

Praphullachandra and ors. Vs. Rajbai and ors.

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Court : Madhya Pradesh

Decided On : Oct-10-1962

Reported in : AIR1964MP129

Judge : V.R. Newaskar and ;P.K. Tare, JJ.

Acts : [Code of Civil Procedure \(CPC\) , 1908](#) - Order 2, Rule 2; [Transfer of Property Act, 1882](#) - Sections 58

Appeal No. : First appeal No. 23 of 1958

Appellant : Praphullachandra and ors.

Respondent : Rajbai and ors.

Advocate for Def. : K. Chitle, Adv.

Advocate for Pet/Ap. : S.D. Sanghi, Adv.

Disposition : Appeal allowed

Judgement :

Newaskar, J.

1. This appeal arises out of a suit filed by plaintiff Bababhai for enforcement of a mortgage dated 22-2-1946 for a consideration of Rs. 22,000/-. The mortgage was anomalous. The mortgagor agreed to deliver possession of the property namely

the house on block No. 362-63 in Madhavanagar Ujjain to the defendants. The mortgagor took it back on rent of Rs. 137-8-0 P. M. This amount was equal to the monthly interest which the mortgagor agreed to pay at Annas 10 per cent per month. The mortgage-money was agreed to be paid with a year and on his failure to do so the mortgagee was given right to recover the whole amount. There was also a term not to create further encumbrance or to sell it to any other person.

Violating the last mentioned term and without the knowledge of the mortgagor defendant No. 1 sold the property to one Chandulal for Rs. 26,000/-under a sale-deed dated 16-6-1946. The purchaser Chandulal then sold it to defendant No. 2 Jagannath under a sale-deed dated 22-3-1947 for Rs. 26,500/-and lastly Jagannath in his turn sold the same to defendants No. 3 and 4 Sundarabai and her adopted son Omprakash. The plaintiff received Rs. 4,457/-as rent in respect of the mortgage property which completely satisfied defendant No. 1's liability for rent upto 3-9-1948.

On the last mentioned date the plaintiff received Rs. 8,368/- towards the principal. This left a balance of Rs. 13,632/- towards the principal. The plaintiff filed a suit for recovery of arrears of rent for a period from 3-9-1948 to 10-11-1949 amounting to Rs. 1961-10-0 in the Court of City Civil Court Ujjain but that Court instead of decreeing the entire claim decreed only Rs. 1362-10-0 corresponding to interest due upon balance of the principal amount which had remained due from defendant No. 1. The claim for the aforesaid amount was decreed only against defendants 3 and 4 and no decree was granted against defendant No. 1 on the ground that he had no longer any interest in the house.

The plaintiff consequently claimed Rs. 13,632/-as principal and Rs. 3090/- as arrears of rent due from 11-11-1949 upto the date of the suit. The plaintiff sought decree against defendant No. 1 under the terms of the mortgage he having undertaken personal obligation to pay the mortgage amount and rent and against defendants 2, 3 and 4 who purchased the property in succession with knowledge of plaintiff's mortgage.

2. Defendant No. 1 Laxmansingh admitted the mortgage but contended that subsequent transfers-were with the knowledge of the plaintiff. According to him he

had repayed Rs. 12,000/1- towards the principal and not Rs. 8,368/- as alleged by the plaintiff. As regards his liability for rent he asserted that as the rent-note was only for one year, he having paid rent in respect of that period, he was no longer liable for the subsequent period.

3. Defendant No. 2 Jagannath admitted purchase of the property by him and its sale to defendants Nos. 3 and 4. According to him although the sale was for Rs. 30,000/- he had received three houses of that value from defendants 3 and 4 and had sold one of those three to an outsider for Rs. 12,000/- and paid the said amount to the plaintiff through Shankarlal Bhargava towards the principal. Oral agreement to accept substituted security viz; the two houses purchased by defendant No. 2 was also pleaded. He expressed his readiness to pay Rs. 2,500/- in cash and the rest by instalments and contended that defendants 3 and 4 were not at all liable.

4. Defendants Nos. 3 and 4 by their separate written statement raised almost the same contentions as those of defendant No. 2 besides pleading estoppel on the ground that all subsequent transfers had been made with plaintiffs' knowledge and consent. The most important of then contention, with which we are now concerned in this appeal, is that the arrangement, for payment of rent on the basis of a rent-deed, was meant as a convenient mode for realising interest and that in fact the lease deed was a part and parcel of the mortgage transaction. When therefore, according to them, the plaintiff brought a rent-note No. 953/ 1949, the principal amount had already become due. As they failed to sue for the principal mortgage-money which had become due then, the present suit for the recovery of the said principal amount and interest thereon is barred under Order 2 Rule 2 C. P. Code.

5. It may be mentioned here that the original plaintiff Bababhai assigned his interest pendente lite to Messrs. Praphullachandra Himmatlal Shah of which Bababhai is a partner. On the petition of the assignees their names were added. On the basis of pleadings of the parties, the trial Court framed 16 issues. It proceeded to consider issue No. 6 first as according to it that was a legal issue which went to the roof of the case. This issue is the one which we shall have to consider in this appeal as the main attack against the decision of the trial Court is

centred round this issue. This issue is as follows:

'Whether the plaintiffs cannot file the present suit for the mortgage money since a decree for interest (pertaining to the mortgage amount) had been passed in C. Suit No. 953/1949.'

The learned Judge held that having regard to the nature of the claim in the earlier rent-suit (No. 953/ 1949) the present suit for enforcement of the mortgage is barred by the principle of Order 2 Rule 2. According to him mortgage-deed and the rent-note or the lease-deed are part and parcel of the same transaction and if the causes of action into two suits are not distinct and separate the instant suit shall obviously be barred. Reference in the mortgage-deed to the term that the mortgage-money would carry no interest and the house would carry no rent; restraint placed upon the mortgagor by another term prohibiting transfer as long as the mortgage money was not paid; the term to treat the arrears of rent as mortgage money, it being treated as charge against the mortgaged property, and reference in the lease deed to the mortgage transaction, according to him, 'lead to the irresistible conclusion that both the deeds are the parts of the same transaction' particularly when they were executed on the same day.

Relying upon the tests laid down by their Lordships of the Privy Council in *Mohomed Khalil Khan v. Mahabub Ali Mian*, AIR 1949 PC 78 the learned Judge then proceeded to examine whether the causes of action in the two suits were distinct or identical. One of the tests laid down by them was to see what are the media upon which the plaintiff asks the Court to arrive at a decision in his favour. Applying that test the learned Judge held that since the plaintiffs had sued the purchasers in that suit as well and had asked for and obtained a decree against them this could not have been upon any other basis than the mortgage deed itself. The reasons given by the learned Judge for holding the two causes of action identical were-

- (i) The execution of both the documents namely the mortgage-deed and the rent-note on the same day,
- (ii) Equivalence of monthly rent and interest, and,

(iii) Reciprocal reference to the transaction in one in the other.

He relied upon the decision in *Natha Singh v. Chunnilal*, AIR 1918 Lah 373 and distinguished those in other cases cited before him on behalf of the plaintiffs and particularly the decision in *Binodilal v. Satyendrasingh*, Madh BLJ (1955) HCR 1368. The last mentioned decision was distinguished on the ground that in that case the arrears were not made a charge upon the mortgaged property along with the principal. He found on evidence that when the suit house was sold by defendant No. 1 to Chandulal and by the latter to Jagannath and by Jagannath to defendants 3 and 4 the consent of the plaintiff had impliedly been taken but according to him such a consent did not in any way affect plaintiff's right under the registered mortgage-deed in his favour when no registered document had been executed by him accepting another security in substitution of the house in suit.

It was further found that the alleged payment of Rs. 12,000/- towards the principal had not been proved and that Rs. 13,632/- as claimed by the plaintiff is the correct balance for the principal and Rs. 3090/- is the correct amount of interest due upto the date of the suit. In view of his decision upon issue No. 6 he held that the plaintiff's suit as against defendants Nos. 3 and 4 is not competent. He however granted a personal decree in plaintiff's favour for the amount in suit as against his mortgagor Laxmansingh and the intermediate transferee Jagannath who had personally agreed to pay the plaintiff's dues.

6. The plaintiff now appeals and contends that the refusal of the trial Court to grant a decree for sale of the mortgaged property as against the defendants was not proper,

7. As observed earlier the plaintiff can succeed in this appeal if we hold that the provisions of Order 2 Rule 2 will not come in his way. The provision is as follows:

'(1) Every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action; but a plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any Court,

(2) Where a plaintiff omits to sue in respect of, or intentionally relinquishes, any portion of his claim, he shall not afterwards sue in respect of the portion so omitted or relinquished.

(3) A person entitled to more than one relief in respect of the same cause of action may sue for all or any of such reliefs; but if he omits, except with the leave of the Court, to sue for all such reliefs, he shall not afterwards sue for any relief so omitted.'

8. It is clear from the analysis of the provision as also from the decision of their Lordships of the Privy Council in AIR 1949 PC 78 that the rule is directed against two evils namely splitting of claims and splitting of remedies. We are in the present case concerned with the former.

9. The correct test in all cases of this kind, as observed by the Privy Council in *Moonshee Buzloor Ruheem v. Shumsoonnissa Begum*, 11 Moo Ind App 551 (PC) is whether the claim in the new suit is, in fact, founded on a cause of action distinct from that which was the foundation of the first suit. Now the phrase 'cause of action' though not defined in the Code is judicially considered and it means every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the Court' or it means media upon which the plaintiff asks the Court to arrive at a conclusion in his favour. The causes of action in the two suits are the same if in substance they are identical. Explanation below the provision of Order 2 Rule 2 indicates that certain cases mentioned there though apparently not covered by the main part are by legal fiction brought within it. The scope of the explanation however has to be confined to what is indicated there and cannot be extended.

10. Now the cause of action for the recovery of arrears of rent in Civil Suit No. 953 of 1949 filed in the Court of Civil Judge Ujjain has to be assumed to be based on the relationship of landlord and tenant created between the parties by reason of the execution of the rent-note. Actual pleadings in that case are not placed before us in this case. It cannot be disputed that the burden of proving this issue was upon the defendant who pleaded that bar. In the absence of the actual pleadings in that case we shall have to proceed upon the admitted facts with the aid of such

legal presumptions as are permissible in view of them.

11. One of the grounds put forward to suggest identity of cause of action in substance is that in the former suit not only the person who was the executant of the rent-note was sued but the subsequent transferees including defendants Nos. 3 and 4 to whom the house is ultimately sold were admittedly included. The learned trial Judge has drawn an inference from this circumstance that since no claim, on contractual basis could have been made against the transferees and since the suit for rent is decreed against defendant 3 and is dismissed against defendant No. 1 the original executant of the rent-note we ought to presume that it could not have been made and decreed except on the strength of the mortgage-deed itself. In my opinion there is no justification or necessity to resort to such an inference.

It is well settled as held by the Privy Council in *Ram Kinkar v. Satya Charan*, AIR 1939 PC 14, that both by English and Indian law an absolute assignee of the whole of the interest of lessee is liable by privity of state for all the burdens of the lease irrespective of the fact whether he enters into possession or not and that the ground upon which he is so held liable is that the whole of the assignor's interest has passed to him by the deed. Assignor having no longer any interest is no longer liable by privity of estate though he still remains liable by contract if he is party to the original lease.

Having regard to this principle there was no justification for the Court below to draw an inference that the suit for rent was based on the same cause of action as that for the enforcement of the mortgage by reason of the circumstance that in that suit subsequent vendees including defendants Nos. 3 and 4 also had been impleaded. There was no doubt apparently no justification for dismissing the suit against Laxmansingh, the original mortgagor and lessee as he should ordinarily have been held liable on the basis of the contract of lease as evidenced by the rent deed. It will thus seem, that the cause of action for the rent-suit was the execution of the rent-deed and the fact of non-payment of rent for the period for which the claim was made under the term of the lease and the absolute assignment of lessee's whole interest to the ultimate vendee, whereas cause of

action for the enforcement of mortgage security in the present suit is the execution of the deed of anomalous mortgage which gave the mortgagee right of sale, non-payment of the whole of mortgage-money within the stipulated period and consequent balance due in respect of the transaction.

To this is joined the claim for rent in respect of the period subsequent to that covered by the first suit and the subsequent sales which brought the property in the hands of defendants 3 and 4. It is clear that the causes of action are obviously different. But it is suggested that what was styled as rent is nothing else than, interest and the lease-deed was really an unreal form which the transaction assumed when in reality it was meant as a machinery for securing regular payment of interest.

This aspect of the contention has been considered by us in a case in LPA Nos. 4 and 5 of 1962, Trustees of Motidas Beragi Sadhu v. Ramjatan, recently decided on 4-10-1962: (AIR 1963 Madh Pra 265) wherein it is held relying upon the decisions in Abduilah Khan v. Basharat Husain, 40 Ind App 31 (PC); Feroz Shah v. Sohbat Khan, 60 Ind App 273: (AIR 1933 PC 178) and Abdul Khadir v. Subramanya Pattar, AIR 1940 Mad 946, that where parties deliberately cast bargain in a particular form with the idea that their mutual rights and obligations should be governed by the transaction as represented in that form then the form cannot be ignored with a view to bring about different rights and obligations. It is further held there that the circumstance that the mortgage and the lease formed parts of the same transaction is by no means inconsistent with the effect being given to each according to its terms and that it is not permissible to treat what is a possessory mortgage as a simple one.

As we have discussed the question with sufficient detail there is unnecessary to cover the ground over again here. The reasons given by the learned Judge for holding the causes of action in the rent-suit and the present suit as being the same are not tenable at all. The fact that the mortgage-deed and the rent-deed are executed on the same day or that the amount of rent was equivalent to the interest payable or that there is reference in each of the aforesaid deed to the transaction incorporated in the other are quite consistent with creation of genuine legal

relationships as contemplated under either of the deeds. Even the circumstance that the amount of rent which would remain in arrears is to be a charge against the mortgaged property will not make any material difference because the original transaction is that of a mortgage and not a sale.

12. The Court below was consequently not justified in dismissing the present claim as barred by the principle of Order 2 Rule 2 C. P. C. As this was the only ground on which the claim was dismissed the decision of the Court does not deserve to stand and plaintiff's suit deserves to be decreed. The appeal is therefore allowed and a preliminary mortgage-decree is passed against defendants Nos. 1 to 4 for Rs. 13,632/- as principal and Rs. 3090/- as interest as against the mortgaged property. The defendants shall pay the aforesaid amount together with interest at Annas 10 per cent per month on the principal sum of Rs. 13,632/- from the date of suit within six month from the date of this decree. In default of payment within that period a final decree for sale of the mortgaged property shall be passed. This will necessarily involve modification of the personal decree already passed against Laxmansingh. But it will be at the instance of the plaintiff in whose favour it was passed. As already indicated above he can apply for a personal decree at a later stage in case the mortgage security when realised is found to be insufficient.