(1911) 07 CAL CK 0038

Calcutta High Court

Case No: None

Mohamaya Prosad Singh and Others		APPELLANT
	Vs	
Ram Khelawan Singh Thakur and Others		RESPONDENT

Date of Decision: July 27, 1911

Acts Referred:

- Limitation Act, 1963 - Article 115
- Transfer of Property Act, 1882 - Section 90

Citation: 15 Ind. Cas. 911

Hon'ble Judges: Mookerjee, J; Carnduff, J

Bench: Division Bench

Judgement

1. This appeal is directed against the decree in a suit for recovery of a sum of money claimed as malikana. The Court below has found that the defendants are liable to pay the malikana to the plaintiff and the question of their liability has not been raised in this Court. But the decision of the District Judge has been assailed on four grounds; namely, first, that the amount of the net assets has been fixed at too high a figure; secondly, that the Government revenue and the cesses should have been deducted from the assets before the malikana was calculated; thirdly, that the plaintiffs are not entitled to claim any sum by way of interest, and, fourthly, that the decree as drawn up is not in accordance with the provisions of the Transfer of Property Act.

2. In support of the first point urged on behalf of the appellants, it has been contended that the burden was upon the plaintiffs to establish the amount of assets with reference to which malikana had to be calculated, that they have not discharged such onus and that the defendants have at any rate shown that the income is much less than has been adopted by the District Judge as the foundation of his judgment. In our opinion, there is no force in this contention. No doubt the

burden lay upon the plaintiffs in the first instance to prove the amount of the net assets of the estate. But they discharged that burden when they produced the judgment in the previous litigation between the parties in which it had been determined that the net assets amounted approximately to Rs. 4,000 a year. The onus then shifted upon the defendants to establish that since the date of the decision in question the condition of the property had deteriorated and that the assets at the present time were smaller than the assets at the time of the previous litigation between the parties. But (he learned Vakil for the appellant has contended that the previous decisions are valueless, as they were based upon teikhana papers It is not open, however, to the appellant to impeach the correctness of the decision in the earlier litigation between the parties. It must be taken, therefore, (hat at that time the income of the property was approximately Rs. 4,000 a year. The question next arises whether the defendants have discharged the burden which lay upon them to rebut the evidence adduced by the plaintiffs. No doubt they have produced the survey record which shows that the amount of rent recoverable from the cultivating raiyats is Rs. 3,242 a year. This, however, is by no means conclusive. It appears that there are zerait lands within the estate and that income is derived also from other sources. A Patwari was placed in the witness-box who swore what the income was as derived from those sources. But he admitted that (here were collection papers which were not produced. We are not prepared to place implicit reliance upon the figures given by the Patwari; and, in (he absence of the collection papers, which admittedly existed but were withheld for some unexplained reason, the defendants have not been able to rebut the evidence produced by the plaintiffs. The conclusion, therefore, follows that the decision of the District Judge upon this part of the case cannot be successfully attacked.

3. In so far as the second point urged by the appellants is concerned, it has been argued that in order to determine the net assets upon which malikana is to be calculated, the Government revenue and the assets should be deducted from the gross income in addition to the collection charges. Here, however, the appellants are in a difficulty. In a previous litigation in 1894, this very question was raised, and it was then decided that the defendants were not entitled to deduct the Government revenue and the cesses from the gross income of the estate. But the learned Vakil for the appellant has contended that the decision was erroneous in law and does not, therefore, operate as res judicata. It is fairly clear, however, that even if the decision be assumed to have been erroneous in law, it was a decision upon a mixed question of fact and law and is consequently, binding as between the parties and their representatives-in-interest. In that litigation a parwana was produced under which in 1788 the malikana had been granted. The Subordinate Judge held that the effect of this parwana was to show that the plaintiffs were entitled to malikana at the rate of 10 per cent, on the produce of the villages; and upon the construction of the parwana in the light of the provisions of the Regulations, the Subordinate Judge held that the defendants were entitled to deduct nothing beyond the collection

charges from the gross proceeds. The decision, therefore, in substance related to the effect of the parwana as regulating the rights and liabilities of the parties. It is obvious that this is a decision on a mixed question of fact and law; and it cannot be disputed that the decision of such a question, even though erroneous, is binding upon the parties and their successors. In support of this proposition, we reed only refer to the case of Aghore Nath Mukerjee v. Kamini Debi 11 C.L.J. 461 : 6 Ind. Cas. 554 The second contentions of the appellants, therefore, fails.

4. In so far as the third ground urged by the learned Vakil for the appellants is concerned, it has been argued that the plaintiffs are not entitled to claim any sum by way of interest on the arrears of malikana due. In support of this proposition, reliance has been placed upon the case of Kallor Roy v. Ganga Pershad Singh 33 C. 998. No doubt, that case is an authority for the proposition that interest cannot be claimed under the provisions of the Interest Act because the sum which the plaintiff seeks to recover is not due under a written instrument; nor has there been a demand of payment in writing. Consequently, the plaintiffs are not entitled to the benefit of Section 1 of Act XXXII of 1839. It does not follow, however, that the plaintiffs are not entitled to claim any sum by way of damages for the detention of the money due to them. It was pointed out by their Lordships of the Judicial Committee in the case of Lala Chhajmal Das v. Brijbhukhan Lal 22 I.A. 199 : 17 I.A. 511, which was followed by this Court in the case of Jogeshur Bhagat v. Ghanasham Dass 5 C.W.N. 356, that even though the claim of the plaintiffs is limited to interest which is not recoverable either under a contract or under the provisions of the Interest Act, it is open to the Court to make a decree for damages for wrongful detention of their money. It is clear, therefore, that the plaintiffs are entitled to claim damages in lieu of interest. In support of this view, it is sufficient to refer to the case of Mansab Ali v. Gulab Chand 10 A. 85, where the learned Judges relied upon the decision of the House of Lards in the case of Cook v. Fowler 43 L.J.Ch. 855, L.R. 7 H.L. 27 and upon the notes to the case of Mounson v. Redshow (Notes to Saunder''s Reports Vol. (1) (1644) 1 Wons. SauR 186, 196. The same view has been adopted by this Court in the cases of Gudri Koer v. Bhubaneswari Coomar Singh 19 C. 19 and Moti Singh v. Ramohari Singh 24 C. 699 : 1 C.W.N. 437.'' But here a question of some nicety arises. If the plaintiffs are not entitled to claim any sum by way of interest, is not their claim for damages for twelve years barred in part at least by the law of limitation? The learned Vakil for the respondent has suggested that damages should be treated as merely accessory to the principal amount due and that they should be treated as charged upon Immovable property in the same manner as the sum due on account of the malikana, In our opinion, this contention is fallacious. The plaintiffs become entitled to damages on the ground that the sum payable to them as malikana has been illegally withheld. The cause of action is entirely different from the cause of action for the recovery of malikana. Consequently, it cannot be suggested that the same rule of limitation must necessarily apply to the claim for recovery of the two sums. In fact, it has been ruled in a series of decisions in this

Court., as well as in Allahabad and Madras, amongst which we may mention Mansab Ali v. Gulab Chand 10 A. 85; Sri Niwas Ram Pande v. Udit Narain Misr 13 A. 330; Badibibi v. Sami Pillai 2 M.L.J. 235; Gudri Koer v. Bhubaneswari Coomar Singh 19 C. 19 and Mold Singh v. Ramohari Singh 24 C. 699 : 1 C.W.N. 437, that in cases of this description, the limitation applicable is that provided in Article 115 or Article 116 of the second Schedule of the Limitation Act. We are not unmindful that, in the peculiar circumstances of the case of Jogeshur Bhagat v. Ghanasham Das 5 C.W.N. 356, Article 120 was held applicable. But that was a case in which the original sum was recoverable under a registered contract and, consequently, it was immaterial whether Article 116 or Article 120 was applied. In the case before us, we are clearly of opinion that the plaintiffs are entitled to damages upon each annual sum in arrear only for three years antecedent to the suit. We may add that in the case of Lala Chhajmal Das v. Brijbhukan Lal 22 I.A. 199 : 17 I.A. 511, where damages were allowed in lieu of interest, the question of limitation was neither raised nor considered, apparently because the appeal was argued ex parte. The third ground taken by the appellants must consequently prevail in part.

5. In so far as the fourth ground urged by the appellant is concerned, it has been contended that the decree has not been properly drawn up, and that at this preliminary stage of the suit, no personal decree can be made in favour of the plaintiffs in addition to the decree for sale of the hypothecated properties. There is no room for controversy that this contention is well founded. A decree u/s 90 of the Transfer of Property Act can be made only after it has been found upon the sale of the hypothecated properties that the judgment-debt has not been satisfied thereby. Till that stage is reached, no question of a personal liability arises. We may point out that the question is not one of form but of substance, because so far as the claim for recovery of money charged upon Immovable property is concerned, the rule of. limitation is that provided in Article 132 of the second Schedule of the Limitation Act, whereas in respect of the claim for the enforcement of a personal remedy, a shorter period of limitation is applicable. The fourth ground, therefore, must prevail.

6. The result is that this appeal is allowed in part and the decree of the District Judge modified. The amount due must be determined on the principle here explained and the plaintiffs will have a decree for the principal amount claimed together with interest on such sum for not more than three years before the suit; and the clause in the decree which allows a personal decree in favour of the plaintiffs will be expunged. Upon the sum ascertained to be due on this principle to the plaintiffs at the date of the commencement of the suit, interest will run at the rate of 12 per cent. per annum up to the date of this judgment and thereafter at the rate of 6 per cent As the victory has been a divided one, there will be no order for costs either in this Court or in the Court below.