

(1924) 06 CAL CK 0039
In the Calcutta High Court

Khondkar Ali Afzal

APPELLANT

Vs

Purna Chandra Tewari and Others

RESPONDENT

Date of Decision : 24-06-1924

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 33 Rule 15, Order 38 Rule 7

Citation : AIR 1924 Cal 1039 : 84 Ind. Cas. 703

Judgement

1. In this matter the petitioner's father purchased at an auction-sale in execution of a mortgage-decree obtained against the father of the first three opposite parties, a certain property on the 20th September, 1908. It appears that other properties were also put to sale about the same time and purchased by other parties. The petitioner's father got possession in 1909 and after his death in 1917, the present petitioner and his mother have been in possession. The opposite parties Nos. 1, 2 and 3 applied on the 20th September, 1920 for leave to sue the petitioner and his mother in forma pauperis for the declaration that the mortgagor (their father) Harish Chandra Tewari had no right to deal with the interest of the whole of the joint Mitakshara family in the absence of an antecedent debt or legal necessity, and so they were entitled to recover 3/4th share of the present property and the properties purchased by certain other people in execution of the original mortgage-decree.

2. The application to sue in forma pauperis came before the Subordinate Judge of Murshidabad on the 5th February, 1921. It would appear that when the case came on for hearing under Rule 7 of Order 38, Civil Procedure Code, as the opposite party did not appear, the application to sue in forma pauperis was dismissed in default. Thereafter on the 18th February, 1941, an application was made to set aside this order of dismissal in default and it too was dismissed for default on the 14th May 1921. After that on the 2nd January, 1923, the present 5 opposite parties filed a new application against the petitioner only to sue him in. forma pauperis to recover the same property, and the case came on for hearing on the 17th March when the present petitioner objected on the ground that the previous application had been refused in 1921 and that was a bar to the

present application in view of the wording of Rule 15 of Order 33, Civil Procedure Code, as also on the allegation that the opposite parties were not really paupers and had concealed their properties and they had sufficient means to pay the necessary Court-fees. The learned Subordinate Judge however overruled the objections of the petitioner and has given the opposite parties Nos. 1 to 5 leave to sue in forma pauperis.

3. Against this order this Rule has been obtained on the ground that the Subordinate Judge had no jurisdiction to entertain the second application in view of the first application being dismissed. The first point taken on behalf of the petitioner is that the second application did not lie as the dismissal of the first application amounted to a refusal. As to this we have heard considerable argument to the effect that there is a distinction between refusal and dismissal of a suit or an application. We do not think that there is any point in such contention. It seems to us that Rule 15 of Order 33 is imperative and shows that if an application is rejected or refused, the second application to sue in forma pauperis, cannot be entertained. In this connection we specially refer to the case of *Ranchod Morar v. Bezanji Edulji* (1894) 20 Bom. 86, where it is held that an order rejecting an application operates as a bar under the old CPC (which has not in this respect been altered) to entertain a second application to sue in forma pauperis. But it is urged that as a matter of fact, the two suits are not of the same nature. In the first place, in the first suit other properties and other defendants were impleaded, and it is argued that, while the first suit was brought on the allegation that there was no antecedent debt, the second suit has been brought on the allegation that the mortgage was not a bona fide one. In both the cases, however, we have this fact that Harish Chandra Tewari is alleged to have incurred debts in consequence of which he mortgaged the properties. We have the allegation in the first case by the three sons and in the second case by three sons and two minor grandsons that Harish Chandra Tewari has wasted the family property in debauchery; and we have it in both cases that the property which the father of the present petitioner purchased is the same; and though no doubt in the present case, we have two extra opposite parties, they were both alive at the time of the first litigation and are the sons of plaintiff No. 1. Certainly however, apart from the question of the position of the opposite parties Nos. 4 and 5 with which we will deal later on, so far as opposite parties Nos. 1 to 3 are concerned, in spite of the long argument that has been addressed to us and the subtleness with which the learned Vakil for the opposite parties has sought to make out that the cause of action or right to sue in the two cases is entirely different, we fail to find that there is any substantial difference in fact in the nature of the two suits and whatever else may be said, the relief claimed in both is exactly the same. We find therefore that the learned Subordinate Judge acted in excess of his jurisdiction in entertaining the second application in forma pauperis by respondents 1-3 when the matter had already been determined on an application of a similar nature.

4. As to the further position that in the present suit two extra plaintiffs have been

added, these two plaintiffs are, as we have said, the sons of the plaintiff No. 1. They were both born before the first application to sue in forma pauperis and are now represented by their father plaintiff No. 1 as their guardian. It is clear that at the time of the first application they were in existence and plaintiff No. 1, their father was the proper person to join them with him as parties. They are still minors and as the learned pleader for the petitioner pointed out, they still will have the right to sue on attaining majority. We have carefully considered their position and we do not believe that their present application to sue in forma pauperis is bona fide. It appears that they have been brought in at the present stage so as to enable the opposite parties to find an opportunity to make a different case, and we do not think that the Court acted in the exercise of proper jurisdiction in permitting an application to sue in forma pauperis to be brought in this way, with such allegations as are here made, and in view of the fact that the first application was rejected.

5. We do not deal with the allegations made on behalf of the petitioner that the form of the suit is bad as the petitioner was a third party bona fide purchaser at the sale in execution of the mortgage decree, and no allegation has been made in the plaint that he had notice of the opposite parties' title. We make no comments on this allegation. It will more properly come on at the trial of the suit which can still be brought on payment of proper court-fees.

6. In this we make the Rule absolute and set aside the order permitting the suit to be through in forma pauperis with costs. We assess the hearing fee at five gold mohurs.