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Court : Kolkata

Decided On : Aug-18-1921

Reported in : 65Ind.Cas.214

Judge : Lancelot Sanderson, C.J. and ;Chotzner, J.

Appellant : Mobarak Molla

Respondent : Hechamuddi Molla and ors.

Judgement :

Lancelot Sanderson, C.J.

1. This is an appeal from the judgment of the learned Officiating Subordinate Judge, First Court, of Faridpur; and the suit was brought to recover the sum of Rs. 780 on accounts which ware alleged to have been settled between the plaintiff and the first defendant.

2. The first Court gave judgment in favour of the plaintiff. On appeal to the lower Appellate Court, that judgment was reversed and the suit was dismissed; and the plaintiff has appealed by way of second appeal to this Court.

3. It appears that accounts were settled between the parties sometime about August 1916, but in August 1916 the plaintiff agreed to take a mortgage-bond from the first defendant in his (plaintiff's) favour. That mortgage-bond is dated the 9th Bhadra 1323 B.S., which, I understand, corresponds with August 1916. The due

date for payment of the money, which was mentioned as Rs. 750 in that mortgage, was the end of Pous 1323 B.S., which corresponded to the 13th of January 1917. Therefore, the money under the mortgage did not become due until the 13th January 1917. The learned Judge has found that the liability for the balance found to be due to the plaintiff on the settled accounts was superseded by reason of the plaintiff's accepting the mortgage-bond from the defendant, and I agree with him. Consequently, the plaintiff was in error in suing the defendant and basing his claim upon the alleged settled accounts. He ought to have waited until the money became due under the terms of the mortgage and then sued the defendant. The mortgage bond is not registered and the learned Vakil for the appellant has argued that although the mortgage-bond by reason of its not being registered could not be used by the plaintiff for the purpose of getting a decree charging the land, still it would have been open to the plaintiff to sue for the money due under the covenant in the mortgage bond. This suit was brought on the 3rd of January 1917; and, as I have already stated, the money did not become due under the mortgage till the 13th of January 1917. Consequently, in my judgment, the learned Judge of the lower Appellate Court was right in holding in this suit, based as it is, not upon the covenant in the mortgage-bond, but upon the settled accounts, that the plaintiff could not recover.

4. The learned Vakil for the appellant asked leave to withdraw the suit with liberty to bring a fresh suit upon the mortgage-bond. The learned Vakil for the respondent had no objection to this being done, on condition that the plaintiff should pay the costs of the suit. Then the learned Vakil for the appellant discovered that if he withdrew the suit the plaintiff could not bring a suit upon the mortgage-bond because the plaintiff's suit would be out of time. Consequently he abandoned his application to withdraw the suit.

5. The learned Vakil for the appellant then urged that the plaintiff should have liberty to amend his plaint by basing his claim against the defendant upon the covenant in the mortgage-bond. The learned Vakil for the respondent has objected to this coarse being adopted, on the ground that this Court is bound to consider the position of the parties and the liability of the defendant at the date when the plaint was issued. In my judgment, at the time this suit was brought, i, e., on the

3rd of January 1917, there was no liability upon the defendant under the terms of the mortgage-bond. Therefore, it seems to me that it is impossible for us now to allow the amendment of the plaint, for the purpose of enabling the plaintiff to rely upon a cause of action against the defendant which had not arisen at the time this plaint was issued. If the plaintiff had recognised the real position, he might have applied to the Trial Court for liberty to withdraw the suit and sue on the covenant in the mortgage-bond. Then he would have been able to substantiate any right which he might have against the defendant. Unfortunately the plaintiff has deferred taking that course till he finds himself in the High Court, in second appeal, when it is too late for him to withdraw the suit and start a new suit.

6. In my judgment this appeal must be dismissed with costs.

Chotzner, J.

7. I agree.

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