(J.C.) Galstaun Vs. Radhakissen Chamaria

Court : Kolkata

Decided On : Aug-01-1929

Reported in : AIR1931Cal23

Appellant : (J.C.) Galstaun

Respondent : Radhakissen Chamaria

Judgement :

Buckland, J.

1. The plaintiff, in this case, claims to recover Rs. 33,100, with interest at 8 per cent. per annum from 13th October 1922, and also an additional sum of Rs. 1,250 in circumstances, which, as the facts are not disputed, may be stated very briefly.

2. In 1918 the plaintiff sold certain property in Bentinck Street to the defendant. It was also agreed that he should take a lease of the property for 10 years. The sale was duly completed, but (shortly afterwards, the property was acquired by the Calcutta Improvement Trust, The parties jointly filed a claim, and compensation amounting to Rs. 3,39,250 was awarded. The question arose whether the plaintiff Galstaun was entitled to any, and, if so, to what portion of that sum. This question was. referred to the arbitration of two gentlemen and, pending their award, the defendant Radhakissen Chamaria, by arrangement, withdrew the whole compensation money, undertaking to pay to the plaintiff, Galstaun any sum which might be awarded to him upon such reference. Ultimately the arbitrators made their award in favour of the plaintiff Glastaun as to Rs. 34,350, which included the costs of the reference. The plaintiff now seeks to recover the amount stated. There is no defence on the merits. The question is whether in certain other circumstances which have also arisen the plaintiff is entitled to obtain a decree for this amount.

3. In the list for the day, immediately before this case, there was before me a suit between the same parties, wherein Radhakissen Chamaria sued Galstaun for the recovery of the money due on a mortgage of other property, and, by consent, the usual mortgage decree for sale was made. It appears that, in all probability, it will be found that a sum very much larger than Rs. 33,350 will be found due to the Chamaria defendant from the plaintiff Glastaun, and it is submitted that, in these circumstances, they are entitled in this suit to claim a set-off.

4. The claim to set-off is based firstly on Order 8, Rule 6, Civil P.C., and it has not been suggested in any way that there is any question of an equitable set-off. The first question that occurs is, whether or not the sum which is 'claimed to be set off is an ascertained sum. No doubt, the original amount without 'interest, for which the security was given, was an ascertained sum, but what it is claimed to set off is the

amount to which the defendants are entitled on the mortgage. That, so far, has not been ascertained. The form of a decree in a suit for sale directs that in the first instance, an account shall be taken of what will be due to the plaintiff for principal and interest on the mortgage and for his costs. In my judgment it cannot be said that the amount due to the Chamarias on their mortgage will be ascertained until after such accounts and inquiries have been taken and made and it does not suffice to point to certain sums mentioned in the mortgage deed and referred to in the plaint as ascertained and therefore capable of being set off within the meaning of Order 8, Rule 6. Moreover, the principle that the security becomes merged in the decree precludes any such view.

5. The form of the decree then goes on to provide that the defendant shall pay the amount so found due within a certain time, in default of which, the property shall be sold A further difficulty appears to arise from this, under the second part of the rule in question, which states that the written statement shall have 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. I inquired of learned Counsel, if his contention were correct, what final judgment would have to be pronounced in this suit, and he found himself in some difficulty in furnishing a reply which would conform to the provisions of this order and rule and at the same time be consistent with the decree which his clients had already obtained in the mortgage suit. Indeed, I see no way whereby these various difficulties can be reconciled and in my opinion, Order 8, Rule 6, is not applicable to circumstances such as these.

6. I was then referred to Order 21, Rules 18 and 19, which provide what shall be done in a case where execution is applie for of cross-decrees in separate suits for payment of sums of money, which have been passed between the same parties and capable of execution at the same time. It is a sufficient answer to say that such a stage has not been reached, but had the provisions of this order and to rule be considered, the principles upon which the Court would proceed are substantially those upon which the Court proceeds under Order 8, Rule 6, with the result that execution is only permitted to the holder of the decree larger in amount for the balance due to him, and this again: introduces the difficulties already considered.

7. Then I was referred to Order 21, Rule 20. which provides that the provisions contained in Rules 18 and 19 shall apply to decrees for sale in enforcement of a mortgage or charge. The question which would have to be determined with reference to this rule is, how its principles are to apply, where there has been a decree for sale, but the amount to which the mortgagee is entitled has not yet been ascertained by the enquiry which Order 31 directs to be held. This is a question, as to which it is unnecessary at this stage to express any opinion, though learned Counsel referred me to Nagar Mal v. Ram Chand [1910] 33 All. 240. If it is sought to execute the decree,, which must be made in this case such matters may have to be considered, and the same observations apply to Order 21, Rule 29, to which reference has been made, but, at the present stage, all I need consider is whether or not, under Order 8, Rule 6, the defendant is entitled to a set-off, and, in my judgment, he is not.

8. There is one more aspect of the matter to which I should refer, and that is that, in the plaint in the mortgage suit, credit is given by the Chamaria defendants for the sum for which this suit has been brought. That has given rise to the contention that what Galstaun, as mortgagor consented to was a mortgage decree for sale for such amount as might be found due after taking such credit into account and that

consequently principles akin to, even if it is not actually, res judicata would apply. But this in my view does not conclude the matter, because the decree ordered was the usual mortgage decree and it is not the practice of this Court, when making such a decree, to adjudicate upon any such questions, and any questions as to sums, for which credit should be given or which should be taken into account, are considered upon the account being taken. It would not be in conformity with the ordinary practice of this Court in a mortgage suit to hold that any such question had been determined at this stage. In my judgment, upon no principle are the Chamarias entitled, at this stage, to resist a decree. The question of staying execution, when a far larger sum may be due to them from Galstaun than they' would have to pay under the decree in this suit is a different matter altogether, and I need not express any opinion now as to what should be done upon any application that may be made hereafter, either to execute the decree or to stay execution. The learned Advocate-General, on behalf of the plaintiff, has stated that his client is prepared not to execute the decree except upon one week's notice to the Chamarias of his intention so to do, and this has bean accepted on behalf of the Chamarias by Mr. Pugh, subject, of course, to his contentions which I have considered. Such undertaking therefore will be stated in the decree.

9. There will be a decree for Rs. 33,100, with interest at 8 per cent from 13th October 1922 until 22nd February 1929, and also for Rs. 1,250, with costs and interest on decree at 6 per cent until realization.