

Privy Council Appeal No. 33 of 1934.

Bengal Appeal No. 18 of 1932.

Maharaj Kumar Srinivas Prasad Singh - - - *Appellant*

v.

Keshava Prasad Singh, since deceased, and others - *Respondents*

FROM

THE HIGH COURT OF JUDICATURE AT FORT WILLIAM IN
BENGAL.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF
THE PRIVY COUNCIL, DELIVERED THE 31ST OCTOBER, 1935

Present at the Hearing :

LORD THANKERTON.

SIR JOHN WALLIS.

SIR LANCELOT SANDERSON.

[*Delivered by* LORD THANKERTON.]

The appellant, who attained majority in 1923, filed the present suit on the 12th June 1926, seeking to set aside a compromise decree passed in 1912 by the High Court of Judicature at Fort William in Bengal. On the 25th January 1932 the appellant's suit was dismissed for want of prosecution by a judgment and order of the High Court passed in its original jurisdiction (Lort Williams J.) which was affirmed on appeal by a judgment and order of the High Court dated the 11th July 1932. Hence the present appeal.

The litigation is concerned with the title to the Dumraon Raj, a large and important estate situated in the Shahabad District of the Province of Bihar and Orissa and other places, and other properties pertaining to the Raj.

In 1894, the then Maharaja of Dumraon, Sir Radha Prasad Singh, died, leaving no male issue, but leaving a widow, Maharani Beni Prasad Kuari, and a daughter. By an authority executed and registered in 1889, which he confirmed by his will, the Maharaja had empowered his widow to adopt a son to him. On his death, the widow took possession of the estate, and held it until her death on the 13th December 1907, when it was claimed on the one hand by the present appellant, who maintained that he had been duly adopted by the widow on the day before her death, and, on the other hand, by Keshava Prasad Singh, who, failing such adoption, was the next person entitled to the estate, and was the first respondent in the present appeal, but has since died, his representatives being substituted in his place.

The Court of Wards, in exercise of its powers under Bengal Act IX of 1879, made the appellant, who was then five years old, a ward of court and took possession of the estate on his behalf. Thereafter, in 1909, Kesheva Prasad Singh instituted a suit in the Court of the Subordinate Judge of Shahabad to recover possession against the present appellant, J. B. Rutherford, Manager under the Court of Wards, as his guardian *ad litem*, and the Collector of Shahabad, as representing the Court of Wards. After trial, the Subordinate Judge, on the 12th August 1910, decided against the adoption and made a decree in favour of Keshava Prasad Singh awarding him possession with mesne profits and costs.

In September 1910, J. A. M. Wilson, who had succeeded J. B. Rutherford as manager and guardian *ad litem*, obtained the leave of the High Court to prosecute an appeal against the decision of the Subordinate Judge. Thereafter the Court of Wards made over the estate to Keshava Prasad Singh, the latter furnishing security in Court. Mr. Rutherford became manager under the latter, and Angus Ogilvy was thereafter appointed guardian *ad litem* to the present appellant. The appeal came on for hearing before the High Court in April 1912, but it was adjourned on a suggestion from the Bench that a settlement might be effected. A compromise was arranged among the parties and was submitted by the said Angus Ogilvy to the Court, by which, after certain alterations, it was approved as for the benefit of the present appellant. On the 17th May 1912 the compromise was filed as of record and a decree was made in terms thereof. This compromise and decree forms the subject matter of the present suit, by which the appellant seeks to set it aside and to be remitted to his original rights so as to proceed with the appeal which was the subject of the compromise.

Under the compromise, the main terms were that the present appellant's adoption was negatived, and Keshava Prasad Singh was declared to be entitled to the estate, the Court of Wards was not to be liable for any monies spent prior to the handing over of the estate in September 1910, and Keshava Prasad Singh was to pay a sum of rupees ten lakhs by ten annual instalments to the present appellant.

On the 30th July 1923 the appellant attained the age of 21 years, and, having failed to obtain from the Collector of Shabahad and the Government authorities access to the correspondence and other papers relating to the compromise of 1912, he instituted the present suit on the 12th June 1926. He impleaded as defendants (1) Keshava Prasad Singh, (2) the member constituting the Board of Revenue in Bihar and Orissa and as such forming the Court of Wards of the said Province, (3) Mr. Murphy, I.C.S., who had been the Collector of Shabahad at the relevant times, and (4) the Collector of

Shahabad as representing the Court of Wards. The defendants all duly entered appearance, and thereafter filed written statements. As already stated, the suit was dismissed for want of prosecution on the 25th January 1932 under the Rules of the High Court, Original Side, 1914, of which the following rules from Chapter X are relevant to the present issue:—

6. There shall also be kept in the Registrar's Office three lists of defended suits ripe for hearing, to be called:—

Prospective List A, for commercial causes.

Prospective List B, for liquidated claims.

Prospective List C, for other suits.

7. The attorney for any party or any party acting in person may, by requisition in writing to the Registrar, have a suit, other than a special suit, standing in the General Cause List, entered in its proper Prospective List, on the ground that it is ready to be heard and shall, at the same time, give notice to the opposite party or parties of such transfer:

Provided that, where a written statement has been called for, no such requisition shall be made until, in the case of commercial suits or suits for liquidated claims the expiry of one week, and in other suits six weeks, after the filing or the expiry of the time or extended time fixed or prescribed for the filing of the written statements of the defendants appearing.

Where a suit is entered in any of the Prospective Lists, it shall, unless otherwise ordered by the Court or a Judge, be placed at the bottom of such list.

11. Where in any suit standing in any of the Prospective Lists a party dies, or where, except as provided in rule 13, the suit is stayed or postponed or ordered not to be taken before a certain date, the Registrar shall, on receipt by him of information in writing to that effect, cause the suit to be removed from such list, and notice thereof shall be given to the other parties by the party giving the information.

12. Where a suit has been removed from any of the Prospective Lists, it shall not, unless otherwise ordered by the Court or a Judge, be replaced therein without a further requisition under rule 7.

13. Where a day is specially fixed for the hearing of a suit, such suit shall be entered in the proper Prospective List, if not already standing therein, and a note shall be made in such list to the effect that the same will be taken on the day fixed, and such suit shall, unless otherwise specially ordered, be set down in the Peremptory List of defended suits for the day fixed for the hearing thereof, next after any part-heard suit or proceeding in such list.

19. From the Prospective Lists shall be taken, in turn, suits required for the Peremptory List of defended suits for each of the Courts, and except as otherwise provided by these rules, no suit or proceeding shall, unless otherwise ordered, be omitted from the Peremptory List in which it ought to be placed.

31. Unless otherwise ordered, a commission to examine witnesses issued in a suit or proceeding shall, until the return or the expiration of the time for the return thereof, operate as a stay of such suit or proceeding.

36. Suits and proceedings, which have not appeared in the Prospective List within six months from the date of institution, may be placed before a Judge in Chambers, on notice to the parties or

their attorneys, to be dismissed for default, unless good cause is shown to the contrary, or be otherwise dealt with as the Judge may think proper.

At the time of its dismissal the suit had not yet entered the Prospective List, and the dismissal was in intended exercise of the discretionary power conferred by Rule 36.

The appellant submitted two contentions to their Lordships. In the first place, he contended that the only default which justified dismissal under Rule 36 was default during the first six months from the date of institution, although subsequent conduct of the suit might affect the mind of the Court in deciding whether to exercise its discretion, and in the present case it was admitted that there was no default during the first six months. This argument raises a question of construction of Rule 36. In the second place, failing his success on the first contention, he maintained that neither Court in India had properly exercised its discretion, and submitted that their Lordships should set aside their decision and allow him to proceed with his suit. It should be stated that the appellant did not challenge the Rule as *ultra vires*, in view of the decision of the High Court in *Udoy Chand Pannalal v. Khetsidas Tilokchand*, (1924) 51 Cal. 905. Rule 36 was amended in 1922 by the deletion of an alternative ground of dismissal, but, in their Lordships' opinion, the Rule should be construed as it now stands, without reference to its earlier form.

The appellant seeks to read the words "to be dismissed for default" in Rule 36 as if the default related solely to the failure to appear in the Prospective List within six months from the date of institution, while the respondents maintain that the default refers to failure to appear in the Prospective List before the date of the notice under the Rule. The only cases referred to were *Haribux Shroff v. Dwijendramohan Ghosh*, (1930) 58 Cal. 736, and an unreported case of *Balkissendas Ramkissendas v. Hazarimull Sethia*, decided by the same Bench on the same day. Both these cases related to suits which had reached the Prospective List, after the six months, but before the date of the notice, though they had subsequently been taken out of it, and it was held that Rule 36 no longer applied, once the suit had reached the Prospective List. These cases clearly decide that the material time at which the failure to appear in the Prospective List is to be looked for is when the suit is placed before the Judge in Chambers. Their Lordships agree with these decisions; in their opinion, the six months provides a minimum period, on the lapse of which action may be taken under the Rule, that the failure to appear in the Prospective List must be still continuing at the date of such action, and that the default in respect of which the suit is liable to dismissal, is such continuing failure, and that the conduct of the suit as from its institution up to the date of the action under the Rule, is proper matter for the consideration of the Judge.

This question of construction does not appear to have been argued or considered in the Courts below, but their Lordships reject the contention of the appellant on this question.

The appellant's second contention raises the delicate question of the proper exercise of a judicial discretion, and it is clear that the appellant must satisfy this Board that both the Courts below have failed to exercise their discretion properly. Unless the appellant succeeds in that task, this Board will not be willing to disturb the conclusions of the Courts below. Shortly stated, the submission of the appellant is that both the Courts have improperly taken into account—in addition to the history of the suit itself—considerations which should have been excluded and which have no foundation in fact. In order to support this absence of foundation in fact, the appellant filed an application to this Board on the 18th December 1934 for leave to file a supplemental printed book of papers, which did not form part of the record in this appeal. The application was ordered to stand over until the hearing of the appeal, each of the respondents to be at liberty to prepare a supplemental volume of any documents which they might desire to have before the Board, in the event of the appellant's application being successful. At the hearing of the appeal, their Lordships refused the application on the ground that no adequate reason had been shown by the appellant for adding to the record as settled in the appeal in India. The appellant will pay the costs of this application and any costs properly incurred by the respondents under the liberty afforded to them as above mentioned.

Their Lordships find it unnecessary to restate in detail the history of the suit up to August 1929, as no serious suggestion is made of any blameworthy delay on the appellant's part during that period. In August 1929, as the result of material produced under discovery, the appellant sought and obtained leave to amend the plaint, the respondents being at liberty to file additional statements, if they so desired. On the 15th November 1929 defendants Nos. 2 to 4 filed an additional written statement. On the 30th January, 1930, a notice was issued under Rule 36 that the suit would be on the Special List to be taken in Chambers on Friday, the 14th February. Affidavits were filed by the parties; the suit was not set down in the Special List on the 14th February, but it was set down on the 21st February. On the 20th February the appellant had served notice on the defendants of an application for a commission to examine witnesses. On the 21st February, the parties came before the Court, when the appellant asked for liberty to proceed with the suit, and the defendants asked for its dismissal. Lord Williams J. adjourned the case for a month, and on the 27th March, when it was again set down, appellant's counsel asked that the suit should go out of the Special List, the defendants' counsel consented and the Court agreed.

About one year and ten months later, on the 19th January 1932, a second notice was issued, under Rule 36, intimating that the suit would be on the Special List to be taken in Chambers on Friday, the 22nd January 1932. The notice in fact is dated the 19th December 1931, and, while this is probably an error, nothing material turns on it. While the defendant No. 1 had taken advantage of the liberty given to him to file an additional written statement on the 20th November 1930, the appellant had taken no step in Court since the 27th March 1930. The solicitors of defendant No. 1 had written to the Assistant Registrar on the 18th January 1932, requesting that the suit should be placed on the Special List, and, in their Lordships' opinion, they were entitled to call the attention of the Court to the position of the suit.

On the 25th January, the appellant filed an affidavit, the material portion of which is as follows:—

"2. Thereafter (i.e. after 27th March 1930) an application was made for the issue of a commission. The said application stood over from time to time to suit the convenience of counsel of both the parties and the same has not yet been disposed of.

3. One Rai Bahadur Rameswar Nathany who was financing this suit, owing to certain difficulties in his business, has stopped doing so.

4. Since then I have been trying to secure another capitalist and with great difficulty I have succeeded in getting a person in Bombay. The necessary arrangement will be put through in a week's time and then I shall be in a position to go on with the suit."

On the same day an affidavit by the private secretary and attorney of defendant No. 1 was filed on the latter's behalf, the material portion of which is as follows:—

"15. That the plaintiff is in impecunious circumstances and this suit has been filed by a gang of persons consisting of one Rameswar Nathani, one Abdul Halim Guznavi and others who have entered into a champertous agreement in writing on the 8th February 1926 in order to finance this suit and to divide the said Raj amongst themselves in certain proportions.

16. That the main champertor Rameswar Nathani is a heavy gambler and speculator in the Stock Exchange and Jute and Gunny Baras. He has incurred heavy losses and is in great difficulties."

On the same day, the 25th January, 1932, the matter was heard in Chambers by Lord Williams J., who dismissed the suit with costs. In the judgment delivered by him the learned Judge, after narrating the history of the suit down to the 27th March, 1930, states as follows:—

"Since that date, which is a year and ten months ago, nothing has been done. The only explanation which the plaintiff offers is that a certain person who was financing the suit has himself got into difficulties and has ceased to do so. He says that now he has obtained another financier in Bombay, but does not mention his name. The defendant Maharaja of Dumraon states in his affidavit that the plaintiff is in impecunious circumstances and that the suit has been filed at the instance of a number of persons, some of whose names he gives and who, he alleges, have entered into a champertous agreement in writing on the 8th February 1926 to finance this suit

and divide the Raj between them in certain proportions. He also alleges that one of these persons is a heavy gambler and speculator who has incurred heavy losses and is in great difficulty.

It is stated by counsel on behalf of the plaintiff that already two lacs of rupees have been expended in costs and it is suggested that another lac has been spent by the defendants. In my opinion it is clear from these facts that this is not a suit which ought to be allowed to continue. As far as I can see the only persons who are getting any advantage out of it are the various lawyers engaged in it. Upon the face of it it appears to be a suit the main object of which is to harass the defendants, and in view of the fact that no steps have been taken since March 1930 the suit must be dismissed with costs."

It appears to their Lordships that Rule 36 is mainly conceived in the public interest, as the defendants will usually be able to force progress under Rule 7. Every litigant has the right to have his case heard and disposed of, but that right must not be abused, even though the defendant, for reasons of his own, is not anxious to complain of the plaintiff's delay. But the Court is not entitled to deprive the litigant of his right, except on clearly ascertained grounds, and to the exclusion of grounds which rest only on suspicion.

The history of the suit and its delays, the champertous agreement—which is lawful in India—and the financial difficulties of one of the parties to that agreement, along with the causes of those difficulties, rested on material which the learned Judge was entitled to take into consideration. But their Lordships are unable to find any material such as would justify the learned Judge in the very serious charge which he makes in the last two sentences of his judgment, and, in their Lordships' opinion it was an unjustifiable and improper consideration to take into account in the judicial exercise of the discretionary power of dismissal under Rule 36.

It appears that before the 19th January, 1932, when the notice was issued, a letter was received, which was dated the 8th December 1931, and was addressed to the learned Judge and signed by a name, which cannot be identified as that of any real person. This letter is endorsed "Lort Williams J. —Let this be kept with the records of the suit. F. Palsett. 17-12-31."; it was thus filed, but it was not brought to the notice of the parties, and did not become known to them till much later. In this letter the following passage occurs:—
"Of course you will be pleased to see from the records to what stage the case has reached, but it is purely a money making device of the Calcutta lawyers and attorneys for robbing the money from both the parties. These people do not like that the case should be either struck off or opened for final disposal, as their bread and butter will be taken away if the case is finally disposed of."

At the hearing of the application for special leave to appeal, their Lordships thought right to request the learned Judge to inform them as to the precise history of this letter. In his reply to the Registrar, the learned Judge states that

he has no recollection of the particular letter, but that it is his invariable rule, after ascertaining that any letter is written to him in his judicial capacity, to send it unread to the Registrar to take such action upon it as he may think fit. He further states that he can say, without hesitation, that the contents of the letter were unknown to him when he gave his decision, and that any expression used in his judgment which may suggest knowledge must have been based upon some similar statement appearing in the affidavits, or in the arguments of counsel. This makes clear that this letter did not form the foundation of the learned Judge's charges, dubious though such foundation would be. Their Lordships are unable to find anything in the affidavits to justify the charges, and, even if the arguments of counsel contained any such improper suggestion, which their Lordships do not assume, it would not justify its adoption by the Court. Their Lordships would add that while destruction would seem to be the more suitable method of dealing with such a letter, it would be better, if it is to be filed, that the parties should at once be informed of its existence.

Accordingly, their Lordships are of opinion that the learned Judge did not properly exercise his judicial discretion in the matter, and it becomes necessary to consider the decision of the Appellate Court. Rankin C.J. with whose judgment Ghose J. agreed, after referring to the history of the suit up to the order of the 27th March, 1930, states :

“ The result of that was that the plaintiff's case having become very stale the plaintiff got a most elaborate warning that it was necessary for him to take steps to be diligent, otherwise the suit would be regarded as a water-logged suit which the plaintiff did not intend to bring on for hearing and which he wanted to keep on the stocks for other purposes. . . . In my judgment, upon the facts of this case, the learned Judge has exercised his discretion under the Rule very properly.”

The Appellate Court has thus identified itself with that which their Lordships hold to have been an improper exercise of judicial discretion and their decision must also be set aside.

It then remains for their Lordships to consider the exercise of the discretion conferred by Rule 36. The appellant stated, as he had done before the Appellate Court, that he was ready to go to trial at once, on such terms as to costs and security for future costs as might be imposed. In view of the nature and history of the case, and the large amount of costs already incurred, along with the appellant's readiness to proceed forthwith to trial, their Lordships do not think that the public interest is sufficiently involved to lead to the deprivation of the appellant's right as a litigant, and they are of opinion that he should be allowed to proceed, but on terms as to the period within which he is to have the suit entered on the Prospective List, failing which the suit will be dismissed, and as to costs incurred prior to the notice

of the 19th January, 1932, and security for future costs—such terms to be settled by the High Court.

Their Lordships will humbly advise His Majesty that the appeal should be allowed, that the judgments and orders of the High Court of the 25th January, 1932, in its original jurisdiction and of the 11th July, 1932, in its appellate jurisdiction should be set aside, and that the suit should be remanded to the High Court to allow the appellant to proceed with the suit, under such terms as the High Court shall think fit to impose as to the time within which he is to have the suit entered in the Prospective List, failing which the suit will be dismissed, and as to the costs incurred prior to the notice of the 19th January, 1932, and as to security for future costs. The appellant will have the costs of this appeal, except those relating to the application of the 18th December, 1934. These must be paid, as stated, to the respondents and there must be a set-off respecting them. The appellant will also have the costs of the proceedings in the Courts below since the notice of the 19th January, 1932.

In the Privy Council.

MAHARAJ KUMAR SRINIVAS PRASAD
SINGH

2.

KESHAVA PRASAD SINGH, SINCE
DECEASED, AND OTHERS.

DELIVERED BY LORD THANKERTON.

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