
(1870) 03 CAL CK 0015

Calcutta High Court

Case No: Regular Appeal No. 87 of 1869

Khudumani Debi

APPELLANT

Vs

Tarini Prasad Ghose

RESPONDENT

Date of Decision: March 7, 1870

Judgement

L.S. Jackson, J.

The present case resembles in many points that of Tarini Prasad Ghost v. Raghab Chandra Bandopadhy² which was decided by us on the 21st of February last, which arose out of another suit brought by Raghab Chandra Bandopadhy² against the same Tarini Prasad Ghose. There was a certain patni talook which was the property of Shasimakhi Barmonya and others. That patni talook was put up for sale for arrears of rent, and purchased by the defendant Tarini Prasad. The ex-patnidars brought a suit in the Judge's Court, and succeeded in getting the sale reversed, on the ground of certain irregularities; but, in the meantime, Tarini Prasad, the purchaser, had himself committed default in the payment of rent, and a re-sale had taken place, at which the patni fetched the price of 98,000 rupees. Out of that sum, an amount of about 37,000 rupees was taken by the zamindar on account of rent due to him, and there remained in the Collectorate the balance of more than 60,000 rupees which stood to the credit of Tarini Prasad. In this state of things, the right, title, and interest accruing to Shashimakhi Barmonya and others, in the patni, previously mentioned, accruing by virtue of the decree by which the sale had been reversed, were put up for sale, and purchased by the plaintiff Khudumani. She, thereupon, obtained from the Civil Court a certificate declaring her to have become the purchaser of that right, title, and interest. This was on the 28th December 1864.

2. It should be mentioned that, previously to this purchase by the plaintiff, the right of Shashimakhi to wasilat of this patni had been sold privately to a certain Benimadhab.

3. The plaintiff, after acquiring these rights, in the first instance, brought a suit for wasilat, excluding the share of Shashimukhi, which had been already recovered by Benimadhab, and obtained a decree which was made the subject of appeal to this Court, and that case was ultimately compromised with the defendant, Tarini Prasad, for the sum of 8,500

rupees; and on the 12th February 1866, the plaintiff brought a separate suit against Tarini Prasad Ghose, which is headed "claim for 43,854 rupees 5 annas and 9 pie, on account of surplus sale proceeds." The plaint set forth the purchase by Tarini Prasad, the default by him, the re-sale, the fact of money standing in deposit in the Collector's office after payment of the zamindar's rent, the purchase by the plaintiff of the rights and interests of Shashimakhi and others, and it sought to establish the right of the plaintiff to recover the share which she had acquired by purchase of that sum in deposit which amounted to rupees 43,854-5-9.

4. It seems that in that suit, certain persons, co-sharers of Shashimakhi, presented petitions in which they contested the right of the plaintiff to recover anything by reason of her purchase, but those objections (it does not appear what investigation took place) were overruled, and the plaintiff got a decree for the greater part of the amount claimed against Tarini Prasad, but without costs, the alleged share purchased by the plaintiff turning out to be incorrectly stated, but costs were awarded against those parties who had intervened; and it seems that she drew out the money for which she had thus obtained a decree.

5. She now brings a third suit against the defendant, alleging that" though the above mentioned defendant was in possession of the patni mehal in question in 1268 (1861), had realized the rents from the darpatnidar, had secured decrees for rent against him, and subsequently reaped the fruits thereof, yet he fraudulently neglected to pay the rents of the zamindar. The said rents, together with interest and costs, have been satisfied from the sale proceeds, as also the Government fees have been deducted from the same. The amount, therefore, thus deducted from the sale proceeds, must be considered as a special loss entailed by the defendant on the real value of the aforesaid talook of Shashimakhi Barmanya, and her co-sharers; for the nature of the right, which, under the order setting aside the first sale, had accrued to the above-mentioned former patnidars for obtaining back possession of the mehal, was changed by the second auction sale consequent on the fraud of the defendant, and eventually resolved into a mere title to obtain the sale proceeds. Consequently, the above-mentioned former patnidars had also a title accrued to them for obtaining from the defendant compensation on account of the deduction which has been made from the above-mentioned sale proceeds, consequent on the fraudulent, unjust, and improper conduct adverted to of the defendant. Therefore, out of rupees 37,961-6-8, which have been deducted from the above mentioned sale proceeds, I have a right, derived in virtue of my auction-purchase, to obtain rupees 6,168-3-1, on account of Shashimakhi's 2 anna 13 ganda 1 cowrie and 1 krant share, as well as interest thereon, rupees 4,441-8, aggregating rupees 10,609-11-9," which, accordingly, the plaintiff claims from the defendant.

6. It appears to me, as I have already remarked, during the argument in this case, that the case bristles, so to say, with difficulties for the plaintiff, who has to meet four or five most cogent reasons against her being entitled to recover anything under this plaint; but the only question which we are really called upon to decide, is, whether the suit is not barred

by section 7 of the Code of Civil Procedure.

7. It appears to me that the suit is so barred. I am inclined to think that the claim to wasilat, as well as the claim to any portion of the sale proceeds, constitute parts of the whole claim which the plaintiff had arising out of the same cause of action. But whether that be so in respect of the wasilat or not, it seems to me abundantly clear, that the plaintiff's claim to the amount sought for in the present suit undoubtedly formed a portion of the sum claimed which comprised the amount recovered in the first suit for surplus proceeds of sale. This sum of rupees 37,000, of which the plaintiff now seeks to recover a part, was actually a portion of the entire sum of money paid in and originally standing in the defendant Tarini Prasad's name on account of the purchase-money of the patni talook. The plaintiff's first suit, as it were, admitted that the original proprietor of the patni could only be entitled to recover that portion of the proceeds of sale which remained over and above after payment of the zamindar's rent; and, accordingly, the plaintiff laid claim in that suit to a portion of that balance alone. There either was a just and righteous claim, to the amount of rupees 37,000 or a portion of it, or there was not. If there was a just claim to that amount, it appears to me that the plaintiff was certainly bound to ask for it in the first suit, and that if she omitted to do so, then, she comes within the meaning of the 7th section of the Act, and having relinquished or omitted to sue for a portion of the claim accruing at that time, her suit for the portion so relinquished or omitted cannot be afterwards entertained.

8. The pleader for the respondent contended, with great ingenuity and force, that the causes of action were distinct. It was stated also that the parties were not the same; and moreover a mode of stating plaintiff's claim was resorted to which was never thought of in the Court of first instance.

9. The plaintiff's claim, now, was stated to be to recover a sum of money which had been improperly paid out of moneys belonging to the plaintiff to satisfy a debt of the defendant. This, it was stated, was the cause of action in the present suit, and was wholly distinct from the cause of action in the previous suit.

10. It appears to me that there is nothing in that contention. It did not, in the least, matter to the plaintiff where the money went or what became of it. Both the money claimed in the present suit and in the first suit, were portions of the amount claimable, whether justly, or not, by the plaintiff under the original purchase. It was stated that the first suit was not against Tarini Prasad, at least that the decree was not against him. It seems to me that this is wholly untenable. Not only is the plaint headed "for the recovery of, or claim for, rupees 43,000," and the suit is one brought against Tarini Prasad alone, but the decree is a decree for the larger portion of that money, and it is directed to be recovered by the plaintiff out of the sum standing in deposit in the Collector's treasury in the name of Tarini Prasad. We have been much pressed with a case of Sabheer Khan v. Kalli Doss Dutt 1 W.R., 199. It is contended that that is a similar case to the present, where a Division Bench of this Court held that section 7, Act VIII of 1869, would not apply; but that, it

appears to me, was an entirely different case from the present. The learned Judges who decided that case, say--the plaintiffs and defendants were formerly co-sharers in a talook which was sold by the zamindar for arrears of rent. The surplus proceeds of the sale, after deduction of the rent of the year for which it was made, and of previous years' rent for the arrears of which the zamindar held decrees, was divided among the co-proprietors. The plaintiff bought his share (two annas) of the talook in the year 1263 (1856) at a sale in execution of a decree." The learned Judges then go on to say "After the sale of the talook, the plaintiff applied to the Collector for payment of his share of the proceeds; but the sale to him being then unregistered, the Collector required him to establish his interest in the proceeds by a civil suit. Accordingly, the plaintiff sued the present defendants, and obtained a decree establishing his right to 2-16ths of the surplus proceeds; such surplus, in fact, then being the surplus remaining after the payment of all arrears due to the zamindar;" and further on they say the only question in the case, is, whether the plaintiffs former suit does not debar him from maintaining the present suit, and again whatever may be the precise extent of the operation of the section, we think it does not exclude the plaintiff from his present action. The former suit was rendered necessary by the requisition of the Collector who properly declined to recognize the plaintiffs right to any share in the fund then in the Collectorate, until he had established his right thereto by suit." That was a suit, therefore, against the co-sharers for the purpose of establishing the right of the plaintiff as between him and them. The judgment goes on to say--"besides his right to 2-16ths in that fund as it then stood (reduced by payment to the zamindar of all arrears), he had a personal claim against the old proprietors, or some of them, in respect of the portion of the rents of the year 1263 (1856) which had been taken from his share of the property. That was clearly and altogether a distinct subject-matter. It was a personal claim which the plaintiff had against his co-sharers, and which he was at liberty to have satisfied out of any fund, or any property of theirs which he could find. This, on the other hand, is a case in which there are two suits brought by the same plaintiff against the same defendant to enforce, as it seems to me, manifest portions of the same claim arising out of the same cause of action. I think, therefore, the defendant was clearly entitled to be protected from such vexatious proceedings, and that the suit ought to have been dismissed on that ground alone; and therefore it is unnecessary to go into other points in the case or to call upon the pleader of the respondent to argue them. I think that upon the ground I have stated, the decision of the lower Court ought to be set aside, and the plaintiff's suit dismissed, with costs.

¹ Act VIII of 1859, s. 7.--"Every suit shall include the whole of the claim arising out of the cause of action, but a plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any Court. If a plaintiff relinquish or omit to sue for any portion of his claim, a suit for the portion so relinquished or omitted shall not afterwards be entertained.

² Before Mr. Justice L.S. Jackson and Mr. Justice Glover.

Tarini Prasad Ghose (Defendants) v. Raghav Chandra Bandopadhyaya (Plaintiff).

The 21st February 1870.

Baboo Hemchandra Banerjee for appellant.

Baboo Ashutash Chatterjee for respondent.

The judgment of the Court was delivered by

Jackson, J.--It seems to me quite unnecessary to go beyond the first two points which have been raised in this appeal.

The plaintiff's claim in this case, as set forth in his plaint, appears to me to be one of the most monstrous that I have ever heard of. On account of default in the payment of rent to the zamindar by several co-sharers, one of whom the present plaintiff claims to represent, the patni talook which they held was put up for sale, and purchased by the defendant, Tarini Prasad Ghose. One of the co-sharers, afterwards, brought a suit to have that sale set aside upon the ground of an informality in the proceedings before sale, and, upon that ground, the sale, eventually, was set aside.

Tarini Prasad, who was directed to pay his own costs, in defending that suit, in consequence of his having maintained that the sale had been regular, appealed against the judgment to this Court; and while that appeal was pending, he committed default in the payment of rent, and the patni was again sold, and purchased by a third party.

Subsequent to that re-sale, the right, title, and interest of one Taramani, who was not a party on the record of the original suit for setting aside the first sale, but who is alleged to have had a certain interest in it, devolved, by her death, upon a relation, named Beharilal. Against that Beharilal, the present plaintiff held a decree, and, in satisfaction of that decree, he caused those rights of Taramani which had so devolved to be put up for sale, and purchased them himself for rupees 6.

It being impossible to execute the decree for setting aside the sale, by recovery of possession of the patni by reason of the second sale, this plaintiff first sued Tarini Prasad and certain other persons, to obtain a fractional part of the surplus proceeds of the second sale, and he seems to have recovered a decree for that. He then sued Tarini Prasad for a similar share of the surplus accruing for the time that Tarini Prasad had possession of the patni, and he recovered that: and now he brings a third suit (on the same cause of action, as it seems to me,) for compensation, valuing the patni at six lacs and ten thousand rupees, and adding thereto, the sum of 37,000 rupees which the zamindar had taken from the Collector's treasury as rent due to him out of the 98,000 rupees for which the patni sold, and adding these two sums together, he claims as his share 18,298 rupees, with interest, as being the balance of the proceeds of his original investment of 6 rupees.

This plaint, it is strange to say, resting entirely, as it does, upon the sale in execution of decree, was filed without the certificate of sale. The certificate of sale is not upon the record. It is not easy for us, therefore, to say, in the absence of that document, whether the plaintiff purchased anything at all, and what he did purchase. It is quite clear, however, that he made this purchase after all right to recover possession of the patni had passed away, and it was no doubt because that right had so passed away that he made his purchase at so incredibly cheap a rate. That being so, it appears to me, that whatever the plaintiff was entitled to recover against these defendants, by reason of that purchase and under the decree already mentioned, constituted one single cause of action, and that he was bound to include in the suit, which he brought upon that cause of action everything to which he was so entitled.

The pleader for the plaintiff, respondent, before us, has shown a good deal of uncertainty as to whether he would deal with the subjects of the two suits, namely, wasilat and compensation, as two distinct things, or as the same things sought for on two different grounds; but whichever way it be, it seems quite immaterial, because it is quite clear that the plaintiff was bound to include in one suit the whole claim which accrued under that sale, whether made up of distinct things, or the same thing under two different names. The plaintiff having omitted, when he brought his first suit against the defendant in this cause of action, to sue for the compensation now claimed, cannot be allowed to maintain a separate suit just now. There would otherwise be no end to the proceedings against the defendant, arising out of this one right. I think this consideration is quite sufficient to exclude the plaintiff from recovering anything in the present suit, and it is therefore unnecessary to go into the other points. The judgment of the lower Court will be reversed, and the plaintiff's suit dismissed with costs.