

(1921) 06 BOM CK 0003
In the Bombay High Court
Case No : First Appeal No. 287 of 1920

Gulabchand Chhotiram Marwadi

APPELLANT

Vs

Ramnath Chhotiram Marwadi

RESPONDENT

Date of Decision : 27-06-1921

Acts Referred:

Citation : (1921) 23 BOMLR 1171

Hon'ble Judges : Shah, J;Norman Macleod, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

Norman Macleod, Kt., C.J.—In First Appeal No. 315 of 1916 we dealt with the decision of the lower Court in the original suit No. 42 of 1909, which was a partition suit. That suit had been proceeding for a very large number of years before a final decision could be arrived at; and the main question in that appeal was whether the lower Court was right in allowing the plaintiffs mesne profits of certain Nipani lands for the years 1905 to 1909, and we came to the conclusion that that order was wrong.

2. Now it appears that on the basis of certain remarks made in the judgment of the trial Court dated 12th September 1914, the plaintiffs filed this Suit No. 426 of 1918 claiming to recover Rs. 16,000 from the defendants as certain balances shewn as due in the plaint Schedules A, B, C. These balances consist of certain amounts due of bonds and certain amounts said to be outstanding as due against tenants for rents for the years 1905 to 1910.

3. Apart from anything that was said in that judgment, it would follow from what this Court, said in the judgment in First Appeal No. 315 of 1916 that the plaintiffs were not entitled to any account of the mesne profits with regard to rents, and with regard to bonds which were divided amongst the members of the family, they had to take their chance whether the bonds were good or bad.

4. But certainly with regard to the question of any liability of the defendants with

respect to these outstanding debts due on bonds it was a matter which fell to be decided in that suit, and not by a separate suit; and I do not think our attention was drawn, when that appeal was before us, to the fact that this present Suit No. 426 of 1918 was pending. In any event the plaintiffs have not followed the instructions of the learned Judge. He said:

The plaintiff had got the rent notes about all lands that have fallen to his share. He may sue the tenants and defendants on the rent-notes in respect of which there are outstanding balances. In case defendants are found to be negligent, he may sue them for negligence.

5. In the first instance, the Judge said the plaintiff could sue the tenants making defendants parties, and presumably seeking to make the defendants liable for their neglect in not recovering the rents.

6. Again the Judge said:

The plaintiff says that the first three bonds were not given to him but defendants say that they were given. The plaintiff may sue the defendants and the debtors.

7. It is said that there is a suggestion there that the defendants would be liable on the bonds. The defendants might be necessary parties as being the persons to whom the bonds were given. But certainly the present suit as framed in which the plaintiff seeks to recover from the defendants the amounts of the bonds could not possibly be entertained.

8. But apart from that, this is a claim within a partition suit with regard to matters which certainly should have been dealt with in the partition proceedings, as it was intended that the partition suit should once and for all have disposed of all questions with regard to the family estate; and it is certainly undesirable, after the decision in the partition suit, which had been going on for so many years, that one party should file subsidiary suits against the other party on matters which in the ordinary course would be relevant questions in the partition suit. I think, therefore, that the decision of the learned Judge in the Court below was right and that the appeal must be dismissed with costs.

9. I should like to mention that my own opinion is that if a charge of negligence is brought by a party in a partition suit against a manager, that is a matter which should be dealt with in the suit when accounts are being taken. There is no warrant for such a question being left outside, leaving it to the option of the aggrieved party to file: another suit if he so chooses.

Shah, J.

10. I entirely agree. The main part of the claim relates to the amount said to have been recovered by the defendants in respect of certain lands the rent notes whereof were assigned in the partition suit to the present plaintiffs' share. It is not disputed that the rent notes were assigned to the plaintiffs in pursuance of the preliminary decree. Though the preliminary decree is not before us, the

learned pleader for the appellants has conceded that fact. The present claim is in respect of the rents said to have been realized by the defendants partly prior to the partition suit of 1909, and partly after the suit was filed. It is difficult to understand how a suit of that character could be maintained now.

11. The only ground upon which the right to file a separate suit is claimed for the plaintiffs is based upon certain remarks which were made by the trial Court when the final decree was passed. If those remarks are considered in relation to the context, it is clear that practically the plaintiffs' claim for mesne profits in respect of those lands for the years 1905 to 1910 was not then allowed by the trial Court. Even assuming at the best in favour of the plaintiffs that the trial Court then thought that the plaintiffs might be able to recover them in a separate suit, when the matter came up in appeal before this Court, this Court disallowed mesne profits for that period in respect of the Nipani lands. The present suit in respect of the rents for the years 1905 to 1910 is nothing but a claim for mesne profits partly prior to the date of the partition suit, and partly after the date of the suit. It is clear that it was really a point arising in the partition suit; and having regard to the result of the appeal to this Court there could be no doubt that that claim would have been disallowed, even if it had been allowed by the lower Court. It follows that the plaintiffs cannot now maintain a suit in respect of the mesne profits which would have been disallowed if they had been claimed then as mesne profits. I do not think, therefore, that the remark in the judgment, which was rather unfortunate, enables the plaintiffs to maintain the present action which otherwise is clearly unmaintainable.

12. As regards the bonds also, it is an admitted fact that they were assigned to the plaintiffs in pursuance of the terms of the preliminary decree; and the mere fact that the claims under those bonds are time-barred is no reason whatever for the plaintiffs to sue the defendants now separately as if they were responsible to them for negligence. If there was any allegation against the defendants in respect of the claim relating to these bonds, it could have been and should have been made in the partition suit. But unfortunately the trial Court, while passing the final decree, left it open to the plaintiffs to file a separate suit. It was quite open then to the plaintiffs to have objected to that course, as they did object to other items when they appealed to this Court. The judgment of this Court shows that all the objections that were raised were disallowed with respect to different items. There was nothing to prevent the plaintiffs from raising that point in the appeal to this Court. Apparently they did not do so at the hearing, though I am not at all sure that the point was not covered by the memorandum of appeal; and now they sue the defendants alleging negligence on their part. There is nothing said beyond this that the defendants allowed the bonds to be time-barred. That is hardly sufficient to support the claim. It appears to me that the plaintiffs' suit in respect of these bonds was rightly dismissed. It is not suggested before this that when the bonds and the rent-notes were assigned to plaintiffs' share, any provision was made in the preliminary decree reserving to them the right to make the claim which they have now made.