(1876) 06 CAL CK 0007

Calcutta High Court

Case No: None

Ramdoyal Khan and Others		APPELLANT
	Vs	
Ajoodhia Ram Khan and Others		RESPONDENT

Date of Decision: June 10, 1876

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Section 139, 141

Citation: (1877) ILR (Cal) 1

Hon'ble Judges: Mitter, J; Markby, J

Bench: Division Bench

Judgement

Markby, J.
In this case the plaintiffs sue to recover, in istemrari maurasi right, possession of an extensive tract of country in Zilla Midnapore. The property is of very large value, and the appeal has been very fully and ably argued.

2. It is necessary to state in what shape the appeal comes before us. The plaint is not at all in the form prescribed in Act VIII of 1859, but, as customary in the mofussil, is a plaint and written statement combined. The plaint was admitted, and the defendants having filed their written statements, the case then came on before the District Judge for settlement of issues. Upon that hearing the District Judge, without taking any evidence, dismissed the suit. Against this decision the plaintiffs appeal.

3. One of the questions which was argued before the District Judge, and which he decided, was whether the plaint disclosed a cause of action. The District Judge held that it did disclose a cause of action. Against this there is no appeal. The District Judge further held that the cause of action arose in 1837, and that the suit was barred by limitation, and against this the plaintiffs appeal.

4. I am not quite sure from the judgment of the District Judge what he considered the plaintiffs'' cause of action to be. There can be no doubt that the plaint does disclose one cause of action, namely that the person through whom the plaintiffs claim was in the year 1837 or thereabouts dispossessed by the auction-purchaser, under an illegal sale for arrears of Government revenue, which was afterwards set aside. But that this was not the sole view put forward in the Court below is clear from the 3rd and the 11th issues.

5. It therefore becomes necessary to consider what the plaintiffs'' cause of action is, and Mr. Kennedy, on behalf of the plaintiffs, now states his case as follows: It is necessary to set it out in full, as the terms of it will, no doubt, form the subject of much discussion hereafter.

6. After stating the facts as above, his Lordship continued: This is the case of the plaintiffs. Besides stating the above facts, the plaintiffs expressly admit that by the proceedings which took place before the Collector, consequent upon the sale for arrears of revenue of 1837, the maurasi tenure, which was then vested in Sreemunto Lall Khan, was put an end to. But they contend that, in consequence of the arrangement between the Rajah, the Government, and the Watsons, Sreemunto Lall Khan had a right as against the Rajah and all persons claiming under him, other than the purchasers for valuable consideration without notice, to be restored to his tenure.

7. This right they contend, the Principal Sudder Ameen, by the decision of July 1848, declared to be suspended, until the expiration of the twenty years'' ijara granted to the Watsons. They further say that this right was a personal equity against the Rajah, which could not be enforced when the ijara expired against the mortgagees of the Rajah because they had no notice of it. They say, moreover, that this equity was destroyed by the sale for arrears of revenue in 1848, but that it arose again when Ajoodhia Ram recovered possession of the estate under the decree of the District Judge of Midnapore, affirmed by the High Court as above mentioned.

8. It was very strenuously argued on the part of the respondents, especially by the learned Counsel who appeared for the Rajah, that the plaintiff''s could not be allowed to put their case in this way; and as it was alleged that to allow them to do this would not only be contrary to law, but also would be a great hardship to the defendants, I think it right to state how in my opinion the matter actually stands.

9. The suit, it must be remembered, was (as already stated) disposed of by the Court below at the first hearing upon the settlement of issues--not a tittle of evidence has yet been taken, and I neither affirm nor deny the truth or otherwise of any single one of the facts above stated. Some of them I believe are not disputed, but many are so. I only state the case as it has been placed before us by the Counsel for the appellants. Moreover, it must be remembered that, by express provision of the Code of Procedure (Section 139), the Court may frame the issues from the allegation of facts which it collects from the oral expression of the parties or their pleaders, notwithstanding any difference between any

allegation of fact and the allegation of fact contained in the written statement (if any) tendered by the parties or their pleaders. The allegations of fact, set out by us above, as relied on by Mr. Kennedy, do not, however, materially differ from the allegations of fact set out in the plaint, except in this that, whereas in the plaint there were allegations that both the revenue sales were set aside, those allegations are now withdrawn, and it is admitted that they were neither of them set aside (The sale of McArthur was set aside). As before pointed out, it is clear from the 3rd and 11th issues that something was said upon this point in the Court below, and it is very doubtful whether these allegations were not then withdrawn; for it is to be observed that, whilst in the District Judge"s statement of the facts of the case in his judgment, no reference is made to either of the sales being set aside, and, whilst the 11th issue raises the question whether the tenure could be revived without the sale of 1837 being set aside, the plaintiff"s did not ask for any issue upon the question whether or no that had been done. But if there were any doubt about this, and as to the application of Section 139 when the case is in the Court of Appeal, there are still the provisions of Section 141 under which "at any time before the decision of the case, the Court may amend the issues or frame additional issues on such terms as to it may seem fit, and all such amendments, as may be necessary for the purpose of determining the real question or controversy between the parties, shall be so made." The mode in which the case is now put on the part of the plaintiffs may render necessary the amending of the issues, or the framing of additional issues, and this can be done at the request of either party, either by this Court or the Court below, should the case eventually go down for trial.

10. There is moreover, in my opinion, ample authority in the decisions of this Court and of the Privy Council to justify the course which we have taken. In Joseph v. Solano 9 B.L.R. 44 Sir Richard Couch thus states what he considered the Privy Council to have done in the case of Mohammed Zahoor Ali Khan v. Mussamnt Thakooranee Butta Koer 11 Moore"s I.A. 468: "The Judicial Committee having held that on the face of the plaint, no relevant case was made against the defendants, but that in a suit, properly framed, if he proved his case, he would be entitled to a decree against one, and considering that a new suit would probably be met by a plea of the act of limitations, allowed the appellant to amend his plaint, so as to make it a plaint against that defendant alone for the recovery of money due on a bond. They considered that the liability on the bond might be tried on the issues already settled, but they would not intimate any opinion upon them and the evidence, and remanded the suit for retrial."

11. In the case of Joseph v. Solano 9 B.L.R. 441itself, the plaintiff sued upon a promissory note; the Court of first instance held that one or two small items in the account, forming the consideration for this note, were illegal, and on that ground dismissed the suit. Sir Richard Couch agreed in this opinion, and considered that, with regard to this note, the plaintiffs" suit had failed and ought to be dismissed; but he allowed the plaint to be amended and an issue to be framed, in order to enquire what amount was due to the plaintiff in respect of the consideration of the note. That is going

far beyond what we propose to do here.

12. It is said that the decision of Eshen Chunder Sing v. Shama Churn Bhutto 11 Moore"s I.A. 7 shows that we ought not to allow the plaintiffs to set up the case upon which they now seek to rely. In my opinion that case has no application whatever to the present. The observations of the Privy Council in that case were based upon the position of this Court when hearing a special appeal, at which stage all consideration of the facts is excluded; and they point out that the learned Judges, whose judgment was under appeal, after all the evidence had been taken and the facts conclusively found, had decided the case upon an assumed state of facts contrary to those stated in the plaint, and devoid not only of allegation, but also of evidence in support of it. That is not what is going to be done here. It is true that the Privy Council say they "desire to take advantage of it" (the particular case before them) "for the purpose of pointing out the absolute necessity that the determination in a cause should be founded upon a case either to be found in the pleadings or involved in or consistent with the case they thereby made" 11 Moore"s I.A. 20; and this has been supposed to prohibit all departure whatsoever from the written allegations of the parties. But we must read this decision of the Privy Council with the other decision already referred to, and which was decided only a few months afterwards. The Privy Council must also have been aware that there were no regular pleadings in this country, and they must also have been aware of the provisions of the Code of Procedure to which I have referred, and I have no doubt, therefore, that by the word " pleadings " in this passage was meant such allegations as the parties put forward at the proper time and in the proper manner; and that the practice that the Privy Council wish to enforce is not an absolutely rigid adherence to the plain and written statements (which the Code declares not to be necessary), but that care should be taken to raise properly on the issues and at the proper time the questions to be tried, so as to give the parties an opportunity of producing their evidence and being heard upon the points upon which the decision of the case ultimately turns. I think therefore that there is no objection to the plaintiffs putting their case as they now seek to put it.

13. It was further objected that no such right to be restored to the tenure as the plaintiff"s now put forward could be claimed; in other words, that the case of the plaintiffs as now put did not disclose any cause of action. I do not, however, think that we could dismiss the suit on this ground. Whether any such right, as the plaintiffs now claim, can be established by law, will be determined hereafter when the facts are fully ascertained.

14. Another objection raised by the respondents to the mode in which the plaintiffs" case is now put was that, if the plaintiffs ever had any such right as that which they now claim, it had been abandoned by the conduct of Sreemunto Lall Khan, particularly by his conduct with reference to the litigation of 1844 in which he was plaintiff. But this I think cannot be determined now. If the suit be tried, this may form one of the issues.

15. Then we come to the question whether the claim of the plaintiffs is on the face of it barred by limitation, and of course in determining this point at this stage of the

proceedings, we must take the case as the plaintiffs choose to put it, provided that they keep within the allegations made.

16. Now, from the mode in which the arrangement between the Rajah, the Government, and the Watsons is stated in the first part of the plaint, I should certainly have thought that any right Sreemunto Khan obtained thereby might have been asserted at once. He could apparently have required the Rajah to recognize his tenure at once. This the Rajah might have done by allowing Sreemunto Khan to stand between himself and the Watsons in respect of the lands covered by his tenure, which would in no way have interfered with their ijara, and would have put him at once in possession of a large income. To this income, if there be anything in his present case at all, it would appear to me that he was then entitled. Instead, however, of asserting this right, Sreemunto Khan chose to join with the Rajah in trying to get rid of the Watsons altogether by asserting that he held his tenure under the Watsons instead of over them--a right which he failed to establish. That, however, is not the view which the plaintiffs now put forward as to the effect of the transactions between the Rajah, the Watsons, and the Government. They contend that, during the ijara of the Watsons, Sreemunto Khan''s rights as mukararridar were entirely suspended, and they go so far as to assert that this point has been finally determined by the decision of the Principal Sudder Ameen. I do not assent to this latter contention. I do not think that this view, which certainly seems to have been in the mind of the Principal Sudder Ameen, was affirmed by the Privy Council. Nor can I help considering it as something extraordinary that the Government should have done this apparent injustice to Sreemunto Khan. I do not see why an arrangement should have been made which benefited the Rajah at his expense when the general desire was to protect the claimants on the zemindari. But I must admit that we are not now in a condition to decide this question, because the documents which show the exact nature of the transaction are not before us. They were apparently filed with the plaint, but were removed from the record by order of the District Judge, and have not been restored, and I cannot therefore undertake to say that the effect of the transaction cannot have been such as the plaintiffs allege and as the Principal Sudder Ameen appears to have thought. I cannot therefore say that the right now set up was capable of being asserted as soon as the Rajah was restored to his zemindari, and that, on this ground, it is barred by limitation.

17. Again, it is contended for the defendants that, if Sreemunto Khan''s interest was suspended during the ijara of the Watsons, it was then in the nature of a remainder or reversion, which fell into possession in 1860, and that the suit was therefore barred within twelve years of that date under the provisions of Clause 141 of Scheduled 2 of Act IX of 1871. But Mr. Kennedy meets this by the assertion that the right of Sreemunto Khan or his representatives was merely a personal equity as against the Rajah, and not anything in the shape of a remainder or a reversionary right to the land itself.

18. Here, again, without the documents before us, it is impossible to say what was the nature of the plaintiff''s'' right, and, if the plaintiffs choose to put their case in this way, I do not think we can then apply this provision of the statute. As far as I can see, if the

plaintiffs succeed in establishing their case in the way in which they now put it, no question upon the statute of limitation really arises at all. They base their present right upon the last recovery of the estate by the Rajah Ajoodhia Ram by the decree of the District Court of Midnapore, affirmed by this Court, and say their cause of action arose when he recovered actual possession of the estate. It is really therefore at the present stage of the inquiry rather a question whether the plaintiffs disclose a cause of action than whether the suit is barred by the statute of limitation. I have already said that I am not prepared to say that the case of the plaintiffs as now put discloses no cause of action. I think sufficient is stated to render it necessary that the suit should be tried.

19. In this view, it is, of course, unnecessary to express any opinion upon the contention of the plaintiffs that, even if they could have brought their suit whilst the Rajah was out of possession, they would be protected by the provisions of Section 19 of Act IX of 1871. But as that point has been argued and may possibly arise again, I may say that, in my opinion, Section 19 does not apply to this case, because I do not think the plaintiff"s allege that they claim through either Abbott or McArthur, by whose fraud they allege that they were kept in ignorance of their rights.

20. The lower Court seems also to have proposed to deal with the 11th and 12th issues, and what I understand to be the opinion of the lower Court on these issues is that the Privy Council had finally decided, on the 3rd February 1854, that the maurasi tenure was destroyed by the revenue sale of 1837 and could not be regained until that sale was set aside by a suit. The Privy Council do undoubtedly say in one passage--"all the right of that party (i.e., Sreemunto Khan,) was merely to institute a suit for the purpose of setting aside the sale which had been made to Government, and the lease which had been granted under that sale." But the view of the case now put forward was certainly not then suggested to the Privy Council and was not adjudicated on. The objection, if it is worth anything, falls rather u/s 7 of the Procedure Code than u/s 2[1] but I do not think it falls under either; for if the view of the transaction between the Government, the Watsons, and the Rajah, which the plaintiff"s now contend for, be correct, their present cause of action was not in existence at all at that time.

21. Lastly, the lower Court held that the plaint ought to be returned upon the ground that it is deficient in the particulars required by Section 26 of Act VIII of 1859. That section requires that "when the claim is for land or for any interest in land, the nature of the tenure or interest must be specified; and if the claim be for land forming part of a village or other known division, or for a house, garden, or the like, its situation shall be described by the setting forth of boundaries, or in such other manner as may suffice for its identification" (Clause 5). Taking this with the form given in Clause 4, it is clear that, when a whole estate bearing a name is sued for, the boundaries need not be given. The plaintiffs here seek to recover two estates "Mouzah Barooah," formerly included in Hudah Tomapara and now included in the map of Hudah Satpatti Jungle Mehal, and "Jungle Mehal, Hudah Satpatti, &c. composed of the turrufs therein comprised, viz., Turruf Roygurh, Turruf Gurwah, Turruf Sabboni, and Turruf Nij Satpatti, and the mouzahs situated within them."

This is the correct translation of the plaint given to us.

22. My learned colleague suggests that the plaintiffs should make their plaint more precise by filing their survey maps of the mouzahs which they claim, and I concur in that view. The plaintiff''s therefore will be ordered to do this.

23. In my opinion, the decree of the lower Court, dismissing the suit, should be set aside, and the suit remanded to the District Judge of Midnapore for trial.

23. The costs hitherto incurred will abide the result.

Mitter, J.

24. I am also of the opinion that the judgment of the lower Court cannot stand. But I desire to record the grounds upon which I think that, at this stage of the case, the lower Court was not right in dismissing the suit as barred by limitation. Upon the other objections raised before us on behalf of the respondents, I entirely concur in the reasons given by my learned colleague in overruling them.

25. The plaintiff puts his cause of action as having arisen when the defendants'' possession was restored. This is admittedly within the time allowed by the law of limitation for bringing a suit of this nature. At this stage we cannot say that according to the case which has been put before us, the ground upon which the plaintiff''s'' case has been made to rest does not constitute a valid cause of action. The contention of the learned Counsel for the plaintiff has been that, according to the arrangement under which the zemindari was restored to the defendant, the plaintiff acquired an equitable right which would entitle him to demand possession of his mokururee property from the Rajah, whenever he happened to be in a position to make good that right. It has been further said that this being a personal equity against the Rajah, enforceable against him or persons deriving their title through him with notice of the existence of this equity, it could not be enforced against the Rajah''s mortgagees, because they had no notice of this equity, and the time for enforcing it against the Rajah arrived only when his possession over the zemindari was established. Without allowing the plaintiff to adduce his evidence, we cannot say that this case, as put before us, cannot succeed, and must be therefore dismissed at this stage. Again, if the facts upon which the plaintiff''s'' case as put before us is based be established, it would be a question requiring serious attention whether the plaintiffs'' claim would not be saved from the operation of the law of limitation under the provisions of Section 29 of Act I of 1845. q.v. supra, 2 cal. 2. But it is not necessary to consider this question now, because, upon the other contention raised by the learned Counsel for the plaintiff, I am not prepared to say at this stage that the cause of action disclosed is not such a valid cause of action that the plaintiffs can successfully maintain this suit upon it.

26. But it has been said that, upon the statements of the plaintiffs'' case, it is evident that the cause of action for the establishment of the plaintiffs'' title accrued at a much earlier

date, and counting from it, the present suit has not been brought within the time allowed by the law of limitation. The contention of the learned Counsel for the respondent upon this point is two-fold. First, that immediately on the restoration of the zemindari to the defendant in the year 1842, the plaintiffs'' cause of action arose; and secondly, if it did not arise then, at any rate, it arose in the year 1860 when the time of the ijara to Messrs. Watson & Co. expired.

27. In the year 1842 when the zemindari was restored, it has now been conclusively established that the plaintiffs were not entitled to possession. In a suit intituted by the father of the plaintiffs, against Messrs. Watson & Co., which went up to the Judicial Committee of the Privy Council, it was held that the zemindari was restored to the defendant, preserving intact the rights which Messrs. Watson & Co. acquired under the then existing revenue sale law. But it has been said that the father of the plaintiffs could assert his right immediately by asking the Rajah to recognize his tenure by allowing him to stand between him (the Rajah) and the ijaradars, Messrs. Watson & Co. This he could not do, because the ijara lease extended over the whole of the jungle mehal, while the plaintiffs'' tenure comprises only a portion of it. He could only ask the Rajah to account to him for his share of the profits derivable from the ijaradari proportionate to the interest he had in the jungle mehal. But if the Rajah failed to account to him in any particular year for his share of the profits, that gave rise to a cause of action for suing the Rajah to recover his share of the profits, a cause of action very different from the one upon which the present suit has been brought. I do not mean to say that under no circumstances non-payment by the Rajah to the plaintiff''s father of his share of the profits could give rise to a cause of action upon which he would be bound to sue within the time allowed by law to enforce the right alleged to have been secured to him by the compromise between Government and the defendant. Facts might be established which would go to show that such a cause of action did accrue. But there is nothing in the statement of the plaintiffs'' case as it was put before the lower Court or before us, from which we can say that this was the case. Furthermore, it appears to me that it has not been admitted by the plaintiffs that the defendant did not account to them for their share of the profits during the continuance of Watson''s ijara lease.

28. Then as regards the other contention. The learned Counsel for the plaintiffs answers it by asserting that their right is of such a nature that it could not be enforced against the Rajah''s mortgagees who had no notice of it. Without an enquiry into the nature of this right, and without an enquiry into the question, whether the mortgagees had or had not such notice, we cannot say that this is not a sufficient answer. Further, as I have already observed before, it is a question which would require serious consideration in this case, whether the provisions of Section 29 of Act I of 1845 would not enure to the benefit of the plaintiffs. Although it has been declared by a competent Court that the revenue sale of the zemindari in 1848 is to be treated as a mere private sale between the defendants on the one hand, and the auction-purchaser and the subsequent transferees on the other hand, it by no means follows that, after the zemindari came back to the defaulting proprietor, the

under-tenants would not be entitled to rely upon Section 29 of the sale law of 1845 for being restored to their tenures.

29. For these reasons I do not think that, at this stage of the case without a trial of it, the plaintiff"s case should be dismissed as barred by limitation.

[1]

[Section 7: Every suit shall include the whole of the claim arising out
action, but a plaintiff may relinquish any porti
Suit to include the whole in order to bring the suit within the jurisdict
claim. Relinquishment of If a plaintiff relinquish or omit to sue for ar
part of claim. claim, a suit for the portion so relinquished c
not afterwards be entertained.

Section 2: The Civil Courts shall not take cognizance of any suit brought
action which shall have been heard and determined
Unless suits previously of competent jurisdiction in a former suit betwe
heard and determined. parties or between parties under whom they claim