

Ram Das Vs. Dwarka Das

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Court : Allahabad

Decided On : Mar-27-1930

Reported in : AIR1930All875; 128Ind.Cas.763

Judge : Shah Muhammad Sulaiman and ;Kendall, JJ.

Appellant : Ram Das

Respondent : Dwarka Das

Judgement :

1. This is a defendant's appeal arising out of a suit for recovery of Rs. 7,000 odd comprised of several items. The claim was disputed, but has been decreed in part. The defendant has accordingly appealed, but the plaintiff has submitted to the decree so far as it dismissed a part of his claim. It will be convenient to take up each of the items separately. The first item claimed was the balance of Rs. 1,575 out of Rs. 5,100 which had been fixed as the value of the share of the plaintiffs deceased father in a certain partnership business. After the dissolution of the partnership, written agreements were executed by the deceased and the defendant and they are to be found at pages 58 and 59 of the paper-book. There cannot be the least doubt that the deceased transferred his entire interest in this partnership in lieu of Rs. 5,100 and ceased to have any further concern with this business. The defendant has taken the plea that there was some sort of an oral understanding that the defendant would be liable to pay this amount only if the valuation of the assets had been correctly made. No such contemporaneous oral

agreement can be pleaded when the agreement between the parties was reduced to writing. We are satisfied that the defendant was bound to pay Rs. 5,100, it being wholly immaterial what the real value of the assets of the partnership turned out to be.

2. The second item was of Rs. 4,000 which represented debts due to the deceased personally from his debtors which were transferred by him to the defendant for a sum of Rs. 4,000, the face value of the debts being over Rs. 6,000. The agreements referred to above leave no doubt that the defendant agreed to pay a consolidated sum of Rs. 4,000, irrespective of the amount which he was actually able to recover from the various debtors. The pleas taken with regard to this item on behalf of the defendant were (1) that the debt of Rs. 600 had really become barred by time, (2) that Rs. 3,000 had been realized by the deceased after the transfer and (3) that the debts included a simple mortgage debt which had not been formally sold to him with the result that he could not sue upon it.

3. In support of his contention the defendant produced a certified copy of the judgment in a previous suit, brought by him both for himself and on behalf of the present plaintiff's guardian against the said debtor, which was ultimately dismissed. The learned Subordinate Judge in the present case has held that that judgment is not relevant in this case, because although the suit had been brought nominally in the name of the present plaintiff as well, he was a minor, and his mother had no knowledge of the suit, and the defendant who was her general attorney had taken advantage of that circumstance and included the minor's name in the plaint. It does appear that after the disposal of the suit, when the present defendant appealed to the District Judge the present plaintiff's mother applied to him stating that the suit as well as the appeal had been filed without her knowledge and that she had not authorized Ram Das to file them. There is no evidence on the present record to show that the minor's mother had any real knowledge of this litigation. The plaint shows that it was signed by Ram Das himself both on his own behalf and for the minor's guardian, professedly as her authorized agent. We are satisfied that the present plaintiff was not fully represented in that case and the judgment, therefore, cannot be conclusive as

against him.

4. It has been contended on behalf of the respondent that it is not open to the defendant in the suit to take the plea that there should be deduction on account of the supposed realization of a debt by Gokul Das. The contention is that his remedy would be by way of a separata suit for damages for breach of contract. We do not find any force in this contention. The deduction claimed is no account of the same transaction. If it be true that Gokul Das had transferred certain debts to the defendant and then, in spite of the sale realized one of such debts, it seems to us only just and equitable that the defendant should be allowed credit for the amount so realized out of the consideration as it has been held in this Court in several cases that an equitable set-off can be claimed even independently of the specific provisions of the Code of Civil Procedure (s. 111 now corresponding to Order VIII, Rule 6: *Nand Ram v. Ram Prasad* 27 A. 145 : A.W.N. (1904) 193 and the earlier cases referred to therein. It is not necessary to demand Court-fees on this account.

5. Both the suits were, unfortunately for the defendant-appellant, going on almost simultaneously. In the present suit Ram Das was examined on 3th July, 1926 and his evidence was formally closed on 2nd August, 1926. The appeal in the previous suit against the debtor, however, was not disposed of till 10th November, 1926. Ram Das was in this awkward position. In his previous suit against the debtor the position taken up by him was that no payment had been made by the debtor to the deceased Gokul Das. Ram Das was actually leading evidence to disprove any such payment. In the present case the plea taken up by him was that such amount was paid but this version was based on the payment of the defendant's debtor as alleged in the other case and the judgment of the first Court which had not become final. The main evidence which Ram Das could have produced in the present case would have been the production of the debtor as his own witness as well as his account books, the genuineness of which he was not challenging in the other litigation. No doubt if he had been properly advised he might have adopted a course of action which would not have placed him in this difficulty, but the fact remains that his position has been awkward and has resulted in sufficient evidence not having been adduced in the present case. The learned Subordinate

Judge has not recorded any clear finding that no payment had actually been made to Gokul Das. He has perhaps implied it in his finding that the defendant is liable to pay the whole of Rs. 4,000.

6. We think that it would be only fair that there should be a clear finding on this question of fact, viz., (1) whether Madho Prasad and Kishori Lal did pay Rs. 3,000 odd to Gokul Das deceased on or about 24th August, 1923, and (2) whether if Gokul Das did receive such an amount he paid it to Ram Das. We further think that in view of the circumstances enumerated above the parties should be at liberty to produce further evidence on these issues,

7. The plea that one of the debts amounting to Rs. 600 had become barred by time cannot be sustained. Under the written agreements the loss must be suffered by the defendant. There is also no force in the contention that there was no sale deed of a simple mortgage which was included in the sum of Rs. 4,000, In the first place there is no satisfactory evidence to prove that there was any such simple mortgage, and in the next place the recitals in the two written agreements make it quite clear that a sale-deed had been duly executed and handed over to the defendant. We accept the findings of the Court below on this point.

8. The third item was a trivial one and was abandoned at the trial.

9. The claim as regards the fourth item has been dismissed and is not in dispute before us.

10. The last item is a sum of Rs. 175 claimed as interest on R3. 10,000 which was subsequently paid off. It appears that Rs. 10,000 were borrowed by Ram Das from Gokul Das under a mortgage-deed which sum was subsequently paid off by executing another mortgage-deed in favour of a third party. The interest, however, was actually not paid under the document. The defence is that this amount was paid in cash privately. As against the defendant's statement we have the statement of the plaintiffs guardian that when the mortgage account was squared the sum of Rs. 175 which was the amount of interest was by agreement transferred to another account and debited to the defendant. The account books of Gokul Das fully corroborate her statement page 76, There seems to be no reason

why the amount should have been given up. The defendant has not produced any entry in his account books to show that he made this payment to Gokul Das. The finding, therefore, must be accepted. We would accordingly accept the findings of the Court below on all the items except the sum of Rs. 3,000 odd which is alleged by the defendant to have been realized by Gokul Das deceased after the transfer of the debts to him. On this one point the issues referred to above are sent to the Court below for findings. Two months are allowed for return of the findings on receipt of which the usual ten days will be allowed for objections.

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