
(1916) 11 AHC CK 0031
In the Allahabad High Court

Rubab Bano

APPELLANT

Vs

Najabat Khan and Others

RESPONDENT

Date of Decision : 30-11-1916

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 47

Citation : AIR 1917 All 240 : 38 Ind. Cas. 601

Hon'ble Judges : Walsh, J;Piggott, J

Bench : Division Bench

Final Decision : Disposed Of

Judgement

Piggott, J.—This is a first appeal from an order of remand and arises out of the following facts. One Raja Baqar Ali Khan held a decree against the respondents now before us, which was a preliminary decree for sale on a mortgage. He died before a. decree, absolute was obtained. It is admitted that his heirs under the Muhammadan Law were his two sons and two daughters. The judgment-debtors went to one of these, daughters, Musammat Rubab Bano, the, original appellant before this Court, and/ they came to an arrangement with her. They, paid her a sum of Rs. 2,541-9-9 (which was, one-half of the amount due under the-decree) and they obtained from her what purported to be a complete discharge of their liability, under the same. Effect was given, to this arrangement by means of an, application to the Court u/s 258 of the CPC of 1882, by which Musamma, Rubab Bano, coming forward as representing the deceased decree-holder, asked the Court to certify the complete satisfaction of the decree. By a procedure which has very properly been made the subject-matter of severe comment by this Court in the course of the subsequent litigation, this extraordinary application was allowed to prevail, and the decree was struck off as completely satisfied. Raja Jafar Ali Khan, the elder son of the deceased decree-holder, jointly with his brother made an application after this, asking the Court to proceed to the passing of a decree absolute for sale. This application was dismissed by the Court of first instance. There was an appeal to the Court of the District Judge, who decided in favour of Raja Jafar Ali Khan on the 8th of May 1907. There was a

further appeal by the judgment-debtors to the High Court, which was decided on the 6th of July 1908. The judgment of this Court expressly recites that all the legal representatives of the deceased decree-holder, that is to say, his two sons and his" two daughters, had been brought on the record by that time on one side or on the other. There was some controversy as to whether this recital was correct as regards Rubab Bano, I do not know that the point is material; but I think that we ought to assume that the recital in the judgment is correct. At any rate this Honourable Court proceeded on the assumption that it had before it all the parties concerned and was entitled to pass a decree finally disposing of the various claims with regard to the subject-matter then in dispute. The result was that it gave Raja Jafar Ali Khan, (whose claim, it may be noted, was supported by his brother and by his other sister, Sugra Begam), a decree absolute for sale to the extent of 5/6ths of the money due under the preliminary decree. The remaining 1/6th share would under the Muhammadan Law have passed by inheritance to Musammat Rubab Bano, and the exemption of this share from the final decree passed by this Court amounts to a recognition of the payment made to that lady as satisfying her personal claim under the decree. The decree absolute for sale having thus been affirmed by this Court was put into execution in due course, and eventually the property of the judgment-debtors was sold -in satisfaction of the money due under the decree absolute on the 20th of December 1910, Precisely three years afterwards, that is to say, on the 20th of December 1913 the present respondents came into Court with the application which has resulted in the appeal now before us. The application, on the face of it, was one u/s 47 of the present Code of Civil Procedure, The applicants took up the position that they were judgment-debtors who had been made to pay more than the sum rightly due from them under the decree. By a misstatement of facts they represented themselves as having been made to pay under the decree absolute the entire sum originally due under the preliminary decree for sale, instead of 5/6ths of that amount. On the basis of this statement they claimed to recover from Musammat Rubab Bano the entire sum of Rs. 2,541-9-9 which they had paid to her as long ago as the 15th of Jane 1903. Their cause of action for this application, they stated, accrued to them on the 20th of December 1910 being the. date on which the money due under the decree absolute affirmed by this Court was actually realised. The application was resisted on various ground?; but the learned Subordinate Judge who entertained it decided one point only. He held that whatever right, if any, the applicants before him might have had to recover from Musammat Rubab Bano the whole, -or any part of the aforesaid sum of Ks. 2,541-9-9, accrued to them, at the very latest, on the 6th of July 1908 being the date of the final decree passed by this Court. He accordingly held that the application before him, being an application admittedly falling under the provisions of Article 181 of the First Schedule to the Limitation Act, was barred by the three years" rule of limitation,, and he dismissed it accordingly. There was an appeal to the District Judge. This appeal was in the first instance heard and decided ex parte. The learned District Judge held that the right claimed in the application was simply a right to refund on account of excessive realizations in

respect of the decree for sale, and from this he deduced the consequence that this right only accrued to the judgment-debtors, the appellants before him, on the date on which the money realized from them exceeded the amount payable by them under the decree, that is to say, on the 20th of December, 1910. He accordingly reversed the decision of the Court of first instance and passed an order remanding the case to that Court, to be heard and disposed of on the merits. The appeal before us is against this order of remand. The arguments before us have necessarily covered a somewhat wide field. We had to consider on what date the cause of action accrued to the present respondents; and in considering this point, it was inevitable that we should examine the case put forward on their behalf and consider what their precise cause of action was, and if they had any at all. I have finally come to the conclusion, however, that the appeal now before us may be disposed of on one single point. The learned District Judge was in error in saying that the applicants had a cause of action by way of refund on account of excessive realizations. I may note that the appeal was eventually re-heard in the presence of both parties; but the decision was re-affirmed by the successor of the District Judge who originally delivered judgment, on the same reasoning in which his predecessor had proceeded. Now the decree under which the realization actually took place was the decree absolute for sale. By that decree a certain sum, namely, 5/6ths of the amount provided by the preliminary decree, was held to be payable by the judgment-debtors, and this amount has been paid, and this amount only. Moreover, the learned Judges of this Court conceived that they had all the parties before them and, taking into account the respective rights and liabilities of all of them, adopted deliberately the course of affirming the decree absolute for sale in the form stated above. The meaning of their decision is that, out of the payment of Rs. 2,541-9-9 made by the judgment-debtors to Musammat Rubab Bano, one-third of the amount (being one-sixth of the sum originally decreed) might be treated as having been paid to that lady in satisfaction of her share of the money due under the preliminary decree. The remaining two-thirds the learned Judges of this Court held, by necessary implication, not to have been paid towards the satisfaction of the decree at all. It follows that the respondents, now before us are not entitled to put it forward as their cause of action that they are in the position of judgment-debtors from whom the decree-holders have realized, in satisfaction of their decree, more than what was actually due to them in accordance with its terms. It was judicially determined against them that that was not the case. Their cause of action, if, any, against Musammat Rubab Bano arose out of the payment which they made to her on the 15th of June 1903 and the agreement in pursuance of which that payment was made. Whatsoever they paid to her in excess of her 1/6th share of the money due under the preliminary decree can only be treated as having been paid in consideration of a covenant on her part to grant a valid discharge in respect of the whole of the said decree. When it was finally decided that the discharge which this lady purported to grant was invalid, and that the remaining legal representatives of the original decree-holder were entitled to a decree absolute for sale to the extent of 5/6ths of the

money due under the preliminary decree, the consideration for this excess payment made to Musammat Rubab Bano failed; and then, if at all, the present respondents acquired a cause of action against that lady for refund, either of the whole sum of Rs. 2,541-9-9, or for two-thirds of that amount. This right accrued to them either on the date of the decree of the Appellate Court which first passed the decree absolute for sale in favour of Jafar Ali Khan, that is to say, on the 8th of May 1907, or at least on the date of the final decree of this Court which disposed of that question. This was, as already stated, the 6th of July 1908. I am satisfied/ therefore, that the decision of the lower Appellate Court on the question of limitation was wrong and that of the Court" of first instance was correct. I would, therefore, allow this appeal, set aside the order of the lower Appellate Court and restore the decree of the Court of first instance with costs in all Courts.

Walsh, J.

2. I entirely agree. I do not think it is a case of excessive realization at all. I think the effect of the previous High Court decision was that the payment made under the compromise was not towards realization of the decree.

3. The appeal is allowed the order of the lower Appellate Court is set aside, and the decree of the Court of first instance is restored with costs in all Courts.