(1909) 05 CAL CK 0007

Calcutta High Court

Case No: None

Gangadhar Sarkar and Others		APPELLANT
	Vs	
Khaja Abdul Ajij and Others		RESPONDENT

Date of Decision: May 4, 1909

Judgement

1. This was a suit brought o establish the title of plaintiffs Nos. 4 to 8 in a 12 anna share of a patni taluk, and to set aside an auction sale of the said patni laluk on the ground that it was illegal, based on fraud and without jurisdiction. The origin-al plaintiffs Nos. 1 to 3, who claimed to be entitled to a 1 anna share in the patni taluk were afterwards made defendants, and the suit continued at the instance of plaintiffs Nos. 4 to 8. The sale took place on 1st Jaisto 1310 B.S. (corresponding to 15th May 1903) and the suit was filed on 5th October 1904, considerably more than one year after. The only point for our determination is whether the suit is barred by the law of limitation. The Munsif held that the suit was instituted within one year from the date when plaintiffs came to know of the sale, arid that it was, therefore, not barred. In this he was not correct, as under article 12 of schedule II of the Limitation Act, 1877, time begins to run from the date when the sale is confirmed, or would otherwise have become final and conclusive had no such suit been brought. He did not expressly find that plaintiffs were kept out. of knowledge of the sale by the fraud of the defendants, as required by section" 18 of the Limitation Act. The District Judge took a different view. He pointed out that the cases referred to by the Munsif were not applicable to the present suit. He held that plaintiffs had failed to show that they were entitled to the" benefit of Section 18 of the Limitation Act, and that as the suit was filed more than a year from the date of the sale it was out of time It is true that in their plaint the plaintiffs claimed exemption from the ordinary law of limitation on the ground that the defendant had fraudulently kept them front knowledge of the sale, arid they maintained that time only began to run from Jaisto 1311, when they came to know of the sale. This was a question of fact, which the District Judge has decided against the plaintiffs and we must accept that finding on second appeal. The matter, however, does not rest there. Both Judges have omitted

to notice that plaintiffs Nos. 5 and 6 on the record were and presumably still are minors. Prima facie, therefore, their suit at all events could not he barred. This omission on the part of the District Judge was the more unsatisfactory, as we understand that a petition was put in before him asking that, if necessary, the plaint might be amended, and we have an affidavit of the pleader who represented the plaintiffs in the lower appellate Court to the effect that he argued before the District Judge that the suit could not be wholly barred as some of the plaintiff''s were minors. Before us the learned pleader for the respondents objected that no such plea could be urged unless definitely set forth in the plaint as required by the last paragraph of Section 50 of the Civil Procedure Code, 1882. It was further urged that leave to amend the plaint u/s 53 could not be granted in second appeal. There is nothing, however, in the Code itself to prevent this Court from adopting such a course if it thought fit, in the peculiar circumstances of the case, to do so. At the most it could be said that it would be unusual. We do not, however, think that there is any necessity to amend the plaint, when the plaintiff or all the plaintiffs are minors it is not usually necessary for them to plead exemption. from the law of limitation, as prescribed by the concluding paragraph of Section 50. The Court can and must see from the record that being minors against them time has not yet commenced to run. It is only when the minor is suing in a representative capacity that the time which has commenced to run against his predecessor in title may continue to run against him. So too where one or more of several plaintiffs is or are a minor or minors, if the provisions of Section 8 of the Limitation Act apply (a point with which we shall presently deal) time would not have commence to run against any of them, and it would scarcely be necessary to expressly claim exemption. The fact is patent on the record.

2. It may further be noticed that the penalty for non-compliance with the provisions of Section 50 is not primarily, dismissal of the suit, but rejection of the plaint, a very different matter (see Section 54). In the case of rejection the plaintiff can, subject always to the law of limitation, bring a fresh suit (see Section 56). The respondents'' pleader relied upon the case of Jogeshwar Roy v. Raj Narain Mitter 31 C. 195 The head note of that case is most misleading. Their Lordships did not in that case hold that u/s 50, a plaintiff can-not take advantage of any ground of exemption which has not been set up in the plaint. Still less did they hold that the plaintiff could not, in any circumstances, be allowed to amend his plaint. The question there was between two-acknowledgments of liability. One the plaint-tiff had pleaded-but it was found to be insufficient for his purpose. In the Court of first instance reported in Benode Behary Mookerjee v. Rai Narain Mitter 30 C. 699 Sale, J. would apparently have given leave to amend, in order that the plaintiff might formally plead the later acknowledgment, but he found as a fact that there was no such acknowledgment as would save him or he could then be allowed to plead. The Court of Appeal also found as a fact that there was no such acknowledgment. The question of amendment of the plaint, therefore, did not really arise, though their Lordships

contemplated it as a possibility. This is a very different case. Here the plaintiffs have pleaded exemption u/s 18 of the Limitation Act, a plea which was incorrect but unnecessary. Can it be seriously contended that a suit under such circumstances should be dismissed as barred by limitation, when on the face of it, it is not barred? The Courts are bound to apply the law of limitation to suits, whether it is pleaded or not, and to dismiss a suit which is apparently out of time. Conversely they are bound not to dismiss as barred a suit, which on the face of it is not barred. If it were necessary, we should be disposed to allow the plaintiffs to formally amend the plaint; we, however, consider it unnecessary. We have sufficient details upon the record (except as to one minor point which we shall mention later) to enable us to dispose of the question of limitation. The only point of difficulty is as to the application of Section 8 of the Limitation Act to a case like the present. If any one or more of the plaintiffs could sue separately to set aside this sale, then, it would obviously not apply as the plaintiffs could not be called joint claimants within the meaning of the section, and the suit of the adult plaintiffs would be out of time. The suit of the minor plaintiffs could, however, proceed.

3. If on the other hand all the co-sharers must join in such a suit, and the suit would not be properly framed unless all were upon the record, then it would seem that they would be joint claimants; that the discharge could only be given by all; and that consequently time would not run against any of them, until such discharge could be given; i.e., till both the minors had attained majority.

4. It is questionable how far Section 8 can be applied at all to such a case as this. There is no discharge properly so-called to be given at all. The last clause too of the section has been the subject of numerous decisions, the Judges taking very different views as to its precise meaning. It appears to us unnecessary to enter upon any such discussion, as in our opinion any one of the co-sharers could have brought the suit alone and it follows that Section 8 has no application to this case.

5. In the first place Section 14 of Regulation VIII of 1819 is clear. It says "it shall be competent for any party desirous of contesting the right of the zamindar to make the sale-to sue (him) for a reversal of the same, and, upon establishing a sufficient plea, to obtain a decree with full costs and damages." The purchaser is to be a party, to such suit, but that is the only provision as to parties. The Full Bench case of Annoda Prosad Roy v. Erskine 12 B.L.R. 370 was cited as an authority for the proposition that all the co-sharers must join as plaintiffs and that unless they so joined the suit would not lie. That, however, is not what their Lordships decided. The suit in that case was a suit by one co-sharer in respect of his share alone and that was the suit, which was held to be bad in form. He has in fact" said the learned Chief Judge " sued in respect of part only of the cause of action." The sale cannot of course be set aside in part but there appears to be nothing to prevent one co-sharer suing alone to set aside the whole sale, especially if all the co-sharers were parties to the suit and before the Court as in the present case.

6. For these reasons we hold that the suit at the instance of the two minor plaintiffs would not be barred, though so far as the adult plaintiffs are concerned it is out of time. There is, however, as regards the minors, one contingency, in which one or both of them also might be barred. That is if they or either of them were not actually co-sharers at the date of the sale, but sue as representing some adult co-sharer, who had died between the date of the sale and date of suit. Against such adult co-sharer time would have begun to run and the subsequent disability could not stop it. This is not very probable, nor does it appear from the record, but it is possible.

7. We accordingly, allow the appeal and set aside the decree of the District Judge, dismissing the whole suit and remand the suit to his Court for a trial upon the merits, regarding it as the suit of the minor'' plaintiffs Nos. 5 and 6. The order dismissing the suit will stand as against plaintiffs Nos. 4, 7 and 8. Before proceeding with the trial on the merits, the learned District Judge should satisfy himself that the minor plaintiffs are suing in their own right and not as the representatives of some adult co-sharer, who was alive at the date of the sale. If one be thus barred, and the other not, the suit can of course proceed at the instance of the latter. Costs will abide the result of the suit.