
(1911) 01 CAL CK 0041
In the Calcutta High Court

Surendra Nath Roy and Others

APPELLANT

Vs

Krishna Sakhi Dasi and Others

RESPONDENT

Date of Decision : 06-01-1911

Acts Referred:

Evidence Act, 1872 — Section 115

Citation : 9 Ind. Cas. 110

Hon'ble Judges : Chatterjee, J;Caspersz, J

Bench : Division Bench

Judgement

1. This is an appeal in a suit brought by the plaintiffs-appellants to eject the principal defendant as being a tenant-at-will in respect of a durjote under the superior jote interest purchased by the plaintiffs from three brothers. The Munsif decreed the suit. On appeal, the Subordinate Judge has reversed that decision, and the plaintiffs appeal.

2. It is urged, first, that the notice to quit was a good notice in point of law, and, secondly, that the conveyance to the plaintiffs binds all the vendors (including Bejoy Gobinda), and the defendant, by way of estoppel.

3. The central fact upon which the case turns is that Bejoy was a minor, under the age of twenty-one years, at the time when he executed the conveyance. He was then over eighteen, but his period of minority had been extended by reason of a certificate of guardianship having been taken under the provisions of Act VIII of 1890. Bejoy is not a party to this litigation, but he has deposed in plaintiff's favour and has rati fied and acquiesced in the conveyance to them of his one-third share in the jote.

4. The Subordinate Judge has decided issues Nos. 2, 4 and the second part of issue No. 5. He observes:: "This transfer by Bejoy was no legal transfer, and hence I must hold that plaintiffs did not purchase Bejoy's share in the superior jots" and hence plaintiffs alone cannot maintain this ejectment suit against defendant, and I must hold that Bejoy not having joined with the plaintiffs in

giving notice to the defendants to quit, the notice to quit which was served upon defendant is not valid and sufficient, and I further find that Bejoy not having joined with plaintiffs in bringing this suit, this suit is bad for non-joinder of party". The Subordinate Judge further finds that, though plaintiffs were under a misapprehension as to Bejoy's age of majority being 21, there was no estoppel, and that Bejoy's ratification and acquiescence cannot avail the plaintiffs. On the question whether the durjote was or was not kaimi, the Subordinate Judge has come to no finding. The Munsif held that defendant was a tenant-at-will and the argument in this Court proceeded on that assumption.

5. Our attention has been called to the decision of the Judicial Committee in *Mohori Bibee v. Dharmodas Ghosh* 30 C. 539 : 5 Bom. L.R. 421 : 7 C.W.N. 441 : 30 I.A. 114 where it was argued that a minor is amenable to the rule of estoppel laid down in Section 115 of the Evidence Act. The Privy Council did not think it necessary to deal with that question on the facts then before them. The statement relied upon in that case was made to a person who knew the real fact and was not misled by the untrue statement.

6. We proceed to examine other authorities the subject of an infant's liability.

7. In *Sreemutty Mohun Bibee v. Sarat Chand Mitter* 2 C.W.N. 18, which was a suit upon a mortgage, it was pointed out that in the case of *Dhan Mull v. Ram Chandra Ghosh* 24 C. 265 : 1 C.W.N. 270 the Court dealt solely with the question of the defendant's personal liability to a money decree, and the learned Judge (Jenkins, J.), upon a review of the authorities, held that, in a Court of Equity, the disability of a party arising from infancy cannot be successfully used in defence of fraud, and the defendant in such a case cannot avail himself of the plea of infancy. As there was fraud found in that case, it was unnecessary to consider whether, apart from fraud, the defendant would be bound by virtue of Section 115 of the Evidence Act. The Court of appeal (Maclean, C.J., Macpherson and Trevelyan JJ.) upheld; the decision of the lower Court, See *Sarat Chand Mitter v. Mohun Bibee* 25 C. 371. The learned Chief Justice (at page 394) observed as follows: "But in this case, upon the facts, I conclude that Luchinarain was deceived and deceived by the course of conduct which the defendant adopted. I think the cases establish that, in a case like the present, the defendant, though at the time when he entered into the contract, he was an infant, is not entitled to take any advantage resulting from his own fraud."

8. In *Dhurmadass Ghose v. Brahmo Dutt* 25 C. 616 : 2 C.W.N. 330 Jenkins, J. held [dissenting from *Ganesh Lala v. Bapu* 21 B.198 that "fraud operating to deceive must be found as a fact, and whether in any particular case there is such fraud must depend on its own circumstances." It was also pointed out that the individuals, sought to be affected in the case of *Sarat Chunder Das v. Gopal Chunder Saha* 20 C. 296 : 19 I.A. 203, which was relied upon in the Bombay case as showing that there was no suggestion of the exception of an infant from the doctrine of estoppel, were not infants.

9. In the same case, *Brumo Dutt v. Dharm Das Ghose* 26 C. 381, the Court of appeal observed that Section 115 of the Evidence Act has no application to contract by infants, that the term "person" in that section applies only to a person of full age and competent to enter into contracts. The declaration containing the alleged representation as to age in that case was prepared and drawn up by an attorney who acted both for the mortgagor and the mortgagee, and who had received the clearest notice from the mother of the mortgagor that he was a minor, and it was found in that case that the mortgagee was not misled as defrauded by the declaration of the mortgager as to his age.

10. As it was found that the mortgagee was not misled by any misrepresentation, the observations of the learned Judges in that case that Section 115 of the Evidence Act did not apply to infants, were not considered by the Privy Council, as already stated.

11. In the present case, the vendees were not aware that Bejoy (who was more than 18 years of age) was a minor by reason of an order having been made u/s 7 of Act VIII of 1890. Bejoy joined his brothers in executing and registering the conveyance. The learned Subordinate Judge, in one part of his judgment, seems to think that there was no talk about the majority or minority of Bejoy, and so any suggestion about misrepresentation by him and his brothers falls to the ground. But, in another part, he says: "I do not believe Bejoy when he says that he did not know anything about the certificate."

12. The Munsif found that Bejoy represented himself to be of age and that the Sub-Registrar took him to be so. The learned Subordinate Judge, apparently, proceeded upon the ground that there was no statement made by Bejoy as to his age. But if Bejoy (who had attained the age of discretion) knew that his minority had been extended, and held himself out as being of age, and registered the conveyance, there was representation by conduct, and these facts, coupled with the fact, that the vendees were not aware that Bejoy was a minor, and were not put upon enquiry, may amount to misrepresentation and legal fraud on the part of Bejoy.

13. If there was misrepresentation by Bejoy operating to deceive, and if the plaintiffs were deceived by it we think that Bejoy would be bound by the transaction. There should be a clear finding on the point. In the absence of such fraud, or if the plaintiffs were not deceived by any such misrepresentation, then the infant cannot, we think, on the authorities, be held liable.

14. The suit is not to enforce any contract or equity as against Bejoy. Bejoy seems to have attained majority before the notice to quit was served upon the defendants. He did not repudiate the transaction on his attaining majority. On the contrary, he affirmed it in his evidence in the present suit. The Subordinate Judge thinks that Bejoy may "turn round hereafter," but it appears that Bejoy has executed a fresh conveyance in plaintiff's favour.

15. The next question is, assuming that Bejoy is bound, whether the defendants,

who were tenants under Bejoy, are also bound. The defendants do not set up any title, in themselves, to the superior jote interest which Bejoy had. They were merely tenants and we must assume, for the present, that they were tenants-at-will. The conduct of Bejoy does not affect their tenancy, it affects the superior interest which Bejoy had. The defendants set up a *jus tertii*, the right of Bejoy. If therefore, plaintiffs acquired a valid title as against Bejoy, we think the defendants cannot impeach that title.

16. The learned pleader for the plaintiffs-appellants contends that, even if plaintiff did not acquire a valid title to the share of Bejoy, the notice is, nevertheless, a good one, and plaintiff is, at any rate entitled to eject the defendant from the 2/3rd share of the property, and reliance is placed upon the case of *Doe d Aslin v. Summersett* 1 B. and Ad. 135.

17. The question was considered in the case of *Gopal Ram Mohuri v. Dhakeswar Pershad Narain Singh* 35 C. 807 : 7 C.L.J. 483 and the learned Judges held as follows: "We think the rule to be deduced from these cases is, as laid down in *Ebrahim Fir Mahomed v. Cursetji Sorabji De Vitre* 11 B. 614, that though in England any joint tenant may put an end to his demise, so far as it operates on his own share, whether his companions join him in putting an end to the whole lease or not, yet, according to the Indian decisions, the relation created by contract with several joint landlords continues, until there exists a new and complete volition to change it. The rule is different in the case of trespassers and also in the case of tenants when khas possession is not sought for, but this would seem to be the law as Settled in India in the cases of tenants when khas possession is the relief asked for."

18. We concur with these observations and hold that the notice to quit is not a good one if plaintiffs did not acquire a valid title to the share of Bejoy.

19. The result is that the decree of the lower appellate Court is set aside and the case remanded to the lower appellate Court to be dealt with in accordance with law.

20. If the Court finds the question of fraud against the defendants, it will try the issues which were left undetermined. Costs to abide the result.