

(1924) 02 CAL CK 0089
In the Calcutta High Court

Niranka Chandra

APPELLANT

Vs

Atul Krishna Ghose and Others

RESPONDENT

Date of Decision : 18-02-1924

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 151

Citation : AIR 1925 Cal 67 : 83 Ind. Cas. 110

Judgement

1. This appeal arises out of the suit for setting aside the sale of a putni tenure held under Reg. VIII of 1819, and for declaration of title to and possession of 8-annas share of the putni tenure. There were alternative prayers, namely, that if the sale be not set aside the defendants Nos. 2 and 3 be directed to convey an 8-annas share of the putni to the plaintiff, and if that sale (and an earlier sale of the putni) be set aside the plaintiff prayed that his title to 1/3rd share in the putni might be declared.

2. It appears that the putni tenure (Mahal Dabibarpur) was held under the Maharaja of Burdwan who is the defendant No. 1 in this case. The plaintiff as well as the defendants Nos. 6 to 27 were the putnidars. The plaintiffs' share originally was one-third in the tenure by right of inheritance, and the remaining 2/3rds belonged to the defendants Nos. 6 to 27. The putni fell into arrears and was sold under Reg. VIII of 1819 on the 15th May, 1916, and was purchased in the name of defendant No. 2.

3. The plaintiff says that in that purchase he had an 8-annas share, because he had paid one-half the purchase money so that although he had 1/3rd share by inheritance he became a sharer to the extent of 8 annas by the purchase. On the 29th May, 1916, the defendants Nos. 6 to 9 instituted a suit (Suit No. 309 of 1916) for setting aside the putni sale.

4. The present plaintiff was defendant No. 19 in that suit, the present defendant No. 2 Mritunjoy Ghosh, was defendant No. 1 and the present defendant 1 the Maharajadhiraj of Burdwan, was the defendant No. 2 in that suit. During the pendency of that suit the putni tenure again fell into arrears and was put up to

sale again on the 16th November, 1916. The plaintiffs in Suit No. 309 of 1916 applied for amendment of the plaint by adding a prayer for Setting aside the second sale also. Before that suit was disposed of, the present suit was instituted on the 14th May, 1917, by the plaintiff. The previous suit was decreed on the 21st February, 1918, by the Subordinate Judge, both the sales being set aside.

5. On the 20th November, 1918, the Court below took up the present suit and dismissed it on the ground that, as both the sales had been set aside there was no cause of action for the present suit. On the 18th December, 1918, the plaintiff applied u/s 151 of the Civil Procedure Code, for setting aside the order dismissing the present suit and for restoration of the suit. On the 26th April, 1919, the Court granted the application of the plaintiff and restored the suit. There was an application to this Court for reviving the order and a rule was issued: but it was discharged on the 23rd February, 1920.

6. It appears that in the meantime the Maharaja of Burdwan appealed to this Court against the decree in Suit No. 309 of 1916. This appeal was decided on the same day, namely, the 23rd February, 1920. The judgment of the Subordinate Judge was set aside and both the sales were upheld by this Court. Thereupon an additional issue (Issue No. 7), viz., "whether the suit is barred by the rule of res judicata" was added at the instance of defendant No. 7 the Maharaja, on the 24th June, 1920 in the present suit.

7. The learned Judge proceeded to decide this preliminary issue first, and by his judgment dated the 5th August, 1921, held that the "question as to whether the second sale should be set aside or not is barred as res judicata." On the 30th September, 1921, the other issues were taken up, and the Subordinate Judge held that the defendant No. 3 was benamidar of the defendant No. 2. The sale under Reg. VIII of 1819 was held to be good, but on the finding that the defendant No. 2 purchased the property in the benami of defendant No. 3 gave a decree to the plaintiffs for joint possession in respect of 8-annas share of the putni with the defendant No. 3.

8. The defendant No. 3 accordingly has preferred this appeal, and, so far as this part of the case is concerned, the only question we have to consider is whether the defendant No. 3 was the benamidar of the defendant No. 2, because, if the defendant No. 3 was the real purchaser at the sale, he is the owner of the entire mahal by his purchase at the second sale, both the sales having been held valid by the High Court. (Their Lordships then discussed the evidence on both sides and continued as follows:

9. On the whole we are of opinion that the plaintiff has failed to prove that the defendant No. 3 was a benamidar of defendant No. 2. That being so the decree of the Court below in favour of the plaintiff for joint possession in respect of an 8-annas share of the putni mahal with the defendant No. 3 must be set aside.

10. So far as the Maharaja of Burdwan is concerned, the sale having been held to be good, he is no longer interested in the question raised in the appeal and no

ground has been urged against him. The cross-objection preferred by the plaintiff has not been pressed. The appeal as against the Maharaja is accordingly dismissed.

11. The next question is whether the plaintiff is entitled to get a decree for one-half of the surplus sale proceeds of the second sale. That sale, as stated above, took place on the 16th November, 1916, and fetched a price of Rs. 10,000.

12. The defendant No. 2 withdrew Rs. 8,999-11-11 as the surplus sale proceeds on the 24th January, 1917. The plaintiff's claim to one-half of this amount is based upon the allegation that he was the owner of the putni taluk (to the extent of 8 annas) by virtue of his purchase of it at the first sale jointly with defendant No. 2.

13. The first point for determination, so far as this part of the case is concerned, is whether the plaintiff was a purchaser at the first sale jointly with defendant No. 2. The Court below has come to the finding that he was. It has found that there was an agreement between the plaintiff and defendant No. 2 to purchase the taluk at the first sale and that the plaintiff paid half the purchase money. The evidence on the point has been placed before us and has been commented upon at length by both parties. The plaintiff's case is that he paid Rs. 300, that being one-half of the money which had been paid into Court on the date the sale took place (i. e. 15th May, 1916), and that he paid a sum of Rs. 2,000 when the balance of the money had to be deposited on the 22nd May, 1916. The plaintiff says that he came to Burdwan a few days before the sale and that he expected that all the co-sharers of the putni mahals would pay their quota of the putni rent, and he further says that he had sufficient money with him for payment of his share of the putni rent which exceeded Rs. 300. It appears that he borrowed a sum of Rs. 1,500 a few days before the sale in order to pay off the rent due on account of some putni mahals held by him under the Burdwan Raj, and he says that he had a sum of Rs. 510 left with him after paying the rent due on account of the other putnis; but as his other co-sharers in the taluk Debibarpur did not pay their shares of the rent, he and defendant No. 2 entered into an agreement to purchase the taluk jointly in the names of defendant No. 2 and the plaintiff's son Tarak.

14. Bids were actually offered in those two names. The plaintiff has not produced his account books and that certainly is a matter for comment. With regard to the balance of the purchase money which was to be deposited on the 8th day (the 22nd May), the plaintiff adduced evidence to show that he paid Rs. 2,000 to Ram Chandra, the brother of defendant No. 2 on account of the balance of his share plus certain incidental costs such as giving security, etc. It is to be observed that in the plaint as originally filed it was stated that a sum of Rs. 2,000 was paid on the 15th May, and there is no mention of the payment of the sum of Rs. 300 on that day. It appears, however, as observed by the Subordinate Judge, that the plaint was carelessly drawn up, and subsequently the plaint was amended.

15. It appears from the evidence that the financial condition of the plaintiff was not good at the time. We have already referred to the fact that he borrowed Rs. 1,500 a few days before the sale and there is also evidence that he had to borrow money again, but that was some time after (November, 1916). The evidence that he had Rs. 2,000 for payment of his share of the balance of the purchase money does not appear to be strong.

16. There is the evidence, however, of one Mahima Ranjan, a pleader of Assansole, who swears that he was sent by his uncle Rash Behari to Burdwan with money in case his cousin Jotindra Mohan required it for purchasing another putni mahal, that the plaintiff's son Radha Raman took two currency notes from him of the value of Rs. 500 each and that the said Radha Raman actually paid money for being deposited in the Collectorate on the 22nd May in the presence of the witness. The two currency notes of Rs. 500 were not as a matter of fact entered in the challan, but it is stated that the podder said that it was unnecessary to enter the notes in the challan.

17. There has been some discussion before us as to the ability of the defendant No. 2 to raise the amount of money which was necessary for being deposited, and the Court below has found that the story of defendant No. 2 as to the raising of the money was false. But it does not follow that it was false. He might have raised money in case the defendant No. 2 was unable to pay his share of the purchase money.

18. The question we have to consider is whether there was an agreement between the plaintiff and defendant No. 2 for the purchase of the taluk and whether the plaintiff paid one half of the purchase money. The plaintiff has produced two letters purporting to have been written by the Defendant No. 2 from Purulia. One is Exhibit 8, dated the 23rd May, 1916, which, if genuine, proves the case of the plaintiff entirely, because, it contains a clear admission of Rs. 2,000 having been paid by the plaintiff to Ram Chandra, the brother of defendant No. 2 for the purpose of purchasing Debibarpur at the auction sale, The defendant No. 2 denied that the letter was written by him.

19. The Subordinate Judge has come to the finding that the letter was in the handwriting of defendant No. 2. There is some similarity between his handwriting and the writing of the letter: but in the absence of any expert evidence on the point we do not think it safe to rest our decision on this letter.

20. There are other circumstances, however, upon which the Court below has relied, and which we think have an important bearing on the case.

21. The first is that joint bids were offered in the names of Tarak and defendant No. 2. The plaintiff's son Tarak was present in Court at the time of the auction sale and if joint bids were offered in the name of the said Tarak, it is difficult to see why his name was joined unless it was agreed that the defendant No. 2 and the plaintiff should jointly purchase the property. The defendant's case was that Tarak, in whose name the bids were offered jointly with defendant No. 2, was the

son of Ram Chandra, the brother of defendant No. 2.

22. It appears, however, that Tarak, the son of Ram Chandra, was a child one month old at that time according to the plaintiff's evidence, and a year old according to the defendant's evidence. Ram Chandra had other grown-up sons and it is extremely unlikely that bids should be offered in the name of a child of so tender an age.

23. The defendant's story is that when bids were going on in the joint names of the defendant No. 2 and Tarak, Ram Chandra came and objected to his being mixed up in the matter of the purchase and thereupon the name of his son Tarak was struck out from the bid-sheet. But Ram Chandra admittedly executed a security bond on behalf of his brother, the defendant No. 2, in favour of the zamindar (the Burdwan Raj) as security for the rent of the putni mahal purchased by the defendant No. 2. The evidence as to when the name of Tarak was struck out from the bid-sheet is conflicting, but we think having regard to the evidence of the Nazir, that it was struck out by Mr. Waddell, the Collector, and initialled by him, when the bids were closed and the bid-sheet was placed before him. The name of Tarak appears jointly with that of the defendant No. 2 in the challan by which the earnest money was deposited on the date of the sale. It is said by way of explanation that Bhuban Banerjee who wrote out the challan was not aware of the fact that the name of Tarak had been struck out and in ignorance of that fact the challan was written out in the joint names after the sale. But, as stated above, the name of Tarak was struck out after the bids had been closed and the challan was corrected, as it appears, by the Nabi Nazir.

24. The second circumstance is that during the negotiations for compromise of the present suit in the lower Court, which however was not successful, the fact that the plaintiff had paid money for the purchase of the putni at the first sale was set up in the presence of the defendant No. 2. It appears from the evidence of Sailendra Nath Mitra, the then Government Pleader of Burdwan and Mahirna Ranjan Bakshi, pleader, Assansol, that defendant No. 2 stated that if the plaintiff had paid money to Ram Chandra, he would ascertain it from his brother and repay him. Of course there was no distinct admission that the plaintiff had paid any money. But the plaintiff had set up a case of payment; of Rs. 2,400 in his plaint and these negotiations for compromise took place long afterwards. It is improbable that defendant No. 2 should not have asked his brother Ram Chandra as to what sum, if any, had been paid by the plaintiff for the purchase of the putni taluk. In these circumstances we are unable to differ from the finding that the plaintiff paid one-half of the purchase money. It is next contended that the plaintiff having admittedly purchased the property for the benefit of his son, the suit could not be maintained by him. But until there was a conveyance executed by him the interest in the property remained in him. Any disclaimer would not pass the interest to his son, and the son's position was that of a benamidar.

25. It is further urged that the purchase of the putni by one of the defaulters was void; but so long as the sale was not set aside it must be taken that it was only

voidable. See *Gobinda Chandra Pal v. Dwarkanath Pal* (1906) 33 Cal. 666. The sale has been confirmed and the question whether it was void or voidable does not arise and does not affect the claim for the surplus sale proceeds.

26. We now come to the questions of amendment of the plaint and limitation, but before doing so, we must notice a contention raised on behalf of the plaintiff, viz., that the defendant No. 2 not having preferred an appeal is not entitled to raise any objection against the finding of the Subordinate Judge. The Subordinate Judge gave a decree for possession to the plaintiff in respect of an 8-annas share of the property. The question of the surplus sale proceeds would arise only if that decree for possession was set aside. There was no decree against the defendant No. 2, with respect to the surplus sale proceeds and an appeal does not lie merely against findings. In any case having regard to the provisions of Order 41, Rule 33, Civil P.C., we can give such relief to defendant No. 2 as he may be entitled to.

27. Then comes the question of amendment of the plaint. It arises in this way. The first sale, as already stated, took place on the 15th May, 1916, and on the 29th May, 1916, Suit No. 309 of 1916 was instituted by defendants Nos. 6 to 9. The second sale took place on the 16th November, 1916. On the 22nd November 1916 the plaintiff put in an application praying that the payment of the surplus sale proceeds might be withheld for one month, but the Court held that no action could be taken without an injunction from the civil Court. On the 24th January, 1917, the defendant No. 2 withdrew the sum of Rs. 8,999 odd, that being the surplus sale proceeds. The present suit was instituted on the 14th May, 1917. There was originally no prayer in the plaint about the surplus sale proceeds, though it was open to the plaintiff on the 14th May, 1917 (when the suit was instituted) to claim a moiety of the surplus sale proceeds in the alternative. He was fully aware of the fact that the defendant No. 2 had withdrawn the whole of the surplus sale proceeds as he had objected to the withdrawal. On the 7th May, 1920, an application was made for amendment of the plaint praying for a refund of Rs. 2,000 in case the first sale was set aside; even then there was no prayer for amendment in respect of the one-half of the surplus sale proceeds. On the 31st May, 1920, an application for amendment in respect of the surplus sale proceeds was made for the first time. The defendant No. 2 objected to the application, but the Court on the 18th July, 1920, allowed the plaint to be amended. The question however seems to have been left open, and was finally decided in the judgment.

28. The question is whether the application for amendment was properly allowed. It is contended on behalf of the appellant that the claim in respect of the surplus sale proceeds was barred at the date of the application for amendment (31st May, 1920), as the surplus sale proceeds were withdrawn by the defendant No. 2 on the 24th January, 1917, and that therefore the amendment ought not to have been allowed. We have to see therefore whether the claim in respect of the surplus sale proceeds was barred by limitation on the

31st May, 1920. The claim for the surplus sale proceeds comes under Article 62 of the Limitation Act, under which a suit has to be brought within three years from the date on which the money was received by the defendant. There is no doubt that money was received by the defendant on the 24th January, 1917, and the date of the amendment was 31st May, 1920 which was more than three years from the former date. It is contended on behalf of the plaintiff that the period between the date on which the sale was set aside by the Court below in Suit No. 309 of 1916 (21st February, 1918) and the date on which the High Court reversed that decision and upheld the sale (23rd February, 1920), should be deducted and that if that period is deducted, the claim for the surplus sale proceeds would be in time. The case does not come u/s 14 of the Limitation Act as the plaintiff was not prosecuting the previous suit, nor does it fall under any other section of the Act.

29. The plaintiff evidently relies upon the principle of suspension of time which has been laid down in some cases. The "question of suspension of the period of limitation is one upon which the authorities do not seem to be uniform. In the well known case of *Ranee Sumo Moyee v. Shoshee Mokhee Burmonia* (1868) 12 M.I.A. 244 the Judicial Committee in determining whether the cause of action accrued with reference to Section 32 of Act X of 1859, at the end of each fasli year, when the rent became due or at the date of the decree reversing the auction sale of the putni taluk belonging to the zamindar, decided in favour of the latter date. That therefore was a case in which the question was when did the cause of action arise for the suit, and it was not really a case of suspension of the period of limitation. The case of *Hukumchand Boid v. Prithichand Lal Chowdhury* AIR 1918 P.C. 151 is also not a case of suspension of the period of limitation. Their Lordships held that the sale had not become final and conclusive; in other words, for the purpose of the question of limitation the sale had not become absolute. On the other hand in the case of *Soni Lal v. Kanhaya Lal* (1913) 35 All. 227 where there was a fusion of the interests of the mortgagor and the mortgagee for a certain period, and it was contended that limitation was suspended for that period, their Lordships observed: "There is nothing in Act XV of 1877 which would justify this Board in holding that once that period of limitation has begun to run in this case it could be suspended. Their Lordships consider that if they were to hold that by reason of the fusion of interests between 1883 and 1898 the period of limitation was suspended, they would -this not being a suit to which the proviso to Section 9 of Act XV of 1877 applies-be deciding contrary to the express enactment of that section, that when once time has begun to run no subsequent disability or inability to sue stops it." But in the case of *Lakhan Chandra Sen v. Madhusudan Sen* (1907) 35 Cal. 209 this Court acting upon the principle of the case *Ranee Surno Moyee v. Soshee Mokhee Burmonia* (1868) 12 M.I.A. 244 and *Pran Nath Ray Choudhury v. Rohea Begum* (1859) 7 M.I.A. 323 held that the plaintiff's right to bring an action was suspended for a certain period: the decision of this Court was approved by the Judicial Committee in the case of *Nrityamoni Dassi v. Lakhan Chandra Sen* AIR

1916 P.C. 96.

30. In that case two out of three brothers were dispossessed of their shares in certain properties by the third brother. One of the three brothers who was dispossessed brought a suit for recovery of possession of his share as against the other two brothers as defendants. One of the defendants supported the plaintiff, and set up his own right to one-third share in the property. It appears that an issue was raised as between the co-defendants as to whether the defendant who supported the plaintiff was entitled to a certain share.

31. The Court actually passed a decree not only in favour of the plaintiff but also declared that the defendant had one-third share. On appeal the decree of the trial Court in favour of the plaintiff was upheld but was set aside so far as the defendant was concerned. It was in these circumstances that this Court and the Judicial Committee held that limitation was suspended from the date of the decree of the first Court to the date when that decree was set aside on appeal. The Judicial Committee observed as follows:

Limitation would, no doubt, run against them from that time. But it would equally without doubt remain in suspense whilst the plaintiffs were bona fide litigating for their rights in a Court of justice. They had in the suit of 1896 before Mr. Justice Henderson associated themselves with the plaintiff in that action and had asked for an adjudication in those proceedings of their rights. A distinct issue was framed in respect of their claim to which no objection seems to have been made by the appellant. It was an effective decree made by a competent Court and was capable of being enforced until set aside. Admittedly, if the period during which the plaintiffs were litigating for their rights is deducted, their present suit is in time. Their Lordships are of opinion that the plea of limitation was rightly overruled by the High Court.

32. Now, what are the facts of the present case? Here the plaintiff himself did not institute any suit.

33. The suit was instituted by the defendants Nos. 6 to 9 for reversal of the first and subsequently by way of amendment they prayed for setting aside the second sale. The plaintiff was interested in upholding the first sale because he has purchased the property at the first sale. Though he was interested in having the second sale set aside he does not appear to have taken any part in the suit. It is true that in the case of *Nrityamoni Dasee v. Lakhani Chandra Sen* AIR 1916 P.C. 96 also the plaintiff did not institute the previous suit and was a defendant, but, as pointed out by their Lordships, he had associated with the plaintiff in the previous suit and had asked for an adjudication of his rights in that suit. A distinct issue was raised in respect of his claim to which no objection seems to have been made by the other defendant.

34. It was in these circumstances that the plaintiff was held entitled to suspension of the time during the time the decree in the previous suit remained in force. The case of *Sani Rani v. Kanhai Lal* (1913) 35 All. 227 does not appear

to have been brought to the notice of the Judicial Committee.

35. A Full Bench of the Madras High Court in the case of *Muthie Korarki Chetti v. Madar Arumal* (1919) 43 Mad. 185, considered the decision of the Judicial Committee on the question of suspension of limitation and one of the learned Judges (Seshagiri Ayyar, J.) observed:

The true rule deducible from these decisions of the Judicial Committee is this: that subject to the exemptions, exclusion, mode of computation and the excusing of delay, etc., which are provided in the Limitation Act, the language of the third column of the first schedule should be so interpreted as to carry out the true intention of the legislature, that is to say, by dating the cause of action from a date when remedy is available to the party. This is a rule of construction and not a rule of law. I would answer the reference as above leaving each case to be dealt with in the light of these observations." However that may be, we do not think that the principle of *Nrityamani v. Lakhan Chandra Sen* AIR 1916 P.C. 96 should be extended to the facts of the present case and we are accordingly of opinion that the claim for the surplus sale proceeds was barred by limitation on the 31st May, 1920, when the amendment was applied for.

36. It is contended on behalf of the defendant No. 2 that even if the claim for the surplus would have been barred by limitation, it would be no ground for disallowing the application for amendment. Reliance is placed upon the case of *Zahur Ali Khan v. Rutta Koer* (1867) 11 M.I.A. 468, where their Lordships allowed an amendment of the plaint on the ground that a new suit would be barred by limitation. But the reason why the amendment was allowed is thus stated:

The fairer course is to do what the Judge of the Court of first instance might under the Code of Procedure have done at an earlier stage of the course, namely, allow the appellant to amend his plaint so as to make it a plaint against Rutta Koer alone for the recovery of money due on a bond. Her liability on the bond may thus be tried on the issues already settled.

37. It does not appear that the claim would have been barred had the amendment been allowed by the Court of first instance in that case. Then against the claim for recovery of the money allowed by way of amendment could be, as pointed out by their Lordships, tried on the issues already settled.

38. Here the claim for the surplus sale proceeds could not be tried on the issues in the case; and although the claim for possession of an 8-annas share and that for recovery of an 8-annas share of the surplus proceeds might be said to arise out of the same transaction, the cause of action was not identical. [See *Saminathan v. Palaniappa Chetty* (1914) 41 I.A. 142.]

39. In a series of cases it has been held that the power of the Court to amend the plaint should not be exercised where the effect is to take away from the defendant a legal right which has accrued to him by lapse of time. See *Kalidas Choudhury v. Draupadi Dassi* 22 C.W.N. 104, *Upendra Narayan Ray v. Janaki*

Nath Ray (1917) 45 Cal. 305, Rebati Raman v. Harish Chandra 24 C.W.N. 749 and Gyanendra Nath Chakravarti Vs. Poresh Nath Pal and Another, .

40. The rule is recognised by the Judicial Committee in the case of Charan Das v. Amir Khan AIR 1921 P.C. 50, where it was held that there are cases in which that consideration is outweighed by the special circumstances of the case. We do not think that there are any special circumstances in the present case to outweigh the rule.

41. The last question is whether the plaintiff is entitled to recover the sum of Rs. 2,300 paid by him on account of the purchase money and other expenses. The application for amendment so far as this claim is concerned was made on the 7th May, 1919, within three years of the date on which the money was paid (15th and 22nd May, 1916). The application was ordered to be put up later, and was taken up along with the subsequent application, dated the 31st May, which related to the claim for surplus sale proceeds and in the alternative for refund of the purchase money. It is stated in the order-sheet that the application, dated the 7th May, was not pressed. But the later application for amendment filed on the 31st May, 1920, which, as stated above, related to the recovery of the surplus sale proceeds and in the alternative for the recovery of Rs. 2,300 was certainly pressed; it was therefore unnecessary to press the application dated the 7th May, separately.

42. The result, therefore, is that the plaintiff's claim, so far as the surplus sale proceeds are concerned, is disallowed; but the plaintiff will get a decree for the sum which he had paid to the defendant No. 2 for the purchase of the first sale, namely, the sum of Rs. 2,300.

43. The plaintiff and defendant No. 2 will bear their own costs in this Court as well as in the Court below. The Maharaja of Burdwan will get three gold mohurs from defendant No. 3 and two gold mohurs from the plaintiff as his costs in the cross-objection. Defendant No. 3 will get his costs from the plaintiff in this appeal, the hearing fee being assessed at 5 gold mohurs.

44. The plaintiff must pay the costs of the Maharaja in the lower Court and half the costs of defendant No. 3 in the lower Court. Defendant No. 2 will not get costs of the additional papers printed out of Court.