(1881) 02 CAL CK 0014

Calcutta High Court

Case No: None

Sashi Bhuson Biswas and Others		APPELLANT
	Vs	
Kanai Lall Khan and Another		RESPONDENT

Date of Decision: Feb. 9, 1881

Citation: (1881) ILR (Cal) 777

Hon'ble Judges: McDonell, J; Field, J

Bench: Division Bench

Judgement

McDonell, J.

The facts of this case are briefly as follows: One Romoni Dasi, the widow of Digambar Mondol, borrowed Rs, 2,000 from the ancestor of the defendants in the present case upon the mortgage of a certain property. This money was not paid, and the mortgagee brought a suit against Romoni Dasi on the 17th May 1872, to enforce the mortgage lien against the mortgaged property. While that suit was pending, Romoni Dasi died; and on the 10th July 1873, the mortgagee applied to have the plaintiffs in the present suit substituted as defendants in the place of Romoni Dasi. In that petition the mortgagee stated, that the present plaintiffs, Sashi Bhuson Biswas and others, were the heirs of Romoni Dasi. These persons were at that time minors, and Bhoopal Chunder Biswas was their father and guardian. Notice was served upon Bhoopal Chunder Biswas, and he, Bhoopal, came in and filed a petition on behalf of the minors.

2. In that petition it was distinctly asserted that the minors were not the heirs of Romoni Dasi; that they were sister''s sons of Romoni Dasi''s husband, Digambar Mondol, and as such, were the true heirs of Digambar Mondol, and were in no respect heirs of the widow Romoni Dasi, or of her stridhan. It is further alleged in that petition, that the debt incurred by Romoni Dasi was a personal debt incurred for her own benefit, and that it was not incurred for any legal necessity which would

have the effect of making such debt chargeable upon her husband''s estate.

3. The Subordinate Judge before whom the case was pending recorded the following order: "The heirs of the husband of Romoni Dasi have raised A new plea in the case, viz., that the property secured in the bond could not be made liable for her personal debts. This plea is foreign to this suit. This could not have been raised by the deceased defendant, and they, coming in as her representatives, cannot be allowed to raise it. The property was described in the bond as belonging to the debtor herself, and not to her husband; and the question as to whether that statement is correct or not, cannot be legitimately tried in this suit. I leave these heirs to settle that question by a different suit, if they are really in earnest." Now there is undoubtedly an error in the part of this order, which says that the present plaintiffs came in as the representatives of Romoni Dasi. They did not "come in," if by that was meant coming in of their own accord. They were brought in by the mortgagee; and so far from coming in as heirs and representatives of Romoni Dasi, they, through their guardian, contended that they were not the heirs of Romoni Dasi, but the rightful heirs of Digambar Mondol. Before making these minors parties to the suit in the character of heirs of Romoni Dasi, it would have been proper for the Subordinate Judge to raise an issue and come to a judicial finding as to whether they were or were not the right heirs of Romoni Dasi.

4. We think it clear that no such issue was raised, and that no such question was substantially decided between the parties. In the decree, the minors are not mentioned as heirs of Romoni Dasi, and the decree was passed against the mortgaged property with the further direction that any balance not realized there from should be realized from the other properties of the deceased judgment-debtor Romoni Dasi. There was no direction that such unrealized balance should be recovered from any assests belonging to the estate of Romoni Dasi in the hands of, and undisposed of by, the minors, who are the present plaintiffs. Then it is clear that the words which we have above quoted---"I leave these heirs to settle that question by a different suit, if they are really in earnest,"---distinctly excluded from the adjudication in that suit the question whether the minors could be made liable as the right heirs of Digambar Mondol.

5. It was first contended before us by the learned pleaders for the appellants, that the present suit is barred by res judicata. We think it impossible to say, that a question not only not decided in the previous suit, but in express language excluded from the decision therein, can be treated as a res judicata, so as to estop the plaintiff''s in the present case.

6. After the decree had been passed in the suit brought by the mortgagee, execution was taken out, and the property, which was the subject of the mortgage bond, was attached in execution. The present plaintiffs appeared before the Subordinate Judge, and raised an objection to the attachment of the property. The objection thus raised again in the execution-proceedings was substantially the same

question which they had asked to have decided in the proceedings before decree, and which the Subordinate Judge had in express language refused to adjudicate. It is not to be wondered at, therefore, that the then Subordinate Judge refused to deal with this question in the execution stage. His order refusing to deal with it was appealed; and the order of the Appellate Court was, that the property should be sold, but at the same time that notice should be given that it was claimed by the reversioners,---that is, the plaintiffs in the present case,-as their own property.

7. The pleader for the appellants has addressed a long argument to us, contending that the question which the plaintiffs now ask to have decided was a question which ought to have been decided between them and the present defendants in the execution-proceedings; that it was in fact a question falling within Clause (c) of Section 244 of the present Code of Civil Procedure,---that is, a question between the parties to the suit in which the decree was passed or their representatives, and relating to the execution, discharge, or satisfaction of the decree. He has relied in support of this contention upon the case of Chowdhry Wahed Ali v. Mussamut Jumaee 18 W. R.s.c 185; 11 B. L. R. F.B. 149, decided by their Lordships of the Judicial Committee on the 14th June 1872, and the subsequent case of Ameeroonnissa Khatoon v. Meer Mahomed Mozuffur Hossein Chowdhry (20 W. R. 280). We think, however, that the present case is one to be decided upon its own merits, and that its special circumstances take it out of the general rule which may be supposed to have been established by the cases just quoted. In the Privy Council case their Lordships say that they cannot concur in the general proposition that a party sued in a representative character is not a party to the suit within the meaning of Clause 11 of Act XXIII of 1861. They then refer to the 203rd section of the old Code of Civil Procedure, and they proceed to say:---"It is obvious, therefore, that a party in a representative character is so distinctly a party to the suit, that, under certain conditions, his own private property may be attached and sold. It is true that to fix him with this liability, it must be shown that he has received property of the deceased, of which he has failed to prove a proper disposition. But these things are all cognizable and proper to be ascertained in the suit in which the decree is made, during the progress of the execution-proceedings founded upon such decree. It does not seem to their Lordships to follow that, because all the provisions relating to execution cannot be applied to a defendant sued in a representative character, such a defendant cannot be regarded as a party to the suit within the meaning of such of them as may be applicable to this case." We entirely agree with what was said in the case of Ameeroonnissa Khatoon v. Meer Mahomed Mozuffur Hossein Chowdhry (20 W. R. 280), that the above remarks of their Lordships of the Judicial Committee are not to be treated as obiter dicta merely, but that they amount to an authoritative decision which this Court ought to follow. But it appears to us that these remarks do not go the length of establishing the proposition contended for before us,---viz., that a party sued in a representative character is a party within the meaning of Section 11 of Act XXIII of 1861 (Section 244 of the present Code) for all

purposes, and irrespective of the nature of the representative character in which such person, is a party. The High Court had laid down a general proposition. See the original judgment of the High Court 2 B. L. R. F. B. 84; and the remarks of the Privy Council, above partly quoted 11 B. L. R. 155. The Privy Council intimated they the could not concur in that general proposition,---in fact, that the proposition was too widely put to be generally true, and they pointed out an instance in which the proposition so generally put could not be maintained. They do not, however, go the length of saying that the converse of this general proposition is true, and that a person, who is a party to a suit in any character, is a party in every other character which he may fill, and this irrespective of the question whether there are in the Code provisions as to execution, which apply to this case. We may apply another test. The questions mentioned in Clause (c) of Section 244 are questions arising between the parties to the suit in which the decree was passed and relating to the execution, discharge, or satisfaction of the decree. Now, when a decree obtained against a particular person is sought to be executed against the heirs or representatives of that person, who have received a portion of his property, and are liable to the extent of the undisposed of assets in their hands, there can be no doubt that the decree is still the same decree; and this is in no way altered by the alteration in the person against whom it is sought to be executed. But in the present case it may be said, that the decree passed against Romoni Dasi, and the property of Romoni Dasi and the heirs of Romoni Dasi, is different from a decree passed against the property of Digambar Mondol and the right heirs of Digambar Mondol. We do not, however, desire to base our decision upon this ground merely.

8. It appears to us that what was directed to be sold, was the right, title, and interest of Romoni Dasi; and looking, at the order of the District Judge, dated 24th December 1879, and the sale notification, we think it clear, that whatever interest the present plaintiff''s might have in the property as reversioners, i.e., as the right heirs of Digambar Mondol, was expressly excluded from the sale. The first paragraph of the conditions of sale runs thus: " Beyond what right, title or interest the judgment-debtor has in the said properties, the rights of any other party or the properties connected therewith, shall not be sold." Now if we turn to the decree at p. 41, we find a direction, that the balance be realized from the properties of the deceased judgment-debtors, Romoni Dasi. It is, therefore, clear that Romoni Dasi, and Romoni Dasi alone, was treated as the judgment-debtor, and that what was sold was the interest of Romoni Dasi; and that the interests of the reversioners, the right heirs of Digambar Mondol, were distinctly and expressly excluded from the sale.

9. It may be, as argued before us, that the prayer for a perpetaul injunction which the plaintiffs have inserted in their plaint cannot be granted in this form; but we think that this is not very material. What the plaintiffs subsequently ask is, to have it declared that the interest of Romoni Dasi in this property is nothing. When once that is found and declared, there will be no occasion for a perpetual injunction

restraining the defendants from selling that which is worth nothing.

10. We have then to consider, whether there is enough on the record to enable us to say that the interest of Romoni Dasi in the attached property amounts to nothing. We think that this question falls within a principle acted upon in many cases-namely, that where parties allow a suit to be conducted in the lower Court as if a certain fact was admitted, they cannot afterwards in appeal question this fact and recede from their tacit admission. No. question was raised in the written statement before the Subordinate Judge as to Romoni Dasi having any other interest in the property than the life-interest which she had as heir of her husband Digambar Mondol No express issue on this question was raised by the Subordinate Judge; nor was he asked to raise such an issue, and the point has not been taken in the grounds of appeal to this Court.

11. Then in the mortgage deed it is stated, that the property was let in ijara to Radha Mohun Mondol for a term of eight years; and we find at page 11 the ijara pottah executed by Romoni Dasi in favour of this Radha Mohun Mondol, in which it is stated, that the right of Romoni Dasi in the property was derived from the fact of her being the heiress of Digambar Mondol.

12. We do not say that the recitals in these two instruments would be sufficient evidence upon which to decide this question, if it really fell to be decided upon evidence; we merely advert to these recitals taken in connection with the conduct of the defendants in the Court below, as sufficient to satisfy our minds that no question as to Romoni Dasi having any other interest in the property than that of a Hindoo widow was ever seriously raised or disputed between the parties in the lower Court.

13. For these reasons, it appears to us that the decree of the lower Court must be affirmed, and this appeal dismissed with costs.

14. With respect to the form of the decree, we think it more appropriate to draw it up as a decree declaring that the mortgage debt was incurred by Romoni Dasi personally; that it is not binding upon any property of her husband Digambar Mondol in which she enjoyed a life-estate; and that Romoni Dasi had no interest beyond this life-estate in the property which forms the subject of this suit, and which the mortgagee has endeavoured to bring to sale after her death in execution of his decree.