
(1897) 07 CAL CK 0027

In the Calcutta High Court

Case No : Appeal from Appellate Decree No. 1859 of 1895

Gour Mohan Golui and Madhub Chandra Samanta

APPELLANT

Vs

Dino Nath Karmakar and others

RESPONDENT

Date of Decision : 12-07-1897

Acts Referred:

Citation : (1897) 07 CAL CK 0027

Final Decision : Dismissed

Judgement

Banerjee, J.—This appeal arises out of a suit, brought by one Dino Nath Karmakar, to obtain a declaration that a decree originally obtained by the Defendant No. 4, against the Defendants Nos. 2 and 3, which had been purchased in the name of Defendant No. 1, had really been purchased by the Plaintiff for his own benefit. The Plaintiff, in his plaint, stated that execution had been taken out by him in the name of his benamidar, the Defendant No. 1, but that subsequently a dispute having arisen between him and the Defendant No. 1, the latter wrongfully, against his consent, took out execution in the year 1892, and that this was his cause of action for bringing the present suit. There was a further relief asked for relating to certain immovable property, but that was subsequently given up and the suit proceeded only with reference to the first-mentioned relief, namely, the relief by way of a declaration that the decree in question had been purchased by the Plaintiff in the name of the Defendant No. 1. The defence was that the suit was barred by limitation, that it was barred also by sec. 244 of the Code of Civil Procedure, and that the Defendant No. 1 was not a benamidar for the Plaintiff.

2. The first Court found for the Plaintiff upon all the questions raised in the case. Upon appeal by the Defendant No. 1, or rather, I should say, by the purchasers of his interest, the objection under sec. 244, C.P.C., seems not to have been pressed, but an objection under sec. 42 of the Specific Relief Act was substituted in its place; and the other two objections—the one of limitation and the other on the merits raised in the first Court—were again urged before the Lower Appellate

Court.

3. The learned Subordinate Judge decided all the three points against the Defendants-Appellants, and confirmed the decree of the first Court.

4. In the second appeal, it is contended for the Defendants-Appellants, first, that the Courts below are wrong in holding that the suit was not barred by limitation, whereas they ought to have held that it was so barred; secondly, that the Court of appeal below ought to have held that the suit was barred by sec, 244, C.P.C.; and thirdly, that the Court of Appeal below ought to have held that the suit was barred by the proviso to sec. 42 of the Specific Relief Act.

5. Upon the first point, we are asked to hold that the suit is governed by art 95 of the second Schedule of the Limitation Act, and that, if that article applies, art. 120 of that Schedule, which has been applied by the Lower Appellate Court, cannot have application. On the side of the Respondents it is contended that art. 95 does not apply to this case, and it is further contended that, having regard to the facts found by the first Court, no question of limitation can arise in this case, as the suit was brought within three years from the date of the cause of action alleged in the plaint, that cause of action being the wrongful execution of the decree by the Defendant No. 1 in the year 1892, the earlier execution-proceedings being found by the Munsif to have been taken out, really by the Plaintiff, though in the name of his benamidar, the Defendant No. 1.

6. The finding of the Munsif upon this question has not, in any way, been interfered with by the Lower Appellate Court; but then it is open to the Appellants to contend that the Appellate Court has not confirmed the view of the first Court, it having overruled the plea of limitation on the ground that the suit was governed by art. 120 and was not barred by limitation, as it was brought within six years of the date of the institution of the first execution-proceedings.

7. If it was not clear that art. 120 applied to the case, then perhaps, it would have been necessary to send the case back to the Lower Appellate Court. But, in our opinion, the Lower Appellate Court was quite right in holding that the case was governed by art. 120, because we think that art. 95 of the second Schedule of the Limitation Act, the only other article under which it has been contended and it could possibly have been contended that the case can come, has really no application to this case. Art. 95 applies to a suit to set aside a decree obtained by fraud, or for other relief on the ground of fraud.

8. The present suit is not one to set aside a decree obtained by fraud. The question is whether it is one for other relief on the ground of fraud.

9. We are clearly of opinion that this question ought to be answered in the negative. As it has been pointed out by the learned vakil for the Respondents, the Plaintiff is entitled to the relief he asks for, namely, a declaration that he was the real purchaser of the decree, and that the Defendant No. 1 was only a benamidar for him, quite irrespective of any fraud on the part of the Defendant;

this suit cannot, therefore, be said to be one for relief on the ground of fraud. That being so, art. 95 cannot have any application to this case. As that article does not apply, and as no other article expressly provides for this case, art. 120 must apply to it.

10. We may here notice a case which was relied upon by the learned vakil for the Appellant, namely, the case of Chunder Nath Chowdhuri v. Tirthnund Thakur I. L. R. 3 Cal. 504. That case really goes against the Appellants' contention; for it shows that art. 95 does not apply to every case in which fraud enters as an element in the conduct of the Defendant, but it is limited in its application to cases where relief is claimed on the sole ground of fraud.

11. As to the second contention, it is enough to say that the question raised in this case is not one arising between the parties to the suit in which the decree was passed or their representatives, but is one that arises between two parties, each of whom claims to be the representative of one of the parties to the court, namely, the party in whose favour the decree was passed. That being so, clause (c) of sec. 244 does not cover this case. And this appears clear upon a reference to the last paragraph of sec. 244 which relates to a case in which the question arises as to who is the representative of a party for the purpose of this section. In such a case, as provided by the section, the Court may either stay execution of the decree until the question has been determined by a separate suit or may itself determine the question by an order under this section.

12. It is not suggested that the Court of execution was ever called upon to decide the question that is now raised, and therefore there can be no doubt that a separate suit would lie for the determination of that question.

13. As to the last point, the question was not raised in the first Court. If it had been raised in the first Court, and if the objection was well-founded, the Plaintiff could have amended the plaint by asking for an injunction which, it is suggested in the Appellants' argument, the Plaintiff ought to have asked for. It is true that the question was allowed to be raised by the Lower Appellate Court, but that Court decided the question against the Defendants Appellants. If the objection had been well founded, we should have followed the course that was followed by the Bombay High Court in the case of Sardar Singhjee v. Gunpat Singhjee (2). But we do not think it necessary to take that course for two reasons. In the first place, we do not think that the objection is well-founded. We do not think that any injunction was necessary to be asked for in this case. The Plaintiff's case is, that he is the real purchaser of the decree and that the Defendant No. 1 was merely a benamidar for him. If he succeeds, as he has succeeded in the Court below, in obtaining a declaration that he is the real purchaser of the decree, no further proceedings can be taken in execution, and no multiplicity of proceedings can arise, for the avoiding of which a prayer for an injunction might have been needed; because an application by him to the Court below of execution to place him on the record, as the real representative of the decree-holder, will have the effect of putting an end to all further proceedings antagonistic to him.

14. The learned vakil for the Appellant, in support of his contention that in cases like this a prayer for an injunction ought to be made, relied upon the case of Kan Hamed v. Kutti I. L. R. 14 Mad. 167; but that case was of a very different nature from the one now before us. There, the Plaintiff asked for a declaratory decree that a certain decree had been obtained against him by fraud, and it was held that the Plaintiff ought to have prayed for a perpetual injunction restraining the decree holder from executing his decree. In that case, the prayer for an injunction was necessary, because it was by an injunction only that the Plaintiff could really protect himself from execution-proceedings being taken against him by the decree holder who had obtained the decree by fraud. Here, as I have pointed out above, it was open to the decree-holder to put an end to all further execution-proceedings by an application under sec. 232, C.P.C. But granting that there was any difficulty in obtaining a cessation of execution proceedings by an application for substitution under sec. 232 of the Code, there is a second reason why, as I said, it was unnecessary to remand the case after giving leave to the Plaintiff to amend the plaint. This is the position of affairs. The Defendant did not raise any objection under sec. 42 of the Specific Relief Act in the first Court; if he had done that, the Plaintiff might have prayed for such amendment of his plaint as was then necessary. As matters now stand, it appears, on the Appellants' own showing, that the rights of the Plaintiff have become vested in the Defendant No. 2, one of the judgment-debtors under the decree, the purchase of which has given rise to this litigation. If, then, it is declared that originally the Plaintiff was the real purchaser of the decree and not the Defendant No. 1, the result would be this, that decree would now, in the course of events have taken, be transferred to Defendant No. 2, one of the judgment-debtors; and by sec. 232, C.P.C., clause (6) of the proviso, it cannot be executed against any of the other judgment-debtors. Thus even if the objection of the Appellants had been well-founded, having regard to the change in the circumstances, we do not think that there would have arisen any necessity for remanding the case after giving the Respondents leave to amend their plaint. The grounds urged before us therefore all fail, and the appeal must be dismissed with costs.