

(1880) 09 CAL CK 0002

Calcutta High Court

Case No: None

Dorab Ally Khan

APPELLANT

Vs

Abdool Azeez

Dorab Ally Khan Vs

RESPONDENT

Abdool Azeez

Date of Decision: Sept. 10, 1880

Acts Referred:

- Limitation Act, 1963 - Section 1(9)

Citation: (1881) ILR (Cal) 356

Hon'ble Judges: Richard Garth, C.J; Pontifex, J

Bench: Division Bench

Judgement

Richard Garth, C.J.

The facts, which have been disclosed at the trial before Mr. Justice WILSON, present this case to us in a very different aspect from that which it assumed in the plaint.

2. The sale by the Sheriff to Deanut-ud-Dowlah took place on the 9th of October 1866. The purchase-money, Rs. 26,000, was then paid to the Sheriff, and the purchasers obtained possession of the property.

3. It then appears that the Judicial Commissioner of Lucknow expressed an opinion, that the sale was invalid ; and Deanut-ud-Dowlah, having taken the opinion of the then Advocate-General, gave notice to the Sheriff, through Messrs. Goodall and Leslie, his attorneys, that the sale was irregular, and required him not to part with the purchase-money.

4. It is clear, therefore, at this time Deanut-ud-Dowlah and his advisers had ample notice of the alleged invalidity of the sale ; and that he might have then taken steps, if he had thought proper, to set the sale aside, and obtain a return of his purchase-money, which was still in the Sheriff's hands.

5. If he had taken this course, the parties might have been placed in their original position without difficulty. The purchaser would have obtained his purchase-money, the execution-debtor would have had his property restored to him, and the execution-creditor might have proceeded at once, by issuing process from Calcutta, to the Civil Courts in Oudh, to re-sell the property again within the Oudh jurisdiction.

6. Instead of this, Deanut-ud-Dowlah, as far as appears, took no further steps in the matter, beyond writing again, through his attorneys, to the Sheriff in the same month of February 1867, requesting him again not to part with the purchase-money under pain of being held personally liable for it.

7. Eight months after this, and upwards of a year from the date of the sale, Mr. Goodall, as Deanut-ud-Dowlah's attorney, again wrote to the Sheriff, requesting him to pay the purchase-money to the execution-creditor ; but at the same time reserving himself a right to dispute the sale, and to claim a return of the purchase-money.

8. It is obvious that this letter involved much inconsistency, and was calculated, if acceded to, to place the Sheriff in a very unfair position.

9. He had complied with the requirements of the purchaser not to part with the purchase-money. He had waited eight months to give him an opportunity of taking steps to annul the sale, and to obtain a return of his money ; but no such steps had been taken.

10. By this letter, he desired the Sheriff to pay over the money to the execution-creditor, thereby, of course, confirming the sale, but at the same time reserving to himself the right to dispute the sale, and to claim a return of the purchase-money from the Sheriff. It was not likely that the Sheriff would have consented to place himself in such a dangerous position; and consequently, we find, from a letter written by Mr. Goodall two days afterwards, that arrangement was come to by the parties to this effect, that, in consideration of the purchase-money being paid over by the Sheriff to the execution-creditor, the latter agreed, that if Deanut-ud-Dowlah should be ousted from the property within a year from the 24th October 1867, he (the execution-creditor) would adopt the necessary steps to reinstate him at his own costs and expenses.

11. This arrangement appears to have been made between the parties at the Sheriff's office in Calcutta, and the Sheriff wrote a letter to Mr. Goodall confirming the arrangement, and paid over the purchase-money to the execution-creditor accordingly.

12. From the time until his death which happened in July 1868, Deanut-ud-Dowlah remained in possession of the property. It then appears to have been taken possession of by the Government officers by order, of the officiating Deputy Commissioner, partly on account of there being an arrear of revenue due upon it,

and partly because Deanut-ud-Dowlah being a eunuch, and consequently having no heirs, the property was supposed to have escheated to the Crown.

13. Now, I entirely agree with the lower Court, that, whatever rights Deanut-ud-Dowlah might have had originally as against the Sheriff, or the execution-creditor, those rights were superseded, and put an end to by the arrangement which was come to between the parties.

14. It is plain that Deanut-ud-Dowlah was anxious to keep the property if he could. It is also pretty plain, that neither he nor the execution-debtor was anxious to take proceedings to invalidate the sale ; and it is very probable, that in October 1867, when the arrangement was made, Deanut-ud-Dowlah, who had already had the property in his hands for upwards of a year, might have considered with some reason, that he would be pretty safe, if his possession were not disturbed for another twelve months.

15. The arrangement, therefore, was a reasonable one for all parties ; and the conditions under which it was made, appear to me perfectly inconsistent with the purchaser's retaining his original right to treat the sale as a nullity, and to obtain back his purchase-money. He had parted with the purchase-money voluntarily ; he had placed it out of the power of the execution-creditor to proceed against the execution-debtor to realize his judgment-debt; and, in lieu of the rights which he originally had, to obtain back his purchase-money and give up the property, he had obtained what he evidently valued much more, his present right to retain possession and an undertaking by the execution-creditor to take steps to reinstate him in that possession, in the event of his being ousted from it within the space of a year.

16. He thus secured a remedy very different from that which he originally had, and a remedy which he thought would secure him in the possession of the property. I, therefore, am quite unable to agree with the Advocate-General, who contended that, after the arrangement was made, Deanut-ud-Dowlah retained his original rights, or that those rights revived, upon his being turned out of possession after the expiration of the year.

His rights, as it seems, to me must now be confined to the agreement.

17. It remains then to be seen whether there was any breach of that agreement ; and, if so, whether the present plaintiff who claims as executor under Deanut-ud-Dowlah's will, can avail himself of it in this suit.

18. A question has been raised by the defendant whether the will of Deanut-ud-Dowlah has been duly established. Of course without this will the plaintiff would have no ground of action ; but the Court below has held that the evidence is sufficient to establish the will, and I quite concur in that opinion.

19. It is then contended by the Advocate-General that there was a breach of the agreement of the 24th of October 1867, and that within the meaning of that agreement, Deanut-ud-Dowlah or the plaintiff who represented him was ousted from the property before the 24th of October 1868.

20. There was a proceeding offered in evidence by the plaintiff which took place before Mr. Wood, the Deputy Commissioner, dated the 2nd September 1868. It seems that the Deputy Commissioner, acting upon some letter of the Judicial Commissioner, dated 2nd January 1867, of which we know nothing, considered that the property in question, which was supposed at that time to have escheated to the Crown, ought to be restored to the party from whom it had been taken ; but, as it was not known who that party "was, and as it was necessary to enquire into the particulars of the property, before the Court could properly decide anything in the matter, an enquiry was ordered, as to who was the recorded proprietor, and who purchased the property, and other particulars.

21. From that time until the 6th of April 1869, it does not appear that anything further was done. But it was on that day reported to the same Court, that the original debtor, Mahomed Wazir Khan, had died, and that two persons, Hossein Ali Khan, the son, and Mussamut Khorshed Begum, the widow of Wazir Khan, ought to be recognised as the parties from whom the property had been taken. There is no evidence whatever that from the time when the property was taken possession of by the Collector, upon the ground that it had escheated to the Crown in default of heirs of Deanut-ud-Dowlah, any change was made either in the mode of possession or of the management.

22. Nothing seems to have been done as regards the property, in pursuance of the order of 2nd September; and it is clear that possession was never given to the representatives of the judgment-debtor until after the 6th of April 1869.

23. The Advocate-General contends, on behalf of the plaintiff, that he has a right to use the order of 2nd September in this way. At the time that order was made, the property was in the hands of the Collector in right of Deanut-ud-Dowlah ; but, from the time when that order was made, the Advocate-General contends that it was held by the Government officers, not as an escheat, but on behalf of the persons, whoever they might turn out to be who were deprived of it at the time of the sale by the Sheriff.

24. Mr. Bonnerjee, on the other hand, contends in the first place, that this order of the 2nd September, which was objected to at the trial, was not admissible in evidence as against his client; and that, even if it were, it does not appear that anything followed upon it except an enquiry, which did not change in any way the nature of the possession or management of the property.

25. I confess I am unable to see how the order of the 2nd September per se can be made evidence against the defendant. If it had been accompanied by any actual

change in the possession of the property, or the reception of the rents, it might perhaps be made evidence ; but, as nothing of that kind was proved, and, as the defendant was no party to the proceedings, I do not see how the order can properly be made to affect him.

26. That being so, it seems to me, that there was no evidence of the ouster of the possession of Deanut-ud-Dowlah, or of the persons who represented him in interest, until the 6th of April 1869, which was more than a year after the making of the agreement of October 1867 ; and I agree with the Court below that no breach of the agreement has been proved.

27. But even supposing that the order of the 7th September 1867 were admissible in evidence, and could be considered as having in any way been the means of ousting Deanut-ud-Dowlah's representatives, then the further question would arise, whether the plaintiff has any right to avail himself of the agreement of 1867 in this suit.

28. He entirely ignored the agreement in his plaint, and his suit is founded entirely upon his original rights which have been superseded ; and, if I thought that any breach of the agreement had taken place, and that the plaintiff was entitled to avail himself of it in this suit, I certainly should not be disposed, considering that he has carefully kept out of sight this agreement, of which of course he must have been well aware, to allow him any costs of suit.

29. But then, another and a far more serious difficulty in the plaintiff's way has occurred to us in the course of the argument, viz., that, assuming the plaintiff to have any cause of suit upon the agreement, it is clearly barred by limitation. And probably it was for this reason that he brought his suit for money had and received, instead of relying upon the agreement. The Limitation Act which governs this case is Act XIV of 1859. The plaint was filed on the 14th of December 1872 ; and the Limitation Act of 1871 did not apply to suits instituted before 1st of April 1873.

30. This case is, therefore, governed by Section 1, Clouse 9 of the Act of 1859, which allows the plaintiff three years only from the time when the breach of contract took place.

31. Now the breach of contract here, if any, occurred when the defendants neglected to take steps to reinstate the plaintiff in the property; and the time when that occurred, was either on the 2nd September 1868, when the order, upon which the Advocate-General relies, was made, or at what would have been a reasonable time for the defendants to have taken steps to reinstate the plaintiff.

32. Now, even if we were to allow six months, which appears to me much more than a reasonable time for such a purpose, that would only carry the plaintiff up to the 2nd March 1869 ; and this suit, not having been brought until December 1872, is clearly out of time.

33. The real truth is, that there was no attempt on the plaintiff's part to obtain from the defendant any performance of the agreement; and it is pretty-clear, from the plaint being entirely silent as to the agreement, that the plaintiff had no thought of being entitled to proceed upon it.

34. The cause of action, as put forward in his plaint, was of a totally different character; and it was not until he found himself driven to rely upon the agreement, that his counsel attempted to shift his ground, and base his claim upon it. I am of opinion that the appeal should be dismissed, with costs, on scale 2.

35. But Mr. Bonnerjee contends that, besides the costs of the trial, which have been awarded to his client in the Court below, the defendant is entitled to the costs of the appeal to the Privy Council.

36. He relies upon the fact that the Privy Council directed that the costs of both sides should be taxed, in order that the lower Court should deal with them as costs in the cause. He contends that it was the obvious intention of the Privy Council that the costs in that Court should go to the successful party, as part of the general costs of the cause.

But it appears to me that this was not their Lordships' intention.

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37. I think they intended to leave the costs in the Privy Council to be dealt with by the Judge who tried the cause at his discretion ; and I think Mr. Justice WILSON exercised a wise discretion in making each party bear their own costs of that appeal.

Pontifex, J.

38. I also think the judgment of the lower Court should be affirmed.

40. The Fi Fa was executed on the 4th October 1866, and the bill of sale to the plaintiff's testator was executed on the 9th October 1866; but the purchase-money remained in the hands of the Sheriff (who had by that time quitted office), till the 24th October 1867, the plaintiff's testator having warned the Sheriff not to hand over to the execution-creditor.

41. Under these circumstances, the plaintiff's solicitors wrote to the ex-Sheriff on the 24th of October 1867 as follows : (reads letter set out, ante, p. 358).

42. Upon that the money was paid over to the execution-creditor (the plaintiff's testator having already been in possession one year) and, under the circumstances, I am of opinion that this arrangement must be treated as a substituted agreement, forming a complete accord and satisfaction of the original cause of action.

43. And I am further of opinion that the ouster, contemplated by the substituted agreement, was an ouster by the judgment-debtor or his representatives ; and that, if a covenant for title had been settled under the agreement, such covenant would

not have been general against the acts of the whole world, but would have been confined to acts by the judgment-debtor or his representatives.

44. The plaintiff's testator died on the 26th of June 1868, while in possession, and thereupon Government, by its officers, entered into possession. It is doubtful whether such entry was made as for an escheat, the plaintiff's testator having been a eunuch, or for non-payment of Government revenue. But, whichever may be the case, while in such possession, the Collector, in September 1868, on the alleged authority of a letter from the Commissioner, which letter is not produced, declared the sale under the Fi Fa inoperative; and directed an enquiry to be made for the judgment-debtor or his representatives. The possession of the Collector, however, continued until April 1869, when he made an order that possession should be restored to the representatives of the judgment-debtor. The representatives of the judgment-debtor do not appear to have been parties to the proceeding in which such order was made; and, until they took possession under the order of April 1869, being more than one year after the date of the agreement, I fail to see that there was any ouster by them protected by the terms of the agreement. Indeed, but for the death of the plaintiff's testator without heirs, and the consequent entry and unauthorised action of the Collector, I see no reason to believe that the possession of the plaintiff's testator would have been disturbed.

45. In my opinion, therefore, the ouster was no breach of the agreement referred to in the letter of the 24th October 1867.

46. The plaintiff has not furnished us with the proceedings before the Commissioner, and excuses himself by alleging that these proceedings have been lost or destroyed, or, from lapse of time, were not procurable. But this is really no excuse; for, in April 1869, they could have been easily obtained ; and it was his own negligence not to obtain them ; yet he now asks us to grope in the dark, and give him a decree in ignorance of what was the real nature of the proceedings. Moreover, he does not institute his suit until the 2nd September 1872. He proves no intermediate notice, calling on the defendant to fulfil the agreement of 24th October 1868 ; and, even if we could treat his suit as a suit for breach of that agreement of the 24th October, he would, in my opinion, be barred by limitation under the Act of 1859, which allowed a period of three years for a suit upon such an agreement. If the plaintiff had duly called on the defendant in reasonable time, the latter might have exercised pressure on the representatives of the judgment-debtor, while his judgment was still alive and capable, by proper process, of being executed against this very property. I think, therefore, the plaintiff fails altogether, and I see no reason to interfere with the discretion exercised by the lower Court as to costs.