

Purna Chandra Bhowmick Vs. Barna Kumari Devi W/O Bibhuti Bhusan Chakravarty and anr.

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Court : Kolkata

Decided On : May-19-1939

Reported in : AIR1939Cal715

Appellant : Purna Chandra Bhowmick

Respondent : Barna Kumari Devi W/O Bibhuti Bhusan Chakravarty and anr.

Judgement :

B.K. Mukherjea, J.

1. This appeal is on behalf of defendant 2 and it arises out of a suit commenced by the plaintiff for a declaration that as an assignee of a decree passed in money suit No. 258 of 1928 he was entitled to realize the decretal amount amicably or by execution of the decree. The facts lie within a narrow compass and are for the most part undisputed. Defendant 1 filed a suit, being Money Suit No. 258 of 1928, in the Court of the Subordinate Judge of Berhampur against the London Mission Society and another person, for recovery of a sum of Rs. 7997-0-5 only. Defendant 1 borrowed money at different dates from the plaintiff aggregating to Rs. 1500, to carry on this litigation and on 23rd August 1932 he executed a mortgage bond in favour of the plaintiff assigning by way of security the decree that would be passed in the money suit instituted by him. The stipulation was that the plaintiff would be entitled to realize out of the decretal amount the sum of Rs. 1500 due to him together with interest at the rate mentioned in the document. On 8th March 1934, a decree was passed in favour of defendant 1 in the money suit for a sum of Rs. 2566-10-0 only. On appeal to this Court preferred by the defendants it was further reduced to Rs. 1743-2-0. The judgment of this Court is dated 22nd December 1936. The plaintiff now wants a declaration that on the strength of the mortgage bond mentioned aforesaid she is entitled to have her dues realized out of the amount payable under the decree mentioned afore, said. As defendant 2 purported to be a subsequent transferee of the same decree under a conveyance executed on 20th April 1934, he was made a party to the suit as it was necessary to have the declaration in his presence. Defendant 1 did not contest the suit. It was contested by defendant 2 alone. His contention in substance was that the plaintiff was a mere benamidar of defendant 1 and there was no consideration for the alleged mortgage bond. It was further pleaded that the plaintiff acquired no rights under the decree passed in Money Suit No. 258 of 1928 which was sold to defendant 2, for money due to the latter by defendant 1 who was stated to be a partner in the former's business. The trial Court dismissed the plaintiff's suit primarily on the finding that the mortgage bond upon which the plaintiff rested his case was a benami document which was not supported by any consideration. On appeal the judgment was reversed. The District Judge who heard the appeal held on evidence that the mortgage bond was for a consideration and that

the plaintiff as an assignee of the decree was entitled to execute it. It is against this decision that the present second appeal has been preferred.

2. Mr. Lahiri who appears for the appellant has urged a number of points in support of his appeal. His first contention is that as a decree for a definite sum of money was not in existence at the date when the mortgage bond was executed in favour of the plaintiff, she was an assignee only of a right to sue which is not alienable under the Transfer of Property Act. The plaintiff therefore has not acquired any rights under the decree and cannot claim to execute it. In support of this contention the learned Advocate has relied upon certain decisions of this Court which are to be found in *Abu Mahomad v. S.C. Chunder* (1909) 36 Cal. 345, *Jewan Ram v. Ratan Chad Kissen Chand* (1921) 8 A.I.R. Cal. 795 and *Khetra Mohan Das v. Bishwa Nath Bera* : AIR1924Cal1047 . I do not think that this contention is sound. It is true, as was laid down in all these decisions that the right to sue for damages of an unascertained amount resulting from a breach of contract could not be transferred. What is assignable is the benefit of the contract before any breach occurred. As the breach discharges the contract nothing remains after that but the mere right to sue for damages which is not assignable in law. This principle however is of no assistance to the appellant in the present case. Here the plaintiff in the money suit did not sue for damages arising out of a breach of contract. He did certain building works for the defendants in the suit and some bills were unpaid. A suit was brought to recover the money due on these unpaid bills. In my opinion, what was transferred was the claim to a debt and as such would come within the definition of 'actionable claim' as given in Section 3, T.P. Act. The mere fact that the claim was reduced by the Court did not make, in my opinion, any difference. It cannot be disputed that an assignment of future or non-existing property is quite valid and the transfer becomes operative as soon as the property comes into existence: *Holroyd v. Marshall* (1864) 10 H.L.C. 191, *Collyer v. Issacs* (1882) 19 Ch. D. 342 and *Planiappa v. Lakshmanan* (1893) 16 Mad. 429. Here the mortgage must be deemed to have attached itself to the decree which was for a definite amount as soon as a decree was passed and I am unable to agree with the appellant that what was transferred was a mere right to sue.

3. The second argument that is put forward is that the plaintiff was at best a mortgagee in respect of the rights under the decree and unless she purchased the entire rights of the decree-holder she could not rank as an assignee of the decree and was not entitled to execute it as such. The assignment was undoubtedly by way of mortgage and not of the entire rights of the assignor. What the assignee was entitled to under the terms of the instrument was to realize the sum of Rs. 1500 together with interest on the decretal amount and she was to pay the balance, if any, to the assignor. She was therefore an assignee of the decree for the purpose of realizing the amount due on the mortgage bond and she was competent under the terms of the bond itself to institute proceedings for recovery of the amount. I think there is nothing wrong in the form of the relief that has been granted to her by the Court below. The third ground put forward by the appellant is that the suit which was one for a pure declaration was bad under Section 42, Specific Relief Act, and the plaintiff ought to have prayed for consequential relief in the shape of a permanent injunction restraining defendant 2 from executing the decree. This argument is manifestly untenable. All that the plaintiff could want possibly at the present stage was a declaration that she was an assignee of the decree, and if she gets a declaration it would be open to her to apply for execution of the decree under Order 21, Rule 16, Civil P.C. No other consequential reliefs, by way of injunction or otherwise could or should have been prayed for by the plaintiff in the present suit. The last argument of

the appellant is directed against the finding of the lower Appellate Court that the mortgage bond was not a benami transaction and was supported by consideration. This is a finding of fact even though there is no other evidence except that of the plaintiff's husband in support of it. In my opinion, the Court of Appeal below has given reasons for this finding and the finding being based on evidence is unassailable in second appeal. It may be that defendant 2 is himself duped by defendant 1 but there is no reason why another innocent person should suffer. In the result we dismiss the appeal but, regard being had to the circumstances, we make no order as to costs.

Latifur Rahman, J.

4. I agree.

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