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Court : Allahabad

Decided On : Aug-05-1949

Reported in : AIR1950All53

Judge : Wanchoo and ;Seth, JJ.

Acts : [Transfer of Property Act, 1882](#) - Sections 82; Uttar Pradesh Encumbered Estates Act, 1934 - Sections 9(5); U.P. Act; Debt Law

Appeal No. : Second Appeal No. 848 of 1945

Appellant : Sheodan Singh

Respondent : Ramesh Singh and ors.

Advocate for Def. : S.N. Misra, Adv.

Advocate for Pet/Ap. : Ram Narain Verma, ;S.S. Verma and ;Baleshvari Prasad, Adv.

Disposition : Appeal allowed

Judgement :

Wanchoo, J.

1. This is an appeal by Sheodan Singh against the order of the Additional Civil Judge of Etah by which he affirmed the judgment and decree of the Additional

Munsif of Etah, dismissing the suit brought by the plaintiff. The circumstances in which the suit was brought by Sheodan Singh were these:

2. One, Lokan Singh, made a mortgage on 18th August 1928, for a sum of Rs. 100, in favour of Prithi Raj Singh. On 13th December 1928, another mortgage for Rs. 100 was executed by Tara Singh and others also in favour of the same Prithi Raj Singh. Later, on 9th November 1929, the mortgagors of both the mortgage deeds jointly executed a sale deed of the equity of redemption in favour of Sheodan Singh, the plaintiff appellant, and the defendant-respondents or their predecessors in interest. Prithi Raj Singh filed a suit against his mortgagors as well as the transferees, and got a decree on the basis of his mortgage deeds on 4th December 1933. Thereafter, Sheodan Singh made an application under the Encumbered Estates Act. There, Sheodan Singh took no steps to implead his co-debtors, namely, the other vendees from Lokan Singh, Tara Singh and others, or to get the debt apportioned between himself and the other vendees under Section 9(5)(a), Encumbered Estates Act. In the result the entire amount due to Prithi Raj Singh was realised from Sheodan Singh. Thereafter the present suit was tiled by Sheodan Singh for contribution under Section 82, Transfer of Property Act.

3. The suit was resisted by the defendant-respondents and their main ground was that as Sheodan Singh had failed to get the debt apportioned between himself and his co-debtors in the proceedings under the Encumbered Estates Act, he could not maintain the suit for contribution under Section 82, Transfer of Property Act. There were other issues also raised, but the Courts Below have dismissed the suit on the ground that it was not maintainable and have accepted the contention advanced on behalf of the defendant-respondents in that connection.

4. The only point, therefore, that requires determination by us is whether Sheodan Singh could maintain the suit for contribution, even though he had failed to implead the co-debtors or to get the debt apportioned between himself and the co-debtors in the Encumbered Estates Act proceedings.

5. We are of opinion that there is no provision in the Encumbered Estates Act which bars Sheodan Singh from maintaining the present suit. We may point out that there is a provision in the Encumbered Estates Act, which, in effect bars a

creditor from filing a suit and obtaining a decree against a co-debtor, if he fails to get the debt apportioned between the debtor, who has applied, and the co-debtors. Under Section 9 (5) (b), Encumbered Estates Act it is provided that if all the joint debtors have not applied under Section 4, the creditor shall have a right to recover from the debtors who have not applied only such amount on account of the joint debt as may be determined by the Special Judge to be due by them. This specific provision makes it incumbent on the creditor, in cases where the application is only by some of the debtors, to apply to the Special Judge to have the liability apportioned between those who are applying and those who have not applied. If the creditor fails to do so, he cannot recover anything from the co-debtors, because under this provision he can only recover that amount from the co-debtors which is determined by the Special Judge.

6. There is, however, no such provision with respect to the debtor himself. As a matter of fact, the right of contribution will arise only when the debtor has discharged the entire liability, though there were others who were also liable to discharge it. We are, therefore, of the opinion that the view of the Courts below is wrong, and that the present suit for contribution is maintainable.

7. As the Courts below have not decided all the issues, the suit must be remanded to the trial Court for decision of the issues which have still to be decided, namely, issues 2, 4 and 5, as framed by the trial Court,

8. We, therefore, allow the appeal, set aside the order of the lower appellate Court and remand the case to the Court of first instance, through the lower appellate Court, for disposal as directed above. The appellant will get his costs of this Court and the lower appellate Court. Other costs shall be in the discretion of the trial Court.