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Court : Mumbai

Decided On : Dec-08-1939

Reported in : AIR1940Bom311; (1940)42BOMLR470

Judge : Kania and ;Wassoodew, JJ.

Appeal No. : First Appeal No. 134 of 1936

Appellant : Gurusangappa Basappa Hokrani

Respondent : Baslingappa Basappa Hokrani

Disposition : Appeal dismissed

Judgement :

Kania, J.

1. This is a first appeal from the decision of the First Class Subordinate Judge at Bijapur in Civil Suit No. 52 of 1934. The plaintiffs claiming to be the mortgagees brought this suit to enforce their mortgage. In the written statement different defences are raised. The trial Court, after an investigation into all the disputes, found in favour of the plaintiffs. The amount found to be due is sixteen thousand and odd rupees as stated in the decree. Before us the learned advocate for the appellants has urged only two points. The first is that this suit is barred because of the decree passed in suit No. 277 of 1926. The second is on the point of

consideration.

2. In support of his contention on the first point it was urged that suit No. 277 of 1026 was filed by plaintiff No. 4 against defendants Nos. 1 and 2. The suit was for a declaration that plaintiff No. 4 was the owner of the property, that it should be declared that the houses in question were in his possession as owner, and if pending the suit possession was lost, an order should be made to replace the plaintiff in possession. Plaintiff No. 4 lost that suit. The Court held that plaintiff No. 4 was a benamidar, the real owners being plaintiffs Nos. 1 to 3. The Court also held that the transaction under which plaintiff No. 4 claimed title was not a sale but only a mortgage. As the suit was framed on the ground of ownership and a declaration to that effect only was sought, the suit was dismissed. The present suit is filed by the four plaintiffs. They claim to be the mortgagees of the property. There are five defendants. The first four of them are members of one family. Defendant No. 5 is an outsider and it is stated in the plaint that a hollow second mortgage deed on the suit property was executed by defendants Nos. 1 and 2 recently in favour of defendant No. 5. The plaintiffs claim that the said transaction is not binding upon them. In the alternative it is urged that even assuming that defendant No. 5 had advanced any money, the plaintiffs claimed priority over that transaction.

3. On behalf of the appellants it is urged that in the previous suit plaintiff No. 4 represented all the plaintiffs and as such he could, and ought to have in the alternative prayed for a mortgage decree. In support of this contention they rely on *Imam Khan v. Ayub Khan* I.L.R. (1897) All. 517. There the plaintiff sued for possession of the immoveable property as owner, having no title as owner but a possible title as mortgagee. It was held that he could not, in a subsequent suit between the same parties, claim possession of the same property as mortgagee inasmuch as, title as mortgagee might have formed an alternative ground of attack in the former suit. In a short judgment it is stated that this ought to have been made a ground of attack in the former suit. In the report, in stating what were the prayers in the second suit, it is stated that the prayer was for possession of the house as mortgagee or in the alternative for recovery of Rs. 93, the mortgage money. A careful examination of that decision however shows that the Court did

not decide that the alternative claim to recover the mortgage money was barred. The judgment as reported shows that the claim for possession as mortgagee in the second suit was held barred by the principle of res judicata. The judgment was in a second appeal and shows that it was limited to certain points only. We are unable to consider that judgment as an authority for the proposition that the claim to enforce the mortgage was held barred by the principle of res judicata. On the other hand the decision in *Mahomed Ibrahim v. Shakh Hamja* I.L.R. (1911) 35 Bom. 507 shows that where an owner filed a suit at first for ejectment and then filed his second suit to redeem the property, the second suit was not considered barred by the principle of res judicata. In the present case the suits are by the mortgagee. Assuming that the parties are the same, he (plaintiff No. 4) attempted to claim possession in the first suit as owner but failed. To that extent the facts in *Mahomed Ibrahim v. Sheikh Hamja* are different. We however think that the principles discussed in that case apply and there is nothing in law to prevent him from filing a suit to enforce his mortgage.

4. The contention of the learned advocate for the appellants is that the right sought to be enforced in both the suits is based on this same document. If therefore all rights which the respondents had under that document are not included in the first suit, Section 11, explanation 4, of the Civil Procedure Code, prevents him from bringing a second suit to enforce the same document. The proposition so stated is far wider than found anywhere. There is no authority in support of that contention and we are unable to accept it as urged by the appellants. The nature of the two suits is entirely different. The first suit was filed as owner and was limited to certain reliefs, viz. a declaration of title and a declaration that as owner plaintiff No. 4 was in possession. The present suit is on an entirely different cause of action. It is a suit to recover the debt due to the plaintiffs by the defendants. It is alleged that the debt is secured by a mortgage and if default is made in paying his debt, the creditor desired to realise his security. It is obvious that the two suits are based on two different titles and constitute entirely different causes of action. The law does not require, although it may permit, a plaintiff to join all his causes of action in one suit.

5. In addition it may be noticed that the parties in the two suits are different. There is clearly an additional relief claimed in this suit against defendant No. 5. The contention that the suit is barred under the principles of res judicata therefore fails.

6. As regards consideration it was urged that the plaintiffs' books of account are not regularly kept and therefore the plaintiffs had not discharged the burden which lay on them, under the Dekkhan Agriculturists' Relief Act, to prove consideration. In our opinion if the plaintiffs' books of account are not regularly kept they cannot have the advantage of those books of account. However they succeeded in proving by other evidence that they had paid the money to the creditors of the defendants at their request. If that proof is sufficient, the decree of the lower Court must stand. The learned advocate for the appellants had to concede that there is sufficient evidence on record, apart from the books of account, to support the conclusion of the learned trial Judge. Under the circumstances the mere absence of regularly kept account books does not help the appellants.

7. It was lastly urged that the amount of each instalment was heavy. We do not think so. The sum of Rs. 2,500 under the circumstances is very fair. The decree is likely to be satisfied, if the instalments as provided are paid, in about ten years' time. The appeal under the circumstances fails and is dismissed with costs.