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Court : Rajasthan

Decided On : Jul-20-1979

Reported in : 1979WLN591

Judge : S.K. Mal Lodha, J.

Appeal No. : S.B. Civil Revision Petition No. 364 of 1976

Appellant : Pyarelal

Respondent : Ramchandra and ors.

Advocate for Pet/Ap. : Mr. I.C. Maloo

Disposition : Application allowed

Judgement :

S.K. Mal Lodha, J.

1. Pyarelal, who was originally defendant No. 16 in the suit has lodged this revision application against the order of the Munsif, Bilara, dated May 18, 1976 by which, issue No. 7 was decided against him. The plaintiffs son petitioners No. 1 and 2 instituted a suit for redemption of house situate at Pipar City, in the Court of Munsif, Bilara on January 24, 1969. The redemption was sought on the basis of the registered mortgage dated June 23, 1922. The suit for redemption was filed originally against 16 defendants. It was averred in para 3 of the plaint that the

house in question was mortgaged with Jamnadass and Mohanlal, who had died and their legal representatives (heirs) are defendants No. 1 to 13. The mortgagee rights were transferred to defendants No. 14 and 15. Defendant No. 16 (petitioner) is said to be in possession of the mortgaged house on behalf of defendants No. 14 and 15. It is also stated in para 3 of the plaint that the original mortgagor, Mohanlal has also died and his heirs are plaintiff-non-petitioners No. 1 and 2 and as such are entitled to redeem the house in question. In para 4, it was alleged that the plaintiffs asked the defendants for redemption of the house after accepting the mortgage amount of Rs. 1350/- & a fixed sum of Rs. 100/- on account repairs, total Rs. 1450/- and to deliver the documents and possession. A notice was also given but with no result. Hence, the suit for redemption was instituted.. The suit proceeded ex parte against all the defendants and ultimately ex parte decree for redemption was passed on March 28, 1972. The material portion of the decree for the disposal of this revision is as under.

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4 edku uhyke gksus n'kk es uhyke dh jde vnkyr es tek gksxh o mles ls izfroknhx.k dh fMdh es fu/kkZfjr jde o uhyke dk [kpkZ tks vnkyr r; djsxh A og izfroknhx.k dks fnykbZ tkdj ckdh jde oknhx.k dks fnykbZ tk;sxh A

An application was moved by the petitioner for setting aside the expert decree on April 25, 1972. The application was dismissed on December 23, 1972. Being dissatisfied with the dismissal of the application for setting aside the expert decree the petitioner preferred an appeal and the learned Additional District Judge, No. 2, Jodhpur, by his judgment dated May 6, 1974 accepted the appeal and set aside the expert decree dated March 28, 1972. It will be relevant here to quote the operative part of the appellate judgment.

The result is that the appeal is allowed and order of the Munsif, Bilara, dated December 23, 1972 and as a consequence thereof, the expert decree passed by him in suit No. 11 of 1969 is also set aside and the appellant is allowed to content the suit afresh, as if no decree had been passed against him in that suit. Thereafter, defendant No. 16 (petitioner) filed the written statement on Sept. 9, 1976 Issues were framed on October 14, 1974. Issue No. 1 is to the effect whether the plaintiffs ancestor, deceased Mohanlal had mortgaged the house in dispute on Asad-sudi-13, Samvat 1978 i.e. March 23, 1922 with deceased Jamnadss and Mohanlal by a registered mortgage-deed and if, it is so whether the plaintiffs are ends led to obtain the possession from defendant No. 16 Pyarelal, On March 9, 1976, additional issue No. 7 was framed, which when translated into English, read as under.

Whether the suit cannot proceed without appointment of Guardian-ad-litem for defendants No. 4 and 8.

2. The learned Munsif, after hearing the arguments on this issue decided it, in favour of the plaintiffs and against defendant No. 16 Aggrieved by this order dated May 18, 1976, defendant No. 16 Pyarelal has come in revision as aforesaid.

3. I have heard Mr I.C. Maloo, learned Counsel for the petitioner and Mr. P.C. Mathur, for the plaintiffs-non-petitioners No. 1 and 2.

4. I have read the plaint, written statement and decree sheet dated March 28, 1972 and the appellate judgment of the learned District Judge, No. 2, Jodhpur dated May 6, 1974 with requisite care and attention. Learned Counsel for the petitioner contended that it is clear from the appellate order setting aside expert

decree that whole of it had been set aside and that the plaintiffs remained satisfied with that order. According to the learned Counsel, the learned Munsif has committed an illegality or at any rate, a material irregularity, when he decided issue No. 7 in favour of plaintiffs and against defendant No. 16 (Petitioner', whereby, holding that the suit can proceed against defendants No. 4 and 8 without appointment of Guardian-ad-litem. Mr. Mathur, vehemently opposed this contention. On the basis of the averments made in para 3 and relies sought in para 9 of the plaint, he submitted that defendant No. 16 (petitioner) has not been sued in the status of a mortgagee in as much as defendants Nos. 14 and 15 were transferees of the mortgagee rights and defendant No. 16 (petitioner) is holding possession on their behalf. He urged that as the suit was for redemption and ex parte decree for redemption was passed, and therefore, it cannot be said that the decree was joint and indivisible so as to warrant its setting aside against heirs of the original mortgagees or for that matter against transferees of mortgagee rights. On the basis of these premises, Mr. Mathur submitted that the ex parte decree is good against minor defendants No. 4 & 8 and as such, learned Munsif was right in holding that the suit can proceed against them without appointment of Guardian ad litem. I have bestowed my most careful and anxious consideration to the rival contentions. Proviso to Rule 13 of Order IX, CPC is as under:

Provided that where the decree is of such a nature that it cannot be set aside as against such defendant only, it may be set aside as against all or any of the defendants also.

The important test is whether the suit as framed can be maintained and a decree made in favour of the plaintiffs, even if the other defendant or defendants against whom the decree has been made ex parte were not impleaded as parties. Proviso clearly says that where the decree is of such a nature that it cannot be set aside as against such defendant only, it may be set aside as against all or any of the other defendants also. It follows that in the following class of cases the decree cannot be set aside only as against, the defendants applying without setting it aside as against the other defendants also:

(I) Where the decree is joint and indivisible.

(II) Where the decree proceeds on a ground common to all the defendants.

(III) Where it is necessary that the whole decree should be reopened in the interests of justice or, in other words where the relief which the applicant is entitled to cannot effectively be given except by setting aside the decree against the other defendants also.

(IV) When the suit would result in two inconsistent decrees if the ex parte decree is set not aside against the other defendants also.

5. Preliminary decree in a redemption suit is passed under Order XXXIV Rule 7, CPC. It will be useful to refer to Clause (c) of Rule 7(1) of Order XXXIV:

(C) directing.-

(1) that, if the plaintiff pays into Court the amount so found or declared due on or before such date as the Court may fix within six months from the date on which the Court confirms and counter signs the account taken under Clause (a) or from the date on which such amount is declared in Court under Clause (b) as the case may be, and thereafter, pays such amount as may be adjudged due in respect of subsequent costs, charges and expenses as provided in Rule 10 together with subsequent interest on such sums respectively as provided in Rule 11, the defendant shall deliver up to the plaintiff, or to such person as the plaintiff appoints, all documents in his possession or power relating to the mortgaged property, and shall, if so required, re transfer the property to the plaintiff, at his cost fee from the mortgage and from all incumbrances created by the defendant or any person claiming under him, or where the defendant claims by derived title, by those under whom he claims, and shall also if necessary put the plaintiff in possession of the property.

6. So after adjudging, the amount due for payment to the mortgagees or their representatives, direction in regard to the delivery of the documents relating to the mortgaged house and its possession are also contemplated. The plaintiffs have stated in para 9(1) that after payment of Rs. 1450/- or such amount as may be determined by the court to the defendants, who so ever be entitled to it, the

possession of the mortgaged house and the document relating to it may be delivered to them. The plaintiffs are, in this suit, required to prove the mortgage as alleged by them. An ex parte decree was passed against all the defendants inclusive of defendant No. 16 (petitioner). If the argument of the learned Counsel for the plaintiffs-non petitioners No. 1 and 2 is accepted, it will lead to inconsistent decrees which is not permissible, in case, the learned Munsif after trial comes to a conclusion that the mortgage alleged has not been proved. A single Judge of the Lahore High Court in *Manokchand v. Hazwimal and Ors.* A.I.R. 1936 Lahore 243, has occasion to consider the proviso to Order IX Rule 13 CPC. In that case the suit was brought against father and son on the basis of a trust-deed said to have been executed by them and an ex-parte decree was passed against both of them. The father applied to have the decree set aside and the son applied separately. The trial court dismissed both the applications. The learned District Judge accepted the appeal of the son and set aside the decree against him but he dismissed the appeal of the father. Thereafter, revision was preferred against the order of the learned District Judge dismissing the appeal of the father. It was urged on behalf of the father that the learned District Judge has failed to consider the proviso to Order IX, Rule 13 CPC. Which lays down that where the decree is of such a nature that it cannot be set aside as against one defendant only, it may be set aside as against all or any of the other defendants. It was observed.

It has been urged before me that the validity of the trust-deed relied on by the plaintiffs is not admitted and if the decree against the father stands and the suit is allowed to proceed against the son, it may result in two inconsistent decrees. The decree is one and indivisible and complications may arise if it is allowed to stand against the father and not against the son.

The learned Single Judge in the Lahore case relied on *Sheoraj Singh v. Kameshar Noth* I.L.R. 24 All 383, and *Mohomed Hamidulla v. Tohurennissa Bibi* I.L.R. 25 Cal. 155. By the order of the Additional District Judge, whole of the decree was set aside, as having regard to the nature of the ex-parte decree, it could not have been set aside against defendant no. 16 only. In this connection averments and relief's sought in the plaint should also not be lost sight of. The ex-parte decree dated March 28, 1972, which was sought to be set aside was joint and indivisible

and could not have been set aside against defendant No. 16 alone. Defendants No. 4 and 8 are minors and as they are defendants in the suit the decree was also set aside against them. No proceedings in a suit against a minor can continue unless guardian-ad-litem is appointed under Order XXXII, Rule 8, CPC.

7. In these circumstances, the learned Munsif has exercised his jurisdiction with material irregularity, when he held that ex parte decree still subsists against minor defendants No. 4 and 8, and therefore, it is not necessary to appoint guardian-ad-litem for them. The decision of the learned Munsif, in respect of issue No. 7 has, thus, to be reversed. It is, accordingly, decided against the plaintiffs and it is held that further proceedings in the suit cannot be taken against minor defendants No. 4 and 8 without appointment of guardian-ad-litem.

8. In the result, I allow this revision application and set aside the order, dated May 18, 1976 and reverse the finding in regard to issue No. 7. In the circumstances of the case, the parties are left to bear their own costs.