

# CALCUTTA HIGH COURT

Lakshan Chunder Dey

Vs.

Nikunjamoni Dassi

(Mookerjee and Rankin, JJ.)

08.05.1923

## JUDGMENT

### **Mookerjee , J.**

1. This is an appeal from an order of dismissal made by Mr. Justice Greaves on an application under Order 22, Rule 10, C.P.C.

2. The Plaintiffs sued the Defendants for a declaration of their right to a room which had been built over the porch of another house. The right title and interest of the Plaintiffs were sold on the 22nd November 1919. On the 4th December 1919 terms of settlement between the Plaintiffs and the Defendants were intimated to the Court and the following order was thereupon made : "Mr. Mitter states that this has been settled. He puts in terms of settlement. Let decree be made in terms of settlement signed and put in by Counsel. The sale in favour of the Appellant was duly confirmed, and the sale certificate was granted to him on the 14th June 1920. On the 1st December 1922, he made the present application for leave to be added as a party Plaintiff. Mr. Justice Greaves dismissed the application on the 4th January 1923.

3. Two reasons have been assigned in support of the order, namely, first, that at the time the application was made there was no suit pending and, secondly, that there was such delay on the part of the Petitioner as would justify a dismissal of the application under Order 22, Rule 10, C.P.C.

4. As regards the first point, it has been urged that as the decree had not been drawn up, the suit was not yet dead : *Jotindra Mohan Tagore v. Bejoy Chand Mahtab*<sup>1</sup> and *Madheswar Singh v. Mohamaya Prosad Singh*<sup>2</sup> In the I first case, it was ruled that a suit for partition must be regarded as a pending suit till the final decree had been drawn up and signed. In the second case, it was ruled that a suit must be deemed to be pending so long as it is possible to make an order therein relating to the subject-matter of the litigation. We are of opinion that the suit could not be deemed to be dead at the time when the application was made.

5. As regards the second point, it has been argued very forcibly that there was such delay on the part of the Petitioner that the Court could justly refuse the application. An

<sup>1</sup>[1904] 32 Cal. 483

<sup>2</sup>[1911] 13 C.L.J. 487

applicant who invokes the aid of Rule 10 of Order 22 is not entitled as a matter of right to an order in his favor, regardless of delay or laches. The Court undoubtedly has a discretion in the matter, which must be judicially exercised; *Veeraraghava Reddi v. Bubba Reddi*<sup>3</sup> and *Afzal Begam v. Akbari Khanum*<sup>4</sup> At the same time, we cannot overlook the fact that though there has been delay on the part of the Petitioner, there has been equal delay on the part of his opponent which has rendered possible the application under Rule 10 of Order 22, for some unexplained reason, the Plaintiff has not taken steps to have the decree drawn up yet, though the order was made on the 4th December 1919. "We are not pressed by the decision in *Script Phonography Co. v. Gregg*<sup>5</sup> which was cited on behalf of the respondent. That was a case where a suit would automatically stand dismissed on the failure of the parties to comply with the directions given by the Court, It was ruled that no application could be made as there was no pending suit. Similar observations apply to *King v. Davenport*<sup>6</sup> and *Metcalf v. British Tea Association*<sup>7</sup> Here, as we have stated, the suit must be deemed pending as the final decree had not been drawn up and signed.

6. We have anxiously considered whether, by reason of the delay on the part of the Petitioner, we should decline to interfere with the order made by Mr. Justice Greaves. We have come to the conclusion that in view of the circumstances about to be mentioned that order should be vacated. Sir B.C. Mitter who has appeared on behalf of the Appellant has urged that the only result of the dismissal of the application will be that there will be another suit and probably a protracted litigation. On the other hand, if the Petitioner is allowed to intervene under Order 22, Rule 10 he may be able to prove that the settlement reported to the Court on the 4th December 1919 was not bona fide and that this will be the basis of his attack on the consent order. We are of opinion that this is a matter which may conveniently be investigated in the present proceeding, so as to avoid multiplicity of litigation.

7. The result is that this appeal is allowed and the order made by Mr. Justice Greaves set aside. We grant the application under Order 22, Rule 10 of the Code. But in view of the delay on the part of the Petitioner in making the application under Order 22, Rule 10, we direct that each party do pay his own costs both of this appeal and of the hearing before Mr. Justice Greaves.

<sup>3</sup>[1919] 43 Mad. 37

<sup>5</sup>[1890] 59 L.J. Ch. 406

<sup>7</sup>[1881] 46 L.T. 31

<sup>4</sup>[1915] 37 Al. 326

<sup>6</sup>[1879] 4 Q.B.D. 402