

Basant Lal and ors. Vs. Dr. Dwarka Prasad Varshney and ors.

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Court : Allahabad

Decided On : May-02-1978

Reported in : AIR1978All436

Judge : Deoki Nandan, J.

Acts : [Code of Civil Procedure \(CPC\) , 1908](#) - Sections 60; Limitation Act, 1908 - Schedule - Articles 111 and 132; [Transfer of Property Act, 1882](#) - Sections 55(4)

Appeal No. : Second Appeal No. 110 of 1978

Appellant : Basant Lal and ors.

Respondent : Dr. Dwarka Prasad Varshney and ors.

Advocate for Def. : G.P. Bhargava, Adv.

Advocate for Pet/Ap. : Raja Ram Agrawal, Adv.

Disposition : Appeal dismissed

Judgement :

Deoki Nandan, J.

1. This is a defendant's second appeal in a suit for recovery of Rs. 3760-00, and, in order to ensure recovery, for a charge on a single storeyed house with land and chabutra pertaining thereto situated in the Court of Wards compound at Aligarh.

There were two sets of defendants in the case. The three appellants were defendants of the first set. The defendant-respondents Nos. 4 to 10 were the defendants of the second set.

2. The case of the plaintiff-respondents was that Hari Mohan, the ancestor of the defendants second set, had sold the aforesaid house on which charge for securing recovery of the amount claimed was sought, for the sum of Ra 15,000/- on November 7, 1951 in favour of Smt. Bhagwati Devi, wife of Sri Murari Lal, the father of the defendants first set; that out of the sale consideration Rs. 2500/-were paid as earnest money and Rs. 8750/-were paid at the time of the registration of the sale-deed leaving a balance of Rs. 3750/- which was left by the vendor with the vendee Smt. Bhagwati Devi as unpaid purchase money; that Lala Ram Swarup, the father of the first and the third plaintiffs and husband of the second plaintiff, respondents Nos. 1, 3 and 2 respectively had two decrees in Suits Nos. 550 of 1953 and 211 of 1955 of the Court of the Munsif, Koil, District Aligarh against Sri Hari Mohan, father of the defendants Nos. 4, 6 and 7 and husband of defendant No. 5 who are defendant-respondents Nos. 4, 9, 10 and 8 respectively, the defendant-respondents Nos. 5, 6 and 7 being the sons of Man Mohan defendant respondent No. 4, that the said unpaid purchase money amounting to Rs. 3750/-in the hands of Smt. Bhagwati Devi was attached and sold as the property of Hari Mohan, the vendor, now represented by the defendants second set (defendant-respondents Nos. 4 to 10); that Lala Ram Swarup now represented by plaintiff-respondents Nos. 1 to 3 demanded payment of the said amount of Rs. 3750/- from the defendants first set now represented by the defendant-appellants and even served a notice, but the defendant-appellants did not pay any heed, hence the suit. It was also alleged that Lala Ram Swarup died as a member of a Hindu joint family and his interest was now duly represented by the plaintiff-respondents who were his survivors and entitled to recover the amount due without obtaining any succession certificate; that Smt. Bhagwati Devi had also died and the defendants first set (appellants) were her heir in possession of the property and responsible for payment of unpaid purchase money: and that Hari Mohan, the original vendor, had also died and was now represented by the defendants second set who were his heirs and were being impleaded as defendants in order to avoid any dispute in future. The dates of the accrual of

cause of action for the suit as alleged in the plaint are November 7, 1951, the date of the sale-deed and July 26, 1955, the date of the auction sale of the liability for payment of the unpaid purchase money.

3. The defendants first set, namely, the appellants, contested the suit on the plea that the payment of Rs. 3750/- was dependent on fulfillment of certain conditions and as those conditions had not been fulfilled, the suit was premature; that in a partition suit decided on November 1, 1955, the house in question had been allotted to other co-sharers and against that decree First Appeal No. 621 of 1956 was pending in the High Court; that another Suit No. 7 of 1959 of the Court of the Civil Judge, Aligarh, Indian Manufacturing Company v. Niranjana Singh and others, for partition of the said house which had fallen in the lot of the other co-sharers, had been stayed under Section 10 of the Code of Civil Procedure in view of the pendency of the First Appeal No. 621 of 1956 in the High Court; that the present suit was accordingly liable to be stayed under Ss. 10/151 of the Code of Civil Procedure; that the present suit was bad for non-joinder of necessary parties and was barred by time; and that the sale in favour of Ram Swarup was invalid and the plaintiffs did not get any rights thereunder; and that the plaintiffs had no right to any charge on the house for recovery of the amount claimed.

4. The defendants second set do not appear to have filed any written statement.

5. The learned Munsif who tried the suit held that attachment and sale of the liability, of the debt due by the defendants first set, for payment of the unpaid purchase money was lawful and valid and that, therefore, the plaintiffs were the owners of the same; that the matters in dispute on the settlement of which the unpaid purchase money under the sale-deed dated November 7, 1951 became payable, had been settled, and that the defendants first set were liable to pay the same; that the suit filed within limitation; that the suit was not bad for nonjoinder of the necessary parties and was not liable to be stayed on account of the pendency of Suit No. 7 of 1959 in the Court of the Civil Judge, Aligarh or the First Appeal No. 621 of 1959 pending in the High Court; that the plaintiffs were entitled to a decree even without a succession certificate and also to a charge on the aforesaid house for the recovery of the amount; and in the result he decreed the suit in favour of

the plaintiffs for of recovery of Rs. 3750/- along with future interest at four per cent per annum. Further, six months' time was allowed for payment of the decretal amount failing which the aforesaid house was declared liable to be sold for its recovery and a preliminary decree under order XXXIV, Rule 4 of the Code of Civil Procedure was ordered to be prepared accordingly.

6. The defendants first set appealed to the District Court. The appeal was heard by the Court of Additional Civil Judge, Aligarh and dismissed by judgment dated October 16, 1967 confirming the findings and decree of the trial court.

7. Mr. R. R. Agarwal, learned counsel for the appellants, urged before me, firstly that the plaintiff-respondents had no right to sue as the attachment and sale of the liability for unpaid purchase money in question was contingent on the happening of an event which may or may not happen at all and was, therefore, not liable to be attached or sold in execution of a decree by reason of the prohibition contained in clause (m) of the proviso to Sub-section (1) of Section 60 of the Code of Civil Procedure, 1908; and secondly that the suit being one for recovery of unpaid purchase money, it was barred by time under Article 111 of the Indian Limitation Act, 1908 the corresponding Article of the Limitation Act, 1963 being Article 53 which prescribes a limitation of three years from the time fixed for completing the sale, or (where the title is accepted after the time fixed for completion) the date of the acceptance, which according to the learned counsel was November 1, 1955, when the suit for partition was decided.

8. With regard to the first contention raised by the learned counsel for the appellants the relevant terms of the sale deed must now be noticed. The suit for partition (Suit No. 54 of 1949) was pending when the sale deed was executed. It was stipulated that in case the property in suit goes out of the possession of Smt. Bhagwati Devi under the decree in Suit No. 54 of 1949 then in that case the purchaser shall have a right to choose and take any property of the rental value of Rs. 50/- per month out of the properties allotted to the vendee Hari Mohan and he will be bound to transfer to her property so chosen by Smt. Bhagwati Devi and in case the vendor failed to do so the purchaser Smt. Bhagwati Devi would be entitled to recover the entire sale consideration with interest thereon at 6 per cent

per annum. It was also agreed that in case the vendor Hari Mohan was allotted property of a rental value less than Rs. 50/- per month, then in that case, the vendor will be entitled to that property and for recovery of a proportionate amount of balance out of the sale consideration. The amount of Rs. 3750/- was left as amanat, i.e., in trust for fulfillment of these conditions and was to be payable to the vendor when the said conditions were fulfilled. Now Suit No. 54 of 1949 was decided on November 1, 1955. Under the decree in that suit some of the land included in the property sold to Smt. Bhagwati Devi was allotted to the Qura of the plaintiff of Suit No. 54 of 1949 and instead some cash amount was awarded as compensation to the defendant-appellants in the present case. On these facts it was found by the two courts below that the conditions on the fulfillment of which the amount of Rs. 3750/- was payable had been fulfilled.

It may also be mentioned here that the parties to Suit No. 54 of 1949 other than the defendant-appellants in the present proceedings did not prefer any appeal against the decree in Suit No. 54 of 1949, with the result that so far as the other parties are concerned, the decree in that suit has become final. On the conditions stipulated in the sale-deed on the fulfillment of which the amount of Rs. 3750/- was payable, the only question which now arises is whether the liability for payment of the same was liable to attachment and sale when it was in fact so attached and sold, the dates of attachment and sale being both prior to the decision of Suit No. 54 of 1949. Now the only possibilities in Suit No. 54 of 1949 were the allotment of the entire property to vendor's share or the allotment of a part or the whole or part of the property to the share of others who were parties to Suit No. 54 of 1949. The sale-deed took note of either of these possibilities and made provision for the same. It cannot be said that the decision of Suit No. 54 of 1949 one way or the other was an event which may or may not happen. The decision was bound to be given some day or the other; and in the decision, the property was bound to be allotted in either of the aforesaid ways. Under the circumstances the reference by the learned Counsel to Clause (m) of the proviso to Sub-section (1) of Section 60 of the Code of Civil Procedure was 'wholly misplaced. The clause refers to 'an expectancy of succession by survivorship or other merely contingent or possible right or interest.' The expectancy of succession by survivorship referred to thereunder is what is usually called spes successions. The principle behind the

clause is that the property in such a case does not vest in praesenti and consequently the person having such an expectancy of succession has no property which could be attached or sold. In the present case on the other hand the vendors were definitely owners of property, namely the share which they had in joint family property and the share had only to be demarcated by allotment of specific properties to them by the final decree of partition. Their interest was not contingent. It was vested in them. They had a lien in the nature of property, and could enforce the same. That being so, they were bound to be allotted some property at the partition and the conditions of the sale-deed only provided that if they were allotted a property different from those which had been sold by them then in that case they would be bound to convey property of an equal valuation (the measure of which was fixed at the annual rental value of Rs. 50/-) to the purchaser and, if they did so, the amount of Rs. 3750/- which was left as amanat, i.e., in trust, immediately became payable to them by the purchaser. The vendors had a vested interest in the amount of Rs. 3750/- inasmuch as if the purchaser did not pay the amount even on the fulfillment of the conditions of the sale-deed, he could have enforced its recovery by suit.

9. The first contention raised by the learned Counsel, therefore, fails.

10. With regard to the second contention that the suit was barred by time, it must be observed as the first thing that the suit was instituted in 1963, that is to say, at a time when the Indian Limitation Act, 1908 was in force. The contention of the learned Counsel is that it was governed by Article 111 of that Act. The terms on which the amount of Rs. 3750/- was left with the purchaser as Amanat, that is in trust, and on the fulfillment of which it became payable by the purchaser to the vendor are contained in the sale-deed itself which is a registered document. The amount was not left with the purchaser as unpaid purchase money but was specifically left with the purchaser as Amanat i.e., in trust. The nature of the money so left was not exactly unpaid purchase money but it was more in the nature of security. Be that as it may, a vendor's right to unpaid purchase money; whether under an express stipulation in the instrument of sale or by virtue of the statutory obligation under Section 55(5)(b) of the [Transfer of Property Act, 1882](#), is a right to recover the amount personally from the purchaser and in addition, in the absence

of a contract to the contrary a statutory charge on the property sold is created for the unpaid purchase money under Section 55(4)(b) of the Transfer of Property Act. Suits to enforce the charge were not governed by Article 111 of the Indian Limitation Act, 1908 but by Article 132 and the remedy was available even where the personal remedy for the unpaid purchase money became barred by time. (See *Megh Raj v. Abdullah Khan* (AIR 1914 All 131) and *Munir-unnessa v. Akbar Khan* (1908) ILR 30 All 172 at pp. 173-174 (FB)). The limitation for a suit to enforce a personal remedy, where the right arose from an expressed stipulation in the registered sale-deed, was governed by Article 116 and not Article 111 of the Indian Limitation Act, inasmuch as Article 116 was a special Article governing all suits on contracts in writing registered. In the case in hand the decree under appeal is in the nature of a decree enforcing a charge on the property. The limitation for a suit to enforce payment of money charged upon immoveable property was 12 years under Article 132 of the Indian Limitation Act, 1908, and that such a charge was created under the deed has not been disputed before me by the learned Counsel for the appellants. The suit was accordingly governed by Article 132 of the Indian Limitation Act, and 12 years had obviously not elapsed from the date when the money sued became due which was November 1, 1955, when according to the own contention of the learned Counsel for the appellant, the suit for partition was decided. The second contention of the learned Counsel has thus no merits.

11. No other point was pressed before me by the learned Counsel for the appellants.

12. In the result, the appeal fails and is accordingly dismissed with costs throughout.

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