Bishwambhar Saha and ors. Vs. Ram Sundar Kaibarta Das

LegalCrystal Citation : legalcrystal.com/873263

Court : Kolkata

Decided On : May-27-1914

Reported in : AIR1915Cal725,30Ind.Cas.719

Judge : Holmwood and; Chapman, JJ.

Appellant : Bishwambhar Saha and ors.

Respondent : Ram Sundar Kaibarta Das

Judgement :

1. This is a second appeal arising out of a decision given by the Sub ordinate Judge of Comilla on the 13th November 1911 holding that a certain application under Section 90 of the Transfer of Property Act was not barred by limitation and that the suit must be remanded to the Munsif for determination of what balance is legally recoverable from the defendant otherwise than from the property sold. An appeal was preferred to this Court on the 15th July 1912 and the first ground was with regard to the question of limitation; the second ground was with regard to the order of remand, the third was the general ground that the learned Subordinate Judge has misconstrued the law. That can only refer to the law of limitation which was the only question raised.

2. As regards the remand we find that the defendants-appellants have been guilty of the greatest laches. The appeal, which they filed on the 4th May 1912, was without the certified copy of the Mnnsif's judgment and could not be admitted till the 5th July. The talabana was not filed till the 10th January 1913, and meanwhile the learned Munsif had heard the remand and decided it in November 1912. We have seldom met with a case where the appellant deserved less consideration from this Court. But as regards the question of limitation it is, of course, quite open to him still to argue that.

3. This is the only point which we can consider. It raises a somewhat new point. The mortgage-decree was passed on the 1st April 1905, the mortgage was dated the 2nd March 1901 the due date was 12th February 1902, and the plaint in the mortgage suit was filed on the 11th February 1905. On the authority of the ruling in Rahmat Karim v. Abdul Karim 34 C. 672 : 11 C.W.N. 674 : 6 C.L.J. 119 the plaintiff had his personal remedy at the date of the institution of the suit. The question which has been raised in this case is whether he loses that personal right by reason of his not having made the application for personal decree under Order XXXIV, Rule 6, within three years of the date of the confirmation of the mortgage sale which took place on the 12th September 1907. The application which he did make was on the 31st January 1911. On that date the new Code of Civil Procedure was in force, and it is argued that Article 181 must necessarily apply to an application of this nature. It was held that the section which corresponded to Section 181 in the later Limitation Act,

namely Article 178, did not apply to an application by a mortgagee for a supplemental decree under Section 90 of the Transfer of Property Act and since the new Civil Procedure Code has come into force, there has been the ruling in the case of Madhab Moni Dasi v. Pamela Lambert 6 Ind. Cas. 537 : 12 C.L.J. 328 : 37 C. 796 : 15 C.W.N. 337 where Mr. Justice Mookerjee, in delivering the judgment of the Court follow the decision to which one of us was a party in Rahmat Karim v. Abdul Karim 34 C. 672 : 11 C.W.N. 674 : 6 C.L.J. 119 and applies it to Order XXXIV, Rule 3, which is the case of order absolute in a mortgage suit.

4. It is urged that what applies to Order XXXIV, Rule 3, does not apply to Order XXXIV, Rule 6. But we are unable to accede to this contention. Not only are both the cases in our opinion strictly parallel but the rule of law and justice which was the ratio decedendi of the case in Rahmat Karim v. Abdul Karim 34 C. 672 : 11 C.W.N. 674 : 6 C.L.J. 119 applies as has been shown by Mr. Justice Mookerjee to both the cases equally. The passage to which we were referred in his judgment may be quoted: 'it may be conceded that Article 178 of the Limitation Act of 1877 did not apply to applications beyond the scope of the Civil Procedure Code, bat it does not follow that that Article or the corresponding Article of the Limitation Act of 1908, applies to all applications made in the course of a suit. It may be pointed out, in the first place, that the preamble to the Limitation Act of 1908 states expressly that the object of the Legislature was to consolidate and amend the law of limitation relating to only certain applications to Courts. In other words, the Limitation Act does not profess to provide for all kinds of applications to Courts whatsoever. The Act certainly does not apply to applications to the Court to do what the Court has no discretion to refuse,' and this is one of those matters in which the Court has no discretion to refuse if it is 'legally recoverable. The words legally recoverable' cannot possibly apply to any question of limitation nor can the provisions of the Act be held to apply to an application to the Court to terminate a pending proceeding, the final order in which has been postponed for the benefit of the defendant or for the convenience of the Court. In cases of this class, it has been suggested that the right to make the application may indeed be deemed to accrue from moment to moment; if this view is adopted, any exception on the ground of limitation cannot obviously be supported;' and in this connection the learned Judge cites the case of Rahmat Karim v. Abdul Karim 34 C. 672 : 11 C.W.N. 674 : 6 C.L.J. 119 to which we have already referred and applies it in support of the principle which he here lays down. It is, therefore, clear that applications under Order XXXIV, Rule 6, are not governed by Article 181 of the Limitation Act of 1908 any more than applications for order absolute under Order XXXIV, Rule 3.

5. We are, therefore, of opinion that the learned Judge was right in holding that the suit was not barred by limitation and he was right in making the remand and we dismiss the appeal and direct that all costs including the costs in remand be paid by the appellant to the respondent.

6. We mark our sense of the defendant's dilatory conduct by doubling the ordinary hearing fee and making it two gold mohurs.