

(1922) 08 CAL CK 0030
In the Calcutta High Court

Mahomed Yasin

APPELLANT

Vs

Bimola Prosad Mukerjee and Others

RESPONDENT

Date of Decision : 16-08-1922

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 16, 20

Citation : AIR 1924 Cal 443

Judgement

1. The opposite party No. 1 in this rule instituted a suit in the Court of the Subordinate Judge at Alipore for specific performance of a contract for lease of a certain property situated in the district of Burdwan. The contract is said to have been originally entered into by one Kundan Lal Kapur of Burdwan and the defendants Nos. 1 and 2, who are the opposite parties Nos. 2 and 3 in the present rule, are the executors under the Will of Kundan Lal and took out Probate of his Will. It was alleged in the suit that, subsequent to the agreement of granting a lease in favour of the plaintiff, the defendant No. 1, on the 22nd August, 1920, granted a lease to defendant No. 3 who took it with notice of the prior agreement in favour of the plaintiff. The plaintiff, accordingly prayed for specific performance of the agreement to grant him the mining lease on declaration that the defendant No. 3 acquired no right, title or interest under the lease of 22nd August, 1920.

2. The defendant No. 3 inter alia pleaded that the Alipore Court, where the suit was instituted, had no jurisdiction to entertain it. A preliminary objection was accordingly raised but it was decided in favour of the plaintiff and, therefore, this rule was obtained by the defendant No. 3.

3. The learned Subordinate Judge was of opinion that as between the plaintiff and the principal defendants, by which we think he meant the defendants Nos. 1 and 2, there was no question of determination of any right to the property, and that the main relief for specific performance of the contract could be obtained through the personal obedience of the defendants, and as such the suit could be tried by the Alipore Court having regard to the proviso to Section 16 of the Civil

Procedure Code. Then the learned Subordinate Judge says : "The only point that can be urged against this view is that it is also prayed that defendant No. 3's right be declared to be a nullity. This point, however, arises incidentally in the case." But so far as the prayer against the defendant No. 3 is concerned, the case comes u/s 16 of the Code and the proviso to that section cannot apply to defendant No. 3 as he does not reside within the jurisdiction of the Alipore Court.

4. Then, again, the defendant No. 2 does not reside within the jurisdiction of the Alipore Court as he is a resident of Burdwan. The proviso to Section 16 uses the word "defendant" but that means "all the defendants" where there are more than one defendant in this suit; see *Hajee Ismael Hajee Hubeeb v. Hajee Mahomed Hajee Joosub* 13 B.L.R. 91, a case under Clause 12 of the Letters Patent. It is contended on behalf of the plaintiff-opposite party that the defendant No. 1 who resides within the jurisdiction of the Alipore Court as one of the executors is entitled to act alone and that, therefore, it is immaterial whether or not the defendant No. 2 also resides within the jurisdiction of that Court. But the question whether one of the executors has power to act alone would depend upon the terms of the Will, see Section 92 of the Probate Act. There was no suggestion in the lower Court that the defendant No. 1 alone was entitled to act and the suit for specific performance was directed against both the defendants Nos. 1 and 2. The question was not gone into in the lower Court; because, as stated above, the plaintiff proceeded upon the footing that both the defendants Nos. 1 and 2 were to perform the contract.

5. In these circumstances, we think that the proviso to Section 16 of the Code does not apply to this case.

6. It is contended on behalf of the plaintiff-opposite party - that Section 20 of the Code is applicable because the cause of action arose within the jurisdiction of the Alipore Court.

7. But, in the first place, in the plaint the cause of action is stated to have arisen on the 22nd August, 1920, which is the date on which the defendant No. 1, granted a mining lease to defendant No. 3 and there was no question that the lease was executed at Burdwan. In the next place, the cause of action may be said to have arisen within the jurisdiction of the Alipore Court only in so far as it concerns the claim for specific performance against defendants Nos. 1 and 2. So far as defendant No. 3 is concerned, we do not see how the cause of action could be said to have arisen within the jurisdiction of the Alipore Court. The property is situated in the district of Burdwan and the cause of action, so far as defendant No. 3 is concerned, arose at Burdwan.

8. We think, therefore, that the Alipore Court had no jurisdiction to entertain the suit, as framed and that the order complained of must, therefore, be set aside and the plaint returned to the plaintiff for presentation to the proper Court and we direct accordingly.

9. The petitioner is entitled to costs of this Court. We assess the hearing fee at 2

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