(1909) 01 CAL CK 0037

Calcutta High Court

Case No: None

Shital Chandra Bairagee		APPELLANT
	Vs	
Manik Chandra Hazra and Others		RESPONDENT

Date of Decision: Jan. 22, 1909

Judgement

1. On the 14th. July 1901, Manik Chand Hazra, Priya Nath Hazra and Notobar Hazra executed an instalment bond in favour of Kedar Nath Bairagi and Shital Chandra Bairagi. Kedar Nath died in April 1902 and his interest in the debt was inherited by his widow Monoda Sundari, who on the 12th April 1908, executed a deed of transfer of her interest in the debt to Shital Chandra. On the 15th April 1908, Shital Chandra commenced the action out of which the present proceedings arise in the Court of Small Causes at Jessore, for recovery of the money due upon the instalment bond. He joined as defendants Manick, Priya Nath and the representatives of Notobar who had meanwhile died. He also joined as pro forma defendant the widow of Kedar Nath whose interest in the debt he had purchased. The principal defendants resisted the claim on various grounds, amongst which it is sufficient to mention that they denied the reality of the transfer by Manoda Sundari to the plaintiff and contended that the suit could not proceed till a Succession Certificate had been taken out in respect of the estate of Kedar Nath. The Small Cause Court Judge held that the suit could not proceed without a Succession Certificate and dismissed the entire claim. He observed that there was no proof that the pro forma defendant had been properly served with notice of the suit and further doubted the reality of the transfer by Manoda Sundari in favour of the plaintiff. We are now invited by the plaintiff to discharge this decree of dismissal u/s 25 of the Provincial Small Cause Courts Act.

2. In support of the Rule it has been argued by the learned Vakil for the petitioner that as a Succession Certificate was necessary at most in respect of the share of the debt which belonged to the deceased creditor Kedar Nath, the Small Cause Court Judge ought to have tried the suit on the merits and made a decree in respect of the

share of the plaintiff Shital. It has been strenuously contended, on the other hand, that u/s 45 of the Indian Contract Act a suit to recover the debt can be maintained only jointly by the plaintiff and the representative of the deceased creditor and if the latter is not in a position to enforce her rights by reason of her omission to take out a Succession Certificate, the plaintiff is without a remedy. After careful consideration of the arguments addressed to us on both sides and of the authorities to which we shall presently refer, we have come to the conclusion that the contention of the defendants ought not to prevail.

3. Section 45 of the Indian Contract Act, which deals with the question of devolution, of joint rights provides that when a person has made a promise to two or more persons jointly, then, unless a contrary intention appears from the contract, the right to claim performance rests as between him and them, with them, during their joint lives and after the death of any of them with the representatives of such deceased person jointly with the survivor or survivors, and after the death of the last survivor, with the representatives of all jointly. On a strict interpretation of this it may be contended that if there is a promise by X in favour of A. and B. it does not mean a promise by X in favour of A plus a promise by X in favour of B (Leake on Contracts 5th Edition p. 299). But does it necessarily follow that if A or B sues X there is no cause of action to sustain the suit? The rule which prevailed in England when forms of pleading were strict and artificial was no doubt that under the circumstances stated, neither A nor B could sue alone, Scott v. Godwine 1 B P. 69, Petrie v. Bury 3 B.C. 353 Witherall v. Langston 1 Ex. Ch. 634. But as is well known the rigour of this rule, originally inflexible, has been mitigated to this extent, that one of several joint promisees may sue alone, if he shows some special title to do so, for example a refusal or an incapacity to join on the part of the other promisees for no person can be added as a plaintiff without his own consent. Hammond v. Schofield (1891) 1 Q.B. 453; Fricker v. Van Grutten (1896) 2 Ch. 649; Cullen v. Knowles (1898) 2 Q.B. 380; Adams v. Paynter (1844) 1 Collyer 530: 63 E. R. 530; Luke v. South Kensington Hotel Company (1879) 11 Ch. Div. 121. In the case last mentioned a suit to enforce a mortgage was commenced by one of the three trustees; the remaining two were made defendants as they had precluded themselves by their conduct from joining as co-plaintiffs. Upon objection taken that the suit as framed could not proceed, Sir George Jessel M.R. ruled that the suit was maintainable on the broad ground that one of several mortgagees could maintain an action to foreclose the mortgage making the others as co-defendants, if they were unwilling to be joined as co-plaintiffs or had done some act which precluded them from being plaintiffs. The principle which underlies this decision is applicable to this country as was finally settled by a Full Bench of this Court in Pyari Mohun Bose v. Kedar Nath Roy 26 C. 409, (F.B.). There the question arose in connection with a suit for rent and it was held that although, as a general rule all co-contractors ought to be joined as plaintiffs, a suit by one would not be bad if the others were joined as defendants and if there was good reason for not joining them as plaintiffs. It was pointed out by the learned

Chief Justice who delivered the judgment of the Full Bench that if the plaintiff joined the co-contractors as defendants and objection was taken by the contesting defendants at the trial the co-defendants might be asked whether they were agreeable to be joined as co-plaintiffs. If they consented they might be transferred at once to the category of plaintiffs and if they objected they would continue to be co-defendants. If they did not appear or were not represented at the trial, their absence might be taken to indicate that they did not wish to be made co-plaintiffs, in which case the trial could proceed with them as co-defendants. This view is also supported by the decision of this Court in Mahomed Ishaq v. Sheikh Akramul Huq 6 C.L.J. 558 , where the nature of the right of a joint promisee is fully analysed and it is pointed out that one of several joint contractees may sue to enforce his share of the obligation, if the other co-contractees are joined as defendants. Now in the case before us the pro forma defendant did not take out a Succession Certificate and consequently even if she joined as a co-plaintiff, no decree could be made u/s 4 of the Succession Certificate Act in respect of the share of the debt inherited by her from her husbands It was suggested, however, by the learned Vakil who appeared to show cause that a Succession Certificate would be required in respect of the whole debt. There is obviously no foundation for this contention. Section 4 of the Succession Certificate Act makes a certificate necessary only in respect of the debt due to the deceased person. It cannot be suggested here that the whole of the debt was due to the deceased creditor, because in that view, the whole of it would be equally due to the other creditor, the present plaintiff, who would thus be entitled to maintain an action for the whole himself without a Succession Certificate. The decision of this Court in the case of Ram Narain v. Ram. Chunder 18 C. 80, makes it quite clear that the certificate has to be taken in respect of only the share of the debt due to the deceased. This case, also, shows that the suit should be brought ordinarily by all the creditors or their representatives; it does not, however, decide what the result would be if some of the creditors commenced the notion and joined the others as co-defendants because they were either unwilling or unable to join as co-plaintiffs.

4. It may be observed that the High Courts of Bombay, Madras and Allahabad have all decided that in the case of debts due to trading partnerships, in which it happens that one of the partners is dead, it is not necessary to join as plaintiff any representative of the deceased partner, Moti Lal v. Ghellabhai 17 B. 6; Vaidyanatha v. Chinnasami 17 M. 108; Debi Das v. Nirpat 20 A. 305. It is not necessary for our present purpose to examine the principle upon which these decisions are founded; it is enough to hold that in view of the decision of the Full Bench of this Court in Pyari Mohan Bose v. Kedar Nath Roy 26 C. 409, (F.B.) even upon the rule adopted in Ram Narain v. Ram Chunder 18 C. 80 it is open to a creditor to maintain an action for recovery of the debt, if the other creditor is joined as a co-defendant and if there is good ground for not joining him as a co-plaintiff. The position, of course, might have been different if there had been any statutory provision, applicable to the case, of

the nature contemplated by Section 188 of the Bengal Tenancy Act which makes it obligatory upon all joint landlords to sue as co-plaintiffs in suits of certain description.

5. The view we take is also supported by the principle which underlies the decision of this Court in the case of Nilmadhub v. Ishan Chandra 25 C. 787, where it was ruled that when some only of several proprietors of an estate have registered their names under the Land Registration Act and the others have omitted to do so it is open to the registered proprietors to recover a decree for their share of the rent if the unregistered, co-sharers are joined as parties defendants to the suit. On all these grounds we must hold that the contention of the defendants that the plaintiff is not entitled to any relief even in respect of his share of the debt because the joint creditor is dead and his representative has not taken out certificate under the Succession Certificate Act, is not well-founded on principle and is not supported by any of the authorities.

6. Our attention, however, has been invited to the circumstance that there is no proof that notice of the suit was served upon the pro forma defendant Monoda Sundari. Of course, it is not enough to place her merely on the record as co-defendant, she must also have notice of the suit. We accordingly direct that when the case goes back for retrial, the plaintiff do take steps to serve notice of the suit upon her. If she appears or is represented at the hearing and expresses a desire to be joined as a co-plaintiff her name will be transferred to the category of the plaintiffs. She will also have an opportunity to take out a Succession Certificate during the pendency of the suit because, as has been repeatedly held, the production of a Succession Certificate is not a condition precedent to the institution of a suit; it is sufficient if it is produced at any time before the decree is made. Kammathi v. Mangappa 16 M, 454. If, however, she does not take a Succession Certificate, or does not produce any, during the pendency of the suit, the Small Cause Court Judge will decide the case on the merits and if he is satisfied that the claim is well-founded, he will give the plaintiff a decree in respect of what may be established to be his share of the debt. The plaintiff will be at liberty to amend the plaint, if necessary, should the pro forma defendant consent to join as co-plaintiff.

7. The Rule is, therefore, made absolute, the decree of the Small Cause Court discharged and the case remitted for retrial in accordance with the directions given above. Under the circumstances of the case, we make no order as to costs in this Court.