
(1926) 08 BOM CK 0007

In the Bombay High Court

Case No : O.C.J. Suits No's. 1418 and 1420 of 1926

F.E. Dinshaw

APPELLANT

Vs

John Carapiet Galstaun

RESPONDENT

Date of Decision : 04-08-1926

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 10

Citation : AIR 1927 Bom 245 : (1927) 29 BOMLR 382

Hon'ble Judges : Madgavkar, J

Bench : Single Bench

Judgement

Madgavkar, J.—The question in these suits arising out. of para. 14 of the written statement of the defendant in each, is whether the defendant is entitled, by reason of the Suit No. 22 of 1926 instituted by him in the First Class Subordinate Judge's Court of the 24-Paraganas, Bengal, to a stay of both the suits u/s 10 of the Code of Civil Procedure. The question arises on a notice of motion taken out in both the suits by the defendant, Written statements have been put in in both the suits but issues have not been raised. I propose to confine myself strictly to this question and to touch as little as possible the merits of the other contentions on either side.

2. The defendant in the present suits executed a mortgage in 1921 in favour of the plaintiff, and subsequently, an agreement in 1923 under which, on the one hand time was extended, and on the other, interest was raised, Principal and interest were repayable by instalments.

3. The second suit is in respect of a further advance of rupees two lacs by the mortgagee to the mortgagor on the same property situated near Calcutta. The plaintiff sues in Suit No. 1420 of 1926 to recover rupees thirty lacs with interest about Rs. 91,000 on the ground that the mortgagor has failed to pay an instalment of Rs. 2,25,000 payable on March 17, 1925, and has been in default of interest after February 1926. In the second, he claims on the mortgage of June 20, 1923, itself. No relief in respect of the property is claimed in either suit.

4. Shortly, the defence in the former suit is that, although the amount of Rs. 2,25,000 was due on March 17, 1925, and was not paid, the mortgagee waived the default by subsequent acceptance of an instalment of interest. The written statement in the second suit is very similar to the written statement in the first suit. Another defence is that the amount advanced belonged to H.H. The Maharaja Scindia, and the plaintiff has no right to sue, at least by himself.

5. About the end of December 1925 or early in January 1926 the mortgagee gave notice purporting to take possession of the mortgaged properties, obtained rents in respect of some of them, and threatened to exercise his power of sale.

6. Thereupon the mortgagor instituted Suit No. 22 of 1926 in the First Class Subordinate Judge's Court of the 24 Paraganas, Bengal, claiming that the mortgagee had neither right to take possession nor power of sale ; the reliefs he claimed were a declaration and an injunction against the mortgagee and damages.

7. It is admitted that the moneys advanced were of the ownership of the Maharaja of Gwalior; and it is argued for the defendant that issues as in the Bengal Court relating to the plaintiffs right to sue will necessarily arise in this Court, and the defendant is, therefore, entitled to a stay. The plaintiff contends that u/s 10, Civil Procedure Code, it is necessary not merely that a certain portion of the matter should be in issue in Bengal but that the whole of the matter here should be so in issue, and that in the present case the whole of the matter in Bombay is not actually in issue in Bengal.

8. u/s 10 of the present Code, it is necessary that the matters directly and substantially in issue here in the two suits should also be directly and substantially in issue in the Bengal suit. Identity of reliefs is not necessary as it was under the Code of 1882. But the mere identity of one or more issues, apart from their importance and bearing, does not suffice. Under the Code of 1882, even the form of reliefs had to be identical before Section 10 could apply, and to that extent the law is amended. But otherwise the law is not substantially affected.

9. In most cases, the substantial relief depends upon the substantial dispute and matter in issue. And the object of the section still remains what it was, viz., to avoid a conflict of judicial decision. In the view which I take, the cause of action as disclosed in the pleadings, the matter directly and substantially in issue, and the relief claimed, are three connected parts of the same legal structure and must be viewed both singly and as a whole. And I propose to consider the question in this light and to ask myself, firstly, what the matter directly and substantially in issue in each of the two suits here and in the suit in Bengal is, and to test it by also considering the causes of action and the reliefs, and, finally, whether a conflict of decisions here and in Bengal is possible.

10. The matter directly and substantially in issue in Suit No. 1420 of 1926 in this Court is the right of the mortgagee to a personal decree for rupees thirty lacs

and interest or any part thereof on the date of the institution of the suit, namely, June 21, 1926, or a waiver of this right. The matter directly and substantially in issue in Suit No. 1418 of 1926 is similarly the right of the mortgagee-plaintiff to a personal decree of rupees two lacs with interest at nine per cent. The matter directly and substantially in issue in the suit in Bengal is the right of the mortgagee in December 1925, firstly, to take possession, and, secondly, to exercise the power of sale, and in the absence of it, the right of the mortgagor to damages along with an injunction and a declaration. Prima facie, therefore, it appears to me that the matter directly and substantially in issue in either suit here is not the matter directly and substantially in issue in the suit in Bengal.

11. To test this further by a consideration, firstly, of the causes of action, and, secondly, of the reliefs claimed ; the causes of action of the plaintiff's suit in Bombay are in Suit No. 1420, the mortgages and the default in respect of Rs. 2,25,000 payable on March 17, 1925, and in respect of interest, the alleged default of the mortgagor after February 1926; and in Suit No. 1418, the mortgage and non-payment. The causes of action in Suits Nos. 1420 and 1418 of 1926 arose on quite different dates to the cause of action in the Bengal suit, which arose directly on the mortgagee's action in December 1925 in taking possession of certain properties and in threatening to take possession of the others and to exercise his power of sale. The causes of action in Bombay and in Bengal are thus, in my opinion, different.

12. As for the reliefs, little need be said as they are clearly quite different. It is important to observe that the suit in Bengal is in no way a suit for redemption or for taking an account of the amount due under the mortgages. It is merely a suit for a declaration and injunction against the mortgagee's right of possession or of sale and for damages. And whichever party succeeds here or there, I see no possibility of a conflict of decrees.

13. I have deliberately refrained from dealing with the arguments on either side which bore directly or indirectly on the merits in the present two suits. Nor do I think it necessary to quote authorities in support of the view I have taken. The only decision to which I might refer is *Mulchand Raichand v. Gill & Co.* ILR (1919) 44 Bom. 283 in which, if at all, the identity necessary for a stay u/s 10, Civil Procedure Code, was far stronger than in the present case. In the present case to accept the contention for the defendant might be to compel the mortgagee to wait for a period of three or four years merely for the ascertainment of the quantum of the much smaller damages, if any, sustained by the mortgagor.

14. Lastly, it was argued that if these two suits are proceeded with, it would be impossible to take an account of the mortgages without considering the damages, at least as an equitable set-off. The question, in my opinion, is not relevant to the decision of the application of Section 10. It must await and can be dealt with at the time of the decision of these suits.

15. For these reasons, I am of opinion that the motion by the defendant

mortgagor fails and that he is not entitled to a stay of either suit u/s 10, Civil Procedure Code. The motion is dismissed with costs.

16. The defendant has preferred to proceed by notice of motion. I might point out, however, that it was at least open to the defendant to raise this along with other issues and to have had it tried as a preliminary issue : Maharaja Kesho Prasad Singh v. Shiva Saran Lall. (1919) 4 P.L.J. 557