

(1909) 06 CAL CK 0045
In the Calcutta High Court

Mahomed Faiz Chowdhury

APPELLANT

Vs

Upendra Lal Singh Roy

RESPONDENT

Date of Decision : 14-06-1909

Acts Referred:

Citation : (1909) 06 CAL CK 0045

Judgement

1. This suit relates to a certain taluk in the Tipperah District, called Durga Charan Dewan's Chakbasta. It appears to have had a somewhat unfortunate history for the past few years. For some reason or other it cannot be managed in the ordinary way and accordingly common managers have been appointed from time to time u/s 93 of the Tenancy Act. The second of these was a Mr. Sandys, who was appointed in 1891. He was succeeded by the principal defendant who was compelled to bring a suit for an account against Mr. Sandys which we understand is still pending. Then on the 20th December 1896 after an enquiry by a Commissioner which revealed a deplorable state of affairs, the District Judge dismissed the principal defendant and appointed the present plaintiff. On this occasion too all sorts of delays took place in handing over papers and finally the present suit for an account was brought by the plaintiff against the former manager, Muhammed Faiz Chowdhuri whom we may call for brevity's sake the 1st defendant, and a number of pro forma defendants. The Subordinate Judge decreed the suit for an account and after an enquiry by Commissioner has finally decreed the suit for nearly 30,000. During the proceedings the 1st defendant died and his son has been substituted on the record. He appeals to this Court.

2. The first point taken is that the present common manager cannot sue the former common manager for an account. Now that such a suit under ordinary circumstances is maintainable is clear from the decision of this Court in the 1st defendant's appeal against the order of the Subordinate Judge of Tipperah dismissing his suit for an account against Mr. Sandys. In that appeal the learned Judges held that such a suit would lie. They overruled the view of the Subordinate Judge that as Section 98 authorised the co-owners or any one of them to inspect the accounts the right to sue for accounts lay in the proprietors

and not in the common manager. u/s 98 a manager is entitled, for the purposes of management of the estate, to exercise all the powers which the co-owners possibly could exercise; and it was held that the institution of a suit for accounts must be regarded as one for the purposes of management. It seems clear, therefore, that the right to sue for an account lies in the proprietors jointly, and, therefore in the common manager, who when there is one represents all the co-owners jointly.

3. There are, however, two points that distinguish the present case from the suit brought by the 1st defendant against Mr. Sandys. In the first place the common manager sued in this case was himself a co-owner; so that he with his co-owners is represented by the plaintiff, while at the same time, he is the defendant in the suit. "We do not think, however, that this circumstance is fatal to the suit. The rule that the same men cannot be plaintiff and defendant in the same suit loses much of its force in India, where the Courts are Courts of Equity, when all the parties are before the Court and their rights can be determined and adjusted, *Premji Ludha v. Dossa Doongersey* 10 B. 358; *Rustomji Aspandiyarji Sethna v. Sheth Purshotamdas Chaturdas*. 25 B. 606. Here all the parties are before the Court, all the co-owners including the 1st defendant on the one side, represented by the manager, and the 1st defendant on the other. It is clearly possible to determine and adjust the rights of all and the suit, therefore, need not fail.

4. Another distinction between this case and the former one is that a number of persons, called the dartalukdars, are made pro forma defendants. It is an extraordinary circumstance in this case, which has led to much confusion, that the common manager is not only the common manager of the talukdars or superior tenure-holders, but also of the under-tenure-holders or dartalukdars. The dartaludars are tenants of the talukdars and it is difficult to understand how a landlord and tenant can be regarded as co-owners, so as to justify the appointment of a common manager of their apparently conflicting interests. But there is no dispute that as a matter of fact the 1st defendant was, and the plaintiff is, the common manager of the talukdars and dartalukdars together; and the defendant cannot plead the impropriety of such a common managership, when his defence is that, with respect to certain sums of money, he is freed from liability by the fact that he has paid them to the dartalukdars, as being some of the co-owners, for whom he was manager. But it is argued that inasmuch as these dartalukdars never authorised the suit, and support the 1st defendant, the manager cannot be regarded as representing the whole body of co-owners, and, therefore, is not entitled to sue. In the plaint it is stated that " the pro forma defendants Nos. 2 to 33 are part dartalukdars of the Taluk Dewan's Chakbasta under the management of the plaintiff. As the principal defendant unjustly debited in their names a large sum of money, although they were not entitled to get any profits, so they are made pro forma defendants, in this case." These persons, therefore, have no quarrel with the 1st defendant, and it may be thought that they have no cause of action. But it is clear from Section 98 of the Tenancy Act, not only that the common manager is entitled to exercise all the

powers of the co-owners for the purposes of management, in which, as we have seen, the institution for a suit for accounts is included; but also that the co-owners are precluded from exercising these powers. If, therefore, the common manager desires to bring a suit or exercise any other power for the purposes of management, it is of no consequence, whether, the co-owners desire it or not. Nor does it matter whether individual co-owners have been injured or not, if the body of co-owners, as a whole, has a cause of action. There is no doubt in this case that the estate has been grossly mismanaged and that the owners, as a body, have suffered great losses. The common manager, therefore, has a right to sue for redress, even if individual co-owners have profited by the mismanagement.

5. Another point taken at the end of the argument was that the District Judge could not, on the dismissal of the 1st defendant, appoint the plaintiff as his successor. The appointment of the plaintiff was, therefore, illegal and the suit consequently bad. Reliance is placed on the decision in *Dwarka Nath Mitra v. Bankutesh Lal Mitra* 10 C.W.N. 437. This was dissented from in another case between the same parties *Dwarka Nath Mitter v. Bankutesh Lal Mitter* 7 C.L.J. 109 but we do not think it is necessary to discuss it. The point has never been raised before. The appointment of the plaintiff was appealed to this Court by the 1st defendant, but the appeal was dismissed and this point was not taken. It is not in the issues or in the grounds of appeal and we cannot permit it to be raised now.

6. The next point taken is that the suit is barred by limitation. It is argued on the authority of *Mati Lal Bose v. Amin Chand Chattopadhyay* 1 C.L.J. 211 that the suit is governed by article 115 of the 2nd schedule of the Limitation Act. The manager was bound to file periodical accounts and it is argued that, when he failed to do so, his failure constituted a breach of contract from which limitation would run. We cannot accept this contention. In the first place we think that the suit comes under article 89 and not article 115 and would refer to the decision in *Hafizuddin Mondal v. Jadu Nath Saha* 12 C.W.N. 820 following *Asghar Ali Khan v. Khurshed Ali Khan* 24 A. 27 (P.C.) : 28 I.A. 827. In the second place the 1st defendant was bound to file his accounts, not by his contract with his co-owners, but by the orders of the District Judge, who had disciplinary powers over him; and neglect to obey those orders did not amount to a breach of contract. It is, however, argued that even if article 89 applies, the accounts were refused on the 14th November 1901 more than three years, before the institution of the suit. The contention, however, wholly fails, for even supposing that neglect by the 1st defendant to obey the District Judge's order to produce his accounts could amount to a refusal of accounts to the co-owners, it is clear that there was neither demand nor refusal on the 14th November. On the 11th October the District Judge directed that the present plaintiff should be informed that he would be appointed manager on giving security on or before the 14th November. At the same time he informed the 1st defendant, not that he must hand over, but that he must be prepared to hand over all the papers on that date. This clearly was

not a demand for an account. It was a warning that the papers would have to be handed over, if the present plaintiff gave security and was appointed manager. The plaintiff's security was filed on the 14th November but as it had to be tested it was not accepted on that day, and so the papers were not required. The fact that they were not required and that the 1st defendant's application for time was granted, certainly does not constitute a refusal of an account such as would set limitation running under article 89.

7. The remaining points in the appeal relate to separate items in the amount. We proceed to deal with these one by one.

8. [Their Lordships then discussed the various items one by one, and proceeded thus.]

9. The next point is whether the 1st defendant is entitled to deduct his commission of 12½ per cent. on the sums of Rs. 14,683 and 1,273 referred to above and on the sums allowed for rent that have become irrecoverable, and for decrees that cannot be executed through lapse of time; viz., Rs. 413 and Rs. 1,904. To this, we think he is entitled. The estate cannot recover more from him than it has lost and if he had collected these sums the estate would not have recovered them in full but subject to deduction. We allow the sum of Rs. 2,284 on this account.

* * *

10. The suit was decreed for Rs. 27,551 and we have allowed a deduction only of 2,284 or about one-twelfth, and the reversal of the order with respect to the bond, which has not been contested. The suit will be decreed accordingly. The appellant will get one-twelfth of his costs from the respondent and will pay eleven-twelfth of the respondent's costs.