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Sadhan Chandra Chatterjee Vs Satyendra Narayan Choudhuri

Letters Patent Appeal No. 8 of 1970

Court: Calcutta High Court

Date of Decision: June 9, 1977

Acts Referred:
Civil Procedure Code, 1895 â€" Section 13, 2#Civil Procedure Code, 1908 (CPC) â€" Section 11#Specific Relief Act, 1963 â€" Section 37

Citation: (1978) 1 ILR (Cal) 570

Hon'ble Judges: G.N. Ray, J; Banerjee, J

Bench: Division Bench

Advocate: Manindra Nath Ghose and Saurindra Nath Roychoudhuri, for the Appellant;P.N. Mitter and Joy Gopal Ghose, for the Respondent

Final Decision: Dismissed

Judgement

Banerjee, J.
The only point for consideration in this Letters Patent appeal is whether the suit out of which the appeal arises is barred by the

principle of res judicata. The present suit is a suit for partition and accounts filed by the Plaintiff Respondent against the Defendant Appellant, the

predecessor-in-interest alleging that he has 8 annas share in the suit land measuring 83 acres appertaining to C.S. Dag No. 395, Khatian No. 100

of mouza Bahir Dag in the district of 24-Parganas together with structures standing thereon. It is alleged that the land belonged to two brothers,

Mohiuddin and Aiyatal Haque and that they were in possession of the suit property. Both the brothers had 8 annas shares. Mohiuddin sold 8 annas

share in the suit property to the Defendant Kalipada Chatterjee, since deceased and that he was in ejmali possession of the suit property with the

other co-sharer, namely, Aiyatal who was minor on the date of the sale by Mohiuddin in favour of Kalipada Chatterjee. After attaining majority,

Aiyatal sold his share to the Plaintiff by a registered kobala dated April 7, 1953. The said Kalipada not having complied with the Plaintiff"s request

for amicable partition of the suit property, the Plaintiff instituted the said suit for partition and for accounts against Kalipada. It must be stated that

while Mohiuddin sold the property to Kalipada by registered kobala dated January 27, 1946, Kalipada executed an agreement for reconveyance

in favour of Mohiuddin and minor Aiyatal. It appears that before the present suit was filed, another suit being T.S. 50 of 1949 was instituted by

one Krishnadas Singh and the minor Aiyatal Haque represented by the widow of his elder brother, Mohiuddin, against the said Kalipada

Chatterjee for specific performance of a contract for conveyance of the suit property on payment of Rs. 660 as stipulated in the agreement for

reconveyance. It is alleged that Kalipada Chatterjee after having purchased the suit property entered into an agreement for reconveyance of the

suit property in favour of the said Mohiuddin and his minor brother Aiyatal. The said suit was dismissed by the learned Munsif and on appeal by

the Plaintiffs of that suit, namely, Krishnadas Singh and minor Aiyatal, the learned Second Additional Subordinate Judge affirmed the decision of

the learned Munsif and dismissed the said appeal holding, inter alia, that the purported purchase under the said agreement for reconveyance was

not genuine and bona fide transaction. But as the tender was not made by both Mohiuddin and Aiyatal being minor, the suit for specific

performance at the instance of both the Plaintiffs must fail. On the basis of these allegations, the suit for partition out of which the present appeal

arises, succeeded in both the Courts below and the High Court also affirmed the judgment and decree for partition and on the prayer of the

Appellant the Hon''ble Judge hearing the second appeal granted leave to the Defendant-Appellant under Clause 15 of the Letters Patent Act.

2. Mr. Ghose on behalf of the Appellant contended, inter alia, that the learned Judge was in error holding that the suit is not barred by the principle

of res judicata. Mr. Ghose contended that in the earlier suit, that is, T.S. No. 50 of 1949 which was a suit for specific performance of contract, the

Plaintiffs predecessor-in-interest might have and ought to have raised the plea of title in him, inasmuch as, he being minor, his property cannot be

transferred by his brother under the Mohammedan Law and thereby would have defeated the ground of attack in the former suit and thereby

would have succeeded in the suit for recovering the property. Mr. Ghose relied upon the cases in Woomatara Debea v. Kristokaminee Dossee

and Ors. 18 W.R. 163, Luvar Popat Kala Vs. Luvar Bachu Rugnath and Others, and Prem Raj Vs. D.L.F. Housing and Construction Pvt. Ltd.

and Another, in support of his contention. Mr. Ghose further relied on the case in Shaik Ohid Bux and Others Vs. Sheikh Dorshu and Another, .

3. Mr. P.N. Mitter, on the other hand, contended that the plea of constructive res judicata, could not have been raised in T.S. 50 of 1949,

inasmuch as, that was a suit for specific performance of contract and the plea of title is one which is destructive in nature of the plea of specific

performance. It is argued that the words "might and ought to have been raised" in explanation IV of Section 11 must be read conjunctively. Mr.

Mitter contended that the plea, dissimilar, incongruous or irrelevant to the case might not be or ought not to be raised in a suit as the matter which

might not be raised within the scope of the suit itself and the matter dissimilar, irrelevant or incongruous cannot be joined in the same suit. Mr.

Mitter relied upon the case in Kameswar Pershad v. Rajkumari Ruttun Koer 19 I.A. 234 : ILR 20 Cal. 79 (P.C), Deputy Commissioner of Kheri

v. Khanjan Singh 34 I.A. 72, In Re: Ayya Nadar, , Debendranath Sharma Vs. Nagendranath Datta, , Anchal Singh v. Krishan Singh AIR 1960

J&K. 123 and Babu Kanhiya Lal Vs. Ashraf Khan and Others, . Mr. Mitter further argued that the case reported in Woomatara Debea v. Krito

Kaminee Dassee and Ors. Supra is not at all relevant for our purpose. It appears to us that Section 13 of the Code of Civil Procedure, 1895 and

Section 11 of the Code of Civil Procedure, 1908, are differently worded. We agree with Mr. Mitter that u/s 11, Expl. IV of the Code of Civil

Procedure, 1908, the emphasis is on the issue while u/s 13 of the Code of Civil Procedure, 1895, the emphasis is on the cause of action. u/s 11 of

the Code of Civil Procedure, no Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and

substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same

title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised and has been heard and finally

decided by such Court. Explanation IV with which we are concerned is a bar for raising in a matter or issue which "might and ought to" have been

made a ground of defence or attack in the former suit to construe a constructive res judicata in a case. If the matter might have been or ought to

have been raised, the parties will be allowed to raise in the suit and it will be deemed to have been a matter constructively in issue and it must be

taken to have been decided between the parties. Section 2 of the Code of 1895 is differently words:

The Civil Court shall not take cognizance of any suit brought on a cause of action which shall have been heard and deter mined by a court of

competent jurisdiction in former suit between the same parties or between the parties under whom they claim.

The point is whether the Respondent might have or ought to have raised the plea for partition in the earlier suit for the specific performance of

contract on the ground that he has 8 annas share in the suit property. In our opinion, the Full Bench decision in Dinobundhoo v. Kristomouee ILR

(1876) 2 Cal. 152 (F.B.) does not apply in the facts of the present case in view of the specific provision of Section 11 read with Expl. IV of the

Code of Civil Procedure, 1908. It has been held by the Privy Council that the words "might and ought to have been raised" appearing in Expl. IV

must be read conjunctively and a dissimilar plea or incongruous plea of attack or defence cannot be taken in the suit. In Kameswar Parshad v.

Rajkumari Ruttun Koer Supra the Privy Council held as follows:

That it "might" have been made a ground of attack is clear. That it "ought" to have been appeared to their Lordships to depend upon the particular

facts of each case. Where matters are so dissimilar that their union might lead to confusion, the construction of the word "ought" would become

important.

In the case Deputy Commissioner of Kheri v. Khanjan Singh Supra the Judicial Committee held as follows:

The contention based upon Section 13 of the CPC arises out of the following circumstances. After the sale by Man Kunwar to Raja Anrudh Singh,

Ajudhia Singh, on December 23, 1869, brought a suit against the Raja and others, in which the Plaintiff claimed a right of pre-emption. The suit

was dismissed on the ground that no right of pre-emption was proved. It is now contended that the ground of claim in the present suit is a matter

which might and ought to have been made a ground of attack in that suit. Their Lordships agree with the Courts in India in thinking that what was in

question in that former suit was the right of pre emption in respect of what Man Kunwar had power to convey and did convey, that is, her

widow"s interest and that the introduction of any question as to the effect of the conveyance upon the reversion would have been incongruous to

the matter in suit.

In Lala Soni Ram v. Kanhaiya Lal L.R. 40 IndAp 74 (81-2) the Judicial Committee

held:

The suit of 1904 was a suit by Lala Shib Shankar Lai and Babu Charan Behari Lai for possession as mortgagees. The mortgage had not been

redeemed and the plea of Lala Soni Ram that he was entitled to redeem was irrelevant to a suit by the usufructuary mortgagee for possession.

4. These three Privy Council cases make it clear to us that the dissimilar, incongruous and irrelevant plea either in defence or attack cannot be

construed to be one of constructive res judicata in a subsequent suit. Mr. Ghose did not dispute the proposition of law laid down in the Privy

Council cases. Mr. Ghose contended that the suit for specific performance of contract is one for recovery of possession of the land in question. In

that suit Aiyatal could have raised his plea of title and got back his possession even if his plea under the agreement for reconveyance failed. In our

opinion, in the present suit for specific performance of contract, there is no scope for raising the question of title in respect of the property which is

a subject-matter of the specific performance. The said question of title might have been raised but we cannot hold that it ought to have been raised.

Mr. Ghose, however, strongly relied in the case Prem Raj v. D.L.F.H. and Company Ltd. Supra. u/s 37 of the Specific Relief Act, it has been

provided that in a suit for specific performance of contract the Plaintiff can raise the plea of rescission of the contract but he cannot raise the plea

suing for rescission of contract, in the alternative, for specific performance of contract. We agree with the contention of Mr. Mitter that Section 37

is an exception to the general rule. Section 37 of the Specific Relief Act clearly provides the exception. In considering the effect of Section 11 of

the Code of Civil Procedure, we cannot apply the exception in so far as the principle embodied in Section 37 of the Specific Relief Act is

concerned. On the other hand, we agree with the decision of the cases In re Ayya Nadar Supra, Debendranath v. Nagendranath Supra and

Anchal Singh v. Krishan Singh Supra. Mr. Mitter relied upon the case In re Ayya Nadar Supra which is a Single Bench judgment. The said case

was between two brothers. The Plaintiff in the said case alleged that he has purchased the property from his mother and having failed to get the

possession, he filed a suit for partition, e The Defendant contended that the suit for partition was barred by the principle of res judicata as the

Plaintiff might and ought to have been put forward his claim for partition in the previous f suit. In para. 7 of the said judgment Ramaswami J. (as His

Lordship then was) repelled the plea with the following observations:

7. In the instant case if this Plaintiff had put forward both the claims it would certainly have been incongruous and would have brought about their

mutual destruction without any effort on the part of the Defendant. His case was that he had paid hard cash for the purchase of the property whose

title and possession were with his mother and that title and possession had passed to him under that sale deed. If he were to advance the plea that

he should get a half share in the property in any event, would any Court believe the payment of consideration or the "bona fides" of the sale or the

title and possession set up in the mother supported by a sale deed in her name, etc.? Only a suicidal client and a lunatic advocate would put

forward such incongruous pleas in Court, the evidence in support of which will be such that it might be destructive of the other plea and unite cause

of action leading to in consistency and confusion.

The case in Anchal Singh v. Krishan Singh Supra also supports the contention put forward by Mr. Mitter. In the said case, the earlier suit which

was one for pre-emption having been filed, the Plaintiff filed the subsequent suit alleging that the vendor had no title and the said suit was void. The

Defendant took the plea that the matter might have and ought to have been made a ground of attack in the earlier suit for pre-emption. In para. 12

of the said judgment, the Division Bench held as follows:

12. The question whether a matter ought to have been made a ground of attack must depend on the particular facts of each case. As a simple rule

of general application, it may be said that if the introduction of a matter into a suit was necessary for a complete and final decision of the right

claimed by the Plaintiff therein, it must be deemed to be a matter which ought to have been made a ground of attack in that suit, unless the matters

in that and the subsequent suit are so dissimilar that their union might lead to confusion.

In Kameshwar Pershad v. Rajkumari Rattan Koer Supra, the Privy Council laid down the principle thus:

That it "might" have been made a ground of attack is clear. That it "ought" to have been appeared to their Lordships to depend upon the particular

facts of each case. Where matters are so dissimilar that their union might lead to confusion, the construction of the word "ought" would become

important; in this case the matters were the same.

5. In our opinion, therefore, the learned Judge was right in dismissing the appeal as the suit was not barred by the principle of Section 11, Expl. IV

of the Code of Civil Procedure.

6. We, therefore, dismiss the Letters Patent Appeal. There will be no order as to costs.

G.N. Ray, J.

7. I agree.