(1870) 06 CAL CK 0009

Calcutta High Court

Case No: Regular Appeal No. 8 of 1870

Baboo Mohan Lal Bhaya Gyal and Another		APPELLANT
	Vs	
Lachman Lal		RESPONDENT

Date of Decision: June 22, 1870

Final Decision: Allowed

Judgement

Bayley, J.

I am of opinion that the judgment of the lower Court is wrong, and must be reversed. The plaintiffs in this case are the sister''s sons of one Sitaram Meherwar; they sue for certain landed property left by Sitaram; they state that their cause of action arose on the death of Inderkumari Dai, the sister of Sitaram, and was the retention by the defendant of the property, on the allegation of heritage by right of adoption; they say that the defendant in this suit is a stranger, and has no right whatever to the property in dispute.

2. The answer of the defendant is that he is the adopted son and heir to the property of Inderkumari, and that, according to the family custom and usage of Gyals, a widow is competent to make adoption, and the party adopted becomes her and her husband''s heir and successor.

3. The lower Court dismissed the plaintiffs'' suit with costs on the ground that, according to certain precedents of this Court, the provisions of section 2, Act VIII of 1859, applied to this case, and that it could not therefore be heard.

4. The one ground of appeal to which we find it necessary, after argument, to direct attention in this case, is the first, viz., that the Court below has erroneously considered that the present suit is barred by section 2, Act VIII of 1859, inasmuch as the cause of action in the present suit is different from that in the former.

5. The terms of section 2 are these:--"The Civil Courts shall not take cognizance of any suit brought on a cause of action which shall have been heard and determined by a Court of competent jurisdiction, in a former suit between the same parties, or between parties under whom they claim." The general current of decisions has established that the cause of action should be the same; that the case should have been heard and determined by a competent Court; and that the parties must be the same, either actually or by representation.

6. Now the cause of action in this case, as clearly alleged by the plaintiffs, was the retention of certain property, of which the defendant, by averment of his right of inheritance by adoption, prevented the plaintiffs, as sister''s sons, from obtaining possession; and it was clearly stated in the plaint that this the plaintiffs'' cause of action arose on the death of Inderkumari.

7. The former suit, which the lower Court holds to be a bar to the plaintiffs'' present suit, is Regular Appeal, No. 150 of 1864, decided by this Court on the 1st September 1864. In that suit the present plaintiffs sued Inderkumari, alleging that the said Inderkumari, as a childless Hindu widow, had no right to hold the property in suit under the Hindu law.

8. The answer of Inderkumari to that suit was that the circumstance of her being a widow was no bar to her succeeding as heir to the property left by her deceased brother, because she was the heir of her brother while the plaintiffs were mere strangers.

9. The decision of the lower Court in that case was that Inderkumari should retain possession, so long as she lived, of the property left by Sitaram, but that she would be incompetent to waste it, or to do an act calculated to cause its loss, and that, after her death, the plaintiffs should be entitled to possession.

10. From that decision Inderkumari appealed, and it is quite clear, from the following judgment passed by Morgan and Pundit, JJ., that the only objection taken in that case was that the lower Court was wrong in decreeing that, after the death of Inderkumari, the plaintiffs were entitled to possession of the property. The learned Judges say:--"The objection taken to this decree by the appellant is correct. The decree should have been simply a decree of dismissal, instead of which the Court has gone on (at the instance of the plaintiff who has failed to prove any right of suit) to declare the nature of the defendant''s estate, and further to declare that the plaintiff shall be entitled to possession of the property after the widow''s death. It is clear that the proper decree is a decree simply dismissing the plaintiff''s suit. That is the decree which we shall make, allowing this appeal with costs."

11. Some arguments have been attempted to be made to the effect that this decision shows that the plaintiff failed to prove his right of suit, because it was held that, as a sister''s son, he had no right to maintain it; but it must be observed that the sentence is parenthetical, and no one can fail to see that the judgment disposed of the case only on

one point, viz., that the lower Court was wrong in ordering that the plaintiffs were entitled to possession after the death of Inderkumari.

12. Having now put in juxtaposition the cause of action in the suit of 1864 and that of the present suit, it is clear that, in the first case, the plaintiff sued Inderkumari as a childless widow, and thus without any title, and was met by the answer that she had a title as the next of kin of her brother.

13. But in this case, after the death of Inderkumari, the plaintiffs sue, as sisters'' sons, to obtain possession of lands held by the defendant as an alleged adopted son. Besides this, I think that the cause of action may be seen in another point of view, viz., when the plaintiffs sued Inderkumari, there was no question of the right of the adopted son; but in this case, the contest against the plaintiffs'' claim is on the question of the right of the adopted son. Another question which was raised in the second issue of fact, accepted by both the parties, was whether, after the death of Sitaram, Mussamat Inderkumari only held subject to the plaintiffs'' reversionary right, or whether the right of inheritance was declared. Now the right of inheritance which was claimed in the former suit was that of Inderkumari, whereas that claimed in this suit is that of the adopted son. In fact, this issue of the right of the adopted son could not be raised and tried in the former suit at all.

14. Taking then the plaint, the issues, and the judgment in the previous suit, I cannot think that the causes of action in the two suits are the same.

15. We have heard at great length a good deal of argument on matters outside of these decisions, but we do not think that the pleader had any right to go beyond them. The observation was made by the Court during the argument, and I think it right to repeat it here.

16. I have to add one other point which was raised, but not seriously pressed, by the pleader for the respondent, viz., that there was a decision on the merits.

17. I have carefully read the judgment twice over. The whole is in substance one argument put in different ways, and when we read the whole, it is clear that the lower Court begins with section 2, continues its argument on section 2, and ends with holding that section 2 bars the plaintiffs'' suit. But the respondent contends that, by an order of the 4th August 1869, the defendant has been allowed a certificate and declared locum tenens of Mussamat Inderkumari.

18. In the first place, I think, that the plaintiffs'' suit against Inderkumari claiming as heir of her brother is one thing, and that against the adopted son claiming as heir of his mother is another; but irrespective of that, I cannot subscribe to the doctrine that a miscellaneous order granting a certificate, or declaring one person locum tenens of another can, taken by itself, be considered any decision of title on the merits, so as to be adduced as evidence in this case; and when we consider that the whole of the substantial part of the decision of the lower Court has proceeded on the argument of the plea in bar, and that

this remark as to the substitution of the parties appears only as an incidental remark, I have no doubt that the lower Court did not decide the case on the merits.

19. Holding then on the grounds above stated that the decision of the lower Court on the plea in bar is wrong, I would reverse it, and remand the case for re-trial.

Markby, J.

20. I also think that the decision of the Judge is wrong. The point for our decision is very short, viz., whether, in consequence of the provisions of section 2, Act VIII of 1859, the lower Court ought not to take cognizance of this suit.

21. The suit is to recover possession of property which the plaintiff claimed by right of inheritance of one Sitaram.

22. The defendant who is in possession claimed the property as the adopted eon of Inderkumari, who, as sister of Sitaram, had been in possession of the property ever since his death.

23. The Judge of the Court below has raised a variety of issues which he calls issues of law and issues of fact, but only one of those issues of law which he tried (except an unimportant one as to the value) is the one which arises u/s 2.

24. I may observe that section 3 has also been referred to by the lower Court, but that seems to be an error.

25. The Court below has held it right not to take cognizance of this suit, because of the decision in a suit No. 150 of 1864, in which the present plaintiff was also plaintiff, and Inderkumari Dai, the defendant. In that suit this issue was raised: "As alleged by the plaintiffs, is the assertion that the plaintiffs are entitled, under the Hindu law current in the Behar district, to inherit after the death of their maternal uncle, Sitaram, the property left by him, true, or as alleged by defendant, Inderkumari Dai, is the plea that a sister"s son is not entitled, under the Hindu law current in Benares and Mithila, to inherit so long as she is alive, correct?"

26. The Court found upon this issue that the plaintiff was not entitled to obtain possession so long as Inderkumari was alive, but that he was entitled to that property after her death, and gave the plaintiff a declaratory decree to that effect.

27. That decree came up to this Court in regular appeal by the defendant who contended that the suit ought simply to have been dismissed. It appears that that appeal was disposed of on one objection only, and I have not the least doubt that the one objection upon which the appeal was disposed of was that taken in the last ground of the grounds of appeal then filed, viz., that an action merely for the declaration of a contingent right could not lie, and that consequently the decree of the lower Court was illegal, and I am

quite clear that the contention there was that the lower Court, as was obviously the case, ought not to have gone beyond the question, whether the plaintiff"s present right to recover possession from Inderkumari was proved, and that on failure of that proof, it had simply to dismiss the plaintiff"s suit.

28. The question is whether the lower Court is right in saying that that decision bars the cognizance of this suit. I will not attempt to define what is meant by the terms "cause of action" in section 2[3]. I have never yet been able to arrive at any accurate definition of that term either as used in section 2 of the Civil Procedure Code, or in section 1 of the Limitation Act, but I think it clear that at any rate this suit ought to have been tried, and that its cognizance is not barred if the plaintiff can arrive at a result favorable to himself, without bringing himself in direct conflict with the decision in the former suit. I take it that all that the former suit decided was that the plaintiff had no right of present possession in 1864. It seems to me that it was perfectly open to the plaintiff to allege and to prove if he could that since 1864 some new title had accrued to him, and the only question is as to whether he did allege that. If he did, I think he should be allowed an opportunity of proving his allegation. To determine that point, it is not necessary to go beyond the second issue of fact raised in this case. It seems to me that, comparing this issue with the statement made in the plaint, it is clear how the issue arose; for in the plaint, the plaintiff distinctly says that his cause of action arose on the death of Inderkumari, and I have no doubt that one question which the plaintiff intended to raise was that, whatever interest Inderkumari may have had in 1864, that interest was only a limited interest; that it expired at her death; and at her death the estate came to the plaintiff.

29. The simple question is, did the plaintiff allege a new title? If he did, I think it would be perfectly possible to arrive at a decision in favor of the plaintiff, without in the least raising any conflict with the previous decision in 1864. I think therefore that this suit ought to be tried.

30. This decision leaves entirely open the question which may arise, whether independently of section 2, some of the questions which arise in this suit have not been settled between the parties and cannot now be re-opened, but I am at present confining myself entirely to the question u/s 2, viz., whether the cognizance of the suit is barred by reason of the decision in 1864, and I think that, as the plaintiff alleges not the same title which he alleged in that suit, but one which accrued to him since the death of the defendant in that suit, it is not so barred. We think the appellants must get their costs of this appeal.

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[1] Before Mr. Justice Kemp and Mr. Justice Glover

[2] Before Mr. Justice Kemp and Mr. Justice E. Jackson

The 8th March 1869.

Kemp, J.--In this suit the plaintiff, special respondent, sues for confirmation of title and declaration of possession under a deed purchasing the mokurrari rights of the defendant No. 3. Defendants Nos. 1 and 2 alleged that the deed, under which the plaintiff claims, is a fraudulent deed, and that the holding is a khasht-kari one. The Judge holds that the deed under which the plaintiff claims, viz., a mokurrari sanad, has been sufficiently and clearly proved; and that the plea in bar set up by the defendants Nos. 1 and 2, that the suit of the plaintiff is beyond time, was untenable, and that the evidence adduced by defendants Nos. 1 and 2, in support of the several pleas raised by them, was untrustworthy. The decision of the Court of first instance was therefore affirmed. The first point taken in special appeal is that the question of whether the tenure purchased by the plaintiff was a mokurrari tenure or not having been adjudicated upon by the Revenue authorities, no suit will lie in the Civil Court to set aside the decision of the Revenue Court. On this point we find that there was no adjudication in an issue raised in the Act X suit upon the validity of the mokurrari tenure. The decision of the Revenue authorities was conclusive of the cause of action then heard and determined, and nothing further. The issue tried by the Collector was the amount of rent for which the defendant in the Act X suit was liable. The mokurrari potta may have come collaterally in issue in the Act X suit for the purpose of enabling the Court to adjudicate upon the question of the amount of rent due by the defendant in that suit. But there was no decision upon the validity or otherwise of the mokurrari by which the plaintiff is estopped.