 L.W. 1059. 12 A.L.J. 653 ; 41 I.A. 91