

(1897) 09 CAL CK 0001

In the Calcutta High Court

Case No : Appeal from Appellate Decree No. 198 of 1896

Mahendra Nath Mukherjee and another

APPELLANT

Vs

Jogendra Nath Roy Chaudhury, principal Defendant and others

RESPONDENT

Date of Decision : 02-09-1897

Acts Referred:

Citation : (1897) 09 CAL CK 0001

Final Decision : Dismissed

Judgement

Macleay, C.J.—The first objection taken to the judgment of the lower Appellate Court is, that, seeing that the conveyance to the Plaintiff was upon the face of it, quite clearly a conveyance of the homestead in addition to certain revenue-paying land, the Court below ought not to have allowed oral evidence to have gone into to show that a different bargain had been come to between the parties, and that the conveyance did not represent the true bargain between them. The Defendant's case is that he never intended to sell the homestead, and that there was a mutual mistake of fact between the Plaintiffs and himself in not excluding the homestead land from the conveyance. The Plaintiffs say that, assuming that to be so, the Defendant cannot raise the question in this suit but ought to have instituted a cross-suit to rectify the conveyance. No doubt, if litigants in the moffusil Courts are to be bound by the same strictness of pleading adopted by the High Court in England, there would be no little force in the contention, but one cannot help feeling that pleadings in cases in the moffusil are not drawn with that accuracy and precision which characterise pleadings in the Courts in England, and that, wisely or the reverse, a latitude is given here which permits the Courts of the moffusil to go into issues not strictly raised by the pleadings. But in the present case it is quite clear that, before the Munsif, in the first instance, evidence was gone into to show that there was this mutual mistake of fact, and the Judge in the Court below finds this as a fact in the case. I will read two passages from his judgment. In one he says : "The lower Court has virtually found that very probably both the parties were under the impression at the time

of the sale that the homestead of the Defendants did not appertain to their revenue-paying estate, and that the principal Defendant's share in the homestead was not intended to be sold and purchased. That this was the fact is quite clear from the admissions of the Plaintiffs themselves" which, having regard to the context, evidently has reference to the previous sentence, "the principal Defendant's share in the homestead was not intended to be sold and purchased." We therefore have a finding of fact in the Court below that the Plaintiff virtually admitted before that Court the fact of there being his mistake. We are told that that could not have been so, because the Plaintiff did not go into the witness-box, but I understand that the Plaintiff called the Defendant who spoke to this mistake and the Plaintiffs did not themselves give any evidence the other way. That was tantamount to an admission on their part that there had been this mistake. The Judge then goes on to say : "It appears to me quite clear that both the parties at the time of the sale in question were under the belief, mistaken though it was, that the disputed land formed no part of the estate, a share of which was being sold and purchased, and that both the parties understood quite well that the principal Defendant's share of the homestead was not to be sold and purchased." I think that, having regard to the fact that the parties were allowed to go and did go into this question of mutual mistake in the first Court, and to the findings of the fact come to upon that question by the lower Appellate Court, it is difficult for us to say that they ought only to be allowed to go into that question in an independent suit for rectification of the conveyance. It is suggested that under sec. 92 of the Evidence Act oral evidence to contradict or vary the terms of the conveyance was not admissible, but having regard to the case which the Defendants raised by paragraph 6 of their defence, which points to the fact that their defence was that the homestead was not included in the conveyance, although it is not very artistically drawn, I think it was open to the Court having regard to proviso 1 to sec. 92 to allow oral evidence to be put in to prove the mutual mistake. I lay stress upon the finding of the learned Judge in the Court below that there was an admission by the Plaintiffs of this mutual mistake. I think it is only equitable that it should be open to the Defendants to raise this defence and that they ought not to be driven to a separate suit to rectify, which, I understand, would now be barred by the Statute of Limitation.

2. Then it is said that, assuming that to be so, this is not in point of law, that class of case in which rectification of the instrument would in any event be granted by a Court of Equity. I do not take that view. I think that the authorities are clear. I do not propose to go into them, that, when there is a mutual mistake of fact in a case such as this, a Court administering equity will interfere to have the deed rectified, so that the real intention of both parties may be carried into effect. On these grounds I think the appeal fails and must be dismissed with costs.

Banerjee J.

3. I am of the same opinion. The appeal arises out of a suit brought by the Plaintiffs, Appellants, to recover possession of some land on the allegation that it is covered by the conveyance executed in their favour by the Defendant No. 1, the land being the site of that Defendant's dwelling-house. The defence was that the land was no part of the taluk or estate that was sold to the Plaintiffs, that it was lakhiraj land and that it formed no part of the property purchased by the Plaintiffs. On these pleadings, the main issue of fact that was raised was the fourth, which ran in these terms "Whether the disputed land is the Plaintiff's purchased land." The first Court found for the Plaintiff and decreed the suit. On appeal, the lower Appellate Court has reversed the first Court's decree and dismissed the suit, holding that "The principal Defendant's share in the homestead was not intended to be sold and purchased," and that there was a mutual mistake of fact in regard to the land which is the subject-matter of this suit. In second appeal it is contended for the Plaintiffs that the decision of the lower Appellate Court is wrong in law, first, because the Defendants were not entitled to any relief in this suit, their proper course being to claim relief, if they are entitled to it, in a suit for rectification of the conveyance; and secondly, because, even if it were open to the Defendants to raise the point that was raised on their behalf, the present case is not one of that class in which relief can be claimed on the ground of mistake.

4. As to the first point, there is no provision in the Code of Civil Procedure, or in any other act of the Legislature, prohibiting the Court from giving effect to the plea raised in the defence; nor is there any reason why we should hold that the only way in which the Defendant could obtain relief was by a suit for rectification of the conveyance. The Plaintiffs have never up to this time obtained possession of the land in dispute, even after the conveyance, the Defendants continued in possession of the same, and the Plaintiffs have brought this suit to recover possession of the land on the strength of their title by purchase. The defence is that they have not acquired any title to this land by their purchase. Why should not the Court have power to give effect to that defence if the defence can be proved ? The parties went to trial upon the question, whether the disputed land is the Plaintiffs purchased land : it is not suggested that by reason of the nature of the suit and the nature of the defence, the Plaintiffs have in any way been taken by surprise, or had not an opportunity afforded to them meeting the point raised by the Defendants.

5. We were referred to the case of *Hawkins v. Jackson* 2 M. & G. 372, as authority in support of the contention that the Defendants cannot obtain any relief on the ground of mutual mistake without bringing a suit for rectification of the instrument. As I understand that case, I do not think that it supports the broad proposition for which the learned vakil for the Appellants contends.

6. Then it was argued that the language of proviso 1 to sec. 92 of the Evidence Act, under which oral evidence was admitted to vary the terms of the document, indicates that such evidence is admissible only in a suit for rectification of the

document. Now the proviso enacts that any fact may be proved, I am only quoting so much of the proviso as bears upon this case, which would entitle any person to any decree or order relating to the document such as mistake in fact that does not, I think, limit the admissibility of oral evidence to a suit to obtain a decree on the ground of mistake. The proviso only indicates the nature of the fact which may be proved by oral evidence to vary a document, if the fact sought to be proved is such that a decree might, upon the fact being proved, be obtained for the rectification of the document on the ground of mistake, then oral evidence of the fact would be admissible, though that evidence is offered not in a suit expressly brought for the purpose of obtaining such a decree, but in any other judicial proceeding in which that fact becomes a relevant fact.

7. Then as to the second point, it was not raised before either of the Courts below in the way in which it has been presented before us, but even if it is open to the Appellant to raise the point now, I do not think the point has much real force. The mutual mistake that has been found in this case was a mistake that related to the subject-matter of the conveyance, and not to any mere matter of description. According to the finding of the lower Appellate Court what was intended to be sold and purchased was the estate, but not the land in dispute and the land in dispute which is now found included in the estate, was not expressly excepted, because both parties were at the time under the mistaken impression that it was not included in the revenue-paying estate but was lakhiraj. If that was the intention of the parties, the mistake was one against which relief ought to be granted. The case before us is not one of the class in which the mistake is merely one as to a matter of description, there being no mistake as to the thing intended to be sold. The case of *Okil v. Whittaker* 2 Phil. 238 that was relied upon in support of the second contention, was of a very different nature. According to the facts found the intention there was to sell the whole and not merely a part of the residue of a certain term, and there was a mutual mistake as to the number of years that the terms had yet to run, and such a mistake was held not to entitle the vendor to any relief. Here it cannot be said that the intention was to sell the whole of the taluk inclusive of the homestead land, the intention of the parties, as found by the lower Appellate Court, having been to exclude that land. The two contentions urged on behalf of the Appellants, therefore, both fail.