
(1951) 09 PAT CK 0012
In the Patna High Court
Case No : A.F.A.D. No. 206 of 1948

Sheobachan Pandey and Another	Vs	APPELLANT
Madho Saran Choubey and Others		RESPONDENT

Date of Decision : 18-09-1951

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 8 Rule 6
Contract Act, 1872 — Section 25, 25(3)
Evidence Act, 1872 — Section 91
Limitation Act, 1963 — Article 116, 19
Registration Act, 1908 — Section 17, 49
Transfer of Property Act, 1882 — Section 100

Citation : AIR 1952 Patna 73

Hon'ble Judges : Lakshmikanta Jha, C.J.; Narayan, J

Bench : Division Bench

Advocate : S.K. Mitra and Dharmashila Lall, for the Appellant; G.P. Das and Harinandan Singh, for the Respondent

Final Decision : Allowed

Judgement

Lakshmikanta Jha, C.J.—The plaintiffs are the appellants. The appeal arises out of a suit for redemption of a usufructuary mortgage in which the mortgagee set up a cross-claim. The trial Court decreed the suit with mesne profits and allowed the claim of the defendant in part by passing a separate decree in his favour. The defendant thereupon preferred an appeal and the plaintiffs filed a cross-objection. The Court of appeal below allowed the appeal in part and dismissed the plaintiffs' cross-objection.

2. One Dhautal Pandey had three sons, Amrit, Sakhi and Mewa. Amrit died leaving four sons, Mahangu, Chanarman, Gena and Bhagwat. Sakhi died leaving a widow, Mehesha Kuer. The case of the plaintiffs is that Sakhi and Mewa died in a state of jointness as members of a joint Mitakshara family and that the family is still joint. Gena died leaving a son Rambachan, who is plaintiff No. 2, and Bhagwat died leaving a son Sheobachan, who is plaintiff No. 1.

3. Mahangu, Gena and Mt. Mahesha Kuer executed a mortgage bond in favour of one Gauri Shanker Chaube, defendant No. 1 (referred to in this judgment as the defendant) on the 3rd February, 1916, for a sum of Rs. 4,606/-, the due date of payment being 30th Jeth, 1325 Fasli (24th June 1918.) Khatas Nos. 63 and 70 of village Manjhauli, having an area 17 B fully set out in Schedule A to the plaint were given in usufructuary mortgage. On the 11th April 1944, plaintiff No. 1, executed three rehan deeds of Rs. 2,000/- each in favour of one Ramrichh Chaubey, giving him in usufructuary mortgage 10 bighas (set out in Schedule C to the plaint) out of the 17 bighas which was in rehan with the defendant, and left with him Rs. 4,606/- to satisfy the defendant's mortgage. Ramrichh was impleaded as defendant No. 2, but later on he was transposed to the category of the plaintiffs. He died during the pendency of the suit and on his death his sons were substituted in his place. The case of the plaintiffs is that the money due under the mortgage bond in suits was tendered to the defendant by Ramrichh and on his refusal to accept the money he deposited it in Court u/s 83 of the Transfer of Property Act on the 25th April 1944, and got a notice of the deposit served in him (the defendant). The defendant having refused to withdraw the money the present suit was instituted for redemption claiming mense profits from the date of service of notice of deposit till recovery of possession.

4. It appears that before the execution of the mortgage bond in suit khata No. 63, which includes Plot No. 862, had been purchased by the Maharaja of Dumraon in execution of a money decree and delivery of possession thereof had been taken by him through Court. The plaintiffs' case is that the sale was fraudulent and surreptitious and he continued in possession; but in order to purchase peace the plaintiff No. 1, obtained settlement of the land (fully set out in Schedule B to the plaint) from the Maharaja under a patta dated the 20th September 1923, on payment of Rs. 1,10,007-as "nazrana." The allegation of the plaintiffs is that the mortgagee was duly put in possession of the land in spite of the sale and the delivery of possession taken by the Maharaja of the land set out in Schedule B.

5. The defendant contested the suit. He denied the plaintiffs' story of tender of the mortgage money and service of notice of the deposit u/s 83 of the Transfer of Property Act. He also claimed Rs. 1,100/- with interest amounting to Rs. 248712/- on the allegation that he paid the "nazrana" money to the Maharaja on behalf of the plaintiffs on the 22nd December 1919, for settlement of Schedule B land. The defendant also claimed Rs. 3,651/- and odd, by way of damages for the loss of possession of 10 bighas of land of schedule B and payment of excess rent in respect of the rehan land. Thus he set up a cross-claim for a total sum of Rs. 5,000/- over and above the mortgage money and paid Court-fee on the same. His case is that the plaintiffs are not entitled to redeem unless the amount claimed as damages is also paid.

6. The plaintiffs filed a rejoinder to the cross-claim, denying their liability for Rs. 5,000/- as claimed by the defendant. The learned Subordinate Judge found the

story of tender of the mortgage money and service of notice of the deposit to be true. He however, held that the defendant's claim for damages for loss of possession was barred by limitation and that the plaintiffs failed to prove their case of excess payment of rent in respect of the rehan land, but he passed a separate decree in favour of the defendant for a sum of Rs. 1,100/- principal and Rs. 248/- and odd interest against plaintiff No. 1 on a finding that the amount had been advanced by the defendant to plaintiff No. 1 for payment of the "nazrana" money to the Maharaja. On these findings he decreed the suit for redemption with mesne profits as already stated from the date of service of the notice u/s 83 of the Transfer of Property Act till delivery of possession.

7. The defendant thereupon appealed against the decree for redemption and also challenged the decree dismissing his cross-claim for Rs. 3,651. Plaintiffs Nos. 1 and 2 also filed a cross-objection challenging the decree passed against them for Rs. 1,348/- and odd, for which a separate decree had been passed against plaintiff No. 1.

8. On appeal, the learned Additional District Judge held, in agreement with the trial Court, that the mortgage money was tendered and notice of deposit thereof duly served on the defendant. He, therefore, confirmed the decree of the trial Court for redemption, and mesne profits but he allowed the appeal in part and varied the decree of the trial Court to this extent that the defendant was allowed damages for three years, that is, for the years 1917 to 1919. In the view that he took he dismissed the cross-objection of the plaintiff. The plaintiffs have now come up in second appeal to this Court.

9. The points for decision are: (1) whether the defendant is entitled to claim damages by setting up a cross-claim in the mortgagor's suit for redemption, (2) if so, what is the extent of the plaintiffs' liability.

10. According to the plaintiffs, the defendant got possession of the entire mortgaged land, including plot No. 862, on the execution of the mortgage bond in suit on the 3rd February, 1916, whereas according to the case of the defendant he was not put in possession of Khata No. 63 including plot No. 862, at the time of the execution of the mortgage bond in suit -- his allegation being that he got possession of this khata after a registered patta was executed by the Maharaja of Dumraon on the 20th September, 1923, in respect of the land. The Courts below have, however, concurrently found that the defendant never lost possession of plot No. 862 and that he lost possession only of the remaining area of Khata No. 63 after one year of the date of mortgage and remained out of possession of it for three years, that is, for the years 1917 to 1919.

11. In the present suit, the defendant has set up a cross-claim for Rs. 5,000/-. The grounds on which he claimed this amount are fully set out in paragraphs 13 and 14 of his written statement which are as follows:

"13. After the execution of the aforesaid patta, this defendant asked Mahangu Pandey and plaintiff No. 1 who were the managers of their respective joint family

to pay Bs. 1,100/- with interest and damages caused to this defendant after making an account of the same, but as they had no money with them they expressed their liability to pay it and they executed an ekrarnama dated 29-9-1923 as managers of their respective joint family in favour of this defendant. Mahangu Pandey signed it for self and on behalf of plaintiff No. 1 by his own pen and plaintiff " No. 1 gave his thumb impression on it and it was agreed upon that at the time of redemption, all the amount found due by accounting and payable to this defendant will be paid to him in full and that this defendant cannot claim for his dues earlier."

14. In law and equity and also according to the ekrarnama so long as the plaintiffs (do) do not pay Rs. 1,100/-, the principal and Rs. 248-87- the interest i.e., Rs. 1,348/8/- in all, besides Rs. 4808/- as mentioned in the ekrarnama and also damages on account of dispossession at the rate mentioned below, their claim for redemption is not proper. Because this defendant had no right to claim for his dues before redemption, hence this defendant prays that this written statement may be considered as a cross suit or cross-claim and a decree for Rs. 5,000/- with cost may be awarded to this defendant at the time of redemption and may be got realized from the plaintiffs."

This it is clear that the defendant's prayer was that the written statement may be considered as a cross suit or cross-claim for Rs. 6,000/-. The Court of appeal below, relying upon a decision of this Court in "Shiva Prasad Singh v. Lalit Kishore", 22 Pat 5, allowed the defendant's cross-claim for loss of possession of the mortgaged land for a period of three years as an equitable set-off, although on the pleading of the defendant the Question of set-on did not arise. The fact that the defendant had not pleaded a set-off does not preclude him from taking the plea at a subsequent stage "Najan Ahmad Haji Ali v. Salemahomed Peer Mohamed", 77 Ind Cas 943 Bom). I would, therefore, treat, the cross-claim partly as a set-off and partly as a counter-claim and examine the position in law as to whether a claim by way of a set-off is maintainable in a suit for redemption,

12. A cross-claim may be set up as a shield or as a sword. When it is set up as a shield it is a defensive weapon and may be pleaded by the defendant to reduce the liability against him even to the full extent of the plaintiffs' claim. A counterclaim in the shape of a defensive measure is what is technically known as a set-off. A set-off may, either be legal or equitable. There is a statutory provision in the CPC regarding a legal set-off. If the amount claimed be an ascertained sum, it may be awarded by way of a legal set-off under Order 8, Rule 6, CPC if legally recoverable. But if the claim be for un-liquidated damages for any alleged breach of contract or legal obligation, the amount that may ultimately be ascertained may be claimed as an equitable set-off, but not under the provision of the Code. The statutory provision of Order 8, Rule 6, does not preclude what is called an equitable set off. Therefore, the defendant may claim an equitable set-off provided his cross-demand arises out of the same transaction as the plaintiffs' claim or transactions so connected in their nature

and circumstances as to make it inequitable that the plaintiffs should recover and the defendants should be driven to a cross suit. In "Shiva Prasad Smgh v. Lalit Kishore", 22 Patna 5 at p. 18 the law is summarised thus;

"It is well settled that the provisions of Order 8, Rule 6 of the CPC are not exhaustive because, apart from a legal set-off which is expressly provided in the CPC in regard to an ascertained sum Of money legally recoverable by the defendant from the plaintiff, an equitable set-off may be pleaded in the Indian Courts if the defendant's claim is shown to have arisen from the same transaction as the plaintiff's claim."

In Kalanund Singh and others Vs. Gir Prosad Das and others , Mookerjee, J., stated the law thus: "The provisions of the CPC do not take away from parties any right to set-off whether legal or equitable, which they would have independently of that Code: and that such right exists, not only in cases of mutual debts and credits, but also where cross-demands arise out of the same transaction or are so connected in their nature and circumstances as to make it inequitable that the plaintiffs should recover and the defendants should be driven to a cross-suit." But in the present suit, which is one for redemption pure and simple even an equitable set-off cannot be claimed by the defendant because the question of reduction of the defendant's liability does not arise; nor has the claim of the defendant arisen out of the same or connected transactions. In my opinion, in this suit for redemption there is no scope for the application of the doctrine of set-off, whether legal or equitable, for two reasons. In the first place, the plaintiffs have not advanced any claim for money due by the defendant nor have they asked for accounts. Secondly, the circumstances under which the defendant was dispossessed are wholly unconnected with the mortgage transaction because the defendant was dispossessed by a stranger, namely, the Maharaja of Dumraon, Therefore, the plea of set-off is not available to the defendant. In Fakir Chandra Dutta and others Vs. Messrs. Gisborne and Co. , which was a case of a usufructuary mortgage, Banerjee, J., observed :

"The suit is not one for recovery of money but is only one for the enforcement of a mortgage security, the right to sue for a personal decree being barred by limitation when the suit was brought." That being so, the case does not come u/s of the Code of Civil Procedure; and if the claim is to be regarded as one for equitable set-off, it is clearly open to the objection that it does not arise out of the same transaction as that upon which the present suit is based."

Thus it is clear that the defendant is not entitled to claim any relief either by way of legal or equitable set-off. The view of the learned Additional District Judge is therefore wrong.

13. Whatever may be the nature of the defendant's cross claim, there is no legal evidence to support his case. He relies upon the terms of the "ekrarnama" dated the 29th September 1923, to prove his cross-demand and not upon the covenant in the mortgage bond. Therefore, the defendant cannot succeed without referring

to the terms of the "ekrarnama." The relevant portions of this ekrarnama are as follows:

"At the time we redeem the rehan we shall pay, on adjustment of accounts, the damages for the number of days on and the area of land from which the rehandars have already been out of possession as also the sum of Rs. 1,100/- together with interest thereon. Therefore we..... do hereby declare and give ft in writing that at the time we shall make repayment of the aforesaid rehan money we shall simultaneously and along with that pay-off to Gouri Shankar Chaubey the sum of Rs. 1,100/- and interest thereon as also the amount of damages, without interest, that will be found due by us for the period of dispossession. Prior to that the creditor shall not be entitled to demand payment of an realise the amount nor shall we the executants be liable to pay the same."

Thus the agreement between the parties under the "ekrarnama" was that at the time of redemption the mortgagors shall pay, on adjustment of accounts, besides Rs. 1,100/- with interest thereon, the damages for the number of days on and the area of land from which the mortgagee was out of possession, and that the defendant would not be entitled to demand payment before redemption is sought. The mortgagors, according to him, bound themselves to make simultaneous payment to mortgage money and the damages, including the sum of Rs. 1,100/- with interest thereon.

14. The "ekrarnama" is an unregistered document and was not duly stamped. It was, however, impounded and proper stamp realised and then admitted in evidence. A perusal of the terms of the "ekramama" clearly shows that a charge was created. Therefore, the document required registration, and in the absence of registration the terms of the document cannot be referred to. The case before us is similar to the case of "Adit Prasad v. Ram Ratan Lal", 57 Ind App 173. The facts of that case were shortly these: In July 1881, a usufructuary mortgage of a village was executed to secure a sum of Rs. 5,500/- redemption was to be in fifteen years not before. In November 1881, the mortgagor executed a document which, after referring to the mortgage and stating that he had borrowed from the mortgagee a further sum, of Rs. 2,500/-, provided:

"I shall first pay up this debt, including principal and interest, and thereafter I can redeem the mortgaged village, having paid up the mortgage money. Without the payment of this debt I cannot redeem the mortgaged village."

Referring to this recital their Lordships held; "It, appears to them clear when the subsequent deed is looked at that the parties intended that the original village should remain in the possession or THE mortgagees until the second debt was paid on, and intended, therefore, that the property should be security for the debt." Applying the same principle to the present case, I am clearly of the opinion that the intention of the panics was that the mortgaged property shall be security for the sum of Rs. 1,100/- and the unliquidated damages for the period during which the mortgagee remained out of possession. The document though

in form an agreement, if liberally construed is in substance a deed creating a charge. In "Hunoomanpersaud Pandey v. Mt. Babooee Munraj Koonweree", 6 Moo Ind App 393, at p. 411, it was observed by their Lordships of the Judicial Committee:

"Deeds and contracts of the people of India ought to be liberally construed. The form of expression, the literal sense, is not to be so much regarded as the real meaning of the parties which the transaction discloses."

This principle was applied by Sir Lawrence Jenkins in "Janardan Vishnu v. Anant Lakshmashet", 32 Bom 386, and the Judicial Committee in "Aditya Prasad v. Ram Ratan Lal", 57 Ind App 173, affirmed this principle .

15. "Aditya Prasad v. Ram Ratan Lal", 57 Ind App 173, it may be stated, is not governed by the Transfer of Property Act, but the principle is still applicable and no change in law has been introduced after the enactment of the Transfer of Property Act. Therefore, the "ekrarnama" being an unregistered instrument, no evidence can be given in proof of the terms of the agreement except the document itself u/s 91 of the Evidence Act and as such oral evidence is inadmissible; and if the document is bad for want of registration, its terms cannot be referred to and the defendant's claim must accordingly fail.

16. The damages are also not legally recoverable because the claim is barred by the statute of limitation either as a set-off or as a counter-claim. It is well settled that when a set-off is pleaded the plaintiff in order to establish his plea of limitation must prove that the set-off was barred when the plaintiff commenced his action. In the case, how ever, of a counter-claim as a weapon of offence, it is enough for the plaintiff to prove that it was barred when it was pleaded "Narasimha Rao v. Zamindar of Tiruvur", 42 Mad 873, "Najan Ahmed Haji Ali v. Salemahomed Peer Mohamed 77 I C 943.) Therefore, the defendant's claim was not legally recoverable because it was clearly barred as a set-off on the 20th November 1944, when the suit was instituted, and as a counter-claim on the 6th February 1945, when the written statement was filed. The defendant remained out of possession for three years, from 1917 to 1919. He had, therefore, six years under Article 116 of the Limitation Act to commence his action for compensation for the breach of the contract under the mortgage bond in suit which provided; "Should, in consequence of any act done by us the executants or our heirs and representatives or due to want of title on our part the said creditor be dispossessed in any way from the property given in rehan hereby the said creditor is and shall be competent to realise the rehan money and damages by sale of the rehan property and from our person and other properties by seeking proper redress."

An acknowledgment of liability under the "ekrarnama" was made on the 29th September 1923. Therefore, the defendant had another six years from this date within which he could claim compensation by a suit. By an acknowledgment in the "ekrarnama" the period could not be extended beyond 1929. If the right to

sue was barred in 1929, it could not be revived by an admission in the "ekrarnama" under which the plaintiffs covenanted to pay damages for the period of dispossession at the time of redemption. If any authority be needed in support of this view, I could refer to the case of the "East India Co. v. Oditchurn Paul", 5 Moo Ind App 43 at p. 69. In that case it was held by the Judicial Committee that "when limitation once begins to run nothing could stop it. In "Midnapur Zamindary Co. v. The Deputy Commr. of Manbhum, 3 Pat L J 132 at p. 136, Chamier, C. J., observed: "It was settled many years ago that limitation could not be extended even by express agreement and it certainly could not be extended by an agreement to be implied from circumstances." Therefore, the plaintiffs' claim for mesne profits must be ruled out. There is no doubt hardship on the defendant in that he loses his usufruct, but hard cases do not make bad law.

17. The learned Additional District Judge has, however, relying on Section 25(3) of the Indian Contract Act, held that the defendant's right to claim compensation for the period of dispossession was not barred on the date of the suit inasmuch as Mahangu, one of the mortgagors, and plaintiff No. 1 promised under the "ekrarnama" to compensate the defendant at the time of redemption, in my opinion, the view of the learned Judge is not correct. Section 25(3) of the Indian Contract Act provides:

"An agreement made without consideration is void, unless it is a promise, made in writing, and signed by the person to be charged therewith, or by his agent generally or specially authorized in that behalf, to pay wholly or in part a debt of which the creditor might have enforced payment but for the law for the limitation of suits."

The question for consideration is whether there was any promise by the mortgagors to pay wholly or in part "a debt." The promise under the ekrarnama was that "at the time we redeem the rehan we shall pay, on adjustment of accounts, the damages for the number of days on and the area of land from which the rehandars have already been out of possession." Thus the recital in the ekrarnama shows that the mortgagors promised to pay an amount which may be found due on taking accounts, that is, an unascertained sum. But, in my view, a promise to pay an unascertained sum is not a promise to pay a "debt" within the meaning of Section 25(3) of the Indian Contract Act. This is also the view of a Full Bench of the Madras High Court in "Doraisami Padayachi v. Vaithilinga Padayachi", 40 Mad 31. The claim for Rs. 4,606/- must, therefore, be ruled out.

18. The claim for the recovery of Rs. 1,100/- with interest thereon is also time-barred. According to the findings of the Courts below, the defendant advanced Rs. 1,100/- to the plaintiffs for payment of "nazrana" to the Maharaja of Dumraon. The payment of the loan was made on the 22nd December 1919. Therefore, the defendant could recover this amount within three years from that date. But the "ekrarnama" was executed on the 29th September 1923, when his claim had already become barred. Therefore, the acknowledgment of liability

when the debt had become barred could not revive the liability. This sum is also not legally recoverable even if there was a promise on the part of the mortgagors to pay a barred debt, because the only evidence in support of the claim is the "ekrarnama" which I have already held to be inadmissible. The claim for Rs. 1,100/- must also, therefore, fail.

19. I would, therefore, allow the appeal, set aside the decree in favour of the defendant and confirm the decree of the trial Court in favour of the plaintiffs for redemption and recovery of possession with mesne profits. Under the circumstances of the case the parties must bear their own costs throughout,

20. There is also a cross-objection, but it has not been pressed. It is accordingly dismissed without costs.

Narayan, J.

21. I agree.