

(1937) 02 CAL CK 0016
In the Calcutta High Court

Mt. Saiyadunnessa Khatun and Others	APPELLANT
Vs	
Gaibandha Loan Co. Ltd. and Others	RESPONDENT

Date of Decision : 02-02-1937

Acts Referred:

Court Fees Act, 1870 — Section 7(v)

Citation : AIR 1937 Cal 562

Hon'ble Judges : S.K. Ghose, J;Patterson, J

Bench : Full Bench

Judgement

S.K. Ghose, J.—This is an appeal by the plaintiffs and it arises under the following circumstances: The suit was for setting aside a certificate sale held by the Collector for arrears of cess on the allegation that the sale was fraudulently brought about by defendant 1 in collusion with the peons of the Collectorate. There is a further prayer that if the Court should decide that the sale is not liable to be set aside, a decree may be passed directing defendant 1 to return the properties to the plaintiffs or, failing that, to pay a sum of one lac of rupees to the plaintiffs as compensation. Para. 8 of the plaint runs thus:

For the purposes of the jurisdiction of this Court this suit is valued at Rs, 1,00,000 and the property in suit being a revenue-paying Mahal this plaint in this suit is filed by paying a court-fee of Rs. 1,020 on Rs. 15,505-5-0 as being ten times the revenue thereof amounting to Rupees 1,550-8-6 per year u/s 7; Clause (v), Court-fees Act.

2. Thereupon the question of adequacy or otherwise of court-fees came up for decision and was considered by the Subordinate Judge in his order dated 17th May 1934. He decided that the governing factor should be the larger relief asked for, which in this case was the alternative prayer for payment of one lac of rupees, and he accordingly directed the plaintiffs to pay court-fees on one lac of rupees. On 31st May 1934 the plaintiffs put in a petition praying for time to file the balance of the court-fees as ordered and three weeks time was allowed till 21st June 1934. On that date the plaintiffs, instead of paying the balance of

court-fees, filed a petition for amendment, which is printed at p. 36 of the paper-book. The prayer was that they should be allowed to value their alternative claim for

compensation at present on Rs. 16,000, and if after hearing they are found to be entitled to additional compensation then they pray that they may be allowed to get a decree for that excess amount by paying additional court-fee thereon;

and they asked that the prayer Kha of the plaint might be amended accordingly. The order which the Subordinate Judge passed upon this petition on 21st June 1934 does not show that he considered the prayer on its merits, but it is also clear that he understood that the prayer was to reduce the amount of compensation. The order runs thus:

In this case plaintiffs' relief in the suit was for possession of the property or compensation to the extent of one lac of rupees. The Court held that the larger of the two reliefs would determine the value of the stamp and asked the plaintiffs to supply the requisite stamp paper on one lac of rupees within a certain time. The plaintiffs pray today for amendment of the plaint by reducing the amount of compensation. In view of the decision in *Midnapore Zemindari Co. v. Secy, of State* AIR 1917 Cal 77I think the prayer for amendment cannot be allowed. The petition is therefore rejected.

3. Upon that the plaintiffs filed a petition praying for further time to file deficit court-fees, but this was rejected. Thereupon as the plaintiffs did not take any further steps, the plaint was rejected on 23rd June 1934. Against that order this appeal has been filed. The contention for the appellant is that the learned Judge below was wrong in thinking that in the present case he was bound by the decision in *Midnapore Zemindari Co. v. Secy, of State* AIR 1917 Cal 77 and that what the plaintiffs were asking for by the aforesaid petition of 21st June 1934 was to abandon a part of their claim, which they are entitled to do at any time after the institution of the suit under Order 23, Rule 1, Civil P.C. Mr. Gupta for the respondent-defendant 1, on the other hand, has contended that the decision in *Midnapore Zemindari Co. v. Secy, of State* AIR 1917 Cal 77 governs the facts of the present case. In that case, a court-fee of Rs. 10 was paid in a suit purporting to be u/s 111.A, Ben. Ten. Act, but the plaintiffs prayed for the declaration (a) that they were occupancy raiyats, and (b) that the entry in the Record of Rights, showing them as tenure-holders, was a nullity; the plaintiffs, on being required to supply the deficit court-fee on the second relief claimed, failed to do so within the time fixed by the Court and so the plaint was rejected under Order 7, Rule 11, Civil P.C. Thereupon, at the time of the argument before the High Court, the Advocate for the appellants prayed for permission to have that prayer struck off and for restoration of the suit. The judgment of Sanderson, C.J. shows that the Court agreed with the decision of the Judge below and held that he had no alternative but to reject the plaint under Order 7, Rule 11. Turning to the suggestion made in the High Court for permission to have the prayer for consequential relief struck off, Sanderson, C.J. remarks as follows:

The learned counsel who appeared on behalf of the plaintiff asked this Court to give the plaintiff leave to amend his plaint by striking out para, (b) of Clause 11 in his plaint. In my judgment he ought not to be allowed to do so for the reasons I have already given, and this Court has no more power than the learned Judge when it is shown that the case comes within Order 7, Rule 11. This Court has no jurisdiction; the provision is mandatory, and this Court, just the same as the Court below, is bound by that section which provides that under the above-mentioned circumstances the suit shall be rejected.

4. It seems to me that this decision takes it for granted that the order of rejection of the plaint had already been made properly under Order 7, Rule 11, for failure to pay the court-fees within the time allowed by the Court. That being the case, it was not open to the Court to allow further amendment of the plaint. But in the present case the prayer for amendment was made actually before the order rejecting the plaint was passed and before the time allowed by the Court for payment of the deficit court-fees had expired. The Court undoubtedly had power to allow abandonment of part of the claim on the part of the plaintiff or, if it be treated as an amendment of the pleadings, to order such amendment under Order 6, Rule 17. Either of these things could be done at any time after the institution. Surely it cannot be said that the Court had lost that power by reason of the fact that the party had been allowed a certain time within which to file the court-fees. On the facts as mentioned above it seems to us that the present case may be distinguished from those in *Midnapore Zemindari Co. v. Secy, of State* AIR 1917 Cal 77. This is in conformity with the view which was taken in *Mahammad Fateh Nasib Vs. Saradindu Mukherjee*, . Mr. Gupta has contended, that case and a series of cases considered there may be distinguished on the ground that there the question was whether an insufficiently stamped plaint could be allowed to be treated as an application to sue in forma pauperis. But we do not think that this was the ratio decidendi. There also the plaintiff was allowed time by the Court to pay deficit court-fees. On the date fixed for such payment the plaintiff, instead of paying the deficit court-fees, applied for permission to continue the suit as a pauper. The trial Court held it to be barred by the decision in *Selina Sheehan Vs. Hafez Mohammad Fateh Nashib*, and so rejected the application, and the deficit court-fees not being paid rejected the plaint. The order of rejection was undoubtedly justified by the provisions of Order 7, Rule 11. But the question arose whether the interposition of the application for permission to continue the suit there made any difference. It was held that when such an application is made within the time allowed by the Court for payment of the deficit court-fees and before the plaint is rejected, it is not obligatory on the Court to reject the application. In this case, *Abdul Khalef Molla and Others Vs. Bama Charan Chatterji and Others*, cited above, was considered and distinguished or not followed. In the present case, having regard to the facts, we prefer to follow the authority of the case reported in *Mahammad Fateh Nasib Vs. Saradindu Mukherjee*, , and we must hold that the learned Judge below was not justified in holding that he was bound by the decision in *Midnapore Zemindari Co.*

v. Secy, of State AIR 1917 Cal 77 to reject the plaintiffs' application for amendment.

5. Mr. Gupta for the respondent-defendant 1 has contended that on the merits the application cannot be treated as one under Order 23, Rule 1, because really the plaintiffs had not abandoned any part of their claim and that they were only putting the reduced valuation tentatively with a claim to future enhancement if possible. It seems to us that this objection is not so important. If the application does not come under O.23, Rule 1, it would come under O.6, Rule 17, as being an application for amendment of the pleadings. The point is that in either view, before rejecting the plaint, the Court was entitled to consider the application on the merits. But as a matter of fact Mr. Chakraborty appearing for the appellant in this Court has contended that the plaintiff's application was really meant to be an abandonment of a part of their claim by reducing the value of the alternative claim for compensation from Rupees 1,00,000 to Rs. 16,000. Mr. Chakraborty has to admit that the language of the petition for amendment is at least clumsy from this point of view, but he points out that in the lower Court the learned Judge himself understood the prayer to be one for reducing the amount of compensation and further that p. 40 of the paper book shows that the present appeal is also limited to the amount of Rs. 16,000. Therefore there is no question that the plaintiffs are really asking to be allowed to limit the amount of compensation to Rs. 16,000. The order rejecting the plaint being out of the way, it is open to the Court to consider the application and allow the plaintiffs to limit their claim for compensation to that figure. We consider that this should be done in this case and it is not necessary, as was done in *Mahammad Fateh Nasib v. Saradindu Mukherjee* AIR 1936 Cal 221, to direct the lower Court to consider the application again on its merits. In this view we allow the appeal, reverse the order rejecting the plaint, and direct that the plaint be taken with the amendment as mentioned above. The plaint will be amended by inserting the figure Rs. 16,000 in place of Rs. 1,00,000 wherever that sum appears in the original plaint. On the question of costs Mr. Gupta has pointed out that the suit was filed so long ago as 1933. The plaint was once rejected for non-payment of court-fees and then revived. There is also a certain amount of laches on the part of the plaintiffs in the proceedings at which the defendants appeared. Defendant-respondent 1 who appeared in this Court is entitled to his costs including the costs of the paper book, if any, hearing fee in his case is assessed at ten gold mohurs.

6. Sir Saadulla appearing for the defendant 2 in this Court has contended that he has been made an unnecessary party. Whether he was an unnecessary party to the plaint is a question which we need not enter into. As he was made a party defendant in the trial Court, we cannot say that he was made an unnecessary party in this Court. Defendant 2 is also entitled to his costs from the plaintiffs; hearing fee in his case is assessed at three gold mohurs. u/s 13, Court-fees Act, we direct a certificate to be granted to the appellants authorizing them to receive back from the Collector the full amount of the court-fees paid on the

memorandum of appeal in this Court. The cross-objection is not pressed, and is dismissed without costs.

Patterson, J.

7. I agree.