

1905
JUNE 5.
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APPELLATE
CIVIL.
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32 C. 1019.

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[1019] APPELLATE CIVIL.

Before Sir Francis W. Maclean, K.C.I.E., Chief Justice, and Mr. Justice
Mitra.

JYOTI KUMAR MUKERJEE v. HARI DAS MAITI.*

[5th June, 1905.]

*Drainage Act Bengal Act (VI of 1880) ; Bengal Act II of 1902 ss. 42, 44 B (b)—
Drainage, recovery of cost of—Contract—Illegality—Contract Act (IX of 1872)
s. 23.*

There is nothing in the Drainage Acts to render invalid a contract between landlord and tenant by which the latter agrees to pay the former drainage cost in respect of land on which rent has for the first time been imposed in consequence of any scheme of works carried out under the Acts benefiting it.

Section 44B of the Act (as amended by Bengal Act II of 1902) does not apply where the plaintiff seeks to recover under a contract.

[Appr. 11 C. W. N. 57=5 C. L. J. 19.]

SECOND APPEAL by the plaintiff Jyoti Kumar Mukerjee.

The suit, out of which the appeal arose, was brought by the plaintiff for the recovery of a sum of money as drainage cost with interest according to the terms of a *solenama* on the following allegations:—

That the defendant Hari Das Maiti held some land as a non-occupancy raiyat under the plaintiff; a previous suit brought against him by the plaintiff for enhanced rent or, in the alternative, ejectment had been disposed of on a compromise, the terms of which were embodied in a *solenama* filed in that suit on the 9th February 1900, the plaintiff agreeing to give up his claim for enhanced rent and to recognise the defendant as an occupancy raiyat and the defendant agreeing to pay in four instalments the sum of Rs. 108-8, the principal amount of certain drainage costs apportioned against the land with interest, and to execute and register a *kistbundi* bond to secure the payment, failing [1020] which the said amount with interest was to be recoverable at once; and that the defendant had refused to pay or to execute the bond.

The defendant pleaded that the suit was not maintainable, that it was barred by limitation, that the *solenama* had been obtained from him by fraud and coercion; that he was an occupancy raiyat from long before the date of the previous rent suit and that the rent of his holding having been resettled after the excavation of the Rajapur canal, in respect of which the drainage costs were claimed, the plaintiff's claim for drainage cost was not maintainable under the provisions of the Drainage Acts.

The Munsiff held that the suit was maintainable, and that it was not barred by limitation and that the *solenama* had been executed by the defendant with free consent. He found, however, that the land had been settled with the defendant after the construction of the drainage works, and that the agreement by the defendant to pay the drainage cost was in contravention of the provisions of the Drainage Acts. He therefore dismissed the suit. This decision was affirmed on appeal.

The plaintiff appealed to the High Court.

*Appeal from Appellate Decree No. 577 of 1904 against the decree of Purna Chandra Banerjee, Subordinate Judge of Hooghly, dated the 12th of December 1903, affirming the decree of Chundra Bhushan Banerjee, Munsiff of Howrah, dated the 6th of June 1903.

Mr. Hill (Babu Lal Mohan Das and Babu Hara Kumar Mitter with him) for the appellant. The Drainage Acts give a statutory right quite apart from agreement. I am not seeking to enforce the statutory right, but an agreement between me and the tenant; there is nothing in the Act rendering such an agreement illegal; section 44B says that nothing is recoverable under section 42 of the Act; the plaintiff is not seeking to recover it under section 42, but under the *solenama*. Moreover, the Act of 1902 cannot invalidate the previous contract.

Babu Nagendra Nath Mitter for the respondent. The plaintiff claims the amount as drainage cost—that is under the Drainage Act. If it is a suit for the recovery of a sum of money under the contract, there can be no second appeal, the value being less than Rs. 500. Under section 23 of the Contract Act the contract is illegal because, if permitted, it would defeat the provisions of the Drainage Act.

[1021] MACLEAN, C. J. The plaintiff and the defendant are landlord and tenant. The plaintiff brought an action against the defendant as a non-occupancy raiyat and asked for enhancement of rent or, in the alternative for ejection from the land. That suit was amicably settled between the parties by a *solenama* dated the 9th February 1900 whereby the plaintiff allowed the defendant to remain on the land and the defendant agreed to pay a certain sum as drainage cost. The defendant apparently has taken advantage of that part of the agreement which benefited him, and when the plaintiff asked him to pay the drainage cost, he refused to pay and hence the present action.

Both the Courts have held that the contract was illegal, having regard to clause (b), section 44B of Bengal Act II of 1902. What we have to consider in this case is whether that view is right. Under the old Act (Bengal Act) VI of 1880, the landlord had the power given him of recovering certain sums mentioned in section 42 of the Act. That Act was subsequently amended by Bengal Act II of 1902, section 44B, which runs as follows:—“Notwithstanding anything herein contained, no sum shall be recoverable under section 42.” I may here leave out the words immediately following, “in respect of any lands which have been benefited by any scheme or works carried out under this Act when in consequence of such scheme or works, rent has for the first time been imposed on such lands.” It is found here that as regards the land now in question, the rent has for the first time been imposed. I cannot say that that has been very specifically found, but we may take it for the purposes of this judgment that it has been so found. Now, upon the contract which the parties entered into, what is there to make it illegal or forbidden by law or of such a nature as that it cannot be enforced? Where do we find in either of these Acts anything which prevents two persons from contracting? The words of section 44 (b) are:—“No sum shall be recoverable under section 42.” But the plaintiff here is not seeking to recover under a statutory title, but under the contract, which he entered into. I can find no statutory provision in either of the Acts referred to, which would authorise us in saying that such a contract, is not valid. I think, therefore, that the Courts below have miscarried, and that the decision must be set [1022] aside and the case must be remanded to the lower Appellate Court to ascertain what the amount of the drainage cost would be. The appellant will be entitled to his costs in this appeal, and in the lower Courts.

MITRA, J. I concur.

Appeal allowed.

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