
(1952) 09 RAJ CK 0008
In the Rajasthan High Court
Case No : Second Appeal No. 179 of 1951

Kasimkhan

APPELLANT

Vs

Chandratan

RESPONDENT

Date of Decision : 04-09-1952

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 23 Rule 1(2)
Limitation Act, 1908 — Section 5

Citation : AIR 1954 Raj 25 : (1952) RLW 425

Hon'ble Judges : K.L. Bapna, J

Bench : Single Bench

Advocate : Chandmal, for the Appellant; Ugam Raj, for Chaitandas, for the Respondent

Final Decision : Allowed

Judgement

Bapna, J.—This is a second appeal in a suit for ejectment and arrears of rent.

2. The respondent Chandratan sued the appellant Kasirokhan for ejectment and arrears of rent in respect of a house and a "bara" situated at Bikaner on the basis of two rent-notes Exs. P-1 and P-2 dated 21-9-1947 alleged to have been executed by the defendant. The defendant denied execution of these rent-notes or having been put in possession of the property by the plaintiff. He alleged that one Isak was the owner of the property and was in possession of the same. According to the plaintiff, Isak had mortgaged the house and the bara for Rs. 10,000/- by a registered deed of mortgage dated 18-9-1947. The trial Court after evidence held that the execution of the rent-notes had not been proved and the suit was dismissed. On appeal, the learned District Judge reversed that finding and decreed the suit in favour of the plaintiff. The defendant has filed this second appeal.

3. Learned counsel for the appellant argued that the appeal which had been filed by the plaintiff in the lower appellate Court was barred by time and the Court had committed error in giving the benefit of Section 5, Limitation Act to the

plaintiff respondent. The Rajasthan Law of Limitation which came into force in the State on 24-1-1950 provides limitation of 30 days for an appeal to be presented to the court of District Judge. The judgment in the present case was pronounced by the Court of Munsif on 21-11-1950 and the appeal was filed in the Court of the District Judge on 19-1-1951, i.e., on the 59th day. After allowing the period for obtaining copies of judgment, the appeal was barred by 6 days. The plaintiff had urged in the lower Court that according to the Bikaner Law of Limitation prior to the enforcement of Rajasthan Limitation Act, the period provided for an appeal to the District Judge was 60 days. The plaintiff had asked his lawyer to present an appeal but he said that there should be no hurry about it as the period for appeal was 60 days. Plaintiff's submission was that under the erroneous advice of his lawyer, the appeal came to be barred by 6 days. The lower appellate Court granted the benefit of Section 5, Limitation Act to the plaintiff. Learned counsel for the appellant argued that the Rajasthan Law of Limitation having been brought into force on 24-1-1950 the advice given by the lawyer of the plaintiff could not be said to be bona fide and must be treated as having been negligently given and in that case the benefit of Section 5, Limitation Act, could not be given to the plaintiff.

4. Learned counsel for the plaintiff respondent finding himself in a difficult position made an application to-day that he may be permitted to withdraw the suit with permission to file a fresh suit. This was opposed by learned counsel for the appellant. The prayer to withdraw the suit with liberty to file a fresh suit can be given if the case could be brought within the four corners of Order 23, Rule 1(2), Civil P. C. and such permission can be given if a suit must fail by reason of some formal defect or there were other sufficient grounds to allow the plaintiff to institute a fresh suit for the subject-matter of a suit or part of a claim. There is no such defect in the suit and as regards other sufficient grounds it has been held in various cases that these grounds should be "ejusdem generis" with the formal defect. In some cases a broad view was also taken that those grounds need not be "ejusdem generis" with formal defect. In the present case there is no inherent defect in the suit as brought in the lower Court nor has the plaintiff been deprived of any opportunity of evidence but the whole defect seems to have been created by a mistaken advice of the lawyer. In the circumstances like these it would not be just and proper to allow the plaintiff to withdraw the suit under Sub-rule (2) of Rule 1, Order 23, Civil P. C. with liberty to institute a fresh suit. The petition is, therefore, rejected.

5. Learned counsel for the respondent prays that he would in that case withdraw the suit. On referring to Vakalatnama, it however appears that the power to withdraw the suit had not been conferred on Mr. Ugam Raj who appears to-day and wants to withdraw the suit. Mr. Ugam Raj wants time to obtain a proper Vakalatnama. Time allowed ten days. Mr. Chandmal wanted costs of adjournment but in the circumstances of this case, no costs for adjournment are allowed.

(The case coming on for final disposal after the disposal of the interlocutory

petition the Court delivered the following :)

6. The facts of this case are mentioned in my order of 25-7-1952, the relevant portion of which is as follows :

(After quoting the portion as given in paras 1 to 3 given above His Lordship proceeded :)

7. The contention is correct. On 21-11-1950 when the judgment was delivered by the Court of Munsif, the Rajasthan Law of Limitation which curtailed the period of appeal had been in force for about eleven months and the plaintiff's lawyer who was consulted in the matter should have information of the change in the period of limitation. In order to induce the Court to give the benefit of Section 5, the delay must be due to a sufficient cause. In this case, sufficient cause is said to be the mistaken advice of the lawyer, but every mistaken advice cannot be a sufficient foundation for exercise of the discretion u/s 5, Limitation Act. The mistake must be bona fide. "Bona fide", however, means "with due care & attention". In the present case, as the change in law had taken place about 11 months before the decision of the suit by the Munsif, it could not be said that the lawyer had exercised due care and attention when he did not make himself conversant with the provisions of the Rajasthan Limitation Act. The advice of the lawyer was, therefore, negligent and the lower appellate Court erred in granting to the plaintiff the benefit of Section 5, Limitation Act and condoning the delay in the presentation of the appeal.

8. The delay in the presentation of the appeal not being liable to be condoned, the appeal in the lower Court was barred by time & should have been dismissed on that account. The present second appeal is, therefore, accepted, the judgment and decree of the lower Court is set aside and that of the trial Court restored. The plaintiff respondent will pay to the defendant appellant costs in all the three Courts.