
(1919) 06 PAT CK 0021
In the Patna High Court

Asan Pandey

APPELLANT

Vs

Rajmon Misser and Nandan Pandey

RESPONDENT

Date of Decision : 24-06-1919

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 99
Criminal Procedure Code, 1898 (CrPC) — Section 145

Citation : AIR 1919 Patna 325 : 52 Ind. Cas. 105

Hon'ble Judges : Atkinson, J

Bench : Single Bench

Judgement

Atkinson, J.—This second appeal comes before me from the decision of the learned Additional Subordinate Judge of Champaran, dated the 20th August 1917.

2. The plaintiff institutes this suit claiming to exercise his right of redemption of a zarpeshgi mortgage-bond, dated the 18th March 1882. The mortgage-bond was for a term of 38 years subject to the annual rent of Rs. 10-8-0. The defendant No. 1 was the original mortgagee and entered into possession of the mortgaged premises; and the defendant No. 2 claims to be a tenant on the mortgaged property. Defendant No. 1 does not contest this suit.

3. The action proceeded to trial upon the defence filed by defendant No. 2. Defendant No. 2 put forward two defences; One, that he was not a necessary party to the suit, and two, that the mortgaged property had been settled with him by the plaintiffs predecessor-in-title as tenant prior to the creation of the mortgage security dated the 18th March 1882.

4. The learned Munsif decided both these issues in favour of the respondent, and granted a decree for redemption coupled with a direction that on the payment of the mortgage money or the balance thereof due by the plaintiff, he should be entitled to khas possession of all the land which formed the subject-matter of the mortgage security discharged from the claim of defendant No. 2 in respect thereof.

5. From this decision defendant No. 2 appealed, and in appeal the Additional Subordinate Judge arrived at the conclusion that no settlement was ever in fact made with defendant No. 2 by the plaintiff or his predecessor in-title prior to the date of the mortgage bond. The learned Subordinate Judge in my opinion gives very cogent reasons for concurring in the findings of fact arrived at by the learned Munsif.

6. In second appeal three objections have been urged against the validity and legal propriety of the decision of the learned Subordinate Judge.

7. It is contended, first of all, that the judgment of the learned lower Appellate Court is not a judgment in accordance with law.

8. I utterly fail to appreciate this contention, because, in my opinion, the learned Judge clearly shows by his judgment that he has carefully considered the material parts of the evidence dealing with the issue as to whether any letting had been created by the plaintiff or the plaintiff's predecessor-in-title with the defendant No. 2 prior to the date of the mortgage security.

9. The learned Judge, to my mind, satisfactorily shows that the defendant No 2 became tenant of the mortgaged premises subsequent to the date of the mortgage security and that the defendant No. 2 was then joint with the original mortgagee in mess and estate, and that collusively in the year 1898 the mortgagee in possession of the mortgaged property got defendant No. 2. recorded as tenant in respect thereof for a period of 7 years. The subsequent Record of Rights only carries this collusive entry one step further. The learned Subordinate Judge rightly laid great stress upon the fact that the defendant No. 2 dare not pledge himself on oath to the defence which he pleaded in his written statement relative to the alleged creation of a letting made to him by the plaintiff prior to the 18th March 1882.

10. I see no reason for holding that the learned Additional Subordinate Judge's judgment is unsatisfactory in any sense whatsoever. In my opinion, being a judgment of affirmance, it satisfies all the requirements of the law.

11. Secondly, it is contended before me that defendant No. 2 was not a necessary party to the suit, and that, therefore, the suit is bad for a misjoinder of parties and that the plaintiff's claim should have been dismissed.

12. I gather from the judgments of the lower Courts that this point was not pressed or urged before either the Munsif or the Additional Subordinate Judge. Before me, however, the matter has been strenuously argued and the learned Vakil appearing on behalf of defendant No. 2 contends that even assuming that defendant No. 2 was a tenant on the lands, under and by virtue of a letting made to him by the mortgagees in possession subsequent to the date of the mortgage security, that nevertheless he is not a person having an interest in the mortgage security which would justify his being made a party under the provisions of Order XXXIV, Rule 1 of the Civil Procedure Code. In addition it is asserted that where a

tenancy is created by a mortgagee in possession in favour of a tenant on the mortgage property, such tenant is not a person having an interest in the mortgage security whom in a suit for redemption it would be necessary to add as a party,

13. Now it must be remembered that this suit is not a suit by way of ejectment; but a suit by a mortgagor claiming to redeem his property from the mortgage-debt which was created in this particular case on the 18th March 1882. As I understand the law, the foundation of the right of a mortgagor to redeem is that upon payment to the mortgagee of the debt due by the mortgagor, the mortgagor shall be then restored by way of redemption to the lands which he pledged as security for the mortgage-debt, free and unfettered from the creation of any rights by the mortgagee puisne to such mortgage, save such obligations and rights as a mortgagee by Statute may create.

14. No authority has been cited in support of the contention addressed to me on behalf of the appellants. But in Mr. Ghose's book on Mortgages, 4th Edition, at page 586, there is a passage which rather tends to support the view pressed by the respondents, viz., that all persons having an interest of any kind in the mortgage property sought to be redeemed are necessary parties in a redemption suit.

15. This certainly conforms with my own view of what the law is. In my opinion the case of Hood v. Easton (1856) 2 Jar. 729 : 2 Giff. 692 : 4 W.R. 75 : 128 R.R. 235 : 66 E.R. 290 tends to show that every interest created by a mortgagee sought to be redeemed puisne to his own is an interest which in a redemption suit should be represented before the Court in order to effectively give relief in a redemption suit between the parties to the mortgage-deed.

16. But even if the addition of defendant No. 2 as a party to the suit was unnecessary, and in that sense there was a misjoinder of parties, it would merely mean that the provisions of Section 99 of the CPC apply to the facts of this case.

17. Section 99 provides that: "No decree shall be reversed or substantially varied, nor shall any case be remanded in appeal on account of any misjoinder of parties or causes of action or any error, defeat or irregularity in any proceedings in the suit, not affecting the merits of the case or the jurisdiction of the Court."

18. In my opinion the provisions of that section of the Code apply with great force and effect to the facts of this particular case, because even if defendant No. 2 was not a necessary party, in my opinion his representation as a party in no way prejudiced the trial of the merits of the suit in so far as the suit has been decreed in favour of the plaintiff respondent.

19. These were the two issues arising for decision in this second appeal as originally presented to this Court.

20. Pending the hearing of the appeal, the plaintiff and the defendant No. 2 entered into the terms of a compromise embodied in a petition dated the 3rd of

April 1919. By this petition of compromise the parties agreed that. the plaintiff should recognise the defendant No. 2 as tenant of the premises originally offered as security by the mortgage deed of the 18th March 1882; and that defendant No. 2 should pay to the plaintiff the annual yearly rent of Rs. 10-8-0, being the rent recorded in respect thereof as being payable in the Record of Rights.

21. The date of this compromise is of vital importance, viz., the 3rd of April 1919.

22. It is contended before me that the parties to the suit having entered into a compromise that this Court is, by virtue of the provisions of Order XXIII, Rule 3, Civil Procedure Code, bound to accept the compromise and to pronounce a decree in accordance therewith.

23. This case originally came before Mr. Justice Das and upon the defendant No. 2 applying to have a decree pronounced in accordance with the terms of the compromise one Baldeo appeared and protested, claiming that the original plaintiff to the suit had no right to enter into the compromise which he did with defendant No. 2, inasmuch as the. plaintiff had in the month of August 1918 sold all his estate and interest in the properties in suit to one Ramphal Pandey.

24. Baldeo purchased from Ramphal Pandey on the 8th November 1918 his interest in the premises which he had purchased from the plaintiff, and the sale-deed between Ramphal Pandey and Baldeo was effected by a registered deed of conveyance; and consequently it was contended by Baldeo that the compromise between the original plaintiff in the suit and the defendant No. 2 was clearly fraudulent in its design, inasmuch as the plaintiff had no right, title or interest whatsoever in the property in respect of which he sought to confirm and ratify a letting already made to the defendant No. 2.

25. Baldeo applied to this Court for leave to be substituted as a party on the record.

26. Mr. Justice Das conceived that Baldeo had an interest, and a very vital interest in contesting the validity of the compromise dated the 3rd April 1919 and he permitted Baldeo to apply to the Registrar to be substituted as a party.

27. The learned Registrar declined to add Baldeo as a party, upon the ground that Baldeo had been guilty of laches in not proceeding at an earlier date to himself substituted as a party upon the record.

28. From the order of the learned Registrar there was an appeal to a Division Bench of this Court, and my learned brothers Mr. Justice Roe and Mr. Justice Jwala Prasad conceived that Baldeo was entitled to be added as a party and by their order dated the 15th April 1919 they so directed, although they admitted that he had been guilty of some remissness, but that under the circumstances they considered he was entitled to assume that the original plaintiff would bona fide conduct the litigation then pending in this Court in an honest, open and fair-handed manner, but now that Baldeo had discovered that the plaintiff was acting fraudulently in defeasance of Baldeo's legal rights, that, therefore, he was a

proper party to be substituted on the record.

29. The question which I have to consider now is, whether the compromise of the 3rd April 1919 ought to be made a decree of this Court. Under the provisions of Order XXIII, Rule 3, Civil Procedure Code, the learned Vakil appearing on behalf of defendant No. 2 contends that his client dealt with the original plaintiff in the suit believing he had title; believing him to be an honest man, and that under the provisions of Order XLI, the rights which had accrued to him under the compromise ought not to be taken from him.

30. One might be inclined to attach some weight to that argument if it was founded upon any substratum of truth or fact; but it appears in this case that early in the present year a contest arose between Baldeo on the one hand and defendant No. 2 on the other, in which or out of which a proceeding u/s 145 of the Criminal Procedure Code was instituted, and in which proceeding Baldeo claimed possession of the land in suit as a purchaser from Ramphal Pandey, who was the purchaser from the plaintiff in the original suit, and the defendant was the opposite party in the proceeding u/s 145. Therefore, I hold that defendant No. 2 had notice of Baldeo's prior title, and that he must be deemed to have known that on the 3rd April 1919, when the compromise was entered into between the original plaintiff on the one hand and himself on the other, that the original plaintiff in the suit had no right, title or interest whatsoever in himself whereby he could make or enter into a valid, lawful and binding contract creating a tenancy in respect of the lands in suit.

31. I hold that the compromise of the 3rd of April 1919 did not sanction or create a lawful and binding contract between the parties thereto. It was a contract designed and conceived in fraud; and it is not such a contract as this Court under the provisions of Order XXIII, Rule 3, Civil Procedure Code, is bound to accept and pronounce a decree in the terms thereof. Accordingly I hold that the three contentions submitted to me on behalf of" defendant No. 2 as appellant in this case are unsustainable in point of law and I would dismiss this appeal with costs.