

John Boisogomoff Vs. Manmatha Nath Mullick and anr.

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Court : Kolkata

Decided On : Jun-30-1930

Reported in : AIR1931Cal76,129Ind.Cas.860

Appellant : John Boisogomoff

Respondent : Manmatha Nath Mullick and anr.

Judgement :

Rankin, C.J.

1. In this case it appears to me that the suit has been somewhat mishandled and that the proper order is that the suit be dismissed with costs leaving Srimutty Provabati Debi to bring a suit of her own upon proper materials properly pleaded if she is advised to do so. The suit began in 1926 as a suit by a Mr. Mullick. The property in question is a house property in Kyd Street which belonged to one Ram Gopal Banerji and after his death, belonged for the estate of a Hindu widow to Joykali--his widow. Joykali died on 11th February 1920 having in the meantime assigned this property to a lady called Annapurna, who in 1926 gave a 40 years' lease thereof to the defendant. Mr. Mullick brought a claim the foundation of which was carefully concealed in the plaint but which was this: he had taken title under certain mortgages made by Nani Mohan Banerji in the lifetime of Joykali. The suit therefore was a suit by a person who had prima facie no title whatever. He had purported to derive title from a man who had a mere spes successionis. When this suit brought in August 1926 in August 1926 was coming on for trial in or about July

1929, it is very intelligible that the plaintiff's advisors had to do something to reconstruct the suit which stood in manifest peril of being dismissed with costs.

2. In the plaint, there was some curious pleading. Srimutti Provabati Debi had originally been made a defendant. The reason of making her a defendant is explained in the plaint itself and it is this:

Inasmuch as it may be contended that the defendant Srimati Provabati Debi had or has some interest in the said premises (which contention the plaintiff does not admit), the plaintiff has been advised for the sake of greater safety to make her a party defendant to this suit.

3. That means that the plaintiff was making her a party defendant in the suit in order that in her presence his title might be established as good so as to bind her. But the plaint goes on to say:

Defendant 3 has however no objection to a decree for ejectment being passed in favour of the plaintiff against defendants 1 and 2 in respect of the said premises and the plaintiff does not therefore claim any relief against her in this suit.

4. In my judgment this paragraph should have been struck out. It was for Provabati by her written statement to say whether she would object or not object to the plaintiff's claim and whether she objected or not the plaintiff had to show title in himself in order to succeed.

5. When the suit was nearing its appointed end a very curious application was made before the learned Judge. It was not made by the plaintiff but it was made by this defendant Provabati who, up to that time, had not even entered appearance or filed a written statement. The petition which was presented to the Judge recited para. 15 of the plaint and went on to say that so far as the reliefs claimed in the suit are concerned, the defendant Provabati and the plaintiff have not any adverse interest and

in fact she informed the plaintiff that she had no objection to a decree for ejectment being passed against defendants 1 and 2...and that any question regarding title to the said premises as between your petitioner and the plaintiff

might be decided in other proceedings if such dispute was not amicably settled between them.

6. In other words, this defendant had bargained with a man who had no title that he might recover against the trespasser and that afterwards they might, if necessary, have a little fight between themselves. The petition then says that this defendant admits certain paragraphs in the plaint and that

she adopted the rest of the plaint for the purpose of these proceedings

not that they are true or that she will treat them for all purposes as true but that she adopts the rest of the plaint for purposes of these proceedings i.e., merely in so far as they will serve the purpose of ejecting the other defendants. She then sets out her real contentions and in so doing is studiously vague. Clause (a), para. 5, is simply to the effect that the premises devolved upon and became vested in her husband Nani Mohan Banerjee on the death of Joykali. It does not say in what right he became entitled, whether as daughter's son of Ram Gopal or as son and adopted to Shib Kishen, the brother of Ram Gopal, It does not say that Nani was adopted into another family or whether the adoption was good or bad. It does not say whether Nani was a Banerji or a Chatterjee. It then deals with a suit which Nand Mohan brought against his daughter-in-law Promoda Debi and it deals with Nani Mohan having left a will and she (petitioner) herself having been made administratrix pendente lite. She then says that 'it clearly appears that the above named plain-tiff and your petitioner are jointly or severally the owners of the said premises.' and that

your petitioner submits that, for the purpose of disposing of the real issues in this suit, it is not necessary to go into the question of title as between the above named plaintiff and your petitioner.

7. Then she asks to be transferred from. the category of defendant to the category of plaintiff and says that necessary amendments should be made in the cause title and the body of the plaint to that effect. Just as the plaintiff in his plaint answered for her that she had no objection, so she goes on to answer for the plaintiff by saying that

she has been informed that the plaintiff has no objection to your petitioner being joined with him as a co-plaintiff in this suit.

8. On this application the plaintiff does not seem to have even appeared though doubtless it was. made with his full approval and the learned Judge, instead of dismissing it as in my judgment he-should have done, made an order which I am bound to say I cannot quite understand. The order made was to the effect that the lady was to be added as plaintiff and struck out from the list of the defendant with consequent amendment of the plaint. But what was to be put in the body of the plaint by way of a case made by this lady was in no way ascertained or decided and when a few days later the case came on for trial the lady had been transferred from one category to the other; and save for that the plaint remained as before. Nor were any terms whatever imposed as a condition of the order: indeed the costs were made costs in the cause. It was impossible at the hearing to try the suit between the lady and the defendant on this plaint and, the sooner somebody discovered what the case to be tried was, the better. On this, the learned Judge, looking at the affidavits, made an order to the effect that the allegations made by the lady in para. 5 of her petition should be deemed to be inserted somewhere in the middle of Mr. Mullick's original plaint. Nothing was said about the lady's right to adopt the rest of the plaint for the purposes of these proceedings; but it was arranged that somewhere and somehow this para 5 of the petition should be deemed to be part of the plaint and, in the same way, finding that this para. 5 had been answered by an affidavit of the defendant, it was ordered that para. 16 of the defendant's affidavit should be deemed to be part of his written statement. An adjournment was refused and particulars were refused.

9. It is said on behalf of the plaintiffs-respondents that this order cannot now be complained of because it was assented to by the late Mr. B. K. Ghose who was the defendant's counsel. I do not so read the minutes at all. It seems to me that Mr. Ghose was in this position that he could not object to the amendments which had been made by the previous order. That being so, what he wanted was that proper pleadings should be set out. The learned Judge was not willing to give him that. It was suggested that he should go on with the additional para. 5 and, not desirous of being obstructive, apparently Mr. Ghose said that he did not mind that

but that he wanted certain particulars. He particularly wanted to raise an issue: Have the plaintiffs or any of them any title to the property in suit? He wanted to know whether it was the case of the lady that there never had been an adoption or whether her case was that there had been an adoption which was a good adoption--or whether her case was that there had been an invalid adoption in which event he desired to contend that it destroyed Nani Mohan's right in both the families. In the circumstances, certain evidence was given and the learned Judge by his judgment has decreed the suit on Provabati's title. Before him Mullick's title was discreetly dropped altogether. The defendant's documents contained evidence to the effect that there had been an alleged adoption of Nani Mohan into the family of Sib Kissen Banerji. On this the learned Judge takes the view that the adoption has not been proved on behalf of the plaintiff and that it is not admitted as valid on behalf of the defendant; and he says: 'But no admission is sought or required' and, in my judgment, no question based on the adoption arises in this case.' It is typical of the confusion that results when cases are tried with pleadings in an impossible condition. The learned Counsel for the defendant was suddenly asked to do all the work that ought to have been carefully done in writing by making statements to the Court instead of getting an opportunity to lay out his defence properly in a written statement replying to a properly laid case. At one time and at one period of this very trial, the learned Advocate-General for the plaintiffs was undoubtedly running as alternatives both of two cases (1) that Nani Mohan was the reversioner apart from any adoption; and (2) that there had been an adoption under which equally he was a reversioner. Para 5 of the lady's petition is vague and inconclusive on the subject and the learned Judge has found against the defendant without even purporting to decide the question whether there ever was the alleged adoption, whether it was good or bad and whether, if it was bad, it would not take away Nani Mohan's right in both families as Mr. B. K. Ghose contended. I fail in these circumstances, to see that there is any substratum for the decision.

10. On the question of mesne profits and on the question of costs, the learned Judge's judgment is also in my opinion, open to objection. In a very different kind of case--not a case where a man has a hopelessly bad suit and wants to substitute another person's suit upon a different title but in another kind of case it may be

right to let in a new plaintiff in order that the substance of the plaintiff's claim may really be decided but even then it would be only right to take care to make it clear that the new plaintiff should have no greater right than he would have had if he had brought the suit himself at that time and to provide for the defendant's costs making that plaintiff who had no just claim answerable for the defendant's costs. *Aysough v. Bullar* [1908] 41 Ch. D 341. It would have been possible, if the learned Judge had made a careful order of that sort, to say that at least no great harm was done by the order giving leave to amend. But, in this case, not only was no precaution taken in the order giving leave to amend but, when the time came to give judgment in this suit the learned Judge gave mesne profits from May 1924, for more than three years before the date of the amendment and made no provision at all so far as I can see, that Mr. Mullick should pay any costs of the defendant. In my judgment, this case is a very good example of the extreme undesirability of trying questions of title except upon proper pleadings.

11. Adoption was part of an alternative case of the combined plaintiffs after the amendment. It is dropped at the trial. The burden shifted to the defendant to prove: (1) an adoption; (2) its invalidity; (3) its effect to destroy Nani's right in his original family. This last question as to the effect of an invalid adoption must be decided before Provabat's claim can be allowed. That question may or may not be an easy one but it is a very important one and it has to be tried. I do not in any way regard it as no part of the merits when the defendant in an action in ejectment raises a defence that the plaintiff is as much a trespasser as he is. That seems to me to be a very good defence on the merits in an action in ejectment. It is now suggested that we should decide this question as an abstract question of law though the learned Judge has not dealt with the facts at all. I should be very sorry to decide such a matter in such a way. In my judgment we should not now remand this case for a further trial. No doubt one year has been lost by these exceptional proceedings under the order to amend but we should now in effect make the order which the learned Judge should have made at the time the application for amendment was made, namely, to dismiss it with costs and then the only (Other order to make is that which the learned Judge should have made at the trial and that is to dismiss the suit with costs. We make it clear that, if Provabati wants to bring a suit properly framed for ejectment of the defendant on the ground of her

own title, she is entirely at liberty to do so and this decision will not stand in her way. The appeal is allowed with costs. The Receiver will not be entitled to his costs of this appeal.

C.C. Ghose, J.

12. I agree.

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