

Mohini Mohan Roy Vs. Ramadas Paramhansa

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Court : Kolkata

Decided On : Jul-05-1923

Reported in : AIR1924Cal487

Appellant : Mohini Mohan Roy

Respondent : Ramadas Paramhansa

Judgement :

Rankin, J.

1. In this case, the defendant appeals from a decision of the District Judge of Nadia reversing a decision of the Munsif of Ranaghat. The plaintiff brought the suit for a sum of money as duo to him by the terms of a document called ekrarnama. That document is dated the 28th March, 1891, and contemporaneously with it on the same day there was a conveyance of certain land by the predecessor-in-title of the plaintiff to the predecessor of the defendant. The terms of the ekrarnama have been discussed in the judgments of the Courts below and the first question is the question of construction. It is to be observed that the conveyance contains no reference whatever to any such covenant as I am now about to read from the ekrarnama. The ekrarnama which was executed by the defendant's predecessor-in-title was as follows : 'When you expressed your dosire to sell your share of the putni and jamai right in mouza Goid, village Salua Parga Ukhara, I had promised before you that, if the above share was sold to me by you, I and my heirs and legal

representatives shall pay you and your legal representatives for the sheba of the Jugal Kishore Thakur the sum of rupees twenty yearly, year after year.' Later on, those words occur : 'Therefore, I make this ekrar that by the grace of Jugal Kishore Thakur as long as there shall be any member in my family and as long as I shall have zemindari right in the above mouza, I and my heirs and legal representatives shall pay you and your legal re-preventatives for the sheba of the Thakur the sum of rupees twenty per year.' The conveyance of the same date contains no covenant to an equivalent effect and there is no recital whatever in it of this ekrarnama. Now, what has happened IK this : The purchaser of the property who made the promise contained in the ekrarnama conveyed this land to the present defendant. The present defendant is a purchaser from him. The plaintiff accordingly brought the suit against the do-fondant, and he brought it upon the ground that the present defendant was bound by the promise of the man who had sold the land to him. The plaintiff says that the promise of the predecessor-in-title of the defendant was intended to bind everybody who would come to own that land and that the convenient runs with the land.

2. Now, in this case, it will be simplest to begin by stating the legal position of the parties. The position of the defendant in the face of a claim of that sort is that he is a person who is sued upon a claim which is unfounded in law. There is no such thing as between a vendor and a purchaser as a covenant to pay money running with the land. In the case of assignment of lease as between any one who may become interested in the term and any one who becomes interested in the reversion it is possible to talk of a covenant running with the land, At common law no covenant ever ran with the reversion. By the statute law, some covenants may run with the term and some with the reversion and the nature of the covenants that can be said in loose language to run with the land has been described in the case-law and in the Conveyancing Acts and made more or less precise. The present covenant is not one which can run with the land as it is in no way a covenant to pay rent. There is no lessor or lessee, there is no term and there is no reversion. There is no charge on the land. The position of a purchaser of land whose predecessor became bound by a restrictive covenant is dealt with upon the principle of *Tulk v. Moxhay* (1848) 2 Ph. 774. If there is a restrictive covenant and the purchaser takes with notice of it, then the person in whose favour the covenant

is made can restrain the purchaser from acting contrary thereto. The present case is far removed from anything of that sort. When one looks at the terms of the ekrarnama, and at the way in which these two documents of the same date were kept separate, it is abundantly plain that the vendor had a mind to sell the land with a clean title and that, as a part of the consideration, he took a personal covenant from the purchaser which was intended to bind the latter and his family and then only so long as they held the land. There is, therefore, upon the merits, no substance in the case against the defendant and there never was.

3. Now, the position in this case is only half dealt with when the merits are dealt with. It appears that, in the protracted series of suits-mostly but not all brought in the Small Cause Court, these parties have litigated upon this matter and the defendant has had very poor success. The present appeal is complicated by the further consideration that this suit was not brought in the Small Cause Court.

4. An objection has been taken by the plaintiff's pleader to the effect that, under Section 102 of the Code, there is no second appeal because the suit was of a nature cognizable by the Small Cause Court. I propose to deal with the case on both assumptions; but my opinion is that the suit is simply a suit for a sum of money giving a bad reason why the defendant is bound by the covenant. That being so, I see nothing in Article 4 or Article 11 of the Second Schedule to the Provincial Small Cause Courts Act to take away the jurisdiction of the Small Cause Court.

5. If that be the true view, then the fact that the case was tried by the Munsif in his ordinary jurisdiction does not take away the prohibition of an appeal contained in the Small Cause Courts Act. Authority for that is cited to us from Shankarbhai v. Somabhai (1900) 25 Bom. 417 which has been followed in this Court in the case of Indra Chandra Mukherjee v. Srish Chunder Banerjee (1913) 40 Cal. 537. The result, therefore, on this view is that the first appeal was without jurisdiction. The second result but for Section 102, C.P.C., would be that this appeal would lie to set aside the decree made without jurisdiction on the first appeal. That would be on the well known doctrines that are laid down in such cases as Gangadhar v. Sekharbashini (1916) 20 C.W.N. 967 and Aduram Halder v. Nakuleswar Roy

(1918) 29 C.L.J. 48. But, in this case, there is a further complication that there is a special prohibition against a second appeal. In that view, an objection has been taken by the plaintiff that this appeal is incompetent. In my opinion, on the assumption which I think to be right that the case is cognizable by the Small Cause Court, the present appeal is not competent, and is barred by Section 102, C.P.C. But it is open to the appellant to ask us to treat his memorandum of appeal as an application in revision and to set aside the order made without jurisdiction. This has been done before now. One instance my learned brother points out to me is the case of *Sita Nath v. Baikunta Nath* (1911) 38 Cal. 421. The question is whether on this assumption we shall exercise our revisional power. Prima facie when a Court is faced with a decree which is made without jurisdiction, it is a very strong thing not to interfere in revision, because otherwise all sorts of troubles may arise. The decree which is a nullity may be contested hereafter by a suit and that may give rise to infinite difficulties. We have, therefore, to see whether there is any valid reason why the decree under appeal should not be set aside. As to that the position is this : If there was no appeal to the District Judge, the plaintiff who was not suited by the Munsiff might have applied in revision under Section 25 of the Small Cause Courts Act to this High Court. Now it may be that, if we had been of opinion that the plaintiff's case was a very good one on merits, we would not necessarily, in the circumstances of this case, have felt bound now to give leave to apply in revision to set aside the decree of the learned Judge of the Court below. That is the position on that hypothesis. We think that the decree of the Court of appeal below is without jurisdiction. We are satisfied that it is wrong on the merits and we propose apart from any question of res judicata to interfere.

6. The other view may also be considered. It may be said that the case is not cognizable by the Small Cause Court. In that event, what is the position? The position then is this : There is a second appeal and we are entitled to deal with the case upon the facts found. Now, the only case on that footing which the plaintiff can make is the case of res judicata and, on the footing that the case is not cognizable by the Small Cause Court, what is the plaintiff's case for res judicata? It appears that the first suit to which the present defendant was a party, was a Small Cause Court Suit of 1901. Well, if the Small Cause Court was not competent to try this case, there is no res judicata. It so happened that in that first suit an

application in revision came up to this High Court, and two learned Judges, for reasons which do not appeal to me, refused to interfere with the decree of the Court below holding that the defendant was liable. I am quite prepared to pay respect to that decision so far as it contains propositions not inconsistent with other decisions. But that judgment is in no way res judicata any more than the Small Cause Court Judge's judgment in connection with which it arose. The next suit was one of 1909 which was a suit in the ordinary Civil Court a decree dated the 26th April, 1901, being made for rent. I entirely demur to the proposition that this case can be governed by any result of a suit for rent. The next case was one of 1916 brought in the Small Cause Court, and there it is perfectly true all points appear to have been canvassed. The defendant was then held liable but on the assumption that the suit was not cognizable by the Small Cause Court, the Judge was not entitled to try the suit. So there is no res judicata. Whichever way, therefore, we look at this matter, in spite of the tangle arising from the procedure adopted in this case and from the procedure adopted in the previous litigation, we see our way to decide this case according to our opinion on the merits. We propose to do so treating the memorandum of appeal presented to this Court by the defendant as an application in revision, and set aside the decree of the learned District Judge with costs in that Court as having been made without jurisdiction. The defendant is entitled to recover his costs in this Court from the plaintiff. We assess the hearing fee at two gold mohurs.

B.B. Ghose, J.

7. I agree.

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