

Jagabandhu Saha Vs. Hari Mohan Roy, Who Appeared and Chandra Mohan Roy and Monmohan Roy, Who Did Not Appear in This Appeal

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Court : Kolkata

Decided On : Apr-26-1921

Reported in : 62Ind.Cas.653

Judge : Newbould and ;Suhrawardy, JJ.

Appellant : Jagabandhu Saha

Respondent : Hari Mohan Roy, Who Appeared and Chandra Mohan Roy and Monmohan Roy, Who Did Not Appear in This Appeal

Judgement :

Newbould, J.

1. This appeal is directed against an order passed in execution proceedings. The plaintiff decree holder brought a suit against several defendants for establishment of his maliki title to an 8-annas share of certain properties. That suit was compromised with defendants Nos. 1, 6 and 7 and a decree against them was passed in terms of the solenama. We are now only concerned with two of the properties which were the subject matter of the suit. These are plot No. 21 of Schedule I and the property of Schedule VIII which is one plot only. These properties were dealt with in paragraphs 7 and 8 of the solenama. In paragraph 7 it was provided that the defendant No. 1 would remain the owner and possessor of property No. 1 of the 8th Schedule and the plaintiff's claim to the same would be dismissed. Paragraph 8 of the solenama provides: 'The plaintiff will get a decree in respect of the share claimed by him in property No. 21 and the defendant No. 1 relinquishes his right and possession in the demarcated 7-annas share on the eastern side in favour of the plaintiff. So long as the plaintiff will not be able to bring the land on the eastern side in his own possession he will be competent to carry on his karbar in the land and tin ghur mentioned in the 8th Schedule of the plaint, and the defendant will be bound to allow the plaintiff to have the said ghur and bhiti for that period without payment of rent.' In respect of the property that was the subject-matter of this suit a partition case had been instituted and in that partition suit the defendant No. 1 was a party but the plaintiff was not. The partition which had been effected in the partition proceedings was confirmed by the Collector. Under this partition the defendant No. 1 lost the possession he had in property No. 21 of the First Schedule of the plaintiff's suit. The consequence was that the plaintiff was unable, by virtue of his decree, to obtain khas possession of that property. He, therefore, tried to execute the decree. by obtaining possession of the house and the bhiti of the 8th Schedule On his petition a peon of the Court was directed to deliver possession to him and did actually deliver possession of a portion of this property. Then, the defendants Nos. 1, 6 and 7 objected to this delivery of possession and their objection has been upheld by the lower Court and it has been

declared that the plaintiff is not entitled to get possession of any property mentioned in Schedule VIII in execution of his present decree. Though, personally, I am not in agreement with all that is said by the learned Subordinate Judge in his judgment as regards the right of the decree-holder to possession of the property in Schedule VIII, yet I think his decision must be upheld on the sole ground that this condition in the solenama cannot be enforced in execution of the decree. The subject-matter of the suit brought by the plaintiff was the maliki right to 8 annas share of certain properties including the property in Schedule VIII. By the decree it was declared that the plaintiff's suit, so far as he claimed the maliki right to Schedule VIII, was dismissed. What was given to the plaintiff in respect of the Schedule VIII property by the 8th paragraph of the solenama was not a portion of the right claimed by him. What he obtained was possibly the right of a tenant holding without payment of rent, possibly the right of a licensee. But it was not a right which was in any way the subject-matter of the suit. It was a part of the consideration for which the plaintiff agreed to compromise the suit. In the case of *Jasimuddin Biswas v. Bhuban Telini* 34 C. 56 at p. 463. it has been held at page 483, that, so far as a solenama decree covers matters not directly in issue in the suit, these terms of the solenama cannot be enforced in execution of the decree, but the decree is evidence of the agreement entered into as regards those matters. On behalf of the appellant it is pointed out that a different view has been taken by other High Courts in this country and that the decision referred to is an obiter dictum and was not necessary for the decision of the appeal in which it was made. It appears, however, that this view has never been dissented from in this Court, and, in a recent decision of the Judicial Committese in *Hemanta Kumari Debi v, Midnapore Zemindari Company Limited* 53 Ind. Cas. 534 : 46 I.A. 240 : 37 M.L.J. 625 : 17 A.L.J. 1117 : 24 C.W.N. 177 : (1920) M.W.N. 66 : 27 M.L.T. 42 : 11 L.W. 301 : 31 C.L.J. 298 : 22 Bom. L.R. 488 : 47 C. 485 (P.C.) their Lordships expressed a similar view. I refer more particularly to their remarks at page 246 page of 46 I.A.--[Ed.] where they said: 'it may be that, as a decree, it was incapable of being executed outside the lands of the suit, but that does not prevent it being received in evidence of its contents.' Taking this view, I would hold that, whether under the terms of the solenama decree holder is entitled to recover possession of the property of Schedule VIII or not, he cannot enforce that right in execution of that decree, and, for this reason, I would dismiss this appeal with costs, hearing fee two gold mohurs.

Suhbawardy, J.

2. I agree.

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