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Court : Allahabad

Decided On : Apr-16-1926

Reported in : AIR1926All605; 95Ind.Cas.913

Appellant : Kedar Nath

Respondent : Har Govind

Judgement :

Kanhaiya Lal, J.

1. The question for consideration in this case is whether the plaintiff is entitled to compensation for the loss said to have been 'occasioned to him by the delay of the defendant in paying certain money, which was left with him by the plaintiff for the payment of a prior mortgage.

2. On the 22nd August 1908 the plaintiff executed a mortgage bond in favour of Bohra Khetpal for Rs. 5,000 repayable with interest at 6 per cent. per annum, and mortgaged two villages, Araila and Sikrari, as security for its repayment. On the 7th June 1913 the plaintiff sold the village Araila to Har Govind, the defendant-respondent, for Rs. 5,000 and left the entire consideration with him for payment to the prior mortgagee. That money was to have been paid according to the sale-deed in part satisfaction of the prior mortgage. But Har Govind did not pay that money till the 22nd September 1916. One of the conditions entered in the sale-deed was that if the vendee failed to pay the money left with him for payment to

Bohra Khetpal thus occasioning a suit in Court (aur naubat nalisth ki adalat tak pahuncha) then the vendee shall be responsible for costs and interest on the money aforesaid from the date of the deposit.

3. Subsequently the village Sikrari was proclaimed for sale in execution of a decree for money obtained by Peare Lal against the plaintiff, and in order to pay up the money due by him to Peare Lal and the balance of the mortgage money due to Bohra Khetpal and certain other debts due by him to other creditors, the plaintiff sold that village to Maqsd Ali Khan for Rs. 10,000, out of which Rs. 3,174 were paid by him to Bohra Khetpal in satisfaction of the remaining money due on the mortgage.

4. In the present case the plaintiff claims the extra interest which he had to pay Bohra Khetpal in consequence of the delay of the defendant in paying the sum of Rs. 5,000, left with him for payment to Bohra Khetpal. The trial Court awarded him Rs. 987-8-0 as compensation on account of the extra interest, which he had to pay to Bohra Khetpal on the said sum of Rs. 5,000 from the 7th June 1913 to the 22nd September 1916, the date on which that money was actually paid to the prior mortgagee. The lower Court however held that the claim was barred by limitation, as the cause of action for a suit for damages for a breach of the contract accrued to the plaintiff on the date the contract was broken, namely, the date on which the sale was effected and the money was left with the vendee for payment to the prior incumbrancer.

5. The sale-deed fixed no time for the payment of the money, and ordinarily it would be presumed that the parties intended that the payment should be made within a reasonable time. There is nothing to show why the payment of the money was withheld for over three years. Under the mortgage the plaintiff was liable to pay interest on the mortgage money at 6 per cent. per annum compoundable yearly. Had the money been paid within a reasonable time from the date of the deposit, the plaintiff would 'have been relieved from the liability for interest on that amount. Not having been so paid, the liability for interest continued and the plaintiff eventually had to pay a much larger sum than he otherwise would have been liable to pay for the balance of the mortgage money.

6. It is urged that the right of the plaintiff to sue for damages accrued when the contract was broken and he had to pay extra interest by reason of the breach. The contract provided that if the vendee failed to pay the money left with him to the prior mortgagee and that occasioned a suit in Court, the vendee will indemnify him for his costs and for interest on the amount left with him from the date of the deposit.

7. It might be argued that the covenant was only intended to apply if, as a result of that failure, a suit was brought by the prior mortgagee for the recovery of his money. But the suit to which the covenant refers might be either a suit brought by the prior mortgagee for the recovery of his money, or a suit which a party to the contract may have to bring either to enforce the covenant or to claim damages for its breach. The contingencies there referred to, namely, a failure to pay and a suit need not moreover be cumulative. They may be read distributively as suggestive of a possible succession of events, any one of which might give the plaintiff a right to sue, if he is damnified. Though a suit by Bohra Khetpal was averted by the plaintiff paying up his mortgage money he has had to pay a much larger amount to him than he would have had to pay, had the amount left by him with the vendee been paid to Bohra Khetpal within a reasonable time of the deposit; and he is entitled consequently to ask the vendee to pay him that amount.

8. A man who is entrusted with a certain sum of money with instructions to pay the same to another person, to whom the person paying the money is liable, keeps the money left with him at his peril. If he fails to pay it or delays payment beyond a reasonable time, he is liable for damages as for a breach of a contract to the extent of the loss which the person depositing the money has suffered by reason of such failure or delay, and under Article 83 of the Indian Limitation Act a suit to enforce the security or for damages resulting from the delay is within time if filed within three years from the date of actual injury. The decision in *Raghubar Rai v. Jairaj* (1912) 34 All 429 does not apply because there was no contract of indemnity in that case and the plaintiff had not made any payment entitling him to enforce any indemnity. The damages in this case accrued when the plaintiff had to sell one of his properties to Maqsd Ali Khan and to pay the balance of the mortgage money claimed by Bohra Khetpal out of the sale consideration for any

excess of what he would have been otherwise liable for had the money left with the defendant been paid in time. The suit was filed within three years from that date.

9. As pointed out in *Ram Barai Singh v. Mohendra Prasad* (1912) 16 CWN 1040 and *Kumar Nath Bhattacharjee v. Nobo Kumar Bhuttajee* (1899) 26 Cal 241 a contract of indemnity may be express or implied. Here there was an express agreement for the payment of the indemnity in case the vendee failed to pay the money left with him, and the plaintiff was landed in a suit in consequence. Either of these contingencies read distributively was sufficient to give him a cause of action. If the two contingencies be read together there would still be an implied contract of indemnity to pay the plaintiff the damage which he may suffer in consequence of the delay and the suit would be within time. In *Kaliyammal v. Kolandavela Goundar* AIR 1918 Mad 1135 a stipulation in a contract for sale whereby the vendee agreed to discharge an existing incumbrance on the property sold was treated as in the nature of an indemnity. In *Kumar Nath Bhattacharjee v. Nobo Kumar Bhattacharjee* (1899) 26 Cal 241 and *Hakim Ali Khan v. Dalip Singh* (1913) 11 ALJ 478 it was held in somewhat similar circumstances that limitation would run from the date when the plaintiff was indemnified. Article 83 of the Limitation Act therefore applies to the case and the suit is within time. The appeal ought, therefore, to be allowed and the decree of the lower appellate Court set aside and that of the Court of first instance restored with costs here and in the lower appellate Court.

Ashworth, J.

10. This is a plaintiff's appeal. It arises out of a suit brought by the plaintiff against the defendant for damages for breach of contract. The contract was embodied in a sale-deed executed by the plaintiff on the 7th of June 1913 in favour of the defendant and in respect of village Acharela. Some five years earlier, on the 22nd of August 1908, the plaintiff had hypothecated this village and another village Sakhrari to one Khetpal Singh for Rs. 5000. In the sale-deed of the 7th of June 1913 the vendee was left the whole of the purchase price, namely, Rs. 5,000 and covenanted to pay it to the mortgagee Khetpal Singh as the principal of the

mortgage. No time was specified for payment, and so it must be deemed that he was to pay it within reasonable time. It has not been shown that it was not reasonable to pay it at once and so it may be taken for the purposes of this suit that the contract was to pay the mortgagee the Rs. 5,000 on the 7th of June 1913. The money was not paid to the mortgagee but in connexion with insolvency proceedings against the plaintiff it was ultimately paid to the plaintiff on the 22nd September 1916. After this the plaintiff redeemed the mortgage on the 15th of August 1917 and had to pay Rs. 3,174-8-0 interest. His case is that if the Rs. 5,000 had been paid by the defendant to the mortgagee on or about the 7th of June 1913, when the defendant was liable to pay it, the interest due at that time would have been only Rs. 2,227-8-0. The plaintiff accordingly sued for the difference namely, Rs. 1,147

11. The defence was that the money could not be paid by the defendant to the mortgagee owing to the plaintiff's fault. The plaintiff had represented that the Rs. 5,000 would redeem the mortgage not taking into account the interest. The mortgagee refused to take the Rs. 5,000 in part payment of what was due under the mortgage. The plea of limitation was also taken, it being contended that the breach of the agreement occurred on the 7th of June 1913, and that limitation expired after six years from that date.

12. The first Court held that the defendant never tendered the Rs. 5,000 to the mortgagee, and that the contention was false that the mortgagee refused to take it. It held that a cause of action accrued when the plaintiff had to pay the extra interest to Khetpal Singh in respect of the sum of Rs. 5,000 in question. It gave the plaintiff a decree for the interest on Rs. 5,000 at the rate mentioned in the mortgage bond from the 7th of June 1913 to the date of payment of the interest, namely, the 15th of August 1917.

13. In first appeal the District Judge found that the defendant never tendered the money as he was bound to do, to the mortgagee Khetpal Singh but he held that the suit was barred by limitation under Article 116 of the Limitation Act. In this appeal plaintiff's counsel argued that if the suit is governed by Article 116, then reading that article with Section 24 of the Limitation Act the suit is within time, as

the cause of action accrued when the plaintiff had to pay up the extra interest. Alternatively he argues that Article 61 or Article 83 is applicable. I hold that Article 61 has no application. The plaintiff did not pay this money for the defendant, as the mortgagee had no right to claim it from the defendant. Nor was the contract one to indemnify. It is true that the sale-deed contained a provision that

If the defendant did not pay up the Rs. 5,000 and litigation ensued, the defendant would be liable for costs of the litigation and for interest on the said sum.

14. This, however, was a particular clause constituting a contract of indemnity in a certain event. As the mortgagee never sued the plaintiff, nor was the plaintiff involved in a suit in consequence of the non-payment, this indemnity did not come into operation. The fact of this special provision being incorporated would not prevent the contract as a covenant to pay the money, apart from a suit by the mortgagee, taking effect. It is true that in a Madras case, *Kaliyammal v. Kolandavela Goundan* AIR 1918 Mad 1135 a similar contract was held to be one of indemnity governed by Article 83 on the strength of the Privy Council decision in *Izzat-un-nissa v. Partab Singh* (1909) 31 All 583. But the Privy Council decision relied on was not one with reference to the Limitation Act, and I consider was no authority for the view that this contract would fall under Article 83. On behalf of the respondent it has been argued that Article 62 might apply, but the money was never payable under the covenant by the defendant to the plaintiff but by the defendant to the mortgagee. Accordingly the only question I consider that arises on the score of limitation is whether Article 116 will apply, and if so, should it be read with Section 24. There can be no doubt that the suit is one based on breach of a registered contract: and that the time begins to run under Article 116 from the date when the contract is broken. The contract was broken on the 7th of June 1913. The suit would therefore be time-barred unless we can invoke 8. 24 of the Limitation Act which is as follows:

In the case of a suit for compensation for an act which does not give rise to a cause of action unless some specific injury actually results therefrom, the period of limitation shall be commuted from the time when the injury results.

15. In construing this section I can give no meaning to the word 'specific' unless possibly it means 'that can be specified'. It appears to me to be redundant. We have therefore to see whether the act of the defendant in not paying or tendering the Rs. 5,000 to the mortgagee gave rise to a cause of action independently of the fact that plaintiff had to pay the additional interest in 1917. In other words could the plaintiff have sued on the breach of contract before 1917 when he paid the additional interest. The lower appellate Court has relied on *Raghubar Rai v. Jairaj Rai* (1912) 34 All 429 decided by a Bench of two Judges of this Court. It was there held on the authority of an English case, *Battley v. Faulkner* (1820) 3 B & Ald 288 and of *Kumarnath Bhattacharjee v. Nobo Kumar Bhattacharjee* (1899) 26 Cal 241, that the plaintiff could have brought an action on the covenant even before any injury was done or damage took place, in order that the person making the covenant (i.e. defendant) should place him in a position to meet the liability the defendant had undertaken on the plaintiff's behalf. In other words, plaintiff could have sued at any time after the 7th of June 1913 for the Rs. 5,000. If this is correct then Section 24 of the Limitation Act could not be invoked.

16. This decision in *Raghubar Rai v. Jairaj Rai* (1912) 34 All 429 was dissented from by a later decision of a Bench of two Judges of this Court, *Sarju Misir v. Ghulam Husain* (1921) 63 IC 87. In that decision it was held that the plaintiff got one cause of action owing to breach of the contract and a second cause of action owing to injury resulting from it.

17. It appears to me that if the decision in *Raghubar Rai v. Jairaj* (1912) 34 All 429, that the plaintiff could have sued at an earlier date for mere breach before incurring actual loss is correct, then it must be admitted that the suit is barred by limitation, but I consider that the English law as set forth in *Raghubar Rai v. Jairaj Rai* (1912) 34 All 429 and *Kumarnath Bhattacharjee v. Nobo Kumar Bhattacharjee* (1899) 26 Cal 241 is not applicable to contracts in India. A reference to the terms of Section 73 of the Contract Act shows that a suit can only be brought for injury or loss already caused and not for prospective loss. Section 74 makes an exception to this. It allows a suit to be based on mere breach when the contract names a sum to be paid in case of mere breach or contains a stipulation by way of penalty. The present contract did neither. Where there is no sum named to be paid in case

of breach or stipulation by way of penalty, under India Law a mere breach of the covenant by omission to pay, as in this case, gives no right to a claim for compensation, and the suit will come within the language of Section 24 of the Limitation Act. I may mention that the word act in Section 24 will include an omission (see Section 3(2) of the General Clauses Act, 10 of 1897.) It has been urged that Section 24 is only applicable to suits based on tort, but no reason appears for holding this. The English Law in fact makes the mere breach the cause of action and treats the injury as the measure of the compensation for the breach. Section 73 of the Contract Act treats the loss or injury actually incurred as the cause of action. It has been suggested that, if this view is correct, the promisee has no remedy until years after the breach. It may be remarked, however, that in such a case as this' though he could not sue for specific performance (the time for performance having passed), he could have treated the agreement as void under Section 55 of the Contract Act and sued for restoration of the Rs. 5,000 under Section 65. In the present case the suit is one for damages for breach and is not one for compensation by reason of avoidance of the contract.

18. For these reasons I hold that the period for limitation runs from the date of actual injury and that the suit is within time. This was held in a case based on facts materially the same in *Hakim Ali Khan v. Dalip Singh* (1913) 11 ALJ 478, by a Bench of this Court, though the law was not discussed therein.

19. I would, therefore, allow the appeal with costs here and in the lower appellate Court and restore the decree of the first Court.