
(1939) 02 BOM CK 0016
In the Bombay High Court
Case No : Second Appeal No. 283 of 1937

Laxman Manjunathaya Balwalli

APPELLANT

Vs

Venkatrao Mangeshrao

RESPONDENT

Date of Decision : 24-02-1939

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 47

Citation : AIR 1939 Bom 386 : (1939) 41 BOMLR 836

Hon'ble Judges : Lokur, J

Bench : Single Bench

Judgement

Lokur, J.—This second appeal arises out of a suit filed by the plaintiffs to recover their share in the monies realized by the defendants on behalf of all of them. The plaintiffs and the minor defendants were members of a joint Hindu family, and by a compromise decree in the year 1925 they partitioned the joint family property among themselves. Plaintiffs Nos. 1 to 4 were allotted one-fourth share, plaintiffs Nos. 5 and 6 three-eighths share, and defendants Nos. 1 and 2 three-eighths share. One other property, situated in the village of Hosakuli, had been purchased by the family, and as the vendor had filed a suit under the Dekkhan Agriculturists' Relief Act alleging that the sale was a mortgage, the decree provided that that property should be left undivided until the termination of the said litigation. The part of the decree which dealt with that property ran as follows:

As there is litigation going on in respect of the property of the village Hosakuli, it is retained in common and undivided. The assessment of the said property should be paid by all the different three branches of the family, according to their respective shares determined in this compromise. Its income also is to be enjoyed similarly, After the determination of the said litigation, the property is to be divided specifically, according to their shares. All costs of the said litigation, including the future, are to be borne by all the three different branches according to their shares.

2. In the litigation it was ultimately held that the transaction was a mortgage, and the vendor was allowed to redeem the mortgage on payment of the amount found due. Defendants Nos. 1 and 2 being minors, the Deputy Nazir of the District Court was appointed their guardian and he recovered Rs. 981-4-9 from the mortgagor on February 10, 1933. The plaintiffs, who were entitled to five-eighths share in this amount, which represented the pro-property of the village Hosakuli mentioned in the compromise decree, made a demand from the Deputy Nazir for their share; but under the orders of the District Judge, plaintiff No. 1 was informed by a letter (exhibit 18) that he and the other plaintiffs should take steps to recover their share by executing the decree. In the meantime the Deputy Nazir himself had presented a darkhast against the plaintiffs to recover Rs. 250 and Rs. 375 which had been awarded to the defendants by the compromise decree in order to equalize the shares. In the suit the defendants put in a written statement asking for a set-off in respect of these amounts. The trial Court held that the suit was barred by Section 47 of the Civil Procedure Code, that the set-off was permissible, and that on deducting the amount sought to be set off from the amount due to the plaintiffs as their share, nothing remained due to them. The suit was, therefore, dismissed, and under the circumstances the parties were ordered to bear their own costs. Those findings were upheld in appeal, and the decree of the trial Court was confirmed.

3. In this appeal the plaintiffs have deducted from their claim the amount of the expenses of the litigation and limited their claim to Rs. 493 only. It is urged that their suit is not barred by Section 47 of the Civil Procedure Code, and that the defendants should not have been allowed to claim a set-off in this suit. It is also contended that, as the plaintiffs were driven to the suit by the reply given by the Deputy Nazir, they should have been awarded their costs.

4. The suit would obviously be barred u/s 47 of the CPC if the claim made in the suit could be made in execution of the compromise decree. The extract from that decree, which I have given above, clearly shows that the property of the village Hosakuli was kept undivided as a litigation was pending about it, and it was further provided that after the termination of that litigation that property should be specifically divided according to the shares, that is to say, that the property should be divided by metes and bounds between the plaintiffs and the defendants. It did not provide for a contingency of the property itself being lost to the family and the mortgage amount being realized. It was not then known that the property was only in mortgage with the family and that the family was only entitled to recover the amount due under the mortgage. The decree did provide for the cost of the litigation, and the executable part of the decree provided for the partition of the land by metes and bounds. The facts of this case are analogous to those in *Krishna Roy v. Jawahir Singh* ILR (1892) Cal. 260. There the plaintiff had purchased a one-guntha share in a certain estate and obtained a decree for possession against the defendants. While the plaintiff's suit was pending, and before he took out execution under the said decree, there were certain partition proceedings, whereby the defendants' interest in that

estate was converted into a smaller estate in view of their share in the whole estate. It was then held that a separate suit could be brought by the plaintiff to have it declared that the defendants' interest in the former estate had passed into the latter and that it was not barred by Section 244, corresponding to the present Section 47 of the Civil Procedure Code. The same view was taken in *Ahmed bin Shaik Essa Khaliffa v. Shaik Essa bin Khaliffa* ILR (1894) 18 Bom. 495. In that case an award decree for partition directed a certain sum of money to be paid to the plaintiffs by defendant No. 1 on the plaintiffs handing over certain moveable and Immovable property and executing certain deeds of conveyance. But subsequently a vessel, which was part of the moveable property to be handed over to the plaintiffs, was lost at sea and the plaintiffs were therefore unable to fulfil the condition on which alone they could claim the payment of the amount awarded to them. The plaintiffs issued a notice calling upon defendant No. 1 to show cause why in execution of the decree the Court should not ascertain and fix some sum as the value of, or compensation for, the loss of the vessel to be deducted out of the amount awarded to him, as their vessel could not be delivered. Subsequently the plaintiffs applied to have the decree amended by stating the sum to be paid in lieu of the vessel, but; that application was also refused; and ultimately it was held that the proper remedy was a suit. Starling J. observed (p. 504):

In my opinion, the only way in which the plaintiffs can obtain what they seek is by filing a fresh suit setting out the decree herein, and the circumstances which have transpired since the passing of that decree, and asking for a declaration of their rights under all the circumstances of the case.

5. In the present case also certain circumstances have transpired after the compromise decree for partition was passed. That decree contemplated the division by metes and bounds of specific Immovable property, but after the decree that property was lost to the family and some moveable property was acquired in its stead. Hence that moveable property cannot be partitioned in execution of the decree which made no reference to it, and the plaintiffs were right in filing a separate suit mentioning the circumstances and basing their right to the partition of the money on the compromise decree. I, therefore, hold that the suit is not barred by Section 47 of the Civil Procedure Code.

6. This litigation was really unnecessary as the trial Court has found that the amount due from the plaintiffs to the defendants is almost equal to the amount claimed by the plaintiffs in this suit, and taking accounts, it found that nothing was really due to the plaintiffs. The plaintiffs, however, contend that as the amount due to the defendants is ordered to be paid to them by the compromise decree, and as the defendants have already filed a darkhast to recover that amount, it cannot be claimed as a set-off in this suit. In support of this contention it is pointed out that a written statement asking for a set-off has the same effect as a plaint in a cross suit so as to enable the Court to pronounce a final judgment in respect both of the original claim and of the set-off, and that as

the claim of the set-off has already been adjudicated upon and embodied in the decree, there cannot be a fresh suit asking for that very amount. This contention, however, cannot be upheld in view of ill. (d) to Order VIII, Rule. 6, of the Civil Procedure Code, which says, "A sues B on a bill of exchange for Rs. 500. B holds a judgment against A for Rs. 1,000. The two claims being both definite pecuniary demands may be set off." It does not matter that B had already secured by a judgment against A the amount which he claimed by way of a set-off. The only other objection to the set-off is that the defendants should have been called upon to pay the necessary Court-fees on the amount claimed. It is true that the defendants should have paid the requisite Court-fees, but their omission to pay the Court-fees does not affect their claim to the set-off since they can be called upon to pay the necessary Court-fees at any stage of the proceedings under s. 149 of the Civil Procedure Code. Thus, the result is that if the defendants pay the requisite Court-fees on their claim for the set-off, nothing will be found due to the plaintiffs, but the plaintiffs had to file the present suit on account of the attitude taken by the Deputy Nazir on behalf of the defendants.

7. His Lordship, after dealing with the question of costs proceeded:

The result is that the decree of the lower Courts dismissing the suit is confirmed. The defendants shall pay the Court-fees on their claim for the set-off in the trial Court. They will pay the plaintiffs their costs in the trial Court to the extent of their claim for Rs. 449-12-7 only, and will bear their own costs in the trial Court. The plaintiffs should pay the costs of the defendants in the lower appellate Court and bear their own. The costs in this Court will be borne by the parties themselves.