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SooperKanoon Citation : sooperkanoon.com/461485

Court : Allahabad

Decided On : May-09-1944

Reported in : AIR1944All276

Appellant : Ode Ram

Respondent : Chhida Singh

Judgement :

Malik, J.

1. This revision has arisen out of a suit brought by the plaintiff for recovery of Rs. 200 with interest thereon in the Court of Small Causes at Bulandshahr. The suit having been dismissed the plaintiff has filed this revision under Section 25, Provincial Small Cause Courts Act. The suit was, according to the plaintiff, on the basis of a bond dated 7th May 1934 for Rs. 200 and the plaintiff brought the suit on 6th May 1940 for the recovery of the amount and for interest thereon. The defendant alleged that the document dated 7th May 1934 was a zarepeshgi lease of ex-proprietary plots for a period of seven years. The zar-i-peshgi lease or mortgage was, there, fore, invalid and the plaintiff had no cause of action to maintain the suit. The defendant had further pleaded that the plaintiff had remained in possession for five years and had himself given up possession and that the suit was barred by limitation. The learned Judge framed three issues of which only issue 1 is relevant, as to whether the plaintiff had a right to sue. On the

other two issues the learned Judge decided in plaintiff's favour. As regards issue 1 the learned Judge held that the zarepeshgi lease was a void document and therefore no suit could be brought on the basis thereof but the plaintiff was entitled to a refund of the sum of Rs. 200 paid by him under Section 65, Contract Act. But a suit under that section should have been brought within three years of the contract, the suit having been filed almost at the end of six years, he held that it was barred by limitation.

2. Learned Counsel for the applicant has urged; before us that the suit was wrongly dismissed on the ground of limitation and that the suit should have been decreed. Learned Counsel for the applicant relies on a term in the document dated 7th May 1934 to the effect that in case the lessee is not able to get possession of the property or is dispossessed on account of any action taken by the lessor or by any third party or on account of any legal defect or flaw, the lessee will be entitled to recover the lease money with interest thereon. Learned Counsel argues that even though that part of the lease under which the plots were given as a sort of security for the loan may be bad, yet this part of the covenant is entirely separable from the first part and should be enforced. His argument is that the real transaction between the parties is that of a loan and if for some reason, the security given under the document is not available to the plaintiff the document itself may be taken as a simple bond and a suit be maintained on the terms contained therein.

3. The question about the validity of such transactions has been agitated in the Courts in this Province now for a number of years and so far as we can find this Court has always held that such transactions were invalid. The Board of Revenue has taken the other view that a usufructuary mortgage of an occupancy holding by a tenant was only voidable against the landlord and as between the mortgagor and the mortgagee it was a perfectly valid transaction. These cases were recently considered by a Full Bench of this Court reported in Ghassu v. Babu Ram ('44) 31 A.I.R. 1944 where, this Court held that if the matter had been res integra the Bench might have examined the question in detail but it was no longer possible to unsettle the law and to go back to first principles. We have, therefore, to start with this assumption that the zarepeshgi lease was a void transaction. The first question for consideration is whether it is possible to base a claim on the personal

covenant contained in the bond, the bond being invalid as a mortgage or a zarepeshgi lease. Two cases of this Court have been cited before us for the proposition that a suit on the personal covenant must also fail as the alternative promise cannot be separated from the main document which was illegal, see Tulshi Ram v. Sat Narain ('21) 8 A.I.R. 1922 All. 392, per Sulaiman and Gokul Prasad JJ., and Har Prasad v. Sheo Govind ('22) 9 A.I.R. 1922 All. 134, per Lindsay and Stuart JJ.

4. In Har Prasad v. Sheo Govind ('22) 9 A.I.R. 1922 All. 134 a usufructuary mortgage had been executed of certain occupancy holdings. The mortgagee was put in possession of the property. He subsequently lost two-thirds of the mortgaged property as his mortgagor was the owner only to the extent of one-third. He thereupon brought a suit under Section 68, T.P. Act, on the ground that the security had become insufficient and he was, therefore, entitled to recover the mortgage debt and claimed interest at 2 per cent, per mensem in accordance with the covenant entered in the deed. The Court held that the entire contract of mortgage was void under Section 24, Contract Act, and the personal covenant in the mortgage was therefore not enforceable. The case in Tulshi Ram v. Sat Narain ('21) 8 A.I.R. 1922 All. 392 was almost a similar case. In that case certain occupancy holdings were mortgaged with possession on 19th August 1909. The mortgagee being dispossessed from those holdings brought a suit under Section 68, T.P. Act, and this Court held:

If the plaintiff cannot compel the mortgagor to put him in possession of the occupancy holding he is not entitled to recover the money on the ground that the mortgagor has failed to carry out the illegal part of the contract.

5. The case before us is entirely of a different nature. Here the plaintiff has not brought the suit under Section 68, T.P. Act. He does not rely on the mortgage at all and was never put in possession of the mortgaged property. His case is that he made a loan of Bs. 200 to the other side on certain terms and on certain securities. The security having failed he is entitled to recover money as on a simple bond. In the cases cited above suits were filed on the ground that the mortgagors had failed to carry out their part of the contract and the Court held that the contract was

illegal and a claim on the basis of breach thereof was not maintainable. No such claim has been put forward in the case before us. Further we do not know what the terms of those deeds were as the terms of those deeds are not quoted in the reports. To our mind, the covenant as regards repayment in this case is entirely separable from the mortgage and can be treated as independent of it. The plaintiff has a right to base his claim on the agreement and as it is a registered document Article 116, Limitation Act, will apply and the suit having been filed within six years it should be deemed to have been filed within time.

6. Cases have arisen in this Court where a mortgagor included in the mortgage occupancy or exproprietary holdings which were not transferable and other property which was transferable and the question has arisen how far such a mortgage was enforceable. In such cases Courts have drawn a distinction between a mortgage or transfer in which the entire property included was not transferable and cases where a part of the property could be validly mortgaged or transferred. In Sita Rai v. Ram Khelawan : AIR1925 All543 where a suit was brought on the basis of a mortgage for possession of certain properties which the mortgagor was entitled to mortgage the Court refused to give him a decree for possession on the ground that he had obtained from the mortgagee possession over occupancy holdings and had retained possession thereof and also refused to grant to the mortgagee a decree for the proportionate share of the mortgage money claimed as against the properties possession of which had not been delivered.

7. In Rajendra Prasad v. Ram Jatan ('17) 4 A.I.R. 1917 All. 290 at page 541 Richards C.J. drew a distinction between executory and executed contracts and also stressed the point that by reason of the inclusion of the occupancy holdings in the' mortgage all that could be said was that those occupancy holdings must be omitted from consideration and it must be deemed that the mortgage was only of the fixed rate holdings and a decree for sale of the fixed rate holdings to pay off the entire mortgage debt was passed. These cases were considered in a Full Bench case of this Court in Dip Narain v. Nageshar Prasad : AIR1930 All1 . In the case of Dip Narain Singh certain occupancy holdings along with certain other transferable property had been included in a mortgage. The learned Chief Justice

drew a distinction between executed and executory contracts and between contracts which were merely void and which were expressly forbidden or prohibited by law. He came to the conclusion that a mortgage of an occupancy holding was not expressly forbidden or prohibited by law but it was merely void. But after having made that observation, the learned Chief Justice did not consider the matter further and the decision is merely based on the fact that properties of two kinds (i.e., transferable and not transferable) were included in the transaction before him. It is not necessary to examine this matter further and in greater detail. In this case we have already held that the principle laid down in Tulshi Ram v. Sat Narain A.I.R. 1922 All. 392 and Har Prasad v. Sheo Govind ('22) 9 A.I.R. 1922 All. 134 does not apply and the plaintiff is entitled to bring a suit on the covenant contained in the deed.

8. The learned Counsel for the plaintiff applicant has urged that even if the contract is void he is entitled to claim the amount under Section 65, Contract Act, and relies on the decisions of the Judicial Committee in Har Nath v. Indar Bhadur ('22) 9 A.I.R. 1922 P.C. 403 and Ananda Mohan v. Gour Mohan ('23) 10 A.I.R. 1923 P.C. 189. To our mind, even if there was no personal covenant the plaintiff could have claimed the refund of the amount under Section 65, Contract Act. The question in that case will be as to what article of the Limitation Act was applicable and when should the cause of action for the recovery of the money be deemed to arise. In this particular case the parties should have known that the transaction was not authorised by law and therefore there is no question of the contract becoming void at a later date than the date of the contract itself. In the well known case in Hanuman Kamat v. Hanuman Mandur ('92) 19 Cal. 123 (P.C.) at page 126 their Lordships of the Judicial Committee have laid down that Article 62, Limitation Act, will be applicable in a case where the consideration had entirely failed from the beginning. If, however, the consideration failed later then the article applicable would be Article 97. In the case before us Article 62, Limitation Act, would be applicable and the period of limitation would begin to run from the date of the contract which in this case was 7th May 1934. The contract, owever, being registered the question that we have to consider is whether the period of three years given in Article 62 is not extended to six years under Article 116 of Schedule 2, Limitation Act. The question how far Article 116 applied where there were

registered deeds was considered by their Lordships of the Judicial Committee in Tricomadas Cooverji v. Gopinath ('16) 3 A.I.R. 1916 P.C. 182. That was a suit for recovery of certain rent which had been reserved under a registered document. The question argued before their Lordships of the Judicial Committee was that a claim for rent came under Article 110 of Schedule 2, Limitation Act, while Article 116 must be confined to eases for 'compensation for breach of a contract in writing registered.' Article 116 was, therefore, alleged to be applicable only to claims for unliquidated damages as in Section 73, Contract Act, 1872. In Act 9 of 1871, Article 115 provided three years for the breach of any contract, express or implied, not in writing registered and not herein specially provided for, but the words 'not herein specially provided for' were omitted from Article 117 which fixed a period of six years for suits on a promise or contract in writing registered. Similarly, in Act 15 of 1877, Article 115 read as follows:

For compensation for the breach of any contract, express or implied, not in writing registered, and not herein specially provided for,

but in Article 116 the words 'not herein specially provided for' were again omitted. Their Lordships pointed out the broad distinction between unregistered and registered instruments and held that if a claim arises on account of a registered agreement between the parties the period of limitation should be six years under Article 116. Article 116 has also been applied in a case which fell under Article 65 or Article 97, Schedule 2, Act 15 of 1877 in Kishen Lal v. Kinlock ('81) 3 All. 712, by a Bench of this Court. A Bench of this Court consisting of Sir Lal Gopal Mukerji and Rachhpal Singh JJ., in Jhamman Singh v. Amar Singh F.A. No. 260 of 1929, observed as follows:

There is, however, a wider view of the case, and which really concludes the matter. It had been held by their Lordships of the Privy Council in Tricomdas Cooverji v. Gopinath ('16) 3 A.I.R. 1916 P.C. 182, that where an agreement is in writing and has been registered, Article 116 would apply, though there might be a shorter period of limitation applicable in the case of a contract made in writing but not registered. The case before their Lordships of the Privy Council was a suit for recovery of rent reserved in a lease.

9. That was a case where the plaintiff, Amar Singh, had brought a suit for recovery of Rs. 15,992-13-0 from Thakur Jhamman Singh. The amount was due under a decree from Rao Brij Raj Saran Singh. Allegations were that Rao Brij Saran Singh transferred some property to Jhamman Singh for Rs. 69,000 but left a sum of Rs. 40,000 in the hands of Jhamman Singh for payment to Brij Raj Singh and the plaintiff had in execution of his decree attached this sum of Rs. 15,992-13-0. Later on in execution of a decree against Brij Raj Saran Singh the right of Brij Raj Saran Singh to recover the sum of Rs. 40,000 from Jhamman Singh was sold at auction and was purchased by the plaintiff. He after the said purchase filed the suit. This Court held that Article 116, Limitation Act, was applicable and six years' period of limitation ran from the date when the defendant undertook to pay the amount to Brij Raj Saran Singh under the sale deed. In the case before us there was a contract entered into by the parties on 7th May 1934 under which the plaintiff paid a sum of Rs. 200 to the defendant. If the covenant under which the amount is recoverable is also void then the money could only be claimed under Section 65, Contract Act. To such a suit where the contract was void in its inception, Article 62, Limitation Act, will apply. We doubt whether the principle laid down in Tricomdas Cooverji v. Gopinath ('16) 3 A.I.R. 1916 P.C. 182 can be extended to a case of this kind. In view, however, that we have taken that the suit is based on a valid covenant in the deed this point need not be finally considered. In this view of the matter the plaintiff's suit was not barred by limitation and should have been decreed. We, therefore, set aside the decree of the lower Court and decree the plaintiff's suit with costs in all the Courts.