
(1903) 05 CAL CK 0023

In the Calcutta High Court

Case No : Appeal from Original Decree No. 294 of 1899

Fakir Chandra Dutta and others

APPELLANT

Vs

Messrs. Gisborne and Co.

RESPONDENT

Date of Decision : 21-05-1903

Acts Referred:

Citation : (1903) 05 CAL CK 0023

Final Decision : Dismissed

Judgement

Banerjee, J.—In this appeal which arises out of a suit brought by the Plaintiffs-Respondents to enforce a mortgage-bond, the only question raised on behalf of the Appellants-Defendants Nos. 23, 24, 39 and 40 who are the purchasers of the equity of redemption of the mortgagor is whether the Court below was right in rejecting the claim for set-off urged on behalf of the Defendants. The set-off claimed, as we gather from the account appended to the written statement consists of four items, namely, (1) amount due in the mortgagor's share on account of enhanced rent, the share being specified, (2) certain hospital subscription, (3) chowkidari wages and (4) dak charges. And the way in which this claim is said to arise is as follows : The original mortgagors executed a usufructuary mortgage in favour of the Plaintiff in 1875 whereby the mortgagees, the present Plaintiffs, who were placed in possession of the mortgaged property and were authorized to deduct from the assets of the property which were fixed at seventeen thousand rupees yearly, certain charges which have to be paid, and amongst which were the hospital subscription, chowkidari wages and the dak charges, and from the balance, after retaining eleven thousand rupees in lien of interest and in part satisfaction of the principal of the mortgage debt, there was left the sum of Rs. 2,994 to be paid to the mortgagors. There was also a subscription that the mortgagors would be entitled to a certain share of the increase in the rent which may be effected. Then in 1884 a second mortgage was created in favour of the same mortgagee, whereby out of the amount of two thousand nine hundred and odd rupees payable to the mortgagors, the mortgagees were authorized to retain 2,520 rupees in lieu of interest on the

second mortgage debt. The present suit is brought for the enforcement of this second mortgage. But in the meantime, that is to say, in the year 1891 the Defendants-Appellants have by purchasing the equity of redemption of the mortgagors became entitled to the mortgaged property subject to the two mortgages in favour of the Plaintiffs. And the allegation of the Appellants in their defence was that they were entitled to their share of the enhanced rent as was found in the previous litigation, and to their share of subsequent enhancement that may have been effected and also to the hospital subscription, the chowkidari wages and the dak, charges which the mortgagees have not to pay and which therefore are sums standing to the credit of the mortgagors, and now since the purchase of the equity of redemption by the Appellants, to the credit of the Appellants in the hands of the Plaintiffs.

2. The answer of the Plaintiffs to this claim for set-off is that it is not claimable in this suit which is based not upon the first mortgage, but upon the second which does not make any mention of those items, that it is not claimable for the further reason that the present suit is not one for recovery of money within the meaning of sec. 111 of the Code of Civil Procedure, but is a suit only to enforce a mortgage, the suit having been brought more than six years after the due date and all claim for a personal decree against the mortgagor having become barred.

3. It is further contended that as the mortgagees have been paying certain new cesses, namely, road and public work cesses without making any deduction in the malikana or profit reserved for the mortgagors under the terms of the mortgage of 1875, an account can be taken of such payment only after the expiry of the 34 years for which the usufructuary mortgage of 1875 was to last and no account is claimable before the expiry of that term. Moreover, it is argued that if that sum together with another sum of 200 rupees which has been assigned to one Balabhadra to be paid to him annually by the mortgagees be taken into account, there would be nothing left for the Appellants to claim by way of set-off. The Court below without going into the account has disallowed the claim for set-off, first, because no Court-fee was paid such as was payable upon a plaint in a cross-suit, if the claim for set-off had been made by way of a cross-suit; secondly, because the money in respect to which the set-off is claimed was not an ascertained sum; thirdly, because no accounts were claimable in this suit; fourthly, because the mortgagee does not stipulate for the taking of any such account, and, fifthly, because the mortgage is an anomalous mortgage and its incidents are to be regulated by the contract between the parties as provided under sec. 98 of the Transfer of Property Act.

4. The correctness of each of these five grounds is questioned by the learned vakil for the Appellants; whilst on the other hand the learned vakil for the Plaintiffs-Respondents relies upon each of them, and in addition urges a further ground that this suit not being a suit for recovery of money within the meaning of sec. 111, the set-off contemplated by that section cannot be claimed, and if it is claimed as equitable set-off, even then the claim is untenable by reason of its

not arising out of the same transaction as the one upon which the suit is based.

5. We are of opinion that the last-mentioned ground urged on behalf of the Plaintiffs-Respondents furnished a sufficient answer to the claim for set-off. The suit is not one for recovery of money but is only one for the enforcement of a mortgage security, the right to sue for a personal decree being barred by limitation when the suit was brought. That being so, the case does not come under sec. 111 of the Code of Civil Procedure; and if the claim is to be regarded as one for equitable set-off, it is clearly open to the objection that it does not arise out of the same transaction as that upon which the present suit is based. That an equitable set-off can be claimed only when it arises out of the same transaction as that upon which the suit is based has been laid down in several cases of which we need refer only to *Stephen Clark v. Buthnavaloo* 2 Mad. H.C.R. 298 (1865), *Bhagabat Panda v. Bamdeb Panda* ILR 11 Cal. 557 (1885), and *Chisholm v. Gopal Chandra Surma* ILR 16 Cal. 711 (1889). Now the transaction on which the present suit is based has reference clearly to the mortgage of 1884. It does not refer to any of the items in regard to which the claim is made. That claim is based upon the terms of the earlier mortgage of 1875 which was a separate transaction.

6. That being so, the claim for set-off has been rightly disallowed. In this view of the case it becomes unnecessary to discuss the other points raised. But as the question whether the Court-fee for a plaint was necessary to be paid by the Appellants-Defendants before their claim for set-off under sec. 111 could be entertained was discussed at some length in the arguments, I may, though not without some diffidence, say that that question ought to be answered in the negative regard being had to the language of sec. 111, and to the absence of any express provision in the Court Fees. Act requiring payment of the Court-fee for a plaint upon the written statement in which a set-off is claimed. I say I must speak with some diffidence because I find that the High Courts of Allahabad, Bombay and Madras have taken a different view of the matter, see the cases of *Amirzama v. Nathu Mal* ILR 8 All. 396 (1886), *Bai Shri Majirajbai v. Narotam Hangovan* ILR 13 Bom. 672 (1889), and *Chennappa v. Raghunatha* ILR 15 Mad. 29 (1891); with all respect for the learned Judges who decided those cases, I must say I am unable to accept the view they have taken. Sec. 111 merely says "such set-off shall have the same effect as a claim in a cross-suit so as to enable the Court to pronounce final judgment in the same suit both on the original and on the cross-claim." It does not say that the written statement in which the set-off is claimed is to be treated as a plaint and to be stamped accordingly. It does not even refer to the written statement in so many words; but it only says "the set-off shall have the same effect as a plaint," which to my mind, evidently means this, that it is not a plaint and it does not partake of the nature or the characteristic of a plaint. It is only for certain purposes to have the same effect as a plaint. A provision like that cannot be taken to mean that the written statement in which a set-off is claimed shall have to bear the Court-fee that is payable on a plaint. Turning to the Court Fees Act I find that all that is provided

for there is that by sec. 6, the documents specified in Schs. I and II shall not be received or acted upon unless they bear the Court-fee payable. Amongst those documents the plaint is certainly one, but not the written statement in which a set-off is claimed nor is there any provision made requiring a written statement in which a set-off is claimed, to bear any stamp duty such a plaint is to bear.

7. In that state of the law, I think, it would be straining it a little too much to hold that a written statement in which a set-off is claimed, should have the Court-fee chargeable on a plaint in cross-suit. The Court-fee on a plaint is a tax on public justice; and no law imposing a tax should be construed so as to make persons liable for the tax unless such liability is clearly imposed by the Legislature. See the cases of *Oriental Bank Corporation v. Wright* 5 App. Cas. 856 and *Cox v. Rabbed* 3 App. Cas. 470

8. As I have stated above, in the view that I take of the nature of the suit the claim for set-off has been rightly disallowed and this appeal must accordingly be dismissed with costs.

9. The Plaintiffs-Respondents are entitled to their costs. The Defendants-Respondents will bear their own costs. Pargiter, J.

I agree in the judgment that has been delivered except as regards the point whether a written statement should be stamped like a plaint. The appeal must fail on the ground that the claim to the set-off does not come within the words of sec. 111, and I prefer to reserve my opinion regarding the, point of the stamp duty.