

Kamal Devi Vs. Dr. C. Khudadad

Kamal Devi Vs. Dr. C. Khudadad

SooperKanoon Citation : sooperkanoon.com/465517

Court : Allahabad

Decided On : Mar-04-1936

Reported in : AIR1936All522; 163Ind.Cas.872

Appellant : Kamal Devi

Respondent : Dr. C. Khudadad

Judgement :

Bennet, J.

1. This is a second appeal by a plaintiff against a decree which has dismissed part of her claim for arrears of rent. The plaintiff brought her suit against the defendant on two leases, one dated 1st March 1922, and the other dated 2nd June 1926, which was the renewal of an earlier lease. The lease of 1926 provides for instalments of rent at Rs. 400 per annum payable half-yearly in the first week of June and in the first week of December each year, and the lease of 1922 provides for annual rent of Rs. 300 in similar instalments. The defendant pleaded set-off, and various items of set-off have been allowed by the Court below. In grounds Nos. 3 and 5 the legality of allowing a set-off has been contested by the appellant plaintiff. The argument for the appellant is that under Order 8, Rule 6(1), a set-off is provided for as follows:

Where in a suit for the recovery of money the defendant claims to set-off against the plaintiff's demand any ascertained sum of money legally recoverable by him

from the plaintiff, etc.

2. The pleading is that a set-off under this Rule must be for an ascertained sum of money, and that unliquidated damages for breach of contract could not be set-off under this Rule. This has been held in various rulings, such as *Najan Ahmad Haji Ali v. Sale Mahomed Peer Mahomed* 1923 Bom 113 and *Vithal Das Gulab Das v. Hyderabad S. & W. Co.* 1923 47 Bom 182. But for the respondent it is pointed out that the wording of Order 20, Rule 19 is wider, and in Sub-rule (3) it is provided:

The provisions of this Rule shall apply whether the set-off is admissible under Order 8, Rule 6 or otherwise.

3. Therefore the Code recognizes that a set-off is not limited to the set-off which is pleaded under Order 8, Rule 6. There are various rulings to this effect, such as *Pragi Lal v. Maxwell* (1885) 7 All 284, *Bachchanlal v. Banarsi Das* (1913) 35 All 238, *Vyavan Chetty v. Nataraja Desikar* 1917 39 Mad 939 and *Panuganti Narasimha Rao v. S. Jagannatha Rao* 1920 42 Mad 873, and the distinction has been pointed out by the learned Chief Justice in *Bharat v. Chet Ram* 1934 All 427. This Rule has been the subject of recent amendment as shown in Notification No. 5664/35(a) 7 dated 2nd October 1935, in which the words were added to Order 20, Rule 19(1):

But no decree shall be passed against the plaintiff unless the claim to set-off was within limitation on the date on which the written statement was presented.

4. Now we are of opinion that the set-off claimed in the present case is an admissible claim within the provisions of Order 20, Rule 19, and that it is not necessary for a set-off that it should be limited to Order 8, Rule 6. The set-off in the present case arises out of claim by the defendant under the leases which are the subject of the suit, and the set-off is therefore a matter properly considered in the suit for arrears of rent on the leases. The first ground of appeal is that the Courts below erred in interpreting the lease in reading into it an undertaking on the part of the plaintiff to ensure a constant supply of water in the canal throughout the year. Now it is true that the Court below based its conclusion on a reference to para. 3 of the lease of 1926, which provided that the said lessee shall continue to

occupy and enjoy the leased plot of land and the mill with the water-power fully and completely for the said purposes without any objection or interruption by the said lessor, etc. The argument for the appellant was that this was merely a negative undertaking that the lessor would not interfere with the supply of water, and that under the lease the lessee was bound to make all necessary arrangements for obtaining the supply of water. The lower appellate Court has found that it is proved that there are two mills leased by the plaintiff to the defendant. These mills are worked by water-power from a canal which is owned by a number of co-sharers. The proprietary right of two-thirds belongs to Markham Grant, and of the remaining one-third to three zamindars, of which the plaintiff is one. Markham Grant is situated lower down than the property of the other co-sharers. Further that there was an agreement between the co-sharers of the year 1886 as to the manner in which the embankments and head-works were to be repaired by them, and that the evidence shows that during the years in suit the repairs were not carried out by the co-sharers who were responsible with the result that the canal water was diverted from the head-works by the owners of Markham Grant; that defendant entered into an independent arrangement with the Markham Grant people under which he paid Rs. 50 a month for the proper maintenance of the 'bunds,' and subsequently the defendant himself repaired the 'bunds' and head-work to ensure a proper flow of canal water; that there was a dispute in 1923 under the previous lease, and plaintiff agreed that the expenses connected with the repairs should be deducted from the rent. The Court therefore held that the defendant was entitled to claim a set-off on account of the expenses connected with the repairs which the defendant had to do. Now an examination of lease of 1926 shows that what was left by the plaintiff to the defendant was a plot of land and a mill 'together with the right to utilise the water of the main canal for creating water power...easements and privileges attached to the plot of land as well as the said mill.' Now it is clear from this lease that the property leased was a plot of land, a mill and a right to receive water from the main canal, and the easements attached to the mill. The easement of water-power is one which is well-known to the law in India, and is referred to in the Easements Act in various illustrations, such as illustration (a) to Section 9:

A has in respect of his mill a right to the uninterrupted flow thereto, from sunrise to noon, of the water of B's stream. B may grant to C the right to divert the water of the stream' from noon to sunset, provided that A's supply is not thereby diminished.

5. Now in the present case the plaintiff was the owner of an easement comprising the right to receive a full supply of water for her mills, and the plaintiff let this right to the defendant. The supply of water depends on the repair of a 'bund' by the plaintiff and other co-sharers. There is no stipulation whatever in the lease that the lessee is bound to repair the 'bund.' The presumption therefore is that the plaintiff, the lessor is bound to continue repairing the 'bund,' and that the plaintiff having let to the defendant the right to receive a supply of water the plaintiff has the duty of ensuring that supply of water regularly. Learned Counsel argued that a lease for the supply of water is sufficiently complied with by the lessor if he places the lessee in possession of the supply of water on the day on which the lease is executed. We do not think that that view of the law is correct. The lease of a supply of water implies the continuance of that supply so far as is in the power of the lessor during the whole period of the lease. The plaintiff therefore was bound to ensure that the supply of water did accrue to the defendant during the whole period of the lease so-far as was within the power of the plaintiff, and therefore the plaintiff was bound under the terms of the lease to carry out the usual repairs of the embankments which resulted in the supply of water to the mill. We think therefore that the Court below was correct in decreeing a set-off to the defendant on account of the expenses connected with the repairs of the embankments.

6. The point in ground 2 of a subsequent agreement does not arise. As a matter of fact, the agreement in question to which reference was made by the Court below was a prior agreement of 1923, and one lease is of 1926, and one is of 1922. No argument was addressed to us in regard to the alleged disallowance by this Court in second appeal of a similar claim to set-off in a previous suit which forms the ground 4. Ground 5 alleged that the claim on account of what are called 'nagas,' a period during which the mill could not work for want of water, was an unascertained claim. We have already dealt with this point, and held that under Order 20, Rule 19, the set-off need not be for an ascertained claim. No further

point arises on this appeal which is dismissed with costs. The defendant pleaded various grounds in cross-objection, the first of which was that the Court below was incorrect in decreeing the first instalment of rent. This instalment according to the plaint was for rent due in June 1928, and the plaint was brought on 27th July 1931, more than three years after the instalment was due. In para. 7 of the plaint it was pleaded that limitation was saved by a letter of the defendant, dated 22nd May 1929, in which it was said that he admitted the liability of the first three instalments. The first three instalments were those due in June and December 1928, and in June 1929. Now the words in the letter on which plaintiff relies are firstly:

I shall after the evening of the 27th instant proceed to renew the lease of the share of the canal water claimed by the Markham Grant, and shall deduct any lease monies paid by me or to be paid by me...from the rents payable by me to you under the leases granted by you to me.

7. This sentence relates to the future, and says that a deduction will be made from rents payable to the plaintiff. There is nothing to indicate from this sentence that any arrears were due. The next sentence on which reliance is placed is as follows-

I have to further notify to you that I am exercising my option of renewing the lease of Missarwala Upper Ghurra granted by you on 1st March 1922 against the rents payable by me to you under this lease as well as the other lease dated 2nd June 1926.

8. Now it is doubtful whether there is any admission at all that any rent was due under these leases, as the words in their natural construction relate to the future. If however the words contain an admission that there was any instalment of rent due, there is nothing to show, as the plaintiff alleges in para. 7 of the plaint, that the words allude to the first three instalments. Those instalments would apparently be of June and December 1928, and June 1929, the instalment of June 1929 being due in the month following the date of letter, 22nd May 1929. We consider that for the purpose of Section 19, Lim. Act, there must be a clear acknowledgment of liability in respect of a right. There is no mention at all in this letter that there was any liability in respect of the instalments due in June 1928. We do not think that without such an admission it can be held that the letter in any

way saves limitation, and in our view therefore the claim for the instalments of June 1928 is time barred, and the Courts below were wrong in decreeing these amounts. We therefore allow the cross-objection so far as this claim is concerned. The second ground of cross-objection alleges that the Court should have granted damages on account of reduction in rent of the defendant. By these cryptic words the cross-objection means that the defendant had sub-let his mills to another person, and had allowed that other person a reduction of rent on account of the deficiency in supply of water. The Court below has already allowed damages to the defendant on account of the deficiency in the supply of water, and considers that a further deduction should not be allowed in regard to his sub-tenant. We consider that this reasoning is sound. Ground 3 of cross-objection was in regard to the alleged failure of the plaintiff to give the defendant land for the construction of a road. The Court below found firstly that no damages are proved to exist under this head, and secondly that the defendant himself was negligent in not constructing the road.

9. The remaining grounds of cross-objection have no merits. We therefore allow the cross-objection only in regard to the instalments of Rs. 200 and Rs. 150 of June 1928, which we hold to be time-barred, and the parties will pay and receive proportionate costs on the cross-objection.