

indu Bala Dassi and anr. Vs. Lakshmi Narayan Ganguly and ors.

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Court : Kolkata

Decided On : Jul-20-1934

Reported in : AIR1935Cal102,155Ind.Cas.1109

Appellant : indu Bala Dassi and anr.

Respondent : Lakshmi Narayan Ganguly and ors.

Judgement :

ORDER

1. The facts which give rise to these rules are as follows: One Indu Bala instituted Suit No, 86 of 1933 in the Court of the Subordinate Judge of Nadia for recovery of a certain amount of money on certain promissory notes. Another suit, viz., Suit No. 85 of 1933, was instituted by one Gurudasi against the same defendants for recovery of another sum of money on the basis of certain other promissory notes.. The two suits were consolidated. It appears that both the suits were instituted on 29th May 1933. Written statements were filed by the defendants on 19th August 1933. Certain issues were settled by the Court on those pleadings on 30th August 1933. The issues which are relevant for the purposes of the present rules are as follows:

Issue 7. Is the business an ancestral joint Hindu family business? Was it inherited by the sons of Ananda Ganguly? If so, did the business go by the name of Ganguly Brothers?

Issue 8. Did the father of defendants 7 to 14 inherit along with the brothers the karbar of Ananda Ganguly? Did they and thereafter the present defendants form a joint Hindu family? Was their karbar a joint family karbar and carried on in the name of Ganguly Brothers? and

Issue 9. Did Ganesh and Rakhal and on Ganesh's death Lakshmi Narayan and Rakhal and Rakhal's death Lakshmi Narayan act jointly and severally as the karta of the joint family and of the joint family karbar? Did they raise the loans for carrying on the joint family business or for the benefit of the joint family.

2. The hearing of the suit commenced on 7th May 1934. On 10th May 1934 the plaintiff wanted to adduce evidence on these issues. The learned Judge by his order dated 31st May 1934 refused to take evidence on these issues on the objections of the defendants to the reception of this evidence. On the same day the plaintiffs in the two suits filed applications for amendment of the plaints. On 7th June 1934 the learned Judge rejected the plaintiffs' applications for amendment. The Rules Nos. 768 and 769 are directed against the orders of the Subordinate Judge, dated 31st May 1934, in the two suits, and Rules Nos. 192 and 193 are for the revision of the orders of the Subordinate Judge dated 7th June 1934 in the two suits.

3. The learned Subordinate Judge refused to allow the plaintiffs to adduce evidence on the aforesaid issues on the ground that the suits were based on the hand notes only on the allegation that the makers thereof were the kartas of a joint Hindu family and manager of a joint family business and that the loans were taken by the hand notes executed personally in their names for the purpose of their joint family and joint business and that the plaintiff's in their plaints did not make an alternative case for recovery of money lent on the basis of an agreement independently of the promissory notes. It may be stated here that the promissory note dated 24th December 1930 which is included in Schedule (kha) of the plaint in Suit No. 86 of 1933 is not admissible in evidence as it is not properly stamped and that the promissory notes which are mentioned in Schedule (ka) of the plaint in Suit No. 86 and the promissory notes mentioned in the plaint in Suit No. 85 of 1933 were executed by Rakhal Das Ganguli, the predecessor of opposite parties

7-14 and Lakshmi Narayan Ganguli opposite party 1 in their own names and not as kartas of a joint Hindu family or as manager of a joint family business. We are concerned with these promissory notes only in the present rules. The plaints in the two suits have been placed before us by the learned advocates appearing for the petitioner in this case. It seems to us that the plaintiffs' case in substance is that though the managers of the joint family and the joint business executed the promissory notes in their own names, the loans were taken by the joint family through their managers for the purposes of the joint family and joint family business. It is no doubt true that it is not specifically stated in the plaint that the promissory notes were taken as securities for the loans advanced to the joint family.

4. From the allegations in the plaint it cannot be said that by the execution of the promissory notes the debt was entirely extinguished. Taking the plaint in each suit as a whole we are not in a position to say that the suits were simple suits for recovery of money on promissory notes only. If that were so the allegations about the joint family, family necessity for the purposes of business would be meaningless. The impleading of the members of the family other than the executants of the promissory notes, or their heirs would be also meaningless. The statement in para. 10 of the plaint, namely, that the defendants being members of a joint Hindu family and the debts having been incurred to meet the necessity of the said joint family karbar and the joint Hindu family the defendants are liable for the said debts, would be meaningless. We are therefore of opinion that the suits are not simple suits on the promissory notes alone. On the other hand we are inclined to hold that the plaintiffs' suits must be taken as suits on the promissory notes as well as on the original consideration, that is, the debts which are alleged to have been incurred by the managers of the joint family for the purposes of joint family and joint business. In our opinion such a course is open to the plaintiffs. This view is supported by the decision of Their Lordships of the Judicial Committee in the case of *Sadasuk Janki Das v. Sir Kishan Pershad* 1918 PC 146. The promissory notes in question were no doubt signed by the kartas of the joint family in their own names and not as kartas of the joint family or as manager of joint family business. But the promissory notes being signed by the kartas in their own names is equally consistent either with a borrowing by the kartas for their own

individual purpose or a borrowing for the purposes of the joint family and the joint family business: see Abdul Majid Khan v. Saraswatbai 1934 PC 4. This view of ours is further confirmed by the fact that the defendants did not raise any objection when the issues mentioned above were framed by the Court. The issues show the real nature of controversy between the parties, as indicated in the pleadings. It is not disputed that those issues relate to the plaintiffs' alternative claim on the original consideration, i.e., the debts for which the promissory notes are alleged to have been taken. It cannot therefore be said that when the plaintiff wanted to adduce evidence relating to those issues, the defendants were taken by surprise. It is not disputed before us that the evidence which the plaintiff wanted to adduce and which the learned Judge has rejected is relevant to the said issues. We are therefore of opinion that the learned Subordinate Judge was not justified in rejecting the evidence which was offered by the plaintiffs. We are further of opinion that in this case the learned Judge was not justified in rejecting the applications for amendment of the plaints: (1) The reasons given by the learned Judge in support of his order are: (a) that

the plaints are nothing but on the foot of the pro-notes and the suits are only for recovery of money borrowed by executing those pro-notes.

5. (b) that

the descriptions of the makers of the hand-notes as kartas and the recitals or the purpose of the loan are immaterial and cannot make the suits other than suits on hand-notes.

(c) That there is no allegation of any obligation in the plaint apart from the obligation created by the hand-note.

6. Under Order 6, Rule 17, Civil P.C., the Court may at any stage of the proceedings allow either party to amend his pleadings in such a manner and on such terms as may be just and all such amendments shall be made as may be necessary for the purposes of determining the real question in controversy between the parties. The learned Judge has observed that the issues mentioned above were wrongly framed for want of discussion of the whole law on the subject.'

Therefore it is clear that plaintiffs' claim on the original consideration, i.e., debts for which the promissory notes were taken was already put into issue. Plaintiffs are therefore justified in thinking that the original plaintiffs contained the alternative claim on the original consideration. When objection was taken by the defendants to the trial of those issues at the hearing the plaintiffs applied for amendment of the plaint in order that there might not be any dispute in future as regards the real nature of plaintiffs' claim in the suits, i.e., as regards the real nature of controversy between the parties. If the learned Judge's view of the matter, namely that the suits are only suits on the promissory notes be correct, then this is a fit case, in which the learned Subordinate Judge should have given leave to the plaintiff's to amend the plaints as prayed for by them.

7. It was however contended by the learned Counsel for the opposite parties that the implied promise to pay the original debts was merged in the express promise to pay as contained in the promissory notes and consequently the alternative claim, namely, the claim on the original debt alleged to have been contracted by the kartas of the joint family for the purposes of joint family and joint business, is not sustainable in law. In the present proceeding it is not necessary to determine whether this contention is valid or not. It is enough to point out at the stage that

where there is a loan independently of the note the creditor is not debarred from suing on the original cause of action by the fact that the cause of action arose out of the same transaction in the course of which the promissory note was 'executed': see Abdul Rabbani V. Shyamlal (1930) 128 IC 194.

8. We are at the present stage of the case concerned only with the question whether the application for amendment should be allowed or not. It has been already pointed out that it is open to the plaintiffs to sue on the promissory notes and alternatively upon the consideration *Sadasuk Janki Das v. Sir Kishan Pershad* 1918 PC 146, and that the promissory notes being signed by the Kartas in their own names is not inconsistent with borrowing for the purposes of the joint family and the joint family business *Abdul Majid Khan v. Saraswatbai* 1934 PC 4. Whether the plaintiffs will ultimately succeed on the amended plaint or not is entirely a different matter and the learned Subordinate Judge will have to come to

a decision on the matter after taking the evidence which the parties may think proper to adduce before him. For the purposes of the present Rule it is enough to say that the entire controversy between the parties regarding plaintiffs' claim on the transactions in question should be adjudicated upon in the present litigation. It is also urged by the learned Counsel for the opposite parties that if the amendment be allowed, the opposite parties will be deprived of a valuable right which they have acquired by virtue of the operation of the law of limitation. If we are right in our view that the alternative claim on the original debt, that is, the original consideration, was already included in the plaints the question of limitation does not arise. If however by the amendment a new claim is being added, the amendment in this case should be allowed in view of the exceptional circumstances of this case, which we have already mentioned. It is however contended by the learned Counsel for the opposite parties that even if the learned Subordinate Judge is wrong this Court has no power to revise his orders under Section 115, Civil P.C. There has been a good deal of controversy as to the exact meaning of the words 'acted in the exercise of its jurisdiction illegally or with material irregularity' as used in Section 115, Clause (c) of the Code. In the case of *Rajah Amir Hossain Khan v. Sheo Baksh Singh* (1885) 11 Cal 6, their Lordships of the Judicial Committee have observed as follows:

It appears that they (i.e., the Judges of the lower Courts) had perfect jurisdiction to decide the question which was before them and they did decide it. Whether they decided it rightly or wrongly, they had jurisdiction to decide the case; and even if they decided wrongly, they did not exercise their jurisdiction illegally or with material irregularity.

9. Again in the case of *Balkrishna Udayar v. Vasudeva Aiyar* 1917 PC 71, their Lordships of the Judicial Committee have observed that:

Section 115 applies to jurisdiction alone, the irregular exercise or non-exercise of it, or the illegal assumption of it. The section is not directed against conclusions of law or fact in which the question of jurisdiction is not involved.

10. In case of *Umed Mal v. Chand Mal* 1926 PC 142, the Judicial Committee has however held that if a Court decide a case in the absence of a necessary party,

that is material irregularity within the meaning of Section 115, Civil P.C. Now if the third clause of Section 115 of the Code is not intended to have a meaning distinct from that of the other two clauses it would not have been added to Section 622 of the Code of 1877 by the Amending Act of Rajah Amir Hossain Khan v. Sheo Baksh Singh (1885) 11 Cal 6, simply decided what 'illegally' or 'material irregularity' is not. From Balkrishna Udayar v. Vasudeva Aiyar 1917 PC 71 it is not also easy to deduce any clear rule of construction of the third clause of Section 115 except the negative one that wrong conclusions of law or fact in which the question of jurisdiction is not involved are not included in it:

All cases of 'acting illegally' are cases of error of law, though the converse is far from true. Any error in law which amounts to a usurpation of authority in the act done by the Court comes within Clause (c) if it is not already within Clause (a). In the broad sense of the word no Court has ever jurisdiction to make an order what in fact in law is wrong: see Hindley v. Joy Narayan 1920 Cal 305, Umed Mal v. Chand Mal 1926 PC 142,

seems to imply that Clause (c) may be applied when failure of justice is due to error or other defects of procedure. But does the said clause refer only to defects of procedure? Is it confined to error in the method or manner of trial only?

Jurisdiction to try a suit does not mean jurisdiction to do anything whatever by order made in that suit; if it did an exception for material error in procedure strictly so-called would be almost ludicrous: Hindley v. Joy Narayan 1920 Cal 305.

11. Again the words 'illegally' and 'material irregularity' cannot have the same meaning. If the words 'acted with material irregularity' refer to irregularity in procedure what meaning is to be attached to the words 'acted illegally'? In view of these difficulties it has been laid down in some cases by this Court that Clause (c) has been advisedly left in indefinite language in order to empower this Court to interfere and correct gross and palpable errors of Subordinate Courts for the ends of justice: see Mathura Nath Sarkar v. Umesh Chandra (1897) 1 CWN 626, Raghu Nath Gujrati v. Rai Chatraput Singh (1897) 1 CWN 633; Jogunnessa Bibi v. Satish Chandra 1924 Cal 633. Another branch of the argument of the learned Counsel for the opposite party in this connexion is that even if this Court has power under

Section 115 to revise the orders of the Subordinate Judge, the orders under discussion in these Rules are merely interlocutory orders and consequently they cannot be revised by this Court at this stage. It is argued that Section 115 of the Code is confined to a case which has been decided; in other words to a case where the rights of the parties have been determined. It is contended by the learned Counsel that as the rights of the parties have not yet been determined this Court cannot interfere at this stage. Reliance was placed in support of this contention on the observations of Woodroffe, J., in the case of *Chandi v. Kripal* (1911) 10 IC 308. So far as this Court is concerned it can be said to be now fairly established that this Court will not interfere with interlocutory orders unless an irreparable injury will be done and a miscarriage will inevitably issue if this Court holds its hand. If however irreparable injury would be caused to one of the litigants if the matter was not set right,

this Court ought to intervene in the current litigation and disturb the normal progress of a case by revising an interlocutory order that has been passed by a Subordinate Court, see *Salam Chand v. Bhagwan Das* 1926 Cal 1149.

12. It was however contended on behalf of the opposite parties that as these orders can be challenged in the appeal from the decree which may be passed in that suit, this Court should not interfere at this stage. Reliance was placed for this contention also on the decision of this Court in the case of *Chandi v. Kripal* (1911) 10 IC 308 cited above. It is true that in that case Woodroffe, J., observed that interlocutory orders did not come within the scope of Section 115 but the learned Judges who decided that case were of opinion that this Court would have power under Section 15, Charter Act, to interfere and to set aside the order of the Subordinate Courts. It is however argued that Order 6, Rule 17 of the Code gives a discretion to the Court either to allow or reject the prayer for amendment and that the Court is not bound to allow the amendment. But it has been pointed out by this Court in the case of *Loke Nath Mukherjee v. Abani Nath Mukherjee* 1934 Cal 102 that

ordinarily the discretion of a judicial officer will not be reviewed by this Court in revision. But it is impossible to lay down a hard and fast rule. That in no instances

will the discretion exercised by the judicial officer be reviewed either under Section 115 of the Code or Section 107, Government of India Act, is under the combined operation of the two sections

13. Again there is a respectable body of authority at any rate in this Court in support of the view that under Section 107, Government of India Act (Section 15 of the Charter), this Court can interfere where irreparable injury will be done to one of the litigants or where there will be a failure of justice if the matter is not set right: *Gobind Mohun Doss v. Kunja Behary Doss* (1909) 4 IC 380, *Amjad Ali v. Ali Hossain Johar* (1910) 6 IC 574, *Charu Chunder Dutt v. Sarat Chunder Singh* (1910) 8 IC 87, *Loke Nath Mukherjee v. Abani Nath Mukherjee* 1934 Cal 102.

14. The point for determination therefore is whether in this particular case any irreparable loss will be caused to the plaintiff if we do not interfere at this stage. It appears from para. 22 of the petition of the plaintiffs to this Court that one Pran Krishna Mallik, who is aged about 70 and who was the principal officer of the defendants and is therefore in a position to prove the account books which have now been produced in Court in spite of the objection of the opposite parties, has recovered recently from a serious attack of double pneumonia and that if his evidence be not taken now, it may be that, if the Court of appeal ultimately be of opinion that the plaintiffs were entitled to proceed with, their claim on the original consideration in this litigation, the plaintiffs may not then get the benefit of the evidence of this witness having regard to his old age and the precarious condition of his health. In the counter-affidavit which was filed by the opposite party the statement that the said witness is aged about 70 was not denied and the answer to the plaintiffs' allegation that the witness had recently suffered from double pneumonia and was in a precarious condition of health is only evasive. In these circumstances we are of opinion that if this evidence be not taken now and if the witness dies in the meantime, the plaintiff will suffer irreparable loss. Further if the order of the learned Subordinate Judge be now allowed to stand and if the Court of appeal ultimately comes to the conclusion that the orders of the learned Judge are wrong, the suits will have to be remanded again to the trial Court for evidence and litigation will be protracted. If, on the other hand, this evidence be taken now and the Court of appeal ultimately holds that the evidence is irrelevant, the appeal

Court would reject that evidence and proceed to hear the cases on the remaining portion of the evidence. It is therefore in our opinion desirable in the interest of the parties that this evidence should be taken at this stage so that there may not be any risk of a remand in future by the appellate Court. We are therefore of opinion that in view of the peculiar facts and circumstances of this case we should interfere in this matter.

15. We accordingly make the rules absolute, and set aside the orders of the learned Subordinate Judge against which these rules were directed. The learned Subordinate Judge is directed to amend the complaints as prayed for by the petitioners, to treat the suits not only as suits for recovery of money on promissory notes but also as suits for recovery of money on the original consideration and then to proceed to take evidence and decide the suits on that footing. The defendants will have an opportunity of filing additional written statement and raising additional issues, if they so like. Costs in these rules will abide the result, hearing-fee being assessed at ten gold mohurs.

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