(1913) 08 CAL CK 0002

Calcutta High Court

Case No: Appeals from Appellate Decrees Nos. 2924, 3296 and 3856 of 1910

Ramdhari Singh		APPELLANT
	Vs	
Permanund Singh and Others		RESPONDENT

Date of Decision: Aug. 27, 1913

Final Decision: Dismissed

Judgement

1. These three appeals arise out of a suit instituted by the Plaintiff, Respondent for recovery of an one-sixth share of Rs. 7,717-14-4 which formed part of the assets, belonging to the estate of one Ram Saran Singh, of whom the Plaintiff and the Defendants 1 to 5 are the reversionary heirs, and which were realized by the Defendants 1 to 5 alone. The Defendants admitted that the said amount had been realized by them but claimed a set-off, with respect to one-sixth share of three sums of money which they pleaded, were payable by the Plain tiff. These were (i) a sum of Rs. 4,195-3-2 spent in litigation with one Jagdis Narain who has claimed the estate of Ram Saran on his death; (ii) a sum of Rs. 3,536-4-0 spent in the sradh of one of the widows of Ram Saran; and (iii) a sum of Rs. 803-1-3, paid as Government revenue for the estate after the succession had opened out. The Defendants set up an agreement between themselves and the Plaintiff to the effect that, they (the Defendants) would pay the expenses of the litigation and sradh and the Government revenue and deduct the same from the assets of the estate which would be realized by them, the total amount realized by the Defendants being Rs. 7,717 as stated above, the Plaintiff claimed 1/6th share thereof, viz., Rs. 1,286-5-3 together with interest thereon at 1 per cent. The Defendants claimed a set-off with respect to 1/6th share of the three sums mentioned above, amounting to Rs. 1,422-6-8, and paid court-fee accordingly.

2. The Court of first instance disallowed the set-off and gave a decree to the Plaintiff for the amount claimed., The learned District Judge on appeal held that the amounts claimed by the Defendants were not "ascertained sums" of money and they therefore were not entitled to a set-off in this suit under the provisions of the Civil

Procedure Code. With reference to a set-off on "equitable considerations and the case law," he was of opinion that the contentions raised by the Defendants were multifarious, and came to the conclusion that the Defendants were entitled to have an adjudication upon the claims they make, but the contentions are such, that they should be made in a separate suit or separate suits and not all tried together in one suit, and accordingly he confirmed the decree of the Munsif. Some of the Defendants have appealed to this Court in the above appeals.

3. It is contended on behalf of the Appellants, first, that the learned District Judge is wrong in holding that the sums claimed by way of set-off are not "ascertained sums," and secondly,: that in any case, the sums could be claimed by way of equitable set-off.

4. It was contended on behalf of the Respondents that it was unnecessary to consider the above questions, as the Defendants were not entitled, upon the facts found, to a set-off of the sums claimed by them, even if a set-off could be allowed in this suit.

5. The first item claimed relates to costs of litigation with Jagdis Narain. It is found that there was no agreement by the Plaintiff to pay any share of the litigation expenses. It is further found that Plaintiff appeared by a separate pleader in the Court of first instance, as also in the Court of appeal in that litigation. Apart from any agreement, express or implied, we do not think the Defendant is entitled to call upon the Plaintiff to pay any share of the costs. In the case of Abdul Wahid Khan v. Shaluka Bibi ILR 21 Cal. 496 (1893), one of two co-sharers entitled to equal shares in an inheritance, having taken possession of the whole, was sued by the other for her share. He claimed to be allowed a proportion of the costs incurred by him for the protection of the inheritance on the ground that the Plaintiff had got the benefit of the litigation. The Judicial Committee held "This is not a ground for making the Plaintiffs liable for any portion of those costs. The proceedings were taken by the Defendant for his own benefit and without any authority, express or implied, from the Plaintiffs; and the fact that the result was also a benefit to the Plaintiffs does not create any implied contract or give the Defendant any equity to be paid a share of the costs by the Plaintiffs"; see also the case of Halima Bee v. Roshan Bee ILR 30 Mad. 526 (1907). We are accordingly of opinion that the Plaintiff is not liable to pay any share of the costs of the litigation.

6. The third item is Government revenue paid by the Defendants. This sum is an "ascertained sum" and the Plaintiff was certainly liable to pay his share.

7. It is contended, however, that as the Government revenue was paid on the 28th March 1905 and this suit was not filed until the 6th February 1909, the claim on this head was barred by limitation and could not be claimed by way of set-off, as it was not legally recoverable. We are of opinion, however, that the amount paid can be claimed. A time barred debt may be claimed by way of equitable set-off. See Sheo

Satan Singh v. Mahabir Pershad Shah ILR 32 Cal. 576 (1905) : and we think the Defendants should not be driven to a separate suit for the recovery of the amount of the Government revenue paid by them for protecting the estate, specially when a separate suit would be barred by limitation.

8. There remains the second item, the expenses of sradh. The learned Judge in one part of his judgment seems to have held that there was no agreement on the part of the Plaintiff to pay a share of such expenses, but in another place he says as follows :-- "The Plaintiff alleges that the amount of cash found was over Es. 4,000 and certain amounts were allotted for sradh and other expenses and only the balance divided. The Defendants allege that all that was found was divided and they undertook the sradh expenses on the Plaintiff agreeing that they should recoup themselves from the moneys in deposit, etc., now in suit. All these questions have to be gone into and many others." It seems to us, therefore, that the learned Judge has not come to any-positive finding upon the alleged agreement on the part of the Plaintiff to pay a share of the sradh expenses. Besides apart from any agreement the Plaintiff is liable to contribute his share of the sradh expenses. No doubt apart from any agreement the Defendants cannot claim a share of whatever money they may have spent in the sradh. The amount spent may be reasonable for rich people like the Defendants, but may not be so for a poor man like the Plaintiff. But the expenses of the sradh of the widow of Ram Saran should come out of the estate, and the Plaintiff is bound to contribute his share of the reasonable expenses for the sradh. The amount, however, which may be found on an enquiry into the above matter, cannot be called an "ascertained sum" But the sum need not be "ascertained" in an equitable set-off.

9. The principle of equitable set-off enunciated in the case of Clarke y. Ruthnavaloo 2 M.H.C.R. 296 (1865), viz., that the right of set-off exists not only in cases of mutual debits and credits, but also where cross-demands arise out of the same transaction, or are so connected in their nature and circumstances as to make it inequitable that the Plaintiff should recover, and the Defendant be driven to a cross suit, and which have been followed in numerous cases, should be followed in the present case. We think it inequitable to give a decree to the Plaintiff for his share of the assets realized, and drive the Defendants to claim against the Plaintiff the amount which might have been spent on account of the sradh, under an arrangement with the Plaintiff, or the reasonable expenses of the sradh apart from any agreement, more specially when a fresh suit may be barred by limitation, and when the Defendants have paid court-fee upon the whole amount claimed by them.

10. It is contended on behalf of the Plaintiff that an enquiry into these claims in this suit would involve great delay, and it would be inequitable to keep the Plaintiff out of the whole of his share of the assets which has been found by both the Courts below to be due to him, for a long period. We think there is some force in this contention; at the same time, we do not think it would be right to drive the

Defendants to a fresh suit, which, as we have said, may be barred by limitation. Under these circumstances, having regard to the fact that the Defendants claim equitable relief, we think it proper to impose terms upon the Defendants if they want to have the claims on account of the sradh expenses tried in this suit.

11. We have held that the Defendants are not entitled to get any share of the litigation expenses from the Plaintiff. The claims on account of the sradh expenses and the Government revenue are Rs. 8,536-4-0 and Rs. 803-1-3 respectively, and one-sixth share thereof amounts to Rs. 723-3-6.

12. The Plaintiff has been given a decree for Rs. 1,286-5-3 and interest Rs. 302-14-6 with costs and interest. We send back the cases to the Court of first instance, and direct that on the Defendants depositing in that Court the sum of Rs. 563-1-9 together with interest thereon at 1 per cent. as claimed in the plaint up to date of suit and proportionate costs in all Courts and interest (to which extent the decrees of the Courts below are confirmed and these appeals are dismissed) within a fortnight of the arrival of the records in that Court for payment to the Plaintiff, which the Plaintiff will be at liberty to withdraw, the Defendants'' claim against the Plaintiff for one-sixth share of the sradh expenses and Government revenue will be tried by that Court in this suit. As to these two items the costs will abide the result. We further direct that on the Defendants failing to pay the amount as directed above within the time fixed, these appeals will stand wholly dismissed with costs.