

(1917) 07 CAL CK 0040

Calcutta High Court

Case No: None

Surendra Nath Ghosh

APPELLANT

Vs

Kaligopal Mozoomdar
 Kali
Gopal Mozoomdar Vs Surendra
Nath Ghose and Others

RESPONDENT

Date of Decision: July 3, 1917

Citation: 42 Ind. Cas. 431

Hon'ble Judges: Walmsley, J; Asutosh Mookerjee, J

Bench: Division Bench

Judgement

1. These appeals have been preferred under Clause 15 of the Letters Patent against a judgment of Mr. Justice Roe in a suit for recovery of possession of land on establishment of title. The case for the plaintiff is that the property in dispute is comprised within his estate, which originally belonged to the husband of his sister Kadambini, that he sued her for recovery of the money due from her husband, that he obtained a decree and that in execution thereof he purchased the property at a sale held by the Court. The case for the defendant is that the plaintiff has no title to the estate mentioned, because the proceedings against his sister were collusive and fraudulent. The defendant further pleads that the disputed land is comprised within his estate, and not within the estate claimed by the plaintiff. The Trial Court found against the defendant and decreed the suit. Upon appeal, the Subordinate Judge reversed that decision and dismissed the suit. He held that as the proceedings taken by the plaintiff against his sister were fraudulent and collusive, he had not acquired title to the disputed property. Upon appeal to this Court, Mr. Justice Roe has reversed the decision of the Subordinate Judge and has remanded the case for re-trial upon the question, whether the disputed land is comprised within the estate claimed by the plaintiff or that owned by the defendant. He has held, upon the authority of the decision in Bam Bhurosee Singh v. Bissessur Narain Mahata (6), that the plaintiff is entitled to maintain this suit although the proceedings taken by him against his sister may have been collusive. The plaintiff and defendant are both

dissatisfied with the order of remand. The defendant has accordingly appealed on the ground that, on the facts found, the plaintiff has acquired no title and is not competent to maintain this action. The plaintiff has, on the other hand, appealed on the ground that the order of remand is unnecessary, as, upon the facts found, a decree should have been made in his favour on the merits. We must consider the appeal of the defendant (Letters Patent Appeal No. 18 of 1916) first, because if his contention is well founded, the suit must be dismissed.

2. The argument of the defendant is based upon the findings of the Subordinate Judge as to the unreality of the proceedings taken by the plaintiff against his sister. The plaintiff, no doubt, sued her sister for recovery of money alleged to have been advanced to her husband. But the Subordinate Judge has found that there was no foundation for this claim, as there was in reality no debt due to the plaintiff from his brother-in-law. Consequently, the suit instituted by the plaintiff against his sister was based upon an imaginary claim. There was no defence to that action and an ex parte decree was made. The decree was nominally put into execution. A collusive sale was held and title was supposed to have passed to the plaintiff from his sister by virtue of the proceedings taken in Court. The defendant urges that, in these circumstances, the plaintiff acquired no title whatsoever to the property of his sister. We are of opinion that this contention is well founded.

3. Suits of this character are not altogether unknown and their effect is vividly described by Lord Brougham in a celebrated passage in the judgment of the House of Lords in *Bandon v. Becher* (1835) 3 C1. & Fin. 479 : 9 Bli. (n. s.) 532: 6 E. R. 1517.: "A sentence is a judicial determination of a cause, agitated between real parties, upon which real interest has been settled;---in order to make a sentence there must be a real interest, a real argument, a real prosecution, a real defence and a real decision; of all these requisites, not one takes place in the case of collusive and fraudulent suits; there is no Judge, but a person, invested with the ensigns of the judicial office, is misemployed in listening to a fictitious cause proposed to him. There is no party litigating, there is no party defendant, and there is no real interest brought into question.... The whole proceeding is collusive and fraudulent. It cannot, therefore, be treated as a judicial proceeding, but may be passed by as availing nothing to the party who sets it up." But the plaintiff-respondent contends that as the decision in this litigation would be operative as against the real owner [*Bash Behary Sarkar v. Mahendra Nath Ghose* 21 Ind. Cas. 979: 19 C. L. J. 34.], the suit should be allowed to proceed at his instance. We are emphatically of opinion that we should not accede to this argument. Courts of Justice should not be permitted to be utilised for the purpose of creating fictitious titles, which must inevitably tend to weaken the sanctity which justly attaches to judicial transactions. It is no doubt open to a party to impeach the reality of a transaction between two private individuals; it is equally open to him to impeach the reality of a judicial proceeding. But the Court should certainly be slow to encourage the creation of fictitious titles in the matter disclosed by the proceedings placed before us.

4. Reference was made to the decision of Sir Richard Couch, C. J., in *Earn Bhurosee Singh v. Bissessur Narain Mahata* (6), where a suit for possession of land by a benamdar was allowed to be maintained. That decision, however, is not in conformity with a long series of cases in this Court both anterior and subsequent to it, which will be found reviewed in *Hari Gobind Adhikari v. Akhoy Kumar Mozumdar* (2) and *Mohendra Nath Mookerjee v. Kali Proshad Johuri* (3). We must take it now as well settled in this Court that, in suits for land, an action cannot be maintained by a benamdar [*Atrabannessa Bibl v. Safatullah Mia* 31 Ind. Cas. 189: 22 C. L. J. 259: 43 C. 504.], But, in our opinion, the case now before us is much stronger than any of the cases just mentioned. This is a suit by a person -who has deliberately sought to utilise the machinery of the Courts for a purpose for which Courts of justice do not exist: viz., for the purpose of creation of fictitious titles, and we fail to appreciate how a Court can be invited, by a person who has so acted, to recognise and enforce such an unreal title. Considerations which may be applicable to bona fide purchasers clearly do not arise here [*Radha Madhab Paikara v. Kalpatara Roy* 16 Ind. Cas. 811: 17 C. L. J. 209., *Akhil Prodhan v. Manmatha Nath Kar* 22 Ind. Cas. 86: 18 C. L. J. 616., *Gore v. Stacpoole* (16).]

5. It has finally been suggested that we should direct that the real owner be joined as a plaintiff in this suit. No doubt a step of this character has been commended in some of the cases found in the books [*sita Nath Shaha v. Nobin Chunder Roy* (8), *Rance Bhobosoonduree Dossee v. Issur Chunder Dutt* (9), and *Bhola, Pershad v Ram Lall* (10)], but the course has not been adopted in others. [*Hari Gobind Adhikari v. A hoy Kumar Mozumdar* (2).] It is obvious that the real owner here could not be joined as a party except upon an application by herself. But even if such an application were made we could not possibly grant it, because if the application were granted, the allegations in the plaint would require to be completely recast. It has further been stated to us that the suit by the real owner, if instituted now, will be in time; consequently there is no substantial reason why we should grant this belated application for addition of the real owner, contrary to the allegations in the plaint and the evidence.

6. The result is that the appeal preferred by the defendant (Letters Patent Appeal No. 18 of 1916) is allowed and that by the plaintiff (Letters Patent Appeal No. 22 of 1916) is dismissed. The suit will stand dismissed with costs in all the Courts, but there will be no separate order for costs in the appeal by the plaintiff.