(1879) 05 CAL CK 0012

Calcutta High Court

Case No: None

The Agra Bank		APPELLANT
	Vs	
Dhuronidhur Sen and Others		RESPONDENT

Date of Decision: May 19, 1879

Acts Referred:

- Charter Act, 1861 - Section 15
- Limitation Act, 1963 - Article 15

Citation: (1880) ILR (Cal) 86

Hon'ble Judges: Richard Garth, J; Jackson, J; Ainslie, J

Bench: Full Bench

Judgement

Richard Garth, C.J.

A review having been granted in this case upon the ground that the previous judgment of this Court contained an inaccurate statement of the facts, and that a review was necessary for purposes of justice, we are now called upon to decide a second time the appeal which has been preferred from the judgment of Mr. Justice White, whose opinion in the Division Bench prevailed over that of Mr. Justice Mitter. Messrs. Gilmore, McKilligan, and Co. were the proprietors of an indigo business called the "Paikurdanga Concern," over which the Agra Bank held a mortgage; one of the properties belonging to that concern was a patni taluq called "Kalabaria," of which Brojonath had the darpatni; the rent of this patni taluq not being paid, it was sold under the provision of Reg. VIII of 1819; and in consequence of that sale Brojonath''s darpatni rights were cancelled. Brojonath then brought a suit against a number of persons including the executors of the deceased members of the firm of Messrs. Gilmore, McKilligan, and Co. for the damage which he had sustained by the cancellation of his rights, and he obtained a decree on the 3rd June 1867 for money to be realized from the estate of the original patnidars. This decree was sold to one Giridhur Sen, the predecessor in title of the present defendants. On the 16th August

1869, the executors of Mr. J.P. McKilligan, the last survivor of the firm of Gilmore, McKilligan, and Co., sold the Paikurdanga Concern with dena and powna to the Agra Bank, the present plaintiffs. In 1871, Giridhur Sen applied to the Court, in which the decree for damages had been passed, to substitute the Agra Bank in the place of the original judgment-debtors, on the ground that the Bank had purchased the rights of the Paikurdanga Concern with dena and powna, and were consequently liable to pay the amount of the decree. A notice of this application was served on the Manager of the Bank, but he being advised that the Court could not possibly grant the application, did not appear to oppose it.

2. The application, however, was granted, and the Agra Bank were substituted in the place of the judgment-debtors. In December 1874, the defendants applied to execute the decree against the Agra Bank; and on this occasion the Manager of the Bank opposed the application: this opposition, however, was overruled. He then applied to this Court, u/s 15 of the Charter Act, to set aside the order under which the Agra Bank was substituted for the original judgment-debtors, on the ground that the Court had no jurisdiction to make such an order; but this application was refused. The Agra Bank then brought this present suit, praying that the order of substitution might be declared illegal; that the proceedings taken upon it should be set aside; and that the defendants should be restrained from taking proceedings upon it against the plaintiffs. The defendants contended:

1st.--That as the plaintiffs'' object was in effect to set aside the order of the 21st of June 1871, and as the suit was not brought within a year from that date, the plaintiffs were barred by limitation (art. 15, Scheduleii of Act IX of 1871).

2ndly.--That as the plaintiffs had not appeared to urge this objection in the execution proceedings, they had no right to do so by a regular suit.

3rdly.--That as the Agra Bank were the mortgagees in possession of the patni taluq which was sold for arrears of rent, it was through their default that the patni taluq was sold and the darpatnidars'' interest cancelled.

4thly--That as the Agra Bank had become the owner of the business carried on by Gilmore, McKilligan, and Co. with dena and powna, they were liable to satisfy the decree obtained by the defendants'' ancestor against Gilmore, McKilligan and Co.

3. The Subordinate Judge in the Court of first instance held that plaintiffs claim was barred by limitation; and also that the plaintiffs as assignees of Gilmore, McKilligan and Co. had become liable to pay the amount of the decree, and consequently dismissed the plaintiffs'' suit, and on appeal to this Court the Judges of the Division Bench differed in opinion; Mr. Justice Mitter substantially agreeing with the Court below, and Mr. Justice White deciding that in point of law the plaintiffs were not liable for the amount of the decree, and that they were entitled to an injunction restraining the defendants from taking further proceedings to enforce that decree. The opinion of Mr. Justice White, being the senior Judge, prevailed. An appeal was

then preferred from his decision, and the Appellate Court as originally constituted allowed the appeal, but a review has been granted, and we have now heard the case re-argued. We have already expressed an opinion during the argument that the Agra Bank were not liable to the present defendants for the amount of the decree; that decree, as it seems to us, had nothing to do with the debts of the Indigo Concern; the Agra Bank were in no sense the representatives of Gilmore and Co.; and the Subordinate Judge had no right whatever to substitute the Bank in the place of the original judgment-debtors. The only points upon which we have entertained the least doubts are:

(1) Whether the Agra Bank, having neglected to appear in the execution proceedings, and to urge their objection to the order made by the Court, can now maintain this suit for the purpose of relieving themselves from that order; and

(2) Whether the suit is barred under Article 15 of the Limitation Act, not having been brought within a year from the time when the order was made.

4. We are of opinion that the plaintiffs in this suit are entitled to be relieved from the effect of the order in question. That order was made under such circumstances that the plaintiffs had no means, by any proceedings which they might have taken in the former suit, of setting aside or preventing the defendants from enforcing it; it is true that in the first instance they had an opportunity of objecting to its being made, but inasmuch as they were not in any sense the representatives of the judgment-debtors, they had certainly good reason to suppose that the Judge would not have made such a mistake as to substitute them in their place. Then the order having been once made, they had no right of appeal against it, and they took the only means in their power of negativing its effect,--1st, by objecting to the application which was made by the defendants to enforce it by execution, and 2ndly, by applying to this Court u/s 15 of the Charter Act to set aside the order upon they ground that the Court had no right to make it. Both these attempts having failed, this suit is now the only means by which they can prevent the defendants from making an inequitable use of the order which they have unjustly obtained: the proper object of the suit is not to set aside the order, but to restrain the defendants by injunction from enforcing it. The principle laid down in Daniell''s Chancery Practice, 3rd edition, p. 1218, is this--it is a general rule illustrated by an abundance of cases that "wherever a party by fraud, accident, mistake or otherwise" has obtained an advantage in proceedings in a Court of ordinary jurisdiction, which must necessarily make that Court an instrument of injustice, a Court of Equity will interfere to prevent a manifest wrong by "restraining the party, whose conscience is thus bound, from using the advantage he has gained." And in Drury on Injunctions, p. 96, where the same subject is discussed, it is said, "Upon this principle it seems immaterial where or what the Court is in which the proceedings are sought to be restrained, provided the party sought to be restrained is amenable to the jurisdiction and is capable of being acted on by the process of contempt of Court;

and the extension of the jurisdiction of equity to stay proceedings in other Courts, besides Courts of common law and in foreign Courts as well as in Courts within the jurisdiction of the Court of Chancery, becomes, when considered in reference to the principle stated, as rational and intelligible as it is firmly established in practice." (See also Story''s Equity Jurisprudence, Sections 899 and 900.) Acting upon this principle, we quite agree with Mr. Justice White that although the order of the 3rd of June cannot itself be set aside in this suit, the defendants ought to be restrained by a perpetual injunction from taking any further proceedings upon it as against the plaintiffs. In the view we have taken of this case, there is of course no ground for the objection founded on [97] Article 15 of the Limitation Act. Our judgment will not have the effect of setting aside the order in the former suit. It will only be binding on the defendants personally; it will prevent them from unjustly and inequitably availing themselves of an order which was to some extent the result of their own mistake, and certainly of error on the part of the Court who made it.

5. The appeal will, therefore, be dismissed, and the appellants will pay to the respondents the costs of both hearings.