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Court : Mumbai

Decided On : Nov-20-1931

Reported in : (1932)34BOMLR489

Judge : Thankerton, ;Salvesen and ;George Lowndes, JJ.

Appellant : Manmatha Nath Mullick

Respondent : Hedait Ali

Disposition : Appeal allowed

Judgement :

Salvesen, J.

1. This is an appeal from a judgment and decree dated December 21, 1928, of the High Court of Judicature at Patna, which varied a judgment and decree dated June 30, 1927: of the Subordinate Judge of Cuttack.

2. The facts of the case which are not in dispute may be shortly stated asfollows:- One Nani Mohan Banerji was an owner of two taluks, which may be shortly described as Narendrapur and Krishnapur. These properties were mortgaged for a total sum of Rs. 1,49,000 and the appellant also held two postponed mortgages over the same properties for a sum of Rs. 35,500. On December 9, 1914, Banerji executed a lease of his two taluks in favour of the first defendant. Under this lease

the lessee agreed to pay the lessor a yearly rent and, in addition, the Government revenue, cesses and other public demands. The lease also contains the provision that in case of any breach of the covenants to be observed by the lessee he should be liable in damages.

3. In 1917 the first mortgagees brought a suit to enforce their claims under the mortgages they held. As the result the two taluks were sold in execution to the appellant in 1924. The appellant purchased Narandrapur on January 26, 1924, and Krishnapur on May 17, 1924. The lessee continued in possession of the two taluks until the expiry of his lease on September 9, 1924, when he gave up possession. He has since died and his representatives are the respondents, who have not appeared.

4. During the currency of the lease the obligations of the lessee were duly performed until 1923, when he failed to pay the revenue instalment due in November in respect of taluk Narendrapur. He similarly failed to pay the revenue and cesses due in April, 1924, on the said taluk, and also the instalment of revenue and cesses due in April, 1924, in respect of taluk Krishnapur, In order to save the taluks from sale the appellant paid these instalments and certain penalties to the Collector in respect of their not having been paid at the due dates. Although in the suit these penalties are sued fur, Mr.De Gruyther in the course of the hearing stated that in respect of the small amount involved he limited his claim to the instalments actually paid.

5. In November 1923, when the first instalment of revenue which is sued for in respect of taluk Narendrapur became due, Banerji and not the appellant was the owner of the two taluks, and the same applies to the instalment of the revenue claimed to meet the arrears of Government revenue in respect of taluk Krishnapur. As regards the other sum claimed, it became due after the appellant had purchased Narendrapur but during the currency of the lease which expired in September thereafter.

6. Both the Courts have held that the appellant is entitled to recover from the respondents the instalment of Government revenue due in April, 1924, in respect of Narendrapur after he purchased the property. The Subordinate Judge held that

he was equally entitled to recover the other two instalments which fell due during the ownership of Banerji, and he accordingly gave decree for payment of all three instalments along with the penalties which the appellant had been compelled to pay.

7. The High Court took a different view and came to the conclusion that while Banerji could have recovered these sums from the lessee in respect of the contract between him and the lessee, the appellant could only recover the revenue instalment which became due after his purchase of the properties in question. The effect of this judgment is, in the circumstances now to be narrated, to discharge the lessee of the obligations which he had undertaken in the lease and which, as a matter of course, devolved on his representatives, the respondents.

8. The appellant, on the other hand, maintains that as a mortgagee at the time when the instalments in question became due, he was entitled to intervene by paying the Government revenue on the failure of the lessee to do so, as unless he had done so the properties over which his mortgage extended might have been brought to sale in execution. In point of fact, it would appear that Banerji in effect paid these instalments because they were deducted from the purchase price paid by the appellant. In addition, however, the appellant founded on a deed of assignment executed by Banerji in his favour on July 28, 1924, by which Banerji assigned his right to recover the instalments in question with interest thereon at the rate of twelve per cent. per annum from the respective dates of payment to the date of commencement of the suit. The deed also constitutes the appellant Banerji's attorney and empowers him to sue for the amount of the instalments with interest at twelve per cent, and on receipt of the same to grant valid and sufficient receipts and discharges, and on non-payment to institute suits for the recovery thereof and to grant sufficient receipts and discharges for the same.

9. The Subordinate Judge decided that in respect of the assignment the appellant was entitled to recover the two instalments which Banerji, as the then owner of the properties, would have been entitled to recover from his lessee. On appeal the High Court held that the plaintiff was entitled to recover the revenue and cesses for the instalment of April, 1924, in respect of Narendrapur. They say:-

By this purchase of January 26, 1924, the plaintiff stepped into the shoes of the defendant No. 2 (Banerji) and he acquired the status of the lessor under the lease. He could, therefore, enforce all the rights which the original lessor could enforce as against the defendant No. 1, The claim of the plaintiff, therefore, for the recovery of the revenue and cesses paid by him for the instalment of April, 1924, must be allowed.

10. They further held the penalty paid by the plaintiff to the Collector, which had been allowed by the Subordinate Judge, should be disallowed, but as the appellant does not now insist on this part of his claim, it is not necessary for their Lordships to decide this point.

11. As regards the other instalments, the High Court held that these could not be recovered by the appellant either in respect of his interest as a mortgagee to preserve the property or under the assignation. The ground of judgment is thus stated so far as the latter point is concerned :-

What was assigned by the defendant No. 2 to the plaintiff was his right to recover damages from the defendant No. 1 on account of the latter's default in payment of the Government Revenue and ceases. The right to recover damages is a mere right to sue and such a right cannot be transferred under the law.

12. The clause in the Transfer of Property Act on which the judgment is based is Section 6, Sub-section (e), which is in these terms :-

A mere right to sue cannot be transferred.

13. Their Lordships are clearly of opinion that this clause has no application to the facts of the present case. In their Lordships' opinion what was assigned to the appellant was not a mere right to sue hut a claim for a definite sum of money which the lessee was bound by his contract with Banerji to repay to him. This would, their Lordships think, be an actionable claim to which Section 130 of the Act would apply. The failure of the lessee to fulfil this obligation does not give rise to a claim of damages within the meaning of the clause in the lease on which the High Court found, but to a claim for reimbursement of the precise sum which the

landlord had disbursed to meet the obligation. This is the view on which the High Court proceeded in allowing the claim for payment of the instalment paid by the appellant after he became owner of the property in respect of which it was levied by Goverment, and their Lordships find it difficult to understand why the same principle was not applied to the right of Banerji to recover from his lessee the two previous instalments. This right having been assigned by a formal deed to the appellant, who has moreover been constituted by the same deed Banerji's attorney to recover the instalments in question, there is on both heads a clear answer to the contention which the High Court sustained that he had no title to sue.

14. Their Lordships are accordingly of opinion that in so far as the High Court judgment disallows the claim for payment of the instalment of Rs. 3,444 with interest at twelve per cent, to January 15, 1926, and the instalment of Rs. 5,583 with interest at twelve per cent, from July 14, up to January 15, 1926, the judgment of the High Court must be reversed as well as the order as to costs. In strictness the appellant would have been entitled to interest at twelve per cent, up to February 8, which was the actual date of the institution of the plaint, but as he has limited his claim to January 15, 1926, in his plaint in respect of all three instalments, he cannot now be allowed to claim a larger sum.

15. In substance the decree of the Subordinate Judge falls to be sustained, but it must be varied in so far as it allows the penalties paid by the appellant to the Collector which are not now insisted on. In form, therefore, it is necessary to recall the judgments both of the Subordinate Judge and of the High Court, and to grant a decree against the respondents as the heirs of Sheikh Haider Ali for the sum of Rs. 15,452-8 and for the sum of Rs. 1,661, being the amount of the costs awarded to the appellant by the Subordinate Judge with interest on these sums at six per cent, from January 30, 1927, until the date of realisation. The appellant is also entitled to the costs of the suit both in the High Court and before this Board. Their Lordships will humbly advise His Majesty accordingly.

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