

(1869) 06 CAL CK 0021

Calcutta High Court

Case No: Regular Appeal No. 46 of 1869

Kalinath Pal

APPELLANT

Vs

Nabadwip Chandra Sirkar and
Others

RESPONDENT

Date of Decision: June 30, 1869

Judgement

Bayley, J.

This was a suit to recover a moiety of certain talook, and to recover moveable property scheduled at the foot of the plaint, to the value of Rs. 7,260-7 as. The only items in the schedule necessary to mention for the purposes of this appeal are the following:--

1. Money paid for advancing loans, Rs. 2,500.
2. The estimated value of the stock in one cloth shop in the Chuck Bazar of Fureedpore and three shops of groceries, Rs. 500.
3. Outstanding balance, Rs. 1,500, and cash in hand, Rs. 500.

The total of these amounting to Rs. 5,000.

In respect of the general list of moveable property as given in the plaint, there is no further contention in appeal, and it is needless therefore to make mention of it.

2. It is admitted that Manik was the father of Sital, and Sankar was the father of Bhyrab; and both the fathers, in their life-time, and the sons in theirs lived in commensality.

3. The plaintiff's case is that, after the death of his father, he held possession of his eight-anna share in the property by right of inheritance; that the defendant No. 1, Nabadwip Chandra Sirkar, in collusion with defendant No. 2, forcibly and fraudulently took possession of all the moveable properties, and purchased the Shikmi Talook in question in the name of his wife (defendant No. 3) out of the money of his father and uncle the said Bhyrab and Sital, and kept him (plaintiff) out

of possession for 8 or 9 years; that be (plaintiff) attained his majority in Aswin 1273, and his cause of action has arisen from that date.

4. The defendant Nabadwip's case was that the plaintiff's paternal grand-father and his (defendant's) maternal grand-father and maternal grand-uncle, and his two brothers separated 60 or 70 years ago; that the plaintiff's father lived separately in a separate house in another village for the last 25 or 30 years; that the plaintiff's suit was thus barred by limitation; that all the moveables were destroyed by fire in Chaitra 1269 during Sital Chandra's life-time, and nothing remained in existence to form the subject of the present suit; that the Fureedpore trade had been long discontinued but it had been carried on by himself, without capital, by his own exertions as a broker; and that he purchased the talook in suit with his own money, in his own name, and was himself in possession thereof.

5. The other defendants put in other answers which it is unnecessary to notice for the purposes of this present appeal.

6. The lower Court put in issue : whether the plaintiff's suit was barred by limitation; whether the disputed Talook was purchased with the money left by the plaintiff's father and uncle, or with the defendant's own money; and whether the moveables were destroyed by fire as alleged by the defendant. There was no issue as to the cash in hand or the stock in the cloth shop at Fureedpore.

7. The lower Court apparently did, to some extent, put the burthen on the defendant to prove, in the first place, that the Talook in suit was purchased with his own money, and not with the joint funds of Sital and Bhyrab; but taking a review of all the evidence, the lower Court came to the finding that the Talook was purchased with the joint funds of Sital and Bhyrab, and that the defendant had no fund of his own to make the purchase.

8. The lower Court dismissed the plaintiff's claim for the moveables consisting of the articles and utensils sued for, and gave the plaintiff, a decree, in modification of his claim, awarding him possession of half of the purchased Talook, and half of the existing monetary transactions as attached on possession as also half of the moveables worth Rs. 50, and proportionate costs.

9. From this decision the defendants appeal before us, and there are eleven grounds taken in the petition of appeal, out of these, six only have been pressed before us, viz., three in bar of the suit, and three on the merits.

10. The first objection taken in bar of the suit is, that, in the absence of a certificate, the case could not proceed under Act XL. of 1858; but looking to the provisions of section 3 of the Act, we find it clearly enacted: "Provided that when the property is of small value, or for any other sufficient reason, any Court having jurisdiction may allow any relative of a minor to institute or defend a suit on his behalf, although a certificate of administration has not been granted to such relative." This disposes of

the first objection, The Court having discretion to dispense with a certificate in this case, this plea is untenable.

11. The next plea in bar is that of limitation, but this plea has been withdrawn by the pleader for the appellant.

12. The third plea in bar is that when the pauper suit was struck off for default, and the plaintiff did not come into Court until the period of 30 days had expired, the lower Court had no jurisdiction to restore the case. Now, this plea is said to be supported by section 114 of Act VIII of 1859, and that section runs to the following effect: "If the defendant shall appear in person or by a pleader, and the plaintiff shall not appear in person or by a pleader, the Court shall pass judgment against the plaintiff by default, unless the defendant admits the claim; in which case, the Court shall pass judgment against the defendant upon such admission. When judgment is passed against a plaintiff by default, he shall be precluded from bringing a fresh suit in respect of the same cause of action." There is nothing in the present case, however, to show that the defendant did appear, and that the plaintiff did not appear when the case was dismissed for default, consequently the provisions of section 114 do not apply here. The section, however, which does apply to this suit is section 110, and under the provisions of that section the Court had clearly jurisdiction to order a revival of the case.

* * * *

13. Under these circumstances, I would direct that the plaintiff do get a decree for the Talook and for the 50 rupees for moveables as given by the lower Court and for the sum of rupees 1,573 on account of the loan transactions; and in regard to the Fureedpore cloth concern and for the other articles and ornaments, the plaintiff's suit and his cross-appeal be dismissed. The plaintiff will have his costs in this Court.