

(1937) 05 CAL CK 0009

In the Calcutta High Court

Case No : Appeal from Appellate Decree No. 912 of 1936

Gourhari Adak and Another

APPELLANT

Vs

Sarat Chandra Lahiri

RESPONDENT

Date of Decision : 13-05-1937

Acts Referred:

Citation : (1937) 05 CAL CK 0009

Final Decision : Dismissed

Judgement

S.K. Ghose, J.—This is a second appeal by Defendants Nos. 1 and 2 in a suit for a declaration that the Defendants have fraudulently bought the property in suit at a revenue sale and for a direction upon them to execute a deed of reconveyance in favour of the Plaintiff. The property in question is a separate account of a share of an estate bearing Touzi No. 15 of the Midnapore Collectorate and is called separate account No. 3. The Plaintiff's case is that he became entitled to the property after the death of his mother by virtue of her will. Defendant No. 3 was the Naib and in that capacity he was entrusted by the Plaintiff and his co-sharers to collect the rents and pay the revenue. Defendant No. 1 who was formerly a tehsildar under Defendant No. 3 became a co-sharer by purchase. Defendant No. 2 is a relation of Defendant No. 1 and very intimate with him. Plaintiff's case is that with a view to secure the disputed property, Defendants Nos. 1 and 2 caused Defendant No. 3 to refrain from paying revenue, keeping that fact concealed from the Plaintiff. By their fraudulent conduct they brought about the sale of the property for arrears of revenue and purchased it in the names of Defendants Nos. 1 and 2 for the nominal price of Rs. 844, on the 27th June, 1932. The Plaintiff brings the suit in his capacity as executor to the estate of his mother. Previous to this, Plaintiff in his personal capacity brought Title Suit No. 128 of 1933 against Defendants Nos. 1 and 2 only to set aside the aforesaid revenue sale. That suit however was dismissed for default and an application to have that dismissal set aside was also unsuccessful. Hence the Plaintiff has brought the present suit. The defence inter alia is that the suit is not maintainable in its present form and that it is barred under Or. 2, r. 2 and Or. 9,

r. 9 of the Code of Civil Procedure. The trial Judge held that the suit was barred as contended for by the defence. On appeal, the learned Judge has held that the suit is not so barred and has directed that the trial should proceed on the remaining issues. Hence this second appeal by Defendants Nos. 1 and 2. So far as Defendant No. 3 is concerned, it is conceded by Dr. Basak for the Appellants that it is open to the Plaintiff to proceed as against him. In the present matter, the question is whether the learned Judge was right in holding that the suit is not barred under the provisions of Or. 2, r. 2, sub-r. (3) and Or. 9, r. 9, sub-r. (1) of the Code of Civil Procedure. Before dealing with the question of law, it is necessary to refer to the plaints in the two suits. In the previous Title Suit No. 128 of 1933, the plaint, (vide Ext. A), recites the circumstances tending to show fraudulent conduct on the part of Defendants Nos. 1 and 2 and also of the Naib Mohendra Nath Nandi who was made Defendant No. 3 in the subsequent suit. These allegations are contained in paragraphs 2 to 5. It is stated at the end of paragraph 5 that

the Plaintiff has suffered substantial injury on account of the said fraudulent acts of the Defendants and the said Naib and the said sale is liable to be set aside.

2. Then in paragraph 6, the Plaintiff goes on to relate certain irregularities in the service of the sale proclamation and so on and at the end it is stated that:

the sale cannot at all stand and it is fraudulent, illegal and liable to be set aside.

3. Coming to the prayers which are set forth in paragraph 9 of the plaint the main prayer (Ka) is stated as follows :

That a decree may be passed to the effect that the sale dated 27-6-32 in the sale case No. 1 held by the office of the Collector of this place may be set aside after declaration that the said sale is illegal, without jurisdiction, invalid and tainted with fraud and a further declaration may be made to the effect that the said sale has not impaired any right of the Plaintiff.

4. The cause of action is stated as having arisen on the 24th September, 1932, which was the date on which the appeal to the Commissioner was rejected. In the plaint of the present Title Suit No. 51 of 1935 the averments of fraud are amplified and the conduct of the three Defendants going to show how they brought about the revenue sale is described. In paragraph 6 it is stated thus:

That in that aforesaid suit for setting aside the sale, the Plaintiff merely prayed for setting aside the sale on the ground that the sale is illegal, irregular and that price is inadequate but except the prayer for setting aside the sale, the subject-matter of the said suit did not comprise the legal position which was created by the collusion and fraud with the Defendant No. 3 as stated in paragraph 3 of this plaint, nor (the Plaintiff; did not pray for any other relief against them. And inasmuch as the said suit was triable by the Civil Court on the ground of any act having been done contrary to the provisions of sec. 33 of Act XI of 1859, prayer for any relief on the ground of fraud in the suit for setting aside sale was

irrelevant and Plaintiff had no cause of action on the ground of such fraudulent acts.

5. In paragraph 8 the cause of action in the present suit is described as having arisen:

towards the middle of the month of August, 1932, when the fact of the said revenue sale as described in the plaint was known.

6. Of the prayers which are mentioned in paragraph 10 the main prayer (Ka) runs as follows:

That a declaration may be made to the effect that Defendants have fraudulently bought the property described in the schedule given below of the plaint and themselves auction-purchased the same and a decree may be passed directing the Defendants to execute a proper deed of re-conveyance in favour of the Plaintiff after receiving the sum of Rs. 844-from the Plaintiff as being the amount of purchase money.

7. Comparing the two plaints together, Dr. Basak for the Appellants contended that the learned Judge below was wrong in thinking that the previous suit was merely for setting aside the sale under sec. 33 of the Revenue Sales Act as having been made contrary to the provisions of that Act. He has contended that the Plaintiff had also asked for having the sale set aside on the ground of fraud, so that fraud is the foundation of the cause of action in both the suits. In support of this Dr. Basak has referred to the allegations of fraud contained in paragraphs 2 to 5 of the previous plaint (vide Ext. A), and also to the prayer (Ka) according to which the sale is to be set aside on declaration " that it is illegal, without jurisdiction, invalid and tainted with fraud." Now in a matter under Or. 2, r. 2, sub-r. (6") and also under Or. 9, r. 9, sub-r. (1) it has to be seen whether in the two suits the cause of action is the same. The expression " cause of action " has been variously defined. It is relevant for our purpose to point to one of these definitions, namely, that cause of action means every fact which is necessary to be proved to entitle the Plaintiff to have a decree but does not mean every piece of evidence which is necessary to prove such facts. *Murti v. Bholu Ram* I. L. R. 16 All. 165.(F. B.) (1893). In the present case it is important to remember that the allegations of fraud and the allegations of irregularities in the sale as contained in the previous plaint, Ext. A, are distinct in the sense that fraud is stated to be the underlying motive to the irregularities, the one being evidence in support of the other. The learned Judge below has pointed out that for the purpose of netting aside the sale one must have resort to sec. 33 of the Revenue Sales Act and strictly speaking for that purpose the question of fraud is irrelevant. Plaintiff had really introduced it for the purpose of proving the irregularities in the revenue sale. In the case of *Muhammad Hafiz v. Muhammad Zakariya* L. R. 49 I. A. 9: s. c. I. L. R. 44 All. 121; 26 C. W.N. 297 (1921) their Lordships point out that in a matter under Or. 2, r. 2 a cause of action is the cause of action which gives occasion for and forms the foundation of the suit. Dr. Basak has strongly relied

on the prayer clause in the previous plaint, Ex. A, as showing that the Plaintiff is also asking for relief on the ground of fraud. In the case of Chand Kour v. Partab Singh L. R. 15 I. A. 156 : s. c. I. L. R. 16 Cal 98 (1888), their Lordships of the Judicial Committee remark:

The cause of action has no relation whatever to the defence which may be set up by the Defendant, nor does it depend upon the character of the relief prayed for by the Plaintiff. It refers entirely to the grounds set forth in the plaint as the cause of action, or, in other words, to the media upon which the Plaintiff asks the Court to arrive at a conclusion in his favour.

Referring to the facts they further say:-

The cause of action set forth in the present plaint is not mere matter of intention, and it does not refer to either sale or mortgage. It consists in an allegation that the first Defendant has in point of fact made a da proesenti gift of their whole interest to a third party, who is the second Defendant.

8. In the present case so far as the previous plaint, Ext. A, is concerned, there is no doubt that the relief that the Plaintiff is asking for is to have the sale set aside, and that can only be done under sec. 33 of the Revenue Sales Act by proving that the sale had been held contrary to the provisions of that Act. In the plaint in the present suit the relief which the Plaintiff is asking for is on the footing that the sale is not set aside, but that it stands. Therefore the two positions are mutually exclusive and the causes of action are not the same.

9. I may also refer to the condition in sub-r. (3) of Or. 2, r. 2 that the Plaintiff must be entitled to more than one relief in respect of the same cause of action. In the present case, the Plaintiff can at best be described as being entitled to only one relief or one of the two reliefs which are mutually exclusive. In this connection there has been an argument at the Bar as to whether a revenue sale can be set aside on the ground of fraud. This enables me to refer to that class of cases in which the facts are similar to those of the present. In the case of Bhoobun Chunder Sen v. Ram Sunder Surma Mazoomdar I. L. R. 3 Cal. 300 (1877) it is alleged that one of several co-sharers fraudulently contrived to have an estate brought to sale for arrears of revenue and purchased it in benami. The relief asked for was to have the sale set aside on the ground of fraud. The trial Court decreed the suit and gave that relief. On appeal it was held that to such a suit the provisions of Act XI of 1859 could not be extended and that the suit must be treated as one for relief on the ground of fraud and subject to the general rule of limitation and was within time. As to facts the High Court agreed with the trial Court, but as to the decree, it was held that the proper form of the decree would be an order for reconveyance of the property to the Plaintiffs, so that the guilty party was not allowed to reap the benefits of his fraud. In the case of Amirunessa Khatoon v. The Secretary of State for India in Council I. L. R. 10/ Cal. 63 (1883) the facts are thus described by Sir Richard Garth, C. J.:

In this case, which we heard yesterday, the suit was brought to set aside a

revenue sale under Act XI of 1859. For this purpose the Plaintiffs relied upon certain irregularities, which are said to have occurred in carrying out the sale itself and also, as the Plaintiffs alleged, that their tehsildar had colluded with the servants of the Defendant No. 1—who was the purchaser, to make default in payment of the revenue so as to bring about the sale of the property, and enable the Defendant No. 1 to buy it at a low price.

10. Substantially therefore the facts are the same as in the present case. The relief that the Plaintiff in that suit asked for was to have the sale set aside on the ground of irregularities in the sale and the fraudulent conduct on the part of the Tehsildar and the Defendants. The trial Court held that the irregularities were not available to the Plaintiffs and the High Court agreed with this view. On the question of fraud the trial Court held that the Plaintiff might sue the Defendant for damages, but that he was not entitled to relief in that suit. As to this, the judgment of Garth, C. J., runs as follows :-

It is not necessary for us to go the length of saying that under no possible circumstances (such as for instance, as fraud on the part of the Collector or his officers) could such a suit be brought, but when we consider the way in which the alleged fraud is sought to be used in this case, we think it clear that it could be no ground for setting aside the sale.

He approves of the decision in the case in *Bhoobun Chunder Sen, v. Ram Sunder Surma Mazoomdar* I. L. R. 3 Cal. 300 (1877) cited above and referring to that case he observes as follows:-

whilst therefore this Court refused to set aside the sale it gave the Plaintiffs the relief which they sought by restoring them to their former position. It is possible that in this case the Plaintiffs may have a similar cause of suit, as between them and the Defendant No. 1, founded upon the fraud which they allege in the plaint. But if so, that is not a claim of which they could avail themselves in the present suit; because they here sue to set aside the sale on various grounds of irregularity and illegality in the sale itself. If the Plaintiffs wish to avail themselves of the fraud which they allege, they must make it the subject of another suit; and we think we ought to allow them an opportunity of doing so.

11. We find it very difficult to distinguish this judgment on the facts of the present case. Here also in the previous suit (vide Ext. A) the Plaintiff wanted to have the sale set aside on various grounds of irregularities and illegality in the sale itself. The mere fact that he mentioned the word fraud does not distinguish this case from the case cited above in which also fraud is alleged. But if it was considered proper to allow the Plaintiff to have another opportunity to sue on the ground of fraud it is difficult to see how that should not be allowed in the present case. Plaintiff's case of fraud remains as yet undetermined. In the case of *Chand Kour v. Partab Singh* L. R. 15 I. A. 156: s c. I. L. R. 16 Cal. 98 (1888) cited above the prayer also was to have the sale set aside on the ground of fraud. The trial Court decreed the suit on the basis of *Bhoobun Chunder Sen v. Ram Sunder*

Surma Mazoomdar I. L. R. 3 Cal. 300 (1877) directing reconveyance of the property. The High Court in appeal however found that fraud was not proved. This judgment was dissented from in the case of Deo Nandon Prashad v. Janaki Singh I. L. R. 44 Cal. 573 : s. c. 21 C. W. N. 471 (P. C.) (1916) which points out that

the decision in the case of Doorga Singh v. Sheo Pershad Singh I. L. R. 16 Cal. 194 (1889), applied too lax a standard of reciprocal conduct in holding that fraud in its strictest sense, such fraud as would support a common law action of deceit, was the test by which to judge these transactions without due regard to the relative position of co-owners.

12. In that case the prayer in the plaint was in the alternative; the Plaintiff prayed for a decree for setting aside the sale or in the alternative that the Appellant should be ordered to re-convey the property to them. It was the latter alternative which they got. Mr. Bhattacharya for the Respondents in this Court has referred to the proviso to sec. 33 of the Revenue Sales Act by which a Plaintiff, failing in his remedy to have the sale set aside under that Act, is not barred from his remedy in a personal action for damages. In the previous suit, no doubt, it was open to the Plaintiff to make an alternative prayer such as was made in Deo Nandon Prashad v. Janaki Singh I. L. R. 44 Cal. 573 : s. c. 21 C. W. N. 471 (P. C.) (1916) so as to include in the suit the whole of the claim to which he was entitled. But the prohibition under sub-r. (3), can only operate in the case of a person who is entitled to more than one relief in respect of the same cause of action. Strictly speaking, that cannot be said to be the case here. As I have already said, under sec. 33 of the Revenue Sales Act he is entitled to claim to have the sale set aside on the ground of breaches of the Act. But his prayer in the present plaint is not on the footing that the sale is set aside, but on the other hand that the sale stands, and the foundation of the cause of action in the present suit is not a breach of the Revenue Sales Act but fraud which has not yet been tried. That being the position we think that the learned Judge was right in holding that the suit is not barred under Or. 2, r. 2, sub-r. (3) or Or. 9, r. 9, sub-r. (1) of the Code of Civil Procedure. The appeal therefore stands dismissed. Having regard to the circumstances however we direct that the parties do bear their own costs in this Court.

Patterson, J.

I agree.