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Court : Allahabad

Decided On : Nov-25-1909

Reported in : 4Ind.Cas.389

Judge : John Stanley, C.J. and ;Banerji, J.

Appellant : Murlidhar

Respondent : Matru Mal

Judgement :

1. The facts of this case are set forth in our order of 7th December, 1908, by which we referred an issue to the Court below for a finding on the question whether the mortgage of the 14th of April, 1893, had been fully discharged before the sale-deed in favour of the plaintiff was executed. That Court has found that a sum of Rs. 1,562-3-8 was due on the date of the sale. Objections have been taken to this finding but they are in our judgment untenable. There is no force in the first and the third objections. As to the profits of Afzalpur we think the Court below has calculated them on a right basis. The fourth objection is equally untenable. As under the terms of the lease executed by the mortgagor on the date of the mortgage of 14th April, 1893, profits were payable to the mortgagee at the end of each year and not half-yearly, the learned Subordinate Judge was right in the method pursued by him in calculating the amount due on the said mortgage.

2. It follows from the finding of the Court below that the defendant did not make a totally false statement as to the amount due upon the two mortgages assigned by him to the plaintiff. No doubt it appears from that finding that the full sum of Rs. 5,300 mentioned in the sale-deed in favour of the plaintiff as due under the two mortgages was not actually due but the amount due was a sum less by about Rs. 2,000. The question is whether under these circumstances the plaintiff is entitled to a refund of the purchase-money. It is contended on behalf of the defendant that the plaintiff has not in his plaint prayed for a rescission of the sale, that he is still in possession of the mortgaged property and is adhering to the bargain, that there was no fraudulent misrepresentation and that before the contract of sale was completed an account was taken by him in the presence of the sons of the deceased mortgagor, Baldeo Singh, that those persons accepted the correctness of the account and attested the sale deed of the plaintiff and that the plaintiff is, therefore, not entitled to rescind. These contentions seem to us to be well-founded. By the sale-deed in favour of the plaintiff two mortgages were assigned to him. As regards one of them, namely the mortgage of the 1st of May, 1893, he has not relinquished it or offered to relinquish it. He has not, given up the property but is enjoying the profits of it and has not offered to account for them. He does not, moreover, seek to rescind the contract of sale but has on the contrary given effect to it and is still adhering to a part of the bargain. So long as the sale subsists he is not entitled to a refund of the purchase money. It is true that if representations were made regarding the nature and character of the property which affected its value and those representations were subsequently found to be false to the knowledge of the party making them, the other party to the contract would be entitled to rescind the contract and to be relieved of the bargain but if he tested the accuracy of the statements made to him he cannot be held to have been deceived and is not entitled to rescind the contract; see *Atwood v. Small* 6 C1. and F. 232. Assuming, therefore, that the present suit is in substance one for the rescission of the contract of sale, we think, it has been established by the evidence that an account was taken and that the plaintiff took an assignment of the mortgages after having satisfied himself as to the amount due. The defendant in his deposition stated that the heirs of the mortgagor, namely Jodh Singh, Raghubir Singh and Jhamman Singh 'were present at the time the sale-deed in

favour of Murlidhar (plaintiff) was executed'. He added 'there had been negotiations between Murlidhar and Jhamman Singh and others. Both of them came together. An account was made and something more or less than Rs. 5,800 was found due. I remitted Rs. 500 on account of the two bonds. The sale-deed was executed for Rs. 5,300, I remitted Rs. 500 at the request of Kunwar Bhure Singh; Jodh Singh, Jhamman Singh and Raghubir Singh signed the sale-deed after understanding the account'. This statement was not made for the first time in this suit, for we find that in his written statement in the suit of Lachhman Das, a puisne mortgagee of the property, he said that an account had been taken before the execution of the sale-deed in the plaintiff's favour. Bhure Singh, whose correct name is Bahori Singh, supports the defendant. He says: Matru Mal made a contract of the sale of the documents executed by Baldeo Singh to Murlidhar in my presence. At that time an account in respect of the documents executed by Baldeo Singh in favour of Matru Mal was made.... Murlidhar, Kishori Lal, Jhamman Singh, Jodha Singh, Raghubir Singh...and certain other persons were present when the account was adjusted After the settlement of accounts the contract as to the sale and lease was made in my presence'. The plaintiff denies that an account was made out in his presence but he says that the amount due was stated to be Rs. 5,826 and that Rs. 500 was remitted and the sale-deed was executed for Rs. 5,300. He admits that Jodh Singh, Jhamman Singh and Raghubir Singh attested the sale-deed. It seems to be highly probable that an account was taken, otherwise the exact amount alleged to be due under the mortgages could not have been ascertained and the son of the mortgagor would not have been made to witness the sale-deed. Whether the amount was accurate or not is immaterial. The plaintiff satisfied himself on the point and then entered into the bargain. It is manifest that he did not rely solely on the statement of the defendant, mortgagee, and that he was not deceived. He is not, therefore, entitled to be relieved from his contract and the suit must fail. He was apparently entering into a speculative transaction and if he has sustained any loss he is himself to blame. For these reasons we dismiss the appeal with costs including fees on the higher scale.