

PRIVY COUNCIL

Naba Kumar Hazra

Vs.

Radheshyam Mahish

P.C.A.No.138 of 1929

(Lord Russell Of Killowen, J. Sir George Lowndes and Sir Dinshah Mulla. JJ.)

19.05.1931

JUDGMENT

SIR GEORGE LOWNDES

1. These appeals are the sequel of a case which came before the Board in November 1923, and is reported as *Nagendrabala Dasi v. Dinanath Mahish* The facts are stated in the judgment then delivered, by Lord Dunedin, and it is not necessary to repeat them in detail.
2. The result of that case was that the present appellant was held to be a trustee for the mortgagors of a mortgage decree, and also of certain properties which he had purchased at a sale in execution of the decree, in the name of his wife, the present appellant 2, and was ordered to transfer the decree and the properties to one set of mortgagors, the plaintiffs in the suit, upon their recouping to him the sum he had paid for the purchase of the decree plus the amount of some additional payments which he had made to save the properties from being taken for other executions. There were three other sets of mortgagors who were defendants to the suit; the accounts between them were evidently of a complicated nature, and they offered no objection to a decree in this form.
3. The two suits now before the Board were instituted in 1924 : one by the mortgagor plaintiffs in the former suit, who are the present respondents; and the other by the unsuccessful appellants in the preceding litigation, who are again the appellants to His Majesty in Council. Their Lordships will deal first with the respondents' suit in which the main questions for adjudication arise.
4. At the date when the former suit was instituted the appellants had purchased only

the mortgage decree. The execution purchase of the properties by them was made a few months later during the pendency of the suit. In the trial Court the plaintiffs in that suit (the present respondents) had not, in the first instance, asked for the assignment of the mortgage decree, but only for declaratory relief. They subsequently amended their plaint, and prayed for its assignment to them. This prayer was granted by the trial Judge, but being dissatisfied with his decree they appealed to the High Court, and by their memorandum of appeal specifically asked also for the conveyance of the properties "with necessary accounts." The High Court varied the decree of the lower Court by including in it a direction that the properties should also be conveyed to the respondents, but made no order for accounts, the claim for which seems to have been abandoned, or, at all events, not to have been pressed. The decree of the High Court was affirmed as a result of the appeal to the Board.

5. The present suit of the respondents is based upon the allegation that after the execution purchase of the properties by the appellants the latter were for some time in receipt of the rents and profits for which they have not accounted, and the prayer of the plaint is for account and payment. There was also a claim for damages, but that was abandoned.

6. The Subordinate Judge, by whom the suit was tried held that the matter was *res judicata* by reason of the decision in the previous suit. The High Court, on appeal was of opinion that as the profits claimed had not been received at the time the previous suit was instituted, there could be no question of *res judicata*. They held that the respondents were entitled to the profits which came to the hands of the appellants during their possession of the properties, and ordered an account.

7. Whether or not the second suit was strictly *res judicata* within the provisions of Section 11 Civil Procedure Code and on this question their Lordships must not be taken to express any opinion-it is, they think, plainly barred by Order 2, Rule 2, of the Code. An issue was raised as to this at the trial, but the Subordinate Judge, having regard to his finding, on *res judicata*, thought it unnecessary to decide it, and the High Court did not apparently take it into their consideration.

8. The rule in question is intended to deal with the vice of splitting a cause of action. It provides that suit must include the whole of any claim which the plaintiff is entitled to make in respect of the cause of action on which he sues, and that if he omits (except with the leave of the Court) to sue for any relief to which his cause of action would entitle him, he cannot claim it in a subsequent suit. The object of this salutary rule is

doubtless to prevent multiplicity of suits.

9. The cause of action in the present suit is, their Lordships think, clearly the same as in the previous suit ; the right to the rents and profits vested on the same foundation of facts and law as the right to have the purchases of the decree and of the properties declared to be purchases for the mortgagors.

10. The relief which the respondents claim in the present suit is an account of the rents and profits of these properties received by the appellants after their purchase and before the conveyance to the respondents. It is, their Lordships think equally clear that this relief could have been claimed in the previous suit. The conversion, by the execution purchase during the pendency of the suit, of the rights under the decree into the properties, entitled the respondents to ask in that suit for the conveyance of the properties. They evidently claimed this relief in the trial Court, but the Subordinate Judge thought that as there was no appropriate prayer in the plaint he could not grant it. The respondents went to the High Court on the contention that the Subordinate Judge was wrong, and that he ought to have ordered the conveyance of the properties. The High Court accepted this contention and granted the relief which the respondents so sought. If this was right, and their Lordships have no doubt that it was, it is obvious that the respondents could also have claimed an account of the rents and profits, and not having done so, or having abandoned the claim, they cannot seek this relief in a subsequent suit.

11. Their Lordships also think that the suit must fail upon another ground, viz., that the necessary parties were not before the Court.

12. Under the execution purchase the appellants became, in virtue of the decision in the previous suit, trustees, not for the respondents only, but for them and their co-mortgagors, inasmuch as the properties, though jointly mortgaged, belonged in severalty to the different sets of mortgagors. The respondents did not think fit to join their co-mortgagors as parties to the suit, and issues were raised as to whether the suit was maintainable in this form, and whether the respondents could claim accounts in respect of the properties belonging to their comortgagors. Both these issues were decided by the trial Judge in the negative. No application was made to him to join the comortgagors ; the respondents elected to go to appeal on the contention that he was wrong in so deciding, and that the comortgagors were not necessary parties to the suit. In the judgment of the High Court this particular question is not referred to, and it must, their Lordships think, have been overlooked, as it is clear that the rents and

profits of properties which did not belong to the respondents could not be awarded to them in the absence of the real owners. Indeed, it could hardly be disputed that payment to the respondents would not discharge the appellants in their character of trustees. If the moneys claimed had been received by the appellants after the conveyance of the properties to the respondents, the question might have been different, but this admittedly was not the case.

13. Almost at the conclusion of his, argument counsel for the respondents asked to be allowed an opportunity of joining the comortgagors who are, as he pointed out, already parties to the other suit under appeal, but such a course would necessitate commencement of the proceedings de novo, and their Lordships were unable at this late stage to accede to his request.

14. They are not unmindful in this connexion of the provisions of Order 1, Rule 9, Civil Procedure Code, which lays down that no suit is to be defeated by reason of the non-joinder of parties, but they are unable to hold that it has any application to an appeal before this Board in a case where the defect has been brought to the notice of the party concerned from the very outset of the proceedings, and he has had ample opportunity of remedying it in India.

15. For the reasons given their Lordships think that the respondents' suit must fail, and was properly dismissed by the Subordinate Judge. The other suit now under appeal was brought by the appellants claiming repayment of certain sums which, it was alleged, had been disbursed by them for protection of the properties after the date of the former proceedings.

16. This suit was dismissed by the Subordinate Judge, but on appeal the High Court allowed the appellants to claim credit for any payments they had made in the account which was ordered in the respondents' suit. Their Lordships think that the appellants could hardly be entitled to recover their moneys without accounting for the rents and profits, and on this understanding it was intimated by counsel that if the claim for an account in the respondents' suit failed, their appeal in the other suit would not be pressed. The decree of the Subordinate Judge therefore dismissing the second suit should, in their Lordships' opinion be re affirmed.

17. In the result their Lordships will humbly advise His Majesty that the decree of the High Court in the first suit should be set aside and the two decrees of the Subordinate Judge, whereby both suits were dismissed, should be restored. Under the circumstances their Lordships think that the proper order as to costs will be that the

Mahis respondents pay half the costs of the appellants in the High Court and before the Board.

Order accordingly.

Cases Referred.

AIR 1924 PC 34=81 IC 752=51 IA 24-51 Cal 299 (PC).