
(1869) 02 CAL CK 0016

Calcutta High Court

Case No: Special Appeal No. 1927 of 1868

Raja Narsing Deb

APPELLANT

Vs

Durgaram Roy and
Others

RESPONDENT

Date of Decision: Feb. 17, 1869

Judgement

L.S. Jackson, J.

It appears to me that the special appeal in this case must fail on the two points which have been taken before us, the first being that the suit, as framed, will not lie. The ground of special appeal, as actually preferred, was that the plaint, as drawn by the plaintiff, is inadmissible. It appeared to me that a special appeal was not the stage at which the Court could fairly consider whether the plaint was admissible or not, because the plaint had been in fact admitted, and the parties had proceeded to trial. The pleader of the special appellant then, in modification of his ground, contended that the suit would not lie. It appears that the present suit, which was one for possession of a resumed mehal, by setting aside a settlement granted to the defendants, was at first thrown out by the Munsiff who tried it, on the ground of limitation. That decision was reversed by the lower Appellate Court, and the suit was remanded for trial on its merits. The defendant did not, in the lower Appellate Court, take any objection u/s 348 of the CPC that the suit was not maintainable, and that question therefore not having been submitted to the lower Appellate Court, there has been no error in its judgment upon that ground. I am at present inclined to think that on the case going before the Munsiff on the new trial, the defendant would be at liberty to take this objection, amongst others, and if an erroneous decision be come to on this point, possibly further appeal and special appeal may lie.

2. The next point taken was that the lower Appellate Court was wrong in holding that the suit was not barred by Section 1, Clause 5, Act XIV of 1859, and Section 246 of the Code of Civil Procedure.

3. This ground also, it appears to me, is bad. The order which it is sought to make binding against the plaintiff, so as to bar the present suit, was an order passed on a claim which

he preferred against the sale of the property in dispute which had been attached at the instance of an execution-creditor; and as the property of a judgment-debtor, neither of whom is the defendant in the present suit.

4. It seems that in that execution case, the present plaintiff and the present defendant both set up claims to the property in question. The claim of the present plaintiff was disallowed, and the property was ordered to be sold. But owing to subsequent circumstances, the sale did not take place. The claim of the defendants was at first also disallowed, but was subsequently admitted.

5. The argument for hearing the present suit appears to have been based on the fact that the present plaintiff's claim was disallowed, and the present defendant's claim ultimately admitted, and the property released. But that, I think, will not make the order of the Munsiff a binding order as between these parties, so that a suit must be brought within one year to set it aside. I think that in proceedings u/s 246 of the CPC the question for the Court to consider is, whether the property attached was in the possession of the party against whom execution is sought or not; and if it appears to the satisfaction of the Court that the property was not in such possession, the Court is to release the property; and the execution-creditor who is affected by that order may, if he think fit, bring a suit within a year to have it set aside, and cause the property to be sold. In like manner, if the Court should be satisfied, as against the claimant, that the land was in possession of the party against whom execution was sought as his own property, and the Court should disallow the claim, then the claimant will be at liberty, as against the execution-creditor, to bring a suit within one year to set aside the order, and to establish his right to the property.

6. In this case, although, no doubt, an order was made setting aside the present plaintiff's claim, yet the Court did not go on to sell the property. I think, therefore, that there was no binding order in force between the present plaintiff as claimant, and the execution-creditor, and also there was no order which in any respect finally decided any question of right between the present plaintiff and the present defendant.

7. I think, therefore, that that order was not in any sense binding as between these parties, and that the plaintiff was not bound to bring his suit to set it aside within a year. On this ground I think that the contention of the special appellant cannot be maintained, and that the special appeal ought to be dismissed with costs.

Markby, J.

Upon the first point taken in this special appeal, I entirely concur in the judgment which has been delivered by Mr. Justice Jackson, and I do not think it necessary to add anything on that point. Upon the second point, so far as regards the construction which is to be put upon Section 246, Act VIII of 1859, I should wish for further opportunity of consideration before concurring in the opinion which has been expressed by Mr. Justice Jackson, and in this case it does not seem to me necessary to express any final opinion

upon that point, because upon another ground the objection taken by the appellant, I think, fails. The two applications of the defendants, and the plaintiffs, respectively, were disposed of by two different orders, but the order which disposed of the application of the plaintiffs referred to the order which disposed of the application of the defendants for the ground upon which it was based. Upon turning to that order, it appears that the Munsiff, after reciting a number of facts which had transpired with reference to these proceedings, and in which the plaintiffs were more or less concerned, goes on to say:--"All these disputes cannot be settled in one suit;" and then he disposes of the application of the defendants, without any further allusion whatever to the application of the plaintiff. It seems to me quite clear, therefore, that the Munsiff has distinctly abstained from adjudicating in any way upon the claim of the plaintiff, and therefore, in accordance with the cases of Monohur Khan v. TroylInckhonath Ghose (4 W.R., 35), and Rutnessur Koondoo v. Majeda Bibee (7 W.R., 252), it seems to me clear that whatever be the construction put upon Section 246, the limitation of one year does not apply to this case. I, therefore, concur in thinking that the special appeal ought to be dismissed.