
(1918) 06 CAL CK 0024
In the Calcutta High Court

Durga Charan Bose

APPELLANT

Vs

Lakhi Narain Bera and Another

RESPONDENT

Date of Decision : 25-06-1918

Acts Referred:

Criminal Procedure Code, 1898 (CrPC) — Section 107, 145

Citation : 47 Ind. Cas. 917

Hon'ble Judges : Walmsley, J; Charles Chitty, J

Bench : Division Bench

Judgement

1. This is an appeal preferred by Durga Charan Bose, plaintiff in Suit" No. 398 of 1915, which suit has been dismissed by the District Judge. We are also asked to revise the decree and order of the Additional District Judge in Appeal No. 291 of 1913 arising out of Suit No. 12 of 1912 in which Durga Charan Bose was defendant No. 9. The facts of the case are somewhat peculiar. There was a dispute between Lakhi Narain Beta and Hari Krista Bera on the one side and Gopal Chandra Jana of Nadabhoga and others on the other over certain paddy, which resulted in proceedings u/s 107 and Section 145, Criminal Procedure Code. The matter was referred to the arbitration of Pramada Nath Dutt, Muktear of the Beras, and (Durga Charan Bose, the present appellant, the Muktear of the opposite party. Of the merits of that dispute we have no means of judging, nor is it necessary for the present purpose to discuss them. It is sufficient to say that on 19th January 1910 Durga Charan Bose executed a promissory note for Rs. 250 .in favour of the Beras payable on demand. On that promissory note the Beras instituted Suit No. 12 of 1912 against Gopal Chandra Jana and 7 others, defendants Nos. 1 to 8, and Durga Charan Bose, defendant No. 9. The suit came on for hearing before the Munsif. Defendants Nos. 3 and 8 not being served, the suit was dismissed as against them. Defendants Nos. 1, 2, 4, 5, 6 and 7 denied all knowledge of the promissory note, pleaded that it was void for want of consideration, and raised other defences. Durga Charan Bose contended that there was no consideration for the note and that) if " there was, it had in fact been satisfied. It may be noted that he no longer puts forward these pleas but

admits his liability on the promissory note. The Munsif found that, the promissory note was executed by Durga Charan Bose for good consideration but really as a surety for defendants Nos. 1 to 8 who owed certain moneys to the Beras. He accordingly on 31st March 1913 passed a decree against all the defendants (other than defendants Nos. 3 and 8 who were not served) and directed that the decretal amount should be realised first from the properties, or persons, or both, of defendants Nos. 1, 2, 4, 5, 6 and 7 only, and then the balance, if necessary, from the properties of the defendant No. 9 (Durga Charan Bose).

2. Against this decree the defendants Nos. 1, 2, 4, 5, 6 and 7 appealed making the Beras, the plaintiffs, respondents, but not Durga Charan Bose their co-defendant. The appeal was heard by the Additional District Judge, Mr. Daval, on 28th February 1914. Before him the plaintiffs' Pleader admitted that on the pleadings there was no cause of action against defendants Nos. 1 to 8, whatever rights defendant No. 9 might have against them. The learned Additional District Judge accordingly set aside the decree against defendants Nos. 1, 2, 4, 5, 6 and 7 but added (and those words appear also in his decree) "a decree will be given against the defendant No. 9 only."

3. On 20th March 1914 Durga Charan Bose applied for the restoration of the appeal. After hearing the parties the Additional District Judge on 24th June 1914 passed the following order:-- "The decree in the lower Court was . against defendants Nos. 1 to 7" (it was not as a fact against defendant No. 3) "and defendant No. 9 and it was acquiesced in by defendant No. 9. I do not see how I can permit defendant No. 9 to re argue the appeal. I dismiss the application, I find no section under which it can come."

4. Durga Charan Bose took no further steps of any kind until, 24th April 1915, when he filed the suit out of which the present appeal arises (Suit No. 398 of 1915) In this suit he proceeded only against the Beras, plaintiffs in Suit No. 12 of 1912, and not against his co defendants in that suit. He prayed for a declaration that the appellate decree of the Additional District Judge above mentioned (money Appeal No. 291 of 1913) was not binding upon him, but fraudulent, illegal, invalid, inoperative, null and void and " dictum" (whatever that may mean); that the Additional District Judge had no jurisdiction to pass such a decree; and that the said decree was "non-executable" against him. The Munsif granted him a decree, but that has been reversed by the District Judge, Mr. Cuming, and the plaintiffs' suit dismissed. We think that the decision of the learned District Judge is correct. It is not open to a litigant, except on the-ground of fraud, to maintain a second suit to rescind or nullify the decree in a former suit to which he was a party and which was tried out by a competent Court. The case of Balwant Prasad Pande v. Ram Ratan . Gir 30 Ind. Cas. 849 : 20 C.W.N. 35 : 13 A.L.J.937 : 29 M.L.J. 165 : 2 L.W. 671 : 18 M.L.T.173 : 17 Bom. L.R 754 : 37 A. 483 : (1915) M.W.N. 736 : 23 C.L.J. 55 : 42. I.A.171 (P.C.) is directly in point. To quote the words of lord Shaw, such a procedure is radically, incompetent."

5. The appeal fails and is dismissed with costs.

6. The matter does not, however, end there. We are asked to revise the decrees in Suit No. 12 of 1912, and this we have power to do u/s 115 of the Civil Procedure Code. In this suit, a series of mistakes has been committed, the last of which, we regret to see, was committed in this Court in the issue of this Rule. The Rule was directed to issue on the "8 defendants-respondents." What was obviously intended was to issue a Rule on the two plaintiffs, the Beras, and the six defendants Nos. 1, 2, 4, 5, 6 and 7, against whom the suit had proceeded. The Bera plaintiffs, though not served with the Rule, are before us in the cognate matter of Appeal No. 2010 of 1917 and have no objection to the order which we propose to pass on this Rule. The petitioner Durga Charan Bose is to blame in this matter as he gave in paragraph 11 of his petition the names of the 8 persons who were to be served. They are the persons who were the original defendants Nos. 1 to 8 in Suit No. 12 of 1912. It appears from the record that defendant No. 8 is now dead and his heirs have not been brought on the record. This is, however, of no importance inasmuch as the suit never proceeded against defendants Nos. 3 and 8, and they have no concern with the subsequent proceedings. None of the persons, defendants Nos. 1 to 7, who have been served appear in this Rule.

7. Turning to the proceedings in the suit it is clear that the plaintiffs, the Beras, sued only on the promissory note. They had, therefore, no cause of action against defendants Nos. 1 to 8 who were no parties to that note. The question whether Durga Charan Bose had signed the promissory note by way of security for the defendants Nos. 1 to 8 could not be tried or determined in this suit, except so far as it affected the question of consideration. Durga Charan Bose alone could be held liable on the promissory note, and the decree of the Munsif making defendants Nos. 1, 2, 4, 5, 6 and 7 liable as principal debtors and Durga Charan Bose liable as a surety only was clearly erroneous. For some extraordinary reason defendants Nos. 1, 2, 4, 5, 6 and 7 in their appeal against this decree did not bring Durga Charan Bose before the Court as a respondent. The learned Additional District Judge, therefore, was correct in setting aside the Munsif's decree against the appellants but had no jurisdiction to pass the decree which he passed, or indeed any decree, against Durga Charan Bose, who was no party to the appeal before him. We think that the learned Additional District Judge was in error in refusing to restore the appeal and re-hear it in the presence of Durga Charan Bose after adding him as a party. It is true that no section of the CPC deals with such a case but then it was never contemplated that a Court would deal with a person, who was no party to the proceeding before it, as if he were a party properly added and properly served. The learned Additional District Judge would have been in order if in" allowing the appeal of defendants .Nos. 1, 2, 4, 5, 6 and 7 he had said nothing about defendant No. 9. In that case the decree of the Munsif against defendant No. 9 would have stood. But as it was, he made the decree against him a decree of the Appellate Court which he had no jurisdiction to do. There are two courses open to us. We may set aside the , decree of the Additional District Judge and remand the appeal for

rehearing in the presence of Durga Charan Bose, or we may now pass such final decree in Suit No: 12 of 1912 as in our opinion, ought to have been passed by the Courts below. As we entertain no manner of doubt as to what the decree should be, we adopt the latter course.

8. We set aside the decrees of both the Courts and pass a decree in favour of the plaintiffs against defendant No. 9, Durga Charan Bose, for Rs. 307-8 0 and costs, and interest at six per cent, par annum from 31st March 1913 until realization. The suit is dismissed against defendants Nos. 3 and 8, who were not served, without costs, and against defendants Nos. 1, 2, 4, 5, 6 and 7 with costs in both the lower Courts and interest on such costs at six per cent, per annum until realization.

9. We make no order as to costs of this Rule, "as the plaintiffs have incurred no additional costs in respect of it and the defendants Nos. 1 to 7 have not appeared.

10. This decree will not affect the rights, if any, which Durga Charan Bose may have against defendants Nos. 1 to 8 and which, as we have said, could not be investigated in this suit.