
(1924) 02 AHC CK 0020
In the Allahabad High Court

Parbhu Dayal

APPELLANT

Vs

Murli Dhar

RESPONDENT

Date of Decision : 26-02-1924

Acts Referred:

Limitation Act, 1963 — Section 14

Citation : AIR 1924 All 867 : 78 Ind. Cas. 677

Hon'ble Judges : Daniels, J

Bench : Single Bench

Judgement

Daniels, J.—This is an appeal by the defendant arising out of a suit for specific performance of a contract. As the appeal raises a question of limitation both as to the plaintiff's suit and as to the plaintiff's appeal to the Court below and involves a question of res judicata as to the defendant's cross-objections in the Court below it will be necessary to set ""out the material facts and dates in some detail. The oontract, of which specific performance is sought, was made on 1st April 1915. By it the defendant-appellant Parbhu Dayal agreed to sell to his nephew the plaintiff Murli Dhar one-fourth of a house whenever the plaintiff should pay him the sum of Rs. 200. Shortly after this, the defendant mortgaged" the house to a third party and I am informed that the mortgagee has filed a suit on his mortgage and has obtained a decree. On 4th November 1921 the plaintiff filed the present suit for specific performance alleging that, on 21st September, he had tendered the sum of Rs. 200 to the defendant and asked him to carry out the contract and transfer the house to him and that the defendant had refused. The learned Munsif passed a decree in favour of the plaintiff on 18th March 1922 subject to his paying to the defendant, a sum of Rs. 300 and one-fourth of the decree obatained by the mortgagee. The sum of Rs. 300 inoluded the original Rs. 200 stipulated in the contract and a further sum of Rs. 100 on account of one-fourth share of the improvements to the house made by the defendant since the date of the contract. The plaintiff, on 29th March 1922, filed an application for review objecting to this condition. His application was dismissed on 6th May 1922.

2. In the meanwhile, on 24th April 1922, the defendant had appealed to the District Judge. On 15th May 1922 he applied to the Court below to withdraw the appeal and the appeal was dismissed on his application. On the next day, that is, one day after the appeal had been dismissed, the plaintiff filed cross-objections under Order XLI, Rule 22. The Court below dismissed those objections on the ground that there was no appeal pending before it and, therefore, no cross-objection under Order XLI, Rule 22 could be preferred or entertained, and that the plaintiff's remedy was to file an appeal. On the same date, namely, the 18th May 1922 the plaintiff filed the appeal against the judgment in which the present second appeal has been brought. The defendant thereupon filed cross-objections raising the same points which he had raised in his appeal of 24th April. The Court below has dismissed those objections as barred by the rule of res judicata. It has allowed the plaintiff's appeal by deleting the condition requiring the plaintiff to pay one-fourth of the decree obtained by the mortgagee. The defendant has preferred a second appeal to this Court and has urged in support of it the following grounds:

3. 1. That the plaintiff's appeal to the Court below was time barred.

4. 2. That as the plaintiff's cross-objections to the defendant's appeal had previously been dismissed it was not competent to the plaintiff to file a separate appeal on the same points.

5. 3. That the Court below was wrong in dismissing the defendant's cross-objections on the ground of res judicata.

6. 4. That the plaintiff's suit was barred by limitation under Article 113.

7. 5. That the plaintiff by his own laches had disentitled himself to equitable relief by way of specific performance.

8. 6. That instead of relegating the defendant to a separate suit for contribution in case the mortgage amount should be realised from him, the equities should be adjusted now by requiring the plaintiff to pay one-fourth of the mortgage-money. In other words, the decree of the trial Court should be restored.

9. I take the third plea first. This plea is wholly untenable. The dismissal of an appeal on withdrawal has the effect of a decision on the merits. It leaves the finding of the trial Court final against the appellant and the rule of res judicata applies. The language of Order XLI, Rule 22 is to the same effect. The rule allows a respondent to take any cross-objection which he could have taken by way of appeal; it does not allow him to take an objection which he has already taken by way of appeal and which has been decided against him. The point was expressly decided against the appellant in *Bamji Das v. Ajudhia Prasad* 25 A. 628 and there is nothing in the alteration in the wording of the rule under the new Code which renders this decision inapplicable. The result is that the appellant cannot now raise any point which was decided against him by the trial Court. His fourth and fifth pleas are, therefore, not maintainable and it is unnecessary to go into them.

10. It remains to consider his objection to the appeal filed by the plaintiff in the Court below. His first contention is that that appeal was time barred. This depends on whether the plaintiff can be allowed the benefit of the time occupied in prosecuting his application for review. It is pointed out that neither the first nor the second para, of Section 14 of the Limitation Act applies to appeals and that in other cases, e.g., in Section 12 where it was intended that the provision should apply to appeals, the word " appeal " has been separately mentioned. In dealing with this question it is, however, necessary to consider not merely Section 14 but also Section 5. The Privy Council, in *Brij Iidar Singh v. Kanshi Ram* 42 Ind.Cas. 48 : 45 C. 94 : 88 M.L.J. 486 : 23 M.L.T. 862 : 6 L.W. 692 : 128 P.W.E. 1917 : 16 A.L.J. 777 : 19 Bom. L.R. 866 : 3 P.L.W. 818 : 26 C.L.J. 572 : 104 P.R. 1917: (1917) M.W.N. 811 : 22 C.W.N. 169 : 127 P.L.R. (1917): 44 I.A. 218, have laid down that time spent in prosecuting with due diligence a proper application for review of judgment can be deducted u/s 5. It is also now settled that the fact of the plaintiff having made a mistake of law does not necessarily preclude him from obtaining the benefit of the section. In this case there is a finding of the Court below that the plaintiff was prosecuting his application with due diligence and it appears to me that I should accept that finding.

11. The second objection is that the dismissal of the plaintiff's cross-objections to the defendant's appeal precluded him from appealing on his own account. If those objections had been dismissed on the merits this plea would have been unanswerable. The record shows quite clearly that they were not dismissed on the merits. Indeed, they appear to have been dismissed on an office report without even hearing the parties. They were dismissed on the view that it was not competent to a party to file cross-objections after the appeal of the other side had been dismissed. Even if the view of the Court below was incorrect I must look to the ground on which the objections actually were decided and not to what, in the view of the appellant, the Court ought to have done. In my opinion, however, the view taken by the Court in dismissing them was correct. The very word "cross-objections" used in Order 41, rule (and introduced, I may note, for the first time in the present Code) implies that the objections are taken in answer to a pending appeal. Clause (and) of the rule has been referred to by the appellant but that clause is really against him. It lays down that where, after the respondent has filed a memorandum of objection under the rule, the appeal is subsequently withdrawn or dismissed for default such withdrawal or dismissal shall not prevent the objections being heard and decided. The rule clearly implies that the objections have been filed prior to the appeal being dismissed or withdrawn. I know of no reported decision on the point, but I am informed that there is an unreported decision of Mr. Justice Banerji in which the same view has been taken.

12. On the sixth plea I do not consider that I should be justified in interfering with the decree of the Court below. It is not yet certain that the mortgagee will realise any portion of his security from the share of the house which is in dispute in this case.

13. The result is that the appeal fails and on all points and it is accordingly dismissed with costs.