CALCUTTA HIGH COURT

Anantaram Bhattacharjee

Vs

Hem Chandra Kar

(Wamlsley, C.J. B Ghose ,J.)

05.01.1923

JUDGMENT

B.B. Ghose, J.

1. This appeal arises out of a suit for recovery of certain sums of money withdrawn by the defendant No. f from the Collectorate which has been decreed by both the Courts below. The defendant No. 1 is the appellant before us. The relevant facts which give rise to the arguments in this Court lie within a narrow compass. The plaintiffs are the owners of a village named Ghola in mukurrari right while the defendant No. 1 and the defendant No. 3 are the owners of a contiguous Mouza called Kan-gore. The defendant No. 3 owns five-sixths of Mouza Kangore and the defendant No. 1 one-sixth share. Some time in 1907 there was a dispute between the defendant No. 3 and the plaintiff's predecessor-in-interest with regard to some lands, one party alleging that the lands appertained to Kangore and the other that they appertained to Ghola. The lands were attached under Section 146 of the Code of Criminal Procedure and remained under attachment up to the year 1916. In consequence, several suits were brought by the defendant No. 3 for establishment of his right to these lands and the dispute between the defendant No. 3 and the plaintiffs terminated in a compromise. In the meantime, the defendant No. 1 withdrew from the Collectorate certain sums of money representing his share of the profits of the lands which had been attached as appertaining to Mouza Kangore on various dates, i. e., nth May 1913, 19th June 1913, 7th January 1916 and 18th January 1916. The plaintiffs commenced this suit on the 16th March 1917 for declaration of their right to the lands, for determination of the northern boundary of their Mouza and also for recovery of the sums withdrawn by the defendant No. 1, on the allegation that the lands which had been attached being in their Mouza Ghola the money in the Collectorate was their money. It has been found by the lower Appellate Court that the lands are situated within village Ghola and that the plaintiffs were entitled to the entire sum in deposit in the Collectorate, and accordingly a decree has been made in favour of the plaintiffs. The defendant No. 1 urges that the decree of the lower Appellate Court is erroneous, first, on the ground that the claim with regard to the sums withdrawn by the defendant No. 1 from the Collectorate on the nth of May and the 19th of June of the year 1913 is barred by limitation, and,

secondly, that the question as regards the title to the land is barred by the rule of res judicata. Certain other objections were raised with regard to the process of reasoning by which the learned Judge came to the conclusion that the lands were included within the plaintiff's Mouza Ghola, but I do not think they can be urged in second appeal.

2. The second point as regards the question of res judicata may be very shortly dealt with. It is based upon this fact: In the year 1906 the defendant No. 1 brought a suit for recovery of his one-sixth share of Mouza Kangore in which the plaintiff's predecessors were impleaded as defendants as those persons also laid a claim to Mouza Kangore. The present defendant No. 1 obtained a decree for what he claimed. It does not appear that any question was raised or decided as regards the lands now in dispute. The learned Judge finds that in that case no question as to the boundaries between the villages was decided and that the suit did not cover any lands of Ghola and also that the plaintin that case does not show that these lands were included in it. The plea of res judicata with regard to Suit No. 193 of 906 does not, therefore, appear to be sustainable.

3. Another argument was raised with regard to this plea of res judicata. The defendant No. 1 brought a suit in 1916 for partition of the lands of Mouza Kangore and the plaintiffs in the present suit were impleaded as defendants. It is said that they objected to the boundaries given in the plaint of Mouza Kangore and the Court found that the boundaries given in the plaint were correct. It, however, appears from the judgment in that suit which has been read over to us, that the question as to what lands were included within those boundaries was left open and it cannot be said that the lands now in dispute were the subject of adjudication in the suit of 1916 in any way. The argument that has been addressed to us on this matter does not also appear to have been raised in either of the Courts below. This plea of the appellant also fails.

4. The question as regards limitation is one of some difficulty. The appellant argues that the suit is governed by Article 62 of the first Schedule to the Limitation Act, as it should be held that this was a suit for money payable by the defendant No. 1 to the plaintiffs for money received by the defendant No. 1 for the plaintiff's use. Apart from authorities, it is difficult to understand how it can be said that the defendant No. 1 when he recieved the money received it for the plaintiff's use. The defendant No. 1 withdrew the money which was in deposit in the Collector's Office as being the profits of the lands of Mouzah Kangore which had been attached under the orders of the Magistrate and he took the money as owner of Kangore. The defendant No. 1 apparently had good reason for believing at the time that the money was really his. It cannot, therefore, be said by any process pf reasoning that the defendant No. 1 received the money for the use of the plaintiff. The defendant No. 1, however, relies upon several cases in support of his contention that, under these circumstances, he should be considered to have received the money for the plaintiffs' use. The principal case on which he relies is the case of *Mahomed Wahib v. Mahomed Ameer*[1] The facts of that case by themselves do not raise much difficulty, because in that case one co-mortgagee received the entire sum of money due to himself and another co-mortgagee from the mortgagor and the other co-mortgagee brought the suit to recover his share of the money. It

may be said in such a case that the defendant had received the money on behalf of and for the benefit of all the co-sharers. But certain observations in the judgments of that case appear to support the contentions of the appellant. The real difficulty seems to be that, in construing the words of Article 62 of the limitation Act, the Courts in some of the cases have considered that that Article refers to all cases where an action for money had and received Would lie at Common Law in England.

5. The Common Law form of action for money had and recieved grew out of the circumstances that at Common Law in England an action in personam is maintainable only on contract or on tort. Where, therefore, an action was not based on tort and the plaintiff was Unable to establish any contract by evidence, it was found necessary to have recourse to a fiction of a promise to pay "implied in law" in order to give relief to the plaintiff and to meet the justice of the ease. The history of this form of action and the reasons which led to its extention are set forth in the case of *Sinclair v. Brougham*[2] (Speech of Lord Haldane, L.C, at pages 415-417, and of Lord Sumner at pages 454-456). It is pointed out by Lord Sumner that this was said to be a "liberal" action, in that it was attended by a minimum of formality, and was elastic and readily h capable of being adapted to new circumstances. There does not appear to be any sufficient reason why this artificial form of action should be imported in this country in order to decide whether a suit would come under Article 62 of the Limitation Act. In India, law arid equity are administered by the same Courts, which are untrammelled by any technical rules as to the form of an action in giving relief to the plaintiff where the defendant has received money which according to the justice of the case he ought to refund The observations of the Judicial Committee in the case of *John v. Dodwell & Co*[3]. furnish an illustration of this view. In my opinion the plain meaning of the words in Article 62 of the Limitation Act should be given effect to without having recourse to any technical rules of English Law regarding forms of action. The plaintiff in this case is equitably entitled to the money as the profits of his lands, which the defendant No. I withdrew although honestly believing that he was entitled to it. In the case of *Gurudas Pyne v. Ram Narain Sahu*[4] their Lordships of the Privy Council observe:-'The suit is to enforce an equitable claim on the part of the plaintiffs to follow the proceeds of their .timber, and, finding them in the hands of the defendant to make him responsible for the amount. That does not fall either within Article 60 (Article No. 62 of. the Act of 1908) or Article 48, but comes within Article 118 (Article 120) as 'a suit for which no period of limitation is provided elsewhere in this Schedule.' "These observations apply to this case, and it falls within Article 120. In my
judgment, therefore, no part of the plaintiff's suit is barred by limitation.

6. The appeal, therefore, fails and is dismissed with costs.

Walmsley, J.

7. I agree.

Cases Referred.

132 C. 527 : 1 C.L.J. 167
2(1914) A.C. 398 : 83 L.J. Ch. 465 : 111 L.T. 1 : 58 S.J. 302 : 30 T.L.R. 315
3(1918) A.C. 563 : 87 L.J.P.C. 92 : 118 L.T. 661 : 34 T.L.R. 261
410 C. 860 : 11 I.A. 59 : 8 Ind. Jur. 322 : 4 Sar. P.C.J. 548 : 5 Ind. Dec. (N.S.) 575 (P.C.)