(1910) 02 CAL CK 0053

Calcutta High Court

Case No: None

Dwarka Nath Sen		APPELLANT
	Vs	
Kisori Lal Gosain and Another		RESPONDENT

Date of Decision: Feb. 11, 1910

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 1 Rule 3, 115

Citation: 6 Ind. Cas. 549

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

Bench: Division Bench

Judgement

1. We are invited in this Rule to reverse an order of the Court below by which an application of the petitioner to be made a party defendant to an action in ejectment has been rejected. The opposite party Kisory Lal Goswami commenced this action against Nripendra Lal Mitter on the allegation that the present petitioner Dwarka Nath Sen was a tenant of a holding tinder him, that on the 18th December, 1908, Dwarka Nath had transferred the holding to Nripendra, that the tenancy was non transferable, that consequently the purchaser had acquired no valid title and the plaintiff w7as entitled to recover possession. The defendant Nripendra resisted the claim principally on the ground that his vendor possessed a mourasi mokarrari transferable right in the land. On the 21st July 1909, the petitioner Dwarka Nath, the transferor, applied to the Subordinate Judge to be added as a party defendant to the suit. He alleged that although the deed executed by him was in form a conveyance, the transaction was in reality a mortgage, and that he himself was in possession as before in spite of the transfer. In support of this allegation, he produced a document purporting to be an agreement by the transferee to re-transfer the property to the transferor upon payment by the latter of the principal sum with interest within a specified period. This document was not stamped; it was accordingly impounded and penalty thereon was levied. The Subordinate Judge, however, refused to admit the document in evidence on the ground of want of

registration. He then held that there was nothing to show that what purported to be on the face of it a conveyance, was in reality a conditional sale. In this view he dismissed the application of the petitioner to be made a party defendant. The propriety of this order has now been assailed on the grounds that the Subordinate Judge has erred in the view he has taken as to the admissibility of the deed for re-transfer of the property, that, the petitioner is a proper party to the suit, and that to avoid multiplicity of litigations he ought to be added as a defendant. On behalf of the plaintiff opposite party the older has been supported on the ground that the matter is one in the discretion of the Court below, that the petitioner cannot be added as a defendant when the plaintiff objects to his presence in the suit, and that in any view it is not competent to this Court to interfere in the exercise of its revisional jurisdiction.

2. There is no room for reasonable doubt that the petitioner may properly be added as a defendant, to the suit. Under Order I, Rule 3 of the Code of 1908, all persons may be joined as defendants against whom any right to relief in respect of, or arising out of, the same act or transaction or series of acts or transactions, is alleged to exist, whether jointly or severally or in the alternative where if separate suits were brought against such persons any common question of law or fact would arise. In the case before us, it is obvious that if the agreement for re-transfer is genuine and if the allegation of the petitioner is true, that he is still in possession in spite of the mortgage by conditional sale, the whole matter in controversy ought to be, and may, indeed conveniently, be determined in one suit. If the plaintiff obtains a decree behind the back of the petitioner, another litigation between them will be inevitable; possibly, there may be two proceedings, one under Order XXI, Rule 97 (resistance to delivery of possession to decree-holder) and another a regular title suit. The question to be determined in such proceedings will relate to the nature of the tenancy, the present possession of the property and the effect of the transfer by the original tenant. It has not been disputed, and, in our opinion, it cannot be disputed that the view of the Subordinate Judge as to the admissibility in evidence of the agreement for re-transfer is erroneous; it is not are-conveyance, but is merely; an agreement for that purpose and consequently does not require registration. We must hold, therefore, that the petitioner is a proper party. The question remains, whether he can be joined as a defendant although the plaintiff objects to or does not desire the joinder. Now, as explained in the case of Montgomery v. Roy (1895) 2 Q.B. 321 : 65 L.J.Q.B. 18 : 14 R. 575 : 73 L.T. 12 : 43 W.R. 691 : 8 Asp. M.C. 36, the Court has the power to add a person as defendant even though the plaintiff objects to such joinder. No doubt, as observed in McCheane v. Gyles (1902) 1 Ch. 911 : 71. L.J. Ch. 446 : 50 W.R. 387 : 86 L.T. 217 the Court does not, except in special circumstances, force a defendant upon a plaintiff. The test to be applied is, whether the party sought to be added ought to have been joined or whether his presence before the Court is necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the cause or matter. No

doubt under Order I, Rule 10, Sub-rule 2, of the Code only provides that the Court may, at any stage of the proceedings, make the order, but as Sir George Jessel put it in Wilson v. Church (1878) 9 Ch. D. 5 39 : 39 L.T. 413 : 36 W.R. 675, it would be absurd to say that the Court may do so, if it did not mean that it was the duty of the Judge to do so, if the proceedings were in such a state that the party could properly be added. The power is discretionary, bat the discretion is judicial and not arbitrary. It is widely exercised, even though the addition of new parties may add new issues and new evidence. The object of the Legislature is to avoid multiplicity of suits, and to ensure that the dispute may be finally determined at the same time in the presence of all the parties interested without the delay and expense of several actions and trials. If the plaintiff could show that serious embarrassment or inconvenience would be caused to him by the addition of the defendant, the Court would be very reluctant to force an additional defendant into his suit. No such consideration obviously arises in the circumstances of the present case. We hold, therefore, that the Subordinate Judge ought to have added the petitioner as a defendant to the suit.

3. It has been strenuously contended, however, that this Court has no jurisdiction to interfere and revise the order of the Court belows. In support of this view, reliance has been placed upon the case of Amir Hassan Khan v. Sheo Baksh Singh 11 C. 6 : 11 I.A. 237. The decision of the Judicial Committee, However, is clearly distinguishable. A printed out by Stanley, C.J., in C. Boss Alston v. Pitambar 25 A. 509 that decision is an authority for the proposition that the words acted illegally or with material irregularity" do not comprehend a case of a decision attacked merely on the ground that it is erroneous in law,--in that particular case, an erroneous decision upon a question of res judicata. The judgment of the Judicial Committee, however, does not furnish any test for determining under what circumstances a Court may be slid to have-acted illegally or with material irregularity, nor is any general principle deducible from the numerous cases in the reports, which are by no means easy to reconcile. One principle was recognised in the cases of Bhagwan Ramanuj Das v. Khetter Moni Dasi 1 C.W.N. 626, Mathura Nath Sarhar v. Times Chandra Sarkar 1 C.W.N. 626 and Raghu Math v. Rai Chatraput 1 C.W.N. 633, namely, that the phrase "acted illegally or with material irregularity" is not limited to cases of procedure only, but includes cases of decisions vitiated by an error so gross and palpable as to lead to grave and manifest injustice. The doctrine thus enunciated, however, obviously leaves much room for divergence of judicial opinion. This is well-illustrated by an examination of cases closely analogous in many respects to the one now before us. Thus the Bombay High Court has interfered in the exercise of its revisional jurisdiction with an erroneous judgment based on evidence inadmissible in law Chenbasapa v. Lakshman Ramchandra 18 B. 369, as also a judgment given after improper exclusion of evidence legally admissible. Fatehchand Harchand v. Kisan 25 A. 509. In this Court, on the other hand, two learned Judges of a Division Bench were divided in opinion upon the question of the jurisdiction of this Court to interfere

with a judgment given after erroneous exclusion of evidence. Enat Mondal v. Baloram, Dey 3 C.W.N. 581. A different view was, however, taken in Mewa Lal v. Kumerji 10 C.L.J. 33 : 13 C.W.N. 797 : 2 Ind. Cas. 946. Again in the case of Rabbaha Khanum v. Noorjehan Begum 13 C. 90, this Court refused to interfere with an order dismissing an application by a person to be made a party to a pending suit. On the other hand, in Khettra Moni Dasi v. Shyama Churn Kundu 21 C. 539, the decision last mentioned was regarded as based upon the special facts of that case, and the Court actually interfered and directed a party to be added to the proceedings. A similar view was adopted in the case of Promoth Nath Mitra v. Rakhal Das Addy 11 C.L.J. 420 : 6 Ind. Cas. 546. We are, therefore, not prepared to adopt as sound the broad proposition put forward by the plaintiff opposite party that it is not competent to this Court to interfere u/s 115 of the Code of 1908 with orders granting or refusing applications for adding parties. We may further point out that in the case of Judooputtee Chatterjee v. Chunder Kant Bhuttacharjee 9 W.R. 309, this Court set aside an order of similar description u/s 15 of the Charter Act. In the case before us, there can be no question that if the order of the Court below which is based on manifestly erroneous grounds, is allowed to stand, the inevitable result would be a needless multiplicity of suits and possible injustice to the petitioner.

4. The result, therefore, is that this Rule is made absolute and the order of the Court below discharged. We direct that the petitioner be added as a party defendant and that if necessary the plaint be amended under Order 1, Rule 10(4). The costs of this Rule will be costs in the cause. We assess the hearing fee at two gold mohurs.