Sarada Prosad Roy Chowdhury and Others Vs Rai Mohan Saha and Others

None

Court: Calcutta High Court

Date of Decision: Aug. 6, 1924

Acts Referred:
Civil Procedure Code, 1908 (CPC) â€" Section 47

Citation: AIR 1925 Cal 819 : 85 Ind. Cas. 629

Hon'ble Judges: Suhrawardy, J; Duval, J

Bench: Full Bench

Judgement

Suhrawardy, J.
The facts of this case are that the defendants had brought a suit against the plaintiffs and several others in respect of a

fishery. During the progress of the suit an agent of the defendants approached the plaintiffs" Pleader and proposed that if the plaintiffs" men could

give a certain information to the defendants with regard to a previous suit which would enable the defendants to win their case against the

defendants in their suit, they would not execute the decree they would thus obtain in that suit as against the plaintiffs in the present suit; and would

further give them a miras patta for 2 1/2 annas share of the fishery. These terms were agreed to by plaintiffs and the Pleader received certain

information from the plaintiffs, the defendants obtained a copy of the judgment in Suit No. 13 of 1893 and with the help of it won the aforesaid suit

being Suit No. 64 of 1910 which was instituted against the present plaintiffs and others. The present plaintiffs did not appear in that suit at the time

of its hearing and the decree passed against them was ex parte. The agreement to which reference has been made was entered on the 5th

September 1912. On the 23rd December 1912 the decree in Suit No. 64 of 1910 was passed ex parte against the present plaintiffs. On the 30th

April 1913 the execution of the decree was taken by the defendants and a permanent injunction was issued against the plaintiffs restraining them

from interfering with the defendants'' possession of the fishery. On the 31st August 1917 the present suit was instituted by the plaintiffs. The suit

was for a declaration (1) that the ex parte decree obtained by the defendants against the plaintiffs on the 23rd December 1912 in suit No. 64 of

1920 in the Court of the Second Subordinate Judge at Dacca and the execution proceedings in connection therewith be held to be fraudulent and

that the same be declared to be ineffectual, inoperative and not binding on the plaintiffs; (2) that the said decree be declared null and void and by

virtue of the agreement and promise of the defendants incapable of execution against the plaintiffs and that the service of notice of injunction be

declared to be fraudulent, inoperative and ineffectual. There were further prayers that the plaintiffs'' title and possession might be maintained and

that if it was found that the plaintiffs were dispossessed by execution of the decree, they might be restored to possession. It was further prayed that

a decree for permanent injunction might be passed restraining the defendants from doing any act causing disturbance to the title and possession of

the plaintiff of the jalkar. With regard to these two last prayers, it appears that as they were not pressed before the First Court, they were

dismissed by that Court, and the following order was passed by the learned Subordinate Judge: ""Prayers ga and gha of the plaint are dismissed as

no issue has been framed so far as those prayers are concerned, and no evidence also has been adduced with respect to the facts on which these

prayers can be allowed, and also on the ground that these prayers are quite outside the scope of the suit as the Pleader for the plaintiffs admitted at

the time of the argument."" The only question, therefore, that was considered by the Subordinate Judge was whether the decree was fraudulent,

inoperative and incapable of execution. He found in favour of the plaintiffs and decreed the suit in terms of the prayers ka and kha. The learned

Additional District Judge on appeal has reversed the decree of the First Court on the finding that the plaintiffs have failed to prove fraud before the

decree. It is, therefore, manifest that the only point on which the parties went to trial was whether there was any fraud on the part of the

defendants; and if there was any fraud, whether that rendered the decree null and void and incapable of execution. The Courts below have differed

in their decisions on this point. It is, however, urged before us by Dr. Nates Chandra Sen Gupta the learned Vakil for the appellants, that on the

finding arrived at by the learned Judge his client is entitled to some relief, namely, that it should have been declared that, though the decree is not

capable of being treated as null and void, it is incapable of execution and in support of this proposition he has cited a number of authorities to show

that a suit for having a declaration to the above effect is maintainable and is not barred by Section 47, C.P.C. The question is one of great nicety

but in this case we have been relieved of the necessity of considering it in view of the objection on the ground of limitation that has been taken by

the learned Vakil for the respondents.

2. The facts found by the learned District Judge are that there was an agreement as alleged by the plaintiffs, that there was no fraud, that execution

was taken out by defendants and notice of a permanent injunction was served on the plaintiffs on or about the 30th April 1918. No doubt the

question of limitation was not considered by either of the Courts below but as the plea has been raised on the findings of the learned Judge, we are

bound in law to consider it. The first question to be determined in this connection is as to the scope of the present suit. The learned Vakil for the

appellants argues that the suit is one for a pure declaration u/s 42 of the Specific Relief Act and, therefore, the period within which the suit ought to

be brought is six years from the accrual of the cause of action. We do not think that we should give effect to this argument. The suit was, as we

have indicated, brought for a declaration coupled with consequential relief. By giving up or not adducing evidence in support of the prayers for

consequential reliefs and treating them as surplusages the plaintiff cannot convert the suit into one for a, mere declaration. In fact if the suit was

brought in the shape in which it now stands, objection might have been taken to its maintainability on the ground that the plaintiff was bound to ask

for consequential relief as he actually prayed for in the plaint. In the present case there was a permanent injunction issued against the plaintiffs; a

mere declaration of the decree being fraudulent or incapable of execution could not give him all the reliefs that he ought to ask against the decree of

the defendants. He must get rid of the injunction. Then again the plaintiffs were apprehensive that they might be dispossessed in execution of the

decree and, therefore, they prayed that their possession might either be maintained or that they might be restored to possession if dispossessed.

Both these prayers have been held to be prayers in the nature of consequential relief. The suit, according to the allegations made in the plaint, is, in

our judgment one for setting aside a decree, admitting that the facts alleged by the plaintiffs are true. By merely describing the decree as fraudulent

or null and void he cannot convert it into a suit other than a suit for setting aside a decree under Article 95 of the Indian Limitation Act. Then again

the plaintiffs have been found by the learned Judge to be not in possession of the property, A mere declaratory suit, therefore, does not lie in the

present case. We hold, therefore, that the plaintiffs" suit is one for setting aside a decree under Article 95, Limitation Act.

3. The next question to be considered, therefore, is as to the date when the plaintiff"s cause of action arose. In the plaint the cause of action is said

to have arisen in January 1917 when, it is alleged, the defendant interfered with plaintiffs" possession. But it has been found by the learned Judge

that the notices of injunction were served on the plaintiffs on the date mentioned therein i.e., the 30th April 1913. It is argued that there is no clear

finding on this point by the learned Judge. But what the learned Judge means to find is that the burden of proof that notice was not served, was on

the plaintiffs and they failed to prove that notices were not served. In fact he goes further and finds that "" it would be going too far to say that the

service never actually took place and that the return was falsely procured and filed."" Reading the observations of the learned Judge on this point, it

is clear that he is of opinion that the notices were served on the plaintiffs. That being the case, the cause of action for the suit arose on the 30th

April 1913. Whether the suit is treated as one for setting aside a decree under Article 95, Limitation Act or one for specific performance of a

contract under Article 113 of the Limitation Act, it is governed by three years'' limitation. The suit having been brought on the 31st August 1917, it

is clearly barred by limitation. In this view of the matter, it is not necessary to enter into the other questions raised in the appeal which must be

dismissed with costs.

Duval, J.

4. I agree.