Khunni Lal Vs Bankey Lal and Others

Court: Allahabad High Court

Date of Decision: Dec. 21, 1933

Hon'ble Judges: Rachhpal Singh, J

Bench: Single Bench

Final Decision: Dismissed

Judgement

Rachhpal Singh, J.
This is a decree-holder''s appeal arising out of execution proceedings. Khunni Lal, decree-holder, obtained a decree

for money on 19th July 1928, against Firanga Lal, Ram Gopal and Ram Bharose Lai, judgment-debtors, and a sum of Rs. 20,376-8-0 is due on it.

On 24tti February 1930, the judgment-debtors executed a possessory mortgage-deed in favour of Bankey Lal for a sum of Rs. 65,000 under

which it was shown that a sum of Rs. 25,000 had been left with the mortgagee out of the entire consideration of Rs. 65,000 for payment to one

Lala Nandlal Shah. The case of the decree-holder is that no money was due to this gentleman, nor was this amount paid to him as agreed upon

under the terms of the mortgage-deed. The decree-holder made an application for execution, praying for the attachment of this sum of Rs. 25,000

which according to him was lying with the mortgagee in deposit. The application was resisted by that objector, Bankey Lal, who pleaded that no

such sum was held by him for the mortgagors and further contended that the decree-holder was not entitled to execute his decree against him. The

learned Subordinate Judge held that no money belonging to the judgment-debtor was in the hands of the objector and he therefore dismissed the

application for execution against him. The present appeal has been preferred by the decree-holder against this order of dismissal.

2. The first point for consideration in this case is whether a debt was due by the mortgagee to the judgment-debtor. The word ""debt"" means an

actually existing debt that is a perfect and absolute debt. Where such is the case the decree-holder who holds a decree against the judgment-

debtor has a right to attach it. The method of attachment is provided for under Rule 46, Order 21, Civil P.C. A debt cannot be attached unless it is

actually due from the garnishee to the judgment-debtor, the respondent in the case before us has contended that even if it be assumed that out of

the Consideration of the mortgage-deed in his favour, he did not pay a sum of Rs. 25,000 to the mortgagors, it cannot be said that the unpaid

money is a debt due by him to the judgment-debtors which can be attached at the instance of the decree-holder. This is the principal question for

consideration in the appeal before us. For the purpose of disposing of this question, we will assume that out of the entire consideration of Rs.

65,000 the mortgagee who is the objector in this case did not pay to the mortgagors a sum of Rs. 25,000. The learned Counsel appearing for the

respondents has relied on Phul Chand v. Chand Mal (1908) 3 All. 252. It was held in this case that where money promised as a loan by a

mortgagee is not advanced in full, the mortgagor is only entitled to recover, if anything, damages for non-payment of the balance; he cannot sue for

specific performance of the agreement to lend the full sum promised, and the non-payment of a portion of the loan does not constitute a debt which

can be the subject of attachment and sale under the provisions of Section 266, Civil P.C. The facts of that case were as follows : Two persons had

executed two mortgage-deeds in favour of Phul Chand and Gulab Chand to secure-the principal sums of Rs. 1,000 and Rs. 6,000, respectively. It

was found that only a sum of Rs. 2,135-11-0 was paid by the mortgagees and the remainder amount remained unpaid. Some of the creditors of

the mortgagors obtained a money decree against them and in execution of that decree attached and put to sale what was described as ""the right of

the mortgagors to receive the balance of the mortgage money."" The purchaser after the sale instituted a suit praying for a decree for the unpaid

balance of the mortgage money. A bench of two learned Judges of this Court, relying on an English authority The South African Territories Co.

Ltd. v. Wallington (1898) A.C. 309 held that the unpaid mortgage money could not be said to be a debt due from the mortgagee to the

mortgagors. They held that it was not open in a case like this to the mortgagors or his representatives to sue for the recovery of the unpaid balance

for the reason that it was not a debt and that if any portion of the mortgage money was not paid by the mortgagees to the mortgagor, then the only

remedy of the mortgagor was to institute a suit for the recovery of damages which might have resulted on account of the non-payment of the full

consideration by the mortgagee. In the concluding portion of the judgment the learned Judges observed:

The mortgagees were never in a position to enforce specific performance of the agreement of the mortgagees to advance the full sum agreed to be

lent by them. The unpaid portion of the loan did not constitute a debt due by them to the mortgagors such as could be attached under the Code of

3. Another case on which reliance has been placed by the respondent"s counsel is Sheikh Galim v. Sadarjan Bibi AIR 1916 Cal. 530. The facts of

that case were very similar to the one before us. There the mortgage-deed by conditional sale was executed by the plaintiffs in favour of the

defendants for a sum of Rs. 150. The plaintiff"s received Rs. 104 out of this sum. The balance was not paid and so they instituted a suit to recover

the amount together with interest. The learned Judges held that a suit for specific performance of the contract in such a case would not lie and that

the only remedy which the mortgagors had was to sue for damages. The next case on the point is Rama Nand v. Nakched (1905) 8 O.C. 5. The

facts were briefly these : The defendant there agreed to land to the plaintiffs a certain sum of money on the security of some property, the

arrangement being that the defendant should pay Rs. 700 in cash and retain the balance in order to pay off a prior mortgage. The defendant did not

pay off the prior mortgage nor did he pay to the plaintiffs the sum of Rs. 700. Thereupon the plaintiffs instituted a suit to recover the sum of Rs.

700 which had been agreed to be paid. The learned Judge who decided the case held that the suit was for enforcement of a contract to lend

money upon a mortgage and therefore having regard to Clause (a), Section 21, Specific Relief Act, was not maintainable. In that case it was

contended on behalf of the mortgagors that the suit was one for the recovery of a debt due from the mortgagee to the mortgagors and that if it was

a suit for specific performance, it was maintainable because an interest in the property had been transferred to the mortgagee and because on the

findings it must be taken that the defendant was in possession of the mortgage deed. The learned Judge on the authorities cited by him held not only

that an agreement to lend money will not be specifically enforced, but also that the rule holds good even where a deed of mortgage has been

executed in favour of the defendant. The suit before him was to enforce a contract to lend money upon a mortgage and therefore could not be

maintained. In Fry"s Specific Performance of Contracts, Edn. 6, pp. 54 and 25, para. 54, the law is stated to be as follows:

It is however settled that the Court will not enforce a mere agreement to lend, advance or pay money (though the loan be one to be secured by

mortgage), while it rests entirely unperformed either by the intended lender or by the intended borrower.

4. Section 21, Clause (a), Specific Relief Act, enacts that:

A contract for the non-performance of which compensation in money is an adequate relief cannot be specifically performed.

5.The illustrations to this clause of Section 21 give the following instance:

In consideration of certain property having been transferred by A to B, B contracts to open a credit in A''s favour to the extent of Rs. 10,000 and

to honour A''s drafts to that amount. The above contract cannot be specifically enforced, for the debtor making the transfer can be adequately

compensated in money.

6. Another case on which reliance haft been placed by the learned Counsel for the respondents is Larios v. Gurety 1873 5 P.C. 346 the learned

Judge wh decided the case Rama Nand v. Nakched (1905) 8 O.C. 5 remarks in his judgment that the third illustration to Clause (a), Section 21,

Specific Relief Act, was taken from this Privy Council case and ho cites the Anglo Indian Codes by Mr. Whitley Stokes who drafted the Act. The

facts of this Privy Council case are given at p. 351 of the judgment of their Lordships. In June 1867, the respondent applied to Larios Brothers for

a loan of money. There had been former transactions between them, and the amount of the balance due from him in respect of those transactions

which had previously been the subject of dispute was in the course of negotiation for the loan settled at 3,337 4r 50c. On 30th June 1867, the

respondent and Don Pablo Larios Herreros, the then senior partner of Larios Brothers appeared before a notary at Algeoiras and executed three

notarial instruments. By the first of these Larios Brothers bound themselves to advance by way of loan to the respondent the sum of $ 2,500,

opening for him a credit in account current on their firm at Gibraltar, with interest at the rate of 6 per cent per annum; he pledging to them by way

of security his stock-in-trade, actual and future and giving them power to inspect his books, so as to assure themselves of the right investment of

the funds advanced. The second instrument purported to be a sale to Messrs. Larios Brothers of certain landed property belonging to the

respondent in consideration of $ 2,100 (of which the receipt was admitted); with a condition for the rescission of the sale, if within five years the

respondent should repay the consideration money, and a stipulation that, during the five years, the seller was to continue to receive the rents and

other proceeds naturally arising from the property.

7. The third instrument, which was executed by the respondent''s wife, as well as by the before mentioned parties, purported to be a sale by her to

Messrs. Larios of certain property belonging to her in consideration of $4,900 (the receipt where of was also admitted upon a like condition for

rescission, and with a similar stipulation for the intermediate possession). Their Lordships found that the second and the third instruments were on

the face of them conditional sales, for which the full consideration was admitted to have been paid. But, in truth, no money passed on either of

them, and the real contract was that stated in paras. 4 and 5, of the respondent''s petition in the nature of a bill of complaint, and admitted by the

paras. 4 and 5 of the plea and answer of the appellant and his late partner; being in fact an agreement that Messrs. Larios Brothers should make

further advances to the respondent to the amount of 6,900 dollars over and above the 2,500 upon the security of the property comprised in the

two instruments of conditional sale debiting him with the old balance of 3,373 4r 50c as part of such advances. The argument addressed to their

Lordships of the Privy Council in the above cited case was that so far as the transaction related to the advance of the 6,900 dollars it was one of

sale, though of conditional sale, and was therefore properly made the subject of a suit for specific performance. Their Lordships in disposing of this

argument at p. 354, observed:

Their Lordships however are of opinion, that to this argument there are two answers which admit of no reply. In the first place, no suit could have

been brought for the specific performance of the supposed agreements for conditional sales, since each of these transactions was, on the face of

the written instrument, completed by an actual conveyance for a consideration admitted to have been paid and received; and, in the second place,

the suit actually brought is not framed with the object of enforcing any such contract, or even with that of obtaining equitable relief, on the ground

that consideration, which in the notarial instruments is expressed to be paid, had not been really paid. The parties throughout the negotiation which

led up to the contract were stipulating for advances of money on one side, and for security for those advances on the other...and it seems

impossible to treat the cause of action in this case as anything more than the breach of a contract to honour the drafts of the respondent to the

extent of the amount agreed to be advanced and placed to his credit. And, upon a full consideration of the arguments and the authorities, their

Lordships are constrained to admit that the Court of Chancery would not have entertained a suit for the specific performance of such an

agreement, but would have left the party aggrieved by the breach of it to seek his remedy, where he would find an adequate remedy, in a Court of

Law.

8. At p. 357 their Lordships observed:

But the agreement for the further advance of 6,900 was one whereunder, in consideration of the promise to advance, the plaintiff had executed one

and induced his wife to execute the other of the two conditional sales, each admitting in a binding manner, as is shown on the face of the

instruments, that the whole of the consideration money had been actually paid. The result of that transaction was therefore to confer irrevocably

upon the defendants all the rights over the property comprised in the two instruments which the law of Spain might give them; and it is reasonable

to presume that the parties intended to treat the consideration money, of which the payment was so acknowledged, as remaining in the hands of the

defendants, just as if it had been a sum paid into their house, standing in their books to the credit of the plaintiff, and to be drawn upon by him in

the same manner as the 2,500 to be advanced under the first of the notarial instruments.

9. Their Lordships held that in such a contract a Court of law will not decree specific performance it being nothing more or less than a mere

agreement to advance money. On behalf of the appellant reliance is placed on Sheopati Singh and Others Vs. Jagdeo Singh and Another . It was

held there that in the case of usufructuary mortgage, when the mortgagor has performed his part of the contract by delivering possession of his

property to the transferee, who has not paid the whole amount contracted to be paid, the mortgagor is entitled to recover the amount and cannot

be compelled to wait till a proper suit for redemption is instituted. At p. 1145 this matter is discussed by the learned Judges who decided that case.

It was remarked that:

as regards the amount representing the consideration for the mortgage money the matter would have been simple, if the transaction were one of a

simple contract to lend money. In such a case it has been held in several cases that the contract to lend money cannot be specifically enforced.

10. But it was held that

the case of a usufructuary mortgage however must stand on a different footing, particularly when the possession has bean delivered and the

stipulation is that the profits are to be set off against interest.

11. The learned Judges held that the suit was not really one for specific performance of a mere contract to lend money, but to compel the

defendants to perform their part of the contract when they obtained delivery of possession of property. The following observations made by the

learned Judges are important:

The cases relied upon by the learned advocate for the appellants, viz., Phul Chand v. Chand Mal (1908) 3 All. 252 Sheikh Galim v. Sadarjan Bibi

AIR 1916 Cal. 530 and Yadavendra Bhatta v. Srinivasa Babbu AIR 1925 Mad. 62 were not cases of possessory mortgages, the second one

being for a mere contract to mortgage. No case directly in point has been brought to our notice and in none of the cases I mentioned does it

appear to have been argued that a mortgage is a conveyance and not a mere contract for sale.

12. It appears to us that the attention of the learned Judges was not drawn by the parties to the clear provisions of Section 21. Clause (a) and also

to third illustration to Clause (a), Specific Relief Act. In our opinion the clause would apply to all cases whether the contract evidences a

usufructuary mortgage or a simple mortgage. The illustration makes it clear that where certain property had been transferred for the purpose of

opening a credit or for securing a loan the Clause (a), Section 21, Specific Relief Act, would apply, nor does it appear that the attention of the

learned Judges was drawn to the ruling of their Lordships of the Privy Council to which a reference has been made above. As will be seen, in that

case two of the deeds were mortgages by conditional sale and yet it was held that the suit to recover the money unpaid in pursuance of such a

contract of mortgage by conditional sale would not be specifically enforced. We are of opinion that having regard to the clear provisions of Section

21, Specific Relief Act, it must be held that a contract under which a sum of money had been agreed to be paid, but was not paid cannot be

specifically enforced. In a case of this kind it is open to the mortgagor to sue the mortgagee for the recovery of damages on account of the failure

of the mortgagee to perform his part of the contract. The ruling Phul Chand v. Chand Mal (1908) 3 All. 252 to which a reference has been made

above is a clear authority for holding that the unpaid portion of the loan does not constitute a debt due by the mortgagees to the mortgagors and as

such cannot be attached under the provisions of the Civil Procedure Code. This ruling has not been dissented from and we are therefore of opinion

that it should be followed. The ruling in Sheopati Singh and Others Vs. Jagdeo Singh and Another , cannot be said to help the decree-holder

because the question as to whether or no the unpaid money in the hands of the mortgagee holding a usufructuary mortgage was a debt due to the

mortgagors which could be attached under the provisions of the Civil Procedure Code, was not decided in that case. The view taken in Phul

Chand v. Chand Mal (1908) 3 All. 252 is in consonance with the view of their Lordships of the Privy Council referred to above and it must,

therefore be followed. We therefore hold that the unpaid portion of the mortgage money is not a debt due to the mortgagors in the hands of the

mortgagee and so the decree-holder is not entitled to ask for the attachment of the same. In view of our decision on the first point, it is not

necessary to consider whether as a matter of fact any unpaid balance out of the sum of Rs. 65,000 was lying with the objector as alleged by the

decree-holder. For the above reasons we dismiss this appeal with, costs.