(1869) 05 CAL CK 0023

Calcutta High Court

Case No: Special Appeal No. 79 of 1869

Mathura Pandey		APPELLANT
	Vs	
Ram Rucha Tewari and Others		RESPONDENT

Date of Decision: May 12, 1869

Judgement

Mitter, J.

We are of opinion that the lower appellate Court baa committed an error in law in the investigation of this case, which may have produced an error in the decision of the case upon the merits. It appears that in execution of a decree against Ramdhan Misser and others, the right and interest of the said Ramdhan Misser in 17 plots of land were attached by the defendant Manrakhan Roy. It further appears that the decree-holder and the judgment-debtors subsequently came to a private arrangement between themselves, and a sum of Company''s rupees 2,600 was paid by the latter towards the satisfaction of the decree. It is not very clear whether the result of this payment was to extinguish the whole debt, or at least that portion of it for which Ramdhan Misser and his property were liable; but it is necessary to remark that the Munsiff who tried this case in the first instance, distinctly found it as a fact that the whole decree was satisfied, and there is nothing in the decision of the lower appellate Court to contradict that finding. For reasons best known to the parties themselves, neither the arrangement nor the payment made under it was certified to the Court as required by the provisions of section 206 of the Code of Civil Procedure, but the decree-holder filed a petition simply asking the Court to release the said properties from attachment, which was accordingly done. Shortly afterwards the decree-holder renewed his application for execution, without giving any credit for the amount which he had already received, and the property which forms the subject-matter of the present litigation, and which is altogether distinct from that previously attached and released, was attached as the property of the same judgment-debtor, namely Ramdhan Misser. The plaintiff intervened under the provisions of section 246 of the Code, but his intervention being rejected the property was put up to sale and purchased, as be alleges, by one of the

judgment-debtors. The present suit has been accordingly instituted by him for the declaration of his title, and the confirmation of his possession. The Munsiff, after holding a local investigation in person, and after going through all the evidence, oral and documentary, which he had before him, came to the conclusion that the property in question rightfully belonged to the plaintiff, and that it was in his lawful possession at the time of the institution of the suit; and he further found as a fact that the decree-holder and the judgment-debtors had been acting in collusion with one another. On appeal, the Judge has reversed the Munsiff''s decision, simply upon the ground that the evidence of the witnesses produced by the decree-holder on the point of possession, was more reliable than that of the witnesses produced by the plaintiff on the same point. With reference to that portion of the Munsiff''s decision in which he found that the decree-bolder had been acting in collusion with the judgment-debtors, the Judge has simply remarked that "it is based upon conjecture and presumption." There can be no doubt that the word "presumption" has been used in this place, not in its ordinary legal signification, but as something synonymous with the word "conjecture," or in other words as a mere surmise, neither amounting to legal proof in itself, nor supported by legal evidence. Indeed the whole tenor of the Judge''s decision points to this interpretation, and to this interpretation only. It has been said, that when the Judge has used that word in a judicial decision, it must be taken for granted that he has used it in its usual legal acceptation, and that it would be obviously improper to construe it in any other way. But this contention can be scarcely admitted when it is borne in mind that there is nothing in the Judge''s decision to show, how that presumption, if the word were really used in its legal sense, has been disposed of, or why it has been rejected. At any rate, it is clear that the Judge appears to have been of opinion that such a presumption is entitled to no more weight than a mere conjecture, as is shown by the very fact of his having placed them both in the same category. We are of opinion, that the Judge has committed an error in law in dealing with this part of the case, and that this error is likely to have produced an error in the decision of the whole case upon the merits.

2. It is a truth confirmed by all experience, that in the great majority of cases fraud is not capable of being established by positive and express proofs. It is by its very nature secret in its movements, and if those whose duty it is to investigate questions of fraud were to insist upon direct proof in every case, the ends of justice would be constantly, if not invariably, defeated. We do not mean to say that fraud can be established by any less proof or by any different kind of proof from that which is required to establish any other disputed question of fact or that circumstances of mere suspicion which lead to no certain result, should be taken as sufficient; proof of fraud, or that fraud should be presumed against any body in any case; but what we mean to say is that in the generality of cases, circumstantial evidence is our only resource in dealing with questions of fraud, and if this evidence is sufficient to overcome the natural presumption of honesty and fair dealing, and to satisfy a

reasonable mind of the existence of fraud by raising a counter presumption, there is no reason whatever why we should not act upon it. In the present case, it appears that the conclusion of fraud arrived at by the Munsiff was based upon the conduct of the parties as disclosed by the execution proceedings, the evidence of the decree-holder himself and of Rang Lal, one of the judgment-debtors, both of whom were examined before him as witnesses in the cause. It is not for us, sitting here in special appeal, to say that these materials were sufficient to justify that conclusion as a conclusion of fact, but it is beyond all dispute that they amounted to such legal evidence as that fraud could have been judicially presumed from it, and that the Judge was wrong in dismissing them with the simple remark that they amounted to nothing more than conjecture and surmise.

3. It has been said that the Judge having rejected the oral evidence produced by the plaintiff to prove his possession that finding alone is sufficient to dispose of the case. We are unable to subscribe to the correctness of this contention. If a Judge in dealing with a question of fact forms his conclusion upon a portion of the evidence before him, excluding the other portion under an erroneous impression that it is not legal evidence but conjecture, there can be no doubt that the investigation is erroneous in law, and that the error thus committed is likely to have produced an error in the decision of the case upon the merits, inasmuch as it is impossible to say whether the Judge would have arrived at the same conclusion if he had looked into all the evidence upon the record, without excluding any part of it from a mistaken idea that it was not admissible in law. Thus for instance, if in the present case the Judge had agreed with the Munsiff in finding that the decree-holder and the judgment-debtors had been acting in collusion with one another, is there any reasonable ground for supposing that he would have still adhered to the opinion that the evidence of the witnesses produced by the decree-holder on the point of possession was more trustworthy than that of the witnesses produced by the plaintiff? And if the Judge has illegally rejected the evidence on the question of fraud, does it not necessarily follow that he has committed an error in law in the investigation of the case which goes to vitiate his whole decision on the merits. "The consideration of a case," observed their Lordships in the Privy Council, in the case of Maharajah Rajendra Kishor Sing v. Sheopursun Misser 10 M.I.A. 453, "on evidence can seldom be satisfactory, unless all the presumptions for and against a claim arising on all the evidence offered or on proofs withheld, on the course of pleading, and tardy production of important portions of claim or defence, be viewed in connection with the oral or documentary proof which per se might suffice to establish it." The observance of this rule is nowhere more necessary than in the Courts of Justice in this country. We cannot shut our eyes to the melancholy fact that the average value of oral evidence in this country is exceedingly low; and although in dealing with such evidence, we are not to start with any presumption of perjury, we cannot possibly take too much care to guard against undue credulity. There is hardly a case involving a disputed question of fact, in which there is not a conflict of

testimony, one set of witnesses swearing point blank to a particular state of facts, the other swearing with equal distinctness to a state of facts diametrically opposed to it. If therefore we were to form our conclusions upon the bare depositions of the witnesses, without reference to the conduct of the parties and the presumptions and probabilities legitimately arising from the record, all hope of success in discovering the truth must be at an end. If the facts found by the Munsiff with reference to the conduct of the decree-holder and the judgment-debtors are correct there is every reason to believe that a fraud has been perpetrated by them against some body, and this circumstance cannot and ought not to be overlooked in ascertaining the relative value of the oral testimony produced by the contending parties.

4. There is another point which requires to be noticed. It must be borne in mind that this was not an ordinary suit for confirmation of title and possession instituted under the provisions of the 15th section of the Code, but that it was a suit brought for "establishment of right" under the provisions contained in the last portion of section 246. It is very true that it has been held in several cases that where a plaintiff sues for confirmation of title and possession, but fails to prove that he was in possession at the time of the institution of the suit, the Court, in the exercise of the discretion vested in it by section 15, would not proceed to make a declaratory decree in his favour. It is not quite clear from the state of the decisions whether this is to be taken as an inflexible rule in every case instituted u/s 15; but it is clear that the decisions referred to were all passed in suits instituted under that section and that section only. But be this as it may, it is extremely doubtful whether the some rule would be equally applicable to suits brought u/s 246. The last portion of that section distinctly provides "that the party against whom an order may be given," under the preceding portion of the section, "shall be at liberty to bring a suit to establish his right at any time within one year from the date of that order," and these words rather go to show that the question to be tried in such cases is the question of right or title, and not merely the question of possession, which is the only one that the Judge seems to have tried in the present case. Of course the plaintiff in such a suit is not only bound to prove his title, but he is also bound to prove that it is not barred by limitation, for a title extinguished by lapse of time is no title at all. But it does not necessarily follow that his failure to prove his possession at the time of the institution of the suit, is at all sufficient ground for its total dismissal. It is to be borne in mind that where the Court dismisses an ordinary suit for declaration of title instituted u/s 15 of the Act, upon the simple ground that the plaintiff has failed to prove his possession at the time of the institution of the suit, the plaintiff may again bring an action to recover the property within the ordinary period of limitation. But the limitation prescribed by section 246 is one year only; and if every case for the establishment of title and confirmation of possession instituted under that section were to be, as a matter of course, dismissed upon the ground that the plaintiff was not in possession on the date of suit, and without any

enquiry as to the title set up by him, irreparable mischief might be frequently done. It may be said that the plaintiff having failed to prove the possession in which he seeks to be confirmed, is himself to blame for having put forward an allegation which he is not able to substantiate, and that he cannot reasonably complain if his suit is dismissed by the Court. But the Civil Courts in this country, which "by their very constitution are Courts of equity and good conscience" ought not to deprive parties of their just rights merely by way of penalty, and such a course would be opposed to the principle laid down by the Privy Council in the case of Rani Surno Moyee v. Suttish Chandra Roy 10 M.I.A. 123. We do not wish however to express any decisive opinion on this point, as we think that the case is not yet ripe for final decision. All that we wish at present to point out to the lower appellate Court is, that the question of title ought not to have been entirely overlooked; and that in a case of this nature, proof of possession cannot be dealt with apart from that of title or vice versa, without serious danger to the administration of justice. We reverse the decision of the Judge, and remand the case to him to try it de novo with reference to the above remarks.

Glover, J.

I concur in remanding this case.