

In Re: Solomon

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Court : Kolkata

Decided On : Jul-16-1885

Reported in : (1885)ILR11Cal767

Judge : Norris, J.

Appellant : In Re: Solomon;gopaul Chunder Lahiry and anr.

Respondent : ;solomon

Judgement :

Norris, J.

1. In this case Mr. Bonnerjee obtained a rule on behalf of the defendant, calling upon the plaintiff to show cause why I should not grant a review of judgment.
2. The suit originally came on for hearing on the 29th January last. Mr. Phillips and Mr. Hill appeared for the Plaintiff'. Mr. Bonnerjee and Mr. Gasper for the Defendant.
3. Mr. Phillips opened the plaintiff's case and stated that his client's title depended upon a conveyance, dated 19th March 1883, which he said conveyed the whole of the premises, 43, Ram Mohun Ghose's Lane, to his client, and suggested that the only issue to be tried was 'is the plaintiff claiming under Khoja Abdool Aziz' entitled to possession

4. Mr. Bonnerjee asked me to try certain other issues which he named, and I adjourned the case until the 5th February to consider whether I ought to allow those issues to be raised.

5. On 5th February I decided against Mr. Bonnerjee, and the trial proceeded.

6. Mr. Hill produced the conveyance of 19th March 1883, and its execution by Khoja Abdool Aziz was proved by Mr. Wheeler. Mr. Hill thereupon tendered the conveyance, and it was admitted.

7. The learned Counsel for the defendant did not object to the conveyance, nor did either of them read it, or ask that the officer of the Court should read it; they relied upon the accuracy of Mr. Phillips' statement that it conveyed the whole premises to his client. I also relied upon that statement, and on that assumption the trial proceeded and ended in a judgment for the plaintiff.

8. On the 26th February Bibi Solomon filed a plaint against Gopaul Chunder Lahiry praying--

(a) That it may be declared that the transaction evidenced by the said Indenture of the 19th day of March 1883 is invalid and inoperative, or that at all events the same is fraudulent and void as against her, and that the defendant, Gopaul Chunder Lahiry, is a trustee for her in respect to any right or interest he may have acquired thereunder.

(b) That it may also be declared that the plaintiff is entitled to attach, levy and bring to sale in execution of the said decree of the 29th day of March 1884 the said property and to reside in the said rooms until the sale thereof.

(c) That the defendant Gopaul Chunder Lahiry may be restrained by and under the order and injunction of this Honourable Court from executing his said decree of the 5th day of February 1885 against the plaintiff pending the final determination of the suit.

(d) That the proceedings in the matter of the said claim of the defendant Gopaul Chunder Lahiry may be stayed pending the final determination of this suit.

(e) That should the said claim be allowed pending the final determination of this suit, then this suit may be taken as one to establish the plaintiff's right to the said property.

(f) That a receiver may be appointed to take charge of the said property pending the final determination of this suit.

(g) That the plaintiff may have such further or other relief as the nature of the case may require.

9. On 2nd March notice was issued upon the plaintiff of an application that the decree which I had given him should not be executed until the suit filed by the defendant had been disposed of.

10. That application was heard by Wilson, J., on 30th and 31st March. Mr. Bonnerjee and Mr. Gasper appeared in support of it. Mr. Hill and Mr. O'Kinealy opposed it.

11. Shortly before Mr. Bonnerjee rose to reply to the arguments of Mr. Hill and Mr. O'Kinealy, he called for the conveyance, read it, and discovered, as he contended, that it was clear, on the face of it, that it did not pass the whole estate in the premises to the plaintiff, but only seventeen-twenty-fourths thereof, and he relied on this fact in his reply.

12. It was not until Mr. Bonnerjee read the conveyance on 31st March that it was discovered that Mr. Phillips had incorrectly stated its purport on 29th January. On the 31st March the defendants' solicitors were advised to make an application to me for review of judgment. I did not sit on 1st April; the Easter Vacation commenced on 2nd April, and application for a rule nisi was made to me on there-opening of the Court on 9th April, which I granted.

13. The conveyance of 19th March 1883 was filed with the plaint and disclosed in the plaintiff's list of documents, but inspection thereof refused on the ground that it formed part of the plaintiff's title and was therefore privileged.

14. On 24th June and 4th July Mr. Hill showed cause against the rule, and on the latter day Mr. Gasper argued in support of it.

15. After hearing Mr. Hill I felt satisfied that the facts disclosed 'sufficient reason' for my granting the review; but I doubted whether the affidavit upon which the rule had been obtained disclosed 'sufficient cause' for not making the application within the period prescribed by the Statute of Limitation, viz., twenty days from the date of the decree.

16. Anyone reading the affidavit would, I think, come to the conclusion that it meant to convey the impression that the only two opportunities that the defendants' advisers had of reading the conveyance were on its production before me on 29th January and on its production before Wilson, J., on 31st March, and I am bound to say I was both surprised and pained to find that this was not so, and to learn from the managing clerk to the defendants' solicitors that he had supplied a copy of it to the learned Counsel who prepared the written statement, and had briefed a copy to both his counsel at the trial.

17. These facts to which I have last alluded cause the question as to whether there is 'sufficient reason' for granting the review to assume a very different complexion from what it bore at the close of Mr. Hill's argument; and I have considerable hesitation in holding that there is 'sufficient reason'; but I think those words should receive a liberal construction, that they should be construed so as to do substantial justice to the parties, and as it appears to me that Mr. Gasper's construction of the conveyance is the correct one, I think I ought to grant the review provided the defendant has shown 'sufficient cause' for not coming here within twenty days after the date of the decree.

18. This is a difficult question. At the hearing, I thought the case of *Anderson v. Corporation of Calcutta* I.L.R. 10 Cal. 445 was fatal to the defendant. I am bound by that decision, (though I must respectfully say that I could not arrive at the same conclusion as the learned Judge who decided it arrived at), and unless I can clearly distinguish it from the present case, I must discharge this rule.

19. In that case Anderson had brought an action against the Corporation of Calcutta and the Secretary of State for India; he obtained a decree against the Corporation, and his suit against the Secretary of State was dismissed with costs, and those costs were added to the costs he was to receive from the Corporation; the decree in that case was made on 27th June 1883; the Corporation gave notice of appeal on 20th July 1883, not making the Secretary of State a party respondent; the plaintiff's attorney, at the time he was served with the notice of appeal, did not observe that the Secretary of State was not a party respondent, and first noticed it on 8th January 1884, and on 22nd January he applied for leave to file a cross-appeal against the Secretary of State. A rule nisi was granted, and after argument discharged.

20. In that case the plaintiff's attorney no doubt ought at once to have noticed that the Secretary of State was not a party respondent; in this case the defendant's advisers ought to have read the conveyance, but Anderson's attorney was not misled by some one else, in good faith, inaccurately stating the purport of the notice to him. Moreover, he waited for a fortnight after the discovery of the omission before he made his application; here the defendant has applied to the Court at the earliest available opportunity after discovery of the mistake; there has been no interval of negligent inactivity on the part of the defendants' advisers since the discovery of the mistake. On these grounds, without putting away the effect of the judgment in *Anderson v. Corporation of Calcutta* I.L.R. 10 Cal. 445 I think the cases may be distinguished.

21. In connection with this object, and as affording a guide to the principles that should guide a Judge in dealing with such a case, I would refer to the judgment of Bowen, L.J. in *re Manchester Economic Building Society* L.R. 24 Ch. D. 488 (503). 'It seems to me that to attempt in any one case to lay down a set of iron rails on which the discretion of the Court of Appeal was always to be obliged to run, and to say that the leave of the Court would never be granted, except in certain special circumstances, and in a defined way, would be very perilous. The rules leave the matter at large. Of course it is to be exercised in the way in which judicial power and discretion ought to be exercised, upon principles which are well understood, but which had better not be defined in a case except so far as may be necessary

for the decision of that case, otherwise there is the great danger, as it seems to me, of crystallizing into a rigid definition that judicial power and discretion which the Legislature and the rules of the Court have for the best of all reasons left undetermined and unfettered: and *Pritchard v. Pritchard* L.R. 55 is also somewhat in point.

22. Upon the whole then, though not without misgiving, I must make the rule absolute; but under the circumstances the defendant must pay the costs.

23. The plaintiff to have all his costs of, and incidental to, the rule, and the payment of these costs to be a condition precedent to the hearing of the 14 Q.B.D. review.

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