Ram Naraln Vs. Nihal Singh

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Court : Allahabad

Decided On : Jan-16-1925

Reported in : AIR1925All488

Appellant : Ram Narain

Respondent : Nihal Singh

Judgement :

Sulaiman, J.

1. This is a defendants' appeal arising out of a suit for damages for Rs. 525. The Court of first instance decreed the claim for Rs. 349-11-6 on account of a period of five years. The defendants appealed to the Judge and their appeal was numbered as Civil Appeal No. 482 of 1921. In this they claimed that the whole suit ought to have been dismissed. The plaintiffs also appealed and their appeal was numbered as Civil Appeal No. 484 of 1921. In this they claimed damages for one year extra which had been disallowed by the Court of first instance. The learned Judge heard the two appeals together and disposed of them by practically one judgment. The result was that he held that the plaintiffs were entitled to claim damages for six years no part of which was barred by time, but he thought that the rate of damages allowed by the first Court was excessive. The net result of his finding was that the decree which had been passed by the first Court in favour of the plaintiffs was reduced in amount. There were two separate decrees prepared in two separate

appeals. The defendants have come up to this Court and have filed an appeal only from the decree in appeal filed by them in which their objection that the whole suit ought to have been dismissed was not allowed. They have preferred no appeal from the decree in the plaintiffs' appeal.

2. There is a preliminary objection on behalf of the respondents that the present appeal is barred by the principle of res judicata. The law on this question is laid down in the Full Bench case of Ghansham Singh v. Bhola Singh A.I.R. 1923 All. 490 At page 469 it was remarked 'where there are two decrees arising out of two appeals to a subordinate Appellate Court, and only one of such decrees is brought up in second appeal and there is nothing prejudicial to the appellant in the decree from which no appeal has been brought which is not raised and cannot be set right if the appeal which he has brought succeeds, the right of appeal is not barred either by the rule of res judicata or at all by reason of his failure to appeal from the decree which does not prejudice him'.

3. I have already stated that the result of the findings of the learned Judge was that the amount decreed to the plaintiffs by the first Court was actually reduced. In substance therefore the plaintiffs' appeal in which they had claimed a larger sum was really not allowed at all, nor was the question of their right to get any amount; decided in it which was not raised in the other appeal. The present appeal is preferred from the main appeal in which the question as to whether the entire claim ought or ought not to have been dismissed was raised. In view of the pronouncement in the Full Bench case I am bound to hold that the hearing of this appeal is not barred by the fact that no formal appeal has been preferred from the decree in the other appeal which really was in favour of the defendants.

4. The learned Vakil for the appellants has not pressed grounds Nos. 1 and 2 taken in the memorandum of appeal. Only two points have been pressed (1) that the plaintiffs not having delivered possession of certain sir land ware not entitled to sue for damages, and (2) that the entire claim was barred by limitation.

5. As to the first point it may be mentioned at the outset that there was no specific ground to that effect raised in the grounds of appeal before the lower Appellate Court. That question in a quite different form was raised in point No. 4 mentioned

in the lower Appellate Court's judgment. I am, however, of opinion that there is no force in this contention. In 1910 there was a usufructuary mortgage of about 36 bighas of land by the plaintiffs in favour of Inder Lal and Sham Lal. Under Section 10, Sub-clause (2) of the Tenancy Act ex-proprietary rights were created in respect thereof. According to the rubkar recorded by the Court of first instance the plaintiffs became ex-proprietary tenants of their previous sir lands and, entered into possession as such. Subsequently on the 29bh of May, 1924, the defendants obtained a sale deed from the plaintiffs of 10 bighas out of the mortgaged lands. In this they included the ex-proprietary lands of the plaintiffs and called them both sir and ex-proprietary lands. Parfe of the sale consideration was left in the hands of the vendees for payment to the prior mortgagee. It is obvious that the sale of ex-proprietary rights to the defendants, was altogether illegal and invalid. Such a transfer could never be enforced in law The mere fact that in spite of the supposed sale the plaintiffs have not delivered possession of their ex-proprietary holdings to the defendants cannot be availed of by the latter or justify their nonpayment of the amount due to the prior mortgagees. They must be presumed to have known that what they were trying to purchase could not be purchased by them. They entered into the contract with their eyes open and in violation of the express provisions of the law and they cannot take advantage if they find themselves unable to compel the plaintiffs to fulfil their illegal contract. The defendants-vendees kept in their hands part of the sale consideration and it was their duty to pay this sum to the mortgagees. Had they paid it to the prior mortgagees the result would have been that the entire 36 bighas of land would have been redeemed, the plaintiffs obtaining possession of 26 bighas and the defendants of the remaining 10 bighas.

6. The real question in the case is whether the plaintiff's claim as brought in 1921 was barred by limitation. The Court of first instance held that it was barred by limitation with regard to the first year. The lower appellate Court has taken the view that it is not at all barred by time because the breach was a continuous breach and no question of limitation really arose.

7. In the sale-deed there was no time fixed within which the defendants-vendees were to pay off the prior mortgage. The ordinary presumption would be that they were to pay the amount on the date of the execution of the sale deed in their

favour. If they failed to make the payment they did commit a breach of the implied covenant in the sale-deed. The question is whether that breach is a continuing one that is to say whether as every day passes the defendants are continuously committing a breach of the covenant to pay off the mortgage or whether they committed the breach when they did not pay off either on the date of the execution of the sale-deed or at any rate within a reasonable time of it. In the case of Raghubar Rai v. Haij Raj (1912) 34 All. 429 a Division Bench of this Court laid down very clearly that upon failure to pay money due by a vendor to a third party which the vendee agreed to pay and where no time was fixed for payment, the breach was committed on the date when the sale dead was executed and there was no continuing breach within the meaning of Section 23 of the Limitation Act, nor successive breaches within the manning of Article 115. Tasifc ruling of the Divisional Bench is binding upon me as a single Judge. I am, therefore, bound to hold that the failure by the defendants to pay the mortgage money to the prior mortgagees was a breach of their covenant which took place once and for all and that there was no continuing breach which would give successive causes of action to the plaintiffs to sue. It is true that on the facts there is a slight difference between the present case and the reported case. In the present case the mortgage was a usufructuary one. The loss to the plaintiffs consists in their not getting the profits out of the mortgaged lands owing to the delay in redemption.

8. In the reported case the loss to the plaintiffs consisted in the continual accrual of interest on the mortgage money. In one case there is an actual loss by non-receipt of profits day after day and in the other there is a loss by a continual enhancement of liability. But the principle underlying both tha cases seems to ma to be identical.

9. In the reported case there are certain' observations at pages 432 and 433 suggesting that even if subsequently the plaintiffs have themselves to pay off the mortgage money and redeem the property they may not have a fresh cause of action to recover the amount from the defendants. Those observations however are mere obiter dicta-and they were not necessary for the purposes of that case inasmuch as there the-suit had been brought before the plaintiffs had actually made any payment. It is, therefore, possible that in this case even; though the present claim is to be held to be barred by time the plaintiff's-remedy may be either

for recovery of the amount treating it as their unpaid purchase money with a charge on the property transferred, or for recovery of damages after they have themselves re-deemed the property by payment of the' mortgage money. But in view of the reported case mentioned above I am bound to hold that the present claims brought more than six years after the sale dead for recovery of damages for failure to pay to the mortgagees the amount left in the hands of the vendees for such payment is barred by limitation.

10. The result therefore is that this appeal must be allowed and the decrees of the Courts below set aside and the plaintiffs' suit dismissed. As however the plaintiffs have obviously suffered considerable loss owing to the deliberate default of the defendants to pay off the amount left in their hands for payment to the mortgagees. I think that this is a fit ease in which the parties must be ordered to pay their own costs in all Courts.

11. In the view which I have taken of the case the cross-objection must be dismissed the parties bearing their own costs.