Ganendra Nath Roy Chowdhury Vs. Surja Kanta Roy Chowdhury and ors.

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Court : Kolkata

Decided On : Apr-22-1912

Reported in : 15Ind.Cas.39

Judge : Carnduff and ;N. Chatterjea, JJ.

Appellant : Ganendra Nath Roy Chowdhury

Respondent : Surja Kanta Roy Chowdhury and ors.

Judgement :

Carnduff, J.

1. This appeal arises out of a suit brought by the plaintiff for the recovery of possession from defendant No. 1 of a piece of their chadrasan, or ancestral homestead, which had been allotted to the former on partition.

2. Both the Courts below found that as the plaintiff had transferred the whole of his interest in a number of parcels of land (including this chadrasan) by exchange with defendants Nos. 2 and 3, he had no cause of action. The suit was in consequence dismissed, and, as between the parties as arrayed in it, this was bound to be the result. But the plaintiff had set up the plea that his agreement for exchange with defendants Nos. 2 and 3 had been contingent on the defendant No. 1 giving up possession of the chadrasan, and that, owing to the defendant No. 1's failure to do so, it became and remained inoperative. This plea was rejected by the Court of first instance. In the lower Appellate Court, the plaintiff persisted in it, but prayed, in the alternative, that, if he again failed to substantiate it, he might be allowed even at that stage to transfer defendants Nos. 2 and 3 from the category of defendants to that of plaintiffs so as to overcome the obstacle to a decree in the suit. This prayer was refused.

3. When the second appeal first came before Mr. Justice Coxe sitting alone in this Court, the learned Judge pointed out that, if the plaintiff had made a bona fide mistake in the matter, he might, under Order I Rule 10, have been allowed to do as he proposed. The first Court had found that the exchange had been practically carried into effect, and that the plaintiff had sued, instead of the defendants Nos. 2 and 3, for the benefit of the latter in order to weaken the position of defendant No. 1. It was thought, the learned Munsif believed, that against his co-sharer, the plaintiff, the defendant No. 1 could have no defence; but that against outsiders like defendants Nos. 2 and 3, he might raise the defence, that it was inequitable to thrust strangers into the chadrasan. Whether this idea was well founded or not, I think it is unnecessary to consider in this appeal; but the fact remains that the first Court found that there was collusion on the part of the plaintiff and defendant No. 1 and that the

other defendants were deliberately not joined as plaintiffs. The lower Appellate Court, however, had not dealt with this aspect of the case, which has a direct bearing on the application of Rule 10, Order I, at all. Mr. Justice Coxe, therefore, directed a remand for a finding on the question whether possession of the other lands covered by the deed of exchange between the plaintiff and the defendants Nos. 2 and 3 was actually exchanged, as held by the first Court. If it had been exchanged, he indicated the opinion that the plea of the plaintiff that his title still subsisted could not be regarded as bona fide. If not, that is to say, if the exchange had not been actually made, he thought that the application under Order I, Rule 10, was one which might be granted.

4. The appeal has now come back to us after the remand with the report of the learned, District Judge that the question sent down to him must be answered in the affirmative. If, then, Mr. Justice Coxe's expression of opinion be adhered to now, the appeal is concluded by this finding of fact and must be dismissed.

5. The learned Vakil for the appellant, however, contends that we are not bound by any expression of opinion recorded by Mr. Justice Coxe in his order of remand. The learned Vakil who appears for the respondent argues that we are. As to this, I am, in the first-place, quite clear that Mr. Justice Coxe did not intend by his order of remand to express any final opinion. His remarks seem to me to come, at most, to this that, as then advised, he inclined to the view which I have already indicated. I am equally clear that even if it were otherwise, Mr. Justice Coxe would not himself now be bound by what he laid down in his order of the 17th May, 1911. When a case is remanded in this way, that is to say, under Section 556 of the Code of 1882, which, corresponds with Order XLI, Rule 25, of the present Code, it has been settled, ever since the decision of Boncharee Ghose v. Ainoodden Biswas 24 W.R. 137, and it is obvious from the language of the provision, that it remains pending and undisposed of on the Appellate Court's file. It surely goes without saying that a Judge may yield to conviction and change his mind at any time before he has pronounced judgment, and it seems to me that the contrary view has only to be stated to be exposed as untenable. The view which I take is, I think, supported by Lachman Prasad v. Jamna Prasad 10 A. 162 and Mubarak Husain v. Behari 16 A. 306 and it is also, I think, in consonance with the unreported decision of the Court in the case of Kailash Chandra Guha v. Heyatunnessa Bibi S.A. No. 376 of 1902, which was decided by the late Chief Justice Maclean and Mr. Justice Mitra on the 31st March, 1905.

6. The learned Vakil who appears for the respondent concedes, indeed, that a Judge can ex proprio motu act in this way; but he contends that he cannot be asked to do so, except in review, by either side. It seems to me, however, that there is no force in this contention, and that if a Judge can proceed ex proprio motu, he can be moved in the same direction. I hold, then, that Mr. Justice Coxe would not have been bound by what he had already said, and, a fortiori, this Bench is not bound thereby. We should, of course, be slow to go back upon the view expressed by another Judge in an earlier stage; and, as was observed by Sir John Edge, C.J., in the earlier of the cases to which I have already referred, we are certainly not bound to reconsider any question already dealt with, while I have no hesitation in saying for myself that I would, as a rule, refuse to do so. But, as I have already said, I do not think that Mr. Justice Coxe intended to express any final opinion: I would, therefore, go into the whole question of bona fides on the findings of fact now supplemented and completed by the judgment of the District Judge after the remand.

7. The short point, therefore, which we have to decide, is whether the plaintiff can be

said to have been acting bona fide within the meaning of Rule 10 of Order 1 when he brought the suit himself without joining the defendants Nos. 2 and 3 as plaintiffs. The position here may be thus described. The plaintiff set up a case which, on the findings before us, is false. He denied that his agreement with the defendants Nos. 2 and 3 had ever been carried into effect; whereas it has been found that it was carried into effect as completely as could be. He obtained all the lands which had to be given to him in exchange and he gave possession of all the lands which he had to give in exchange to defendants Nos. 2 and 3 except this small piece of chadrasan. Notwithstanding, he tried to prove in the first Court that the document was wholly inoperative and even in the appellate stage, he adhered to that case and asked that, if he should again fail to substantiate it, he might be allowed the benefit of Order I, Rule 10. The plaintiff had undoubtedly parted with the whole of his interest and whatever his object, it seems to ma to be impossible, in these circumstances, to hold that he made nothing but a bona fide mistake. It is suggested to us that, if we cannot give relief under the first part of Rule 10, Order I, we ought to do so by using the discretionary power conferred on us by the second part. But we clearly cannot help the appellant in this way when the finding as to goad faith is against him.

8. Finally, it is faintly suggested that we should allow the plaintiff even now to withdraw the suit with liberty to bring a fresh action joining the defendants Nos. 2 and 3 as plaintiffs. In my opinion, it is too late to consider that suggestion which is opposed by the respondent.

9. The result is that this appeal must be dismissed with costs.

N. Chatterjea, J.

10. I agree.