
(1870) 05 CAL CK 0011

Calcutta High Court

Case No: Special Appeal No. 2298 of 1869

Prankishori Dasi

APPELLANT

Vs

Gunamani Dasi

RESPONDENT

Date of Decision: May 11, 1870

Judgement

Sir Richard Couch, Kt., C.J.

The case which the plaintiff makes in the plaint is that the defendant had a decree against her, and that the plaintiff paid to the defendant on account of that decree rupees 930-12-6, consisting of cash and ornaments, and so compromised the claim under the decree; that after that, this payment and compromise not being certified to the Court, the defendant sued out execution of the decree, and obliged the plaintiff to pay the amount of it, and the plaintiff seeks in this suit to recover back the money which was first paid, in order to compromise the claim upon the decree. Now it certainly would be most inequitable that the defendant should be allowed to retain, not only the money which she had obtained in execution of the decree, but also the sum of money which was previously paid by the plaintiff, in order to compromise the claim. I think there are grounds upon which we can very properly come to the conclusion that the defendant is not to be allowed to retain that money, and that she is liable to refund it to the plaintiff. According to section 206 of Act VIII of 1859, this compromise or adjustment and payment of money out of Court would not be recognized by the Court, unless it was certified by the defendant, who was the decree-holder. The plaintiff who paid the money had no power to certify it, or to make it known to the Court. I think it was the duty of the defendant to certify that matter to the Court; and that, if the defendant failed to do so, and afterwards took advantage of the want of a certificate, and sued out execution of the decree, and obliged the plaintiff to pay the whole amount, the defendant must be considered as being a trustee for the plaintiff of the money which had been previously paid, and which she had not appropriated to the satisfaction of the decree, and had indeed, by her omission to certify the matter to the Court, prevented from being so appropriated. This is money, which was in my opinion, in the hands of the defendant as trustee for the plaintiff, and which she is bound in equity to refund to the plaintiff. I would prefer putting it on that ground, rather

than on that of damages for the breach of a contract, either express or implied, to apply the money paid in satisfaction of the decree, or on the ground of a fraudulent omission to certify, because fraud may not at first have been intended, and it cannot be inferred simply from the defendant's omission to certify to the Court the payment and compromise; she may have omitted to do so through negligence, and the fraud is the subsequently taking advantage of the omission to certify, and enforcing a decree which had really been compromised and satisfied out of Court. There is nothing in section 11 of Act XXIII of 1861 which prevents such a suit as the present from being brought. That section says that all questions relating to sums alleged to have been paid in discharge or satisfaction of the decree or the like, and any other questions arising between the parties to the suit in which the decree was passed, and relating to the execution of the decree, shall be determined by order of the Court executing the decree, and not by separate suit;" but section 206 of Act VIII of 1859 prevents the Court executing the decree from taking any notice of payments not made through the Court, or certified to the Court, and I cannot think that it was the intention of the Legislature that the Courts executing the decree should be bound to hear and determine questions as to payments which by section 206 they were forbidden to recognize. I think these two sections can only be reconciled by holding that section 11 does not apply to payments made out of Court, and not certified to the Court, and of which it cannot take notice. Therefore, in my opinion, this suit is maintainable to recover back the money, notwithstanding the provisions of section 11 of Act XXIII of 1861. It is maintainable upon principles of equity, and the plaintiff ought to recover. I would observe, with regard to the case in the High Court of Madras, that Mr. Justice Holloway, for whose judgment I have the greatest respect, seems to treat the case as if it was a suit not to recover the money originally paid under the compromise, but to recover back the money which was levied in the execution of the decree. I think that is not the nature of the suit before us; this suit is to recover back the money first paid; of which the defendant must be regarded as a trustee for the plaintiff, and as such liable to refund it.

2. The appeal will be dismissed with costs.

Kemp, J.

3. I concur in this judgment.

Jackson, J.

4. I am of the same opinion. I think it is quite possible to explain the judgments of the majority of the Judges of the Madras High Court, by a reference to the form in which the suit was brought.

5. It seems to me that, if we were obliged to adopt the construction contended for by Baboo Mohini Mohan Roy, we should be abetting a most serious fraud and injustice; because there is no question that in this country it is a frequent practice, especially

among the poorer classes of suitors, to adjust their decrees out of Court; and in innumerable cases, they so adjust them, without certifying such payments to the Courts. The Legislature has, no doubt, prohibited the Courts executing a decree from taking cognizance of payments made out of Court, but I think it is the extreme limit of the disability under which the law has placed judgment-debtors, who, trusting in the good faith of the decree-holders, have made such payments out of Court, and that it was never intended to deprive them of all remedy as regards payments made under such circumstances. I think there is nothing to prevent those persons who have been so imposed upon by the decree-holder from recovering the money so paid by them in a separate suit. It seems to me quite clear that section 11 of Act XXIII of 1861, and section 206 of Act VIII of 1859, being parts of the same Code, must be read each by the light of the other, and the circumstance of the Legislature having forbidden the Courts executing a decree to take cognizance of payments made out of Court, clearly shows that it cannot have been the intention of the Legislature to leave the final decision upon such questions exclusively in the hands of the Courts executing the decree; but that such questions were left to be cognizable by way of a civil suit.

Mitter, J.

I concur, I have already given my reasons in the order of reference.