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Court : Kolkata

Decided On : Aug-15-1919

Reported in : 54Ind.Cas.636

Judge : Asutosh Mookerjee and ;Panton, JJ.

Appellant : Debendra Narayan Singh

Respondent : Narendra Narayan Singh and ors.

Judgement :

1. The litigation which has culminated in this appeal was commenced by the plaintiff respondent for adjustment of accounts, Tarini Charan Singh, the father of the plaintiff, died on the 5th November 1899. On the 4th March 1881 he had made a testamentary disposition of his properties and had nominated his wife, Rangini Dasi, the sixth defendant in this suit, as executrix to his Will. On the 27th April 1901 the widow obtained probate and took possession of the estate as executrix. Differences arose, however, amongst the members of the family, which consisted of the three sons of the testator (the plaintiff, Narendra Narayan, the first defendant, Debendra Narayan, and Surendra Narayan, the father of defendants Nos. 2-5) and a daughter, Basanta Kumari. The result was that in 1903, the present defendant, Debendra Narayan, instituted a suit for construction of the Will and for administration of the estate. The suit was decreed in the Court of first instance on the 28th July 1905. On appeal by Debendra Narayan a consent decree was made in this Court on the 18th March 1906. Under that decree

Debendra Narayan became entitled to recover a sum of Rs. 15 000 from the estate and for that purpose to take possession for a period of five years. The decree farther directed that upon the expiry of this period, the estate would be held in equal shares by Debendra Narayan, Narendra Narayan and the sons of Surendra Narayan, who hid died meanwhile. Debendra Narayan took possession of the estate under this decree on the 29th October 1906. Narendra Narayan instituted the present suit on the 11th March 1909 for recovery of possession of his one-third share, on the allegation that Debendra Narayan had already realised more than his dues under the decree. Debendra Narayan was made the first defendant, the four sons of Surendra Narayan were made defendants Nos. 2 to 5 and Rangini Dasi was joined as defendant No. 6. On the 12th April 1911 the Subordinate Judge decreed the suit in the following terms:

It is ordered that the plaintiff's right be declared to one-third of the disputed properties and he be given possession of the one-third share jointly with defendants Nos. 1-5; accounts will be taken to ascertain if the defendant, No. 1 has taken more than his own dues during the period of his possession; the plaintiff to get from defendant No. 1 the amount which he may be found to have taken in excess of his one-third share. Order as to costs to be passed after the decree is made final; the first part of the decree to be final and the second part preliminary. Defendant No. 1 to file accounts up to the date of the plaintiff's taking possession of the share decreed to him. It is further decreed that the plaintiff do take possession of the share decreed to him within 15 days from to-day, otherwise the second part of the decree about account to be null and void.

2. The plaintiff accordingly took possession on the 21st, 22 ad and 23rd April 1911. The mode of delivery of possession and the litigation which resulted therefrom will be found narrated in full in the judgment of this Court in Debendra Narayan Singh v. Narendra Narayan Singh 51 Ind. Cas. 976 : 29 C.L.J. 504 : 23 C.W.N. 900; Debendra Narayan appealed against the preliminary decree for account. That appeal was dismissed by this Court on the 9th May 1913. Daring the pendency of the appeal in this Court, the work of the Commissioner, who had been appointed by the Subordinate Judge to take the accounts, was suspended. On the 4th December 1913 the Commissioner was directed to resume his work

and to investigate the accounts in suit, that is, from the 29th October 1906 (the date when Debendra Narayan took possession under the decree in his suit) to the 20th April 1911 (when Narendra Narayan obtained possession under the decree in this suit). Considerable difficulty was experienced by the Commissioner in the performance of his duties from the lack of papers. Possession had been delivered in execution to Narendra Narayan, but to no purpose, because Debendra Narayan had looked up the malghar. The room was not opened by the Execution Officer and all that Narendra Narayan and his nephews did was to place additional looks on the door. Ultimately, the looks were removed by order of the Court and the doors broken open. But many of the requisite papers could not be found inside the room. The Commissioner took such evidence as was adduced by the parties concerned and examined such papers as were available. On the 11th November 1914 while the matter was still pending before the Commissioner, defendants Nos. 2-5, the sons of Surendra Narayan, filed a petition before the Subordinate Judge, praying that the accounts might be adjusted for their benefit as well. On the 19th November the Subordinate Judge held that although these defendants had not entered appearance until after the preliminary decree had been affirmed by the High Court, they were entitled to have their names transferred from the category of defendants to that of plaintiffs. He accordingly directed the Commissioner to ascertain the dues and liabilities as between the principal and pro forma defendants. This order was carried out by the Commissioner, and necessarily widened the scope of the enquiry before him. After much delay and many extensions of time the Commissioner submitted his final report on the 29th February 1916. Objections were lodged by both parties on the 4th May following. Arguments were heard in support of and in answer to the objections and judgment was reserved on the 1st June 1916. On the 6th June, the defendants Nos. 2 to 5 paid the requisite Court-fees on the amount found due to them by the Commissioner from the first defendant. On the 29th June judgment was delivered and the suit was decreed in favour of the original plaintiff and the transferred plaintiffs; On the 5th July defendants Nos. 2-5 deposited the excess Court-fees required. This was accepted on the 15th July and the decree was ultimately signed on the 25th July. The present appeal is directed against this decree, which was in the following terms:

The plaintiff No. 1 will get from defendant No. 1 the sum named by the Commissioner and Rs. 359-4-3, that is, one third of Rs 1,079 10-1 1/2, in all Rs. 2,845 12 8 3/4. The plaintiffs Nos. 2-5, who were previously defendants in the suit but have been made plaintiffs and have paid the Court fees, will also get from defendant No. 1 the sum of Rs. 2,169-4-8 3/4 Plaintiff No. 1 will set the cost of the suit from defendant No. 1 and defendants Nos. 2-5 will get their share of the cost. The plaintiff No. 1 will get from defendant No. 1 Rs. 2,845 12-8 3/4 as his claim and Rs. 4,712 9-5 as cost, that is, in all Rs. 7,538-6-1 3/4, and the plaintiffs Nos. 2-5 will get Rs. 2,169-4 8 3/4 as their claim and Rs. 361 8.0 as cost, that is, in all Rs. 2,530 12 8 3/4

3. This decree has been assailed on behalf of the first defendant appellant on two grounds, namely, first, that the plaintiff should not have been allowed the entire costs of the suit, when his claim has been successful only in respect of a relatively small amount, and, secondly, that no decree should have been made in favour of defendants Nos. 2-5, who applied to be joined as plaintiffs at a very late stage of the litigation. The plaintiff has filed a cross-appeal and has urged that the amounts have not been taken on a correct basis and that he is in reality entitled to a much larger sum than what has been awarded by the Subordinate Judge. The other respondents, the sons of Surendra Narayan, have not preferred a cross-appeal, but they have urged that if at the instance of the plaintiff the amount payable by the first defendant should be increased, they should be allowed to reap the advantage of such finding. The points which emerge for consideration from the arguments addressed to us may accordingly be thus summarised: first, have the accounts been taken on a correct basis; secondly, is the order for costs erroneous on principle, and thirdly, are the sons of Surendra Narayan entitled to the relief they have obtained.

4. As regards the first point the plaintiff-respondent has urged in support of his cross-appeal that the Subordinate Judge placed a too restricted construction upon the preliminary decree and narrowed its scope unduly, when he held that, according to its terms, 'the enquiry was limited to the finding as to what amount the defendant actually received and not what he could have received or in all probability did receive.' In our opinion, the contention of the plaintiff is partially well-

founded. There is a clear distinction between what the defendant actually received and what he could have realised by exercise of due diligence; but no real distinction can be made between what he actually received and what in all probability he received. The evidence relevant for proof of this matter must be tested in the light of the definition of the term 'proved' given in Section 3 of the Indian Evidence Act: 'A fact is said to be proved when, after considering the matters before it, the Court either believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists.' Now in the case before us, the first defendant went into possession of the joint family estate for a specific purpose, namely, to apply the entire income for payment of Rs. 15,000 due to himself. The plaintiff alleges that the defendant has realised more than Rs. 15,000 and calls upon him to account for the profits of the estate during the period of his possession. The plaintiff places before the Court a statement of what he believes to be the surplus of the income of the estate. Clearly, it is the duty of the defendant to produce the account papers, which were presumably in his possession and would show the receipts and the disbursements. Account papers are produced, except the rokars for the Bengali years 1316 and 1317, that is, from April 1909 to April 1911. The Subordinate Judge has expressed the opinion that these books were written up and were most probably in the malghar till shortly before it was looked up by the parties and possibly even after that, The defendant started the theory that the plaintiff was responsible for the disappearance of these papers, and the Commissioner apparently favoured this view. The Subordinate Judge however, has arrived at a contrary conclusion. He has held that it was the first defendant who withheld the papers, and he has described as absurd the story that the Civil Court peon helped the plaintiff to remove cartloads of papers in the presence of the officers of the defendant. The evidence has been planed before ns and we agree with the Subordinate Judge in his conclusion that the defendant is responsible for the disappearance of the papers. Bat we are unable to accept the conclusion that defendant oar, by his misconduct, successfully defeat the claim of the plaintiff. The principle applicable in such circumstances is well established.

5. In a suit for accounts, the non-production of account books by the party who has custody of them justifies the presumption under Section 114(g) of the Indian

Evidence Act that they have been with held, because, if produced, they would have been unfavourable to his case. If he is the plaintiff and is claiming accounts though withholding papers, his suit is liable to be dismissed: Upendra Kishore v. Ram Tara 4 Ind. Cas. 542 : 13 C.W.N. 696; Chand Ram v. Brojo Gobind Doss 19 W.R. 14. If he is the defendant who is liable to render accounts, the Court will proceed on the footing of evidence furnished by the plaintiff, and, in doing so, may mate all reasonable presumptions against him; see the observations of Phear, J. in Syud Shah Alaiahmad v. Bibee Nusibun 24 W.R. 70, quoted with approval by Field, J. in Annoda Persad v. Dwarkanath 6 C. 754 : 8 C.L.R. 321. Again, as was pointed out by Field, J. in Degamber v. Kallynath 7 C. 654 : 9 C.L.R. 265 if satisfied that the defendant has contumaciously refused or omitted to comply with the order for production of the papers, the Court may enforce obedience by imprisonment or by attachment of property or by both. But, even if the Court does not consider it necessary to exercise its disciplinary powers, it may, by raising a presumption against the defendant, afford relief to the plaintiff. An instance of this nature will be found in the case of Rampershad Tewarry v. Sheochurn Doss 10 M.I.A. 490 at p. 507 : 2 Sar. P.C.J. 177 : 19 E.R. 1058. There the defendant refused to render accounts; on evidence adduced to prove spoliation of the banking books, the Court charged him with the principal sum for which he was accountable with interest at 12 per cent, in lieu of the profits he had failed to account for, The Judicial Committe affirmed the decree of the Agra Sudder Court and held that the Court had properly visited the failure of the defendant to produce the accounts required, by charging him with interest on the principal sum for which he was accountable. This is in conformity with principles firmly established in equity jurisprudence. Thus in Walmsley v. Walmsley (1846) 3 J. & S. 556 : 72 R.R. 129 where an accounting party withheld the partnership books and documents and thereby endeavoured to baffle the justice of the Court, Sir Edward Sugden, L.C., held that the Master had rightly raised a presumption against. him both as regards the amount of the capital and stock in trade and of the annual gains from the business. Again in Gray v. Haig (1855) 20 Beav. 219 : 52 R.R. 587 : 109 R.R. 396 where an accounting party had destroyed the accounts before the matters had been finally adjusted, Sir John Romilly, M.R., stated that he would act on the principle laid down in the well known case of Armory v. Delamirie (1722) 1 Strange

505 : 1 Sra L.C. 396 : 93 E.R. 664 and presume, as against the person who destroyed the evidence, everything most unfavourable to him, which is consistent with the rest of the facts either admitted or proved. This accords with the view adopted by Lord Nottingham, L.C., in Wardour v. Berisford (1687) 1 Vern. 462 : 23 E.R. 579. See also Rowley v. Adams (1849) 2 H.L.C. 725 : 9 E.R. 1267 : 81 R.R. 363 affirming Rowley v. Adams (1844) 7 Beav. 395 : 8 Jur. 994 : 49 E.R. 1118 : 64 R.R. 105. The learned Vakil for the defendant has, however, argued that this Court as a Court of Appeal should not interfere with the report of the Commissioner, when it has been accepted by the trial Court. This contention is clearly opposed to the decision in Chetty v. Mahomed Essa 5 C.W.N. 692 which establishes that the Court is entitled to deal with the report on matters of fact as also questions of principle. In our opinion, the narrow view, adopted by the Subordinate Judge, regarding the scope of the preliminary decree has led to an erroneous decision upon the question of the accounts for 1316 and 1317, as is clear from the following passage in his judgment:

The other items claimed by the plaintiff and not either noticed or allowed by the Commissioner can be disposed of together. They are either sale proceeds of grains, or income from holdings purchased with the profits of the money-lending business or income from money or paddy-lending for the years 1316 and 1317; they are not taken into account by the Commissioner. Be they of whatever category, the same remark applies to them, that they are not proved but are supposed receipts by the defendants. I need not go into details, but I have satisfied myself that they should not be relied on as proved facts. These amounts, the plaintiff argued, the defendant must have received during his tenure. I say he might probably have done so, but the terms of the preliminary order limit the scope of our inquiry and I cannot decree the amounts.

6. We hold accordingly that the accounts for 1316 and 1317, mentioned in the above paragraph, must be investigated. They relate to profits from the money-lending business, and sale proceeds of paddy and of winter crops, turmeric, gram, kalai and the like. If the defendant produces the rokarg for 1316 and 1317, the accounts will be taken in the usual manner; if they are not produced, the Court must make all reasonable presumption against the defendant and base its

conclusion upon the figures available for previous years, supplemented by such oral and documentary evidence as may be available. In the events which have happened, the defendant cannot reasonably complain, if the average deducible from the fluctuating figures for previous years works out to his detriment.

7. As regards the second point, we are of opinion that, on the facts found, the Subordinate Judge has properly exercised his discretion in the matter of costs. The defendant is very largely to blame for this litigation and its protracted proceedings and he has spared no effort to defeat the just claim of the plaintiff and his nephews. The principles on which the costs of a suit for an account are regulated were finally stated by Sir John Romilly, M.R. in May v. Biggenden (1857) 24 Beav. 207 : 53 E.R. 337 : 116 R.R. 94: 'It is generally true that if a suit is instituted for an account between two persons, one alleging that nothing is due from him, and a balance is found to be due from him, that person will have to pay the costs of the suit and of the account. But the case would be wholly varied, if the case were, that one party admitted a given sum to be due from him, and the other had claimed a much larger sum, and the suit had proceeded only for the purpose of ascertaining whether such contested balance were really due or not. In this case, the costs would depend upon the substantial result : that is, if the balance claimed, or a substantial part of it, were shown to be due, the claimant would obtain the costs of the suit : if no part of it were due, he would have to pay them : and if only a small portion of it were due, the Court would probably give no costs on either side. But in all these cases, the Court endeavours to see what were the substantial questions and causes of litigation between the parties.' See also Collyer v. Dudley (1823) T. & R. 421 : 2 L.J.Ch. 15 : 37 E.R. 1163; Kemp v. Burn (1863) 4 Giff. 348 : 1 N.R. 257 : 9 Jur. (N.S.) 375 : 7 L.T. 666 : 11 W.R. 278 : 66 E.R. 740 : 141 R.R. 224. In the case before us, the first defendant denied the right of the plaintiff to claim an account and asserted that not only was nothing due from him, but that he himself had not realised, during his possession of the estate, the entire sum of Rs, 15,000 recoverable by him. The result of the litigation is that the plaintiff is unquestionably entitled to an account and that upon accounts taken, it is indisputably established that the defendant has received a considerable sum in excess of his dues. The enquiry has been delayed and lengthened by reason of the obstructive attitude of the defendant, who has managed to hamper the

investigations by non-production of the papers. In such circumstances, he has been rightly made liable for the whole costs and we see no reason to interfere with the directions given by the Subordinate Judge.

8. As regards the third point, the first defendant has argued that his nephews should not have been permitted to be transferred from the category of defendants to that of plaintiffs, not merely after the preliminary decree had been made under Order XX, Rule 16, Civil Procedure Code, but also after the time prescribed for and Rule 224, appeal against that decree under Section 97, Civil Procedure Code, had expired and indeed after an appeal against the decree by the defendant to this Court had been dismissed. We are of opinion that this contention should not prevail. It cannot be disputed that Order I, Rule 10, Civil Procedure Code, authorises the Court to make an order of this description at any stage of the proceedings. The Courts have always been reluctant to place a narrow construction upon this provision of the law, and to restrict the exercise of this discretionary power : Wilson v. Balcarres Brook Steamship Co. (1893) 1 Q.B. 422 : 62 L.J.Q.B. 245 : 4 R. 286 : 68 L.T. 312 : 41 W.R. 486 : 7 Asp. W.C. 32; Robinson v. Geisel (1894) 2 Q.B. 685 at p. 688 : 64 L.J.Q.B. 52 : 9 R. 555 : 71 L.T. 70 : 42 W.R. 609; Brojendra Kumar Das v. Gobinda Mohan Das 34 Ind. Cas 186 : 20 C.W.N. 752. Thus fresh parties have been added after a decree has been passed and a reference made to the Commissioner to take accounts and sell the property : Vakhatchand v. Advocate General 8 B.H.C.R. 96. Similarly in a suit for partition, a fresh party has been added after the preliminary decree and submission of the report by the Commissioner : Jotindra Mohan v. Beioy Chand 32 C. 483. The power of the Court depends on the question whether the case is sub judice, for as Fry, L.J., observed in Duke of Buccleuch (1892) P. 201 at p. 212 : 61 L.J.P. 57 : 67 L.T. 739 : 40 W.R. 455 : 7 Asp. M.C. 294, the words at any stage of the proceedings apply as long as anything remains to be done in the case. See also Attorney General v. Corporation of Birmingham (1880) 15 Ch.D. 423 : 43 L.T. 77 : 29 W.R. 127; Keita v. Butcher (1884) 25 Ch.D. 750 : 53 L.J. Ch. 640 : 50 L.T. 203 : 32 W.R. 378. On this principle, it has been held that, after final judgment, a person, who had hitherto been no party, cannot be made a defendant for the purpose of getting execution against him. Munster v. Cox (1885) 10 App Cas. 630 : 55 L.J.Q.B. 108 : 53 L.T. 474 : 34 W.R. 461. But a person has been allowed to

intervene to get a judgment set aside: Mehaffey v. Mehaffey (1905) 2 Ir.R. 292 : 39 Ir.L.T.R. 11 : 8 Ir.L.R. 424; Jacques v. Harrison (1884) 12 Q.B.D. 165 : 53 L.J.Q.B. 137 : 50 L.T. 246 : 32 W.R. 471. In the case before us, the propriety of the course ' adopted in the Court below cannot be seriously questioned. If the application of the defendants had been refused, the result would have been the institution of a separate suit by them and possibly a fresh enquiry into the accounts at their instance. This could not have benefited the parties in any conceivable manner. One of the aims of the present procedure law is the avoidance of a multiplicity of suits with reference to the same subject-matter, and the course followed by the lower Court is eminently fitted to fulfil that object.

9. The defendant has finally argued that if a further enquiry into the accounts should be directed as the result of the cross appeal, the benefit should accrue to the original plaintiff alone and not to the added plaintiffs as well, inasmuch as they have not preferred a cross-appeal. In all the circumstances of this case, we are of opinion that we should not accede to this contention. Order XLI, Rule 4, and Rule 33 give the Court ample power to make the appropriate order needed in the interests of justice. Under the former rule, on appeal by one of the parties upon a ground common to all, the decree may be varied in favour of all, under the latter rule, the Appellate Court has power to make the proper decree, notwithstanding that the appeal is as to a part only of the decree, and such power may be exercised in favour of all or any of the respondents or parties, even though such respondents or parties may not have filed any appeal or objection. In the case before us, the claim of the added plaintiffs rests on precisely the same foundation as that of the original plaintiff; when they were added as plaintiffs, there was no alteration in the nature of the suit nor was there the introduction of a new cause of Action. The further enquiry we shall presently direct will consequently cover the case of both sets of plaintiffs.

10. The result is that the appeal preferred by the first defendant is dismissed with costs and the decree of the Subordinate Judge is confirmed, except in so far as it disallows the claim for accounts of the years 1316, 1317. The cross-appeal is decreed and the case is remitted to the Subordinate Judge for further enquiry into the accounts of 1316 and 1317 as directed above. This enquiry will be held for the

benefit of all the plaintiffs and a decree will be made for such sums as may be found due in their respective shares. The costs of the cross-appeal as also the costs of the further enquiry by the Subordinate Judge will be in his discretion. No separate hearing fee will be assessed in the cross-appeal in this Court.