(1944) 03 AHC CK 0014

Allahabad High Court

Case No: None

Babu Lal		APPELLANT
	Vs	
Mangat Rai		RESPONDENT

Date of Decision: March 16, 1944

Citation: AIR 1944 All 195 : (1944) 14 AWR 124

Hon'ble Judges: Allsop, J

Bench: Division Bench

Final Decision: Dismissed

Judgement

Allsop, J.

This appeal arises out of a suit in which the plaintiffs claimed a sum of Rs. 7728 from the defendant. It appears that the defendant executed a deed of simple mortgage in favour of the plaintiffs on 5th June 1924 in order to secure an advance of Rs. 3000. The plaintiffs brought a suit on the basis of the mortgage and obtained preliminary and final decrees. The final decree was passed on 23rd May 1931 but it was subsequently modified on 18th January 1936 to enable the defendant to pay the amount due by way of instalments. The defendant''s son, however, instituted a suit on 16th March 1936 in order to obtain a declaration that the property mortgaged could not be transferred by the defendant, Babu Lal, because it was ancestral family property and there was no legal necessity for the transfer. A decree was passed in favour of Babu Lal''s son on 1st September 1936. The plaintiffs attempted to obtain redress against Babu Lal under the provisions of Order 34, Rule 6, Civil P.C., but they failed to do so presumably because the property had never been put to sale. They then instituted the suit, which has given rise to this appeal, on 31st August 1939, i.e., within three years from the date of the decree in favour of Babu Lal''s son. The learned Judge of the Court below passed a decree in favour of the plaintiffs for a sum of Rs. 4742-8-0 with costs and future and pendente lite interest at the rate of 3J per cent, per annum.

2. Two main arguments have been addressed to us, namely, that a decree should not have been passed in favour of the plaintiffs because there could be no warranty of title made by the defendant when the plaintiffs were well aware that the property was ancestral joint family property. It has been found as a fact that the plaintiffs had no such knowledge and we see no reason to differ upon this point from the learned Judge of the Court below. It is true that the plaintiffs attempted to contest the claim of Babu Lal''s son upon the ground that they had made full enquiries and had been satisfied that there was legal necessity but as the learned Judge has pointed out this was merely a formal defence and it does not necessarily follow that it is true. It also seems to us that it does not really matter whether the plaintiffs had knowledge or not about the property; then why the implied warranty of the defendant and in these circumstances it was the defendant and not the plaintiffs who was taking the risk that the title might fail. We have been referred to Bishan Datt Singh and Another Vs. Mathura Prasad and Another , but there is nothing in this case about a breach of warranty of title. The other main argument is that the suit should have been dismissed because it was barred by the rule of limitation. Learned Counsel has argued very strenuously that a cause of action on the basis of a breach of warranty of title arises on the date of the execution of the deed of transfer in which it is contained. He has referred us to the English law upon the point and particularly to two English cases, namely, Spoor v. Green (1874) 9 Ex. 99 and Turner v. Moon (1901) 2 Ch. 825. It is true that it has been assumed in some cases decided in India that limitation for an action on the basis of mere breach of warranty of title begins to run from the date when the deed of transfer was executed, but there is only one case in which a suit was dismissed upon the basis of this principle, namely, Gur Prasad v. Ram Samajh (''15) 2 AIR 1915 All. 459. We think ourselves that it is somewhat unsafe to decide questions arising out of Indian Statutes upon the basis of English decisions and there is a great deal of authority that a suit of the nature of that with which we are dealing is not necessarily barred by limitation, if a claim is made more than three years or six years, as the case may be, after the execution of the instrument in which the covenant of title is included. Learned Counsel for the appellant is constrained to admit that there is conclusive authority for the rule that compensation must be paid for the loss of property sold if a suit for recovery of such property is brought within a period of three or six years, as the case may be, from the date when the title of the property is lost by the vendee on the action of some person whose title is paramount. His contention is that there is a different rule to be applied to mortgages because the suits dealing with sales have been decreed on an implied warranty of quiet possession and not on mere warranty of title.

3. The distinction which learned Counsel attempts to make is based on certain English rulings and certain covenants which have normally been included in English conveyances or which must now be presumed under the Conveyancing Act or the latest Act of 1925 to be included in such conveyances. The contract of a seller and the contract of a mortgagor under the Transfer of Property Act includes exactly the

same warranty, namely, that the seller or the mortgagor, as the case may be, has a subsisting interest which he professes to transfer and that he has a power to transfer it. The words used in Sections 55 and 65, T.P. Act, are exactly the same. Learned Counsel argued that there was a guarantee of peaceful possession in the case of a vendor. There is no provision in Section 55, T.P. Act, that any such guarantee is to be read into a deed of sale. It has doubtlessly been held in various cases that the warranty of title includes a warranty of quiet enjoyment, but this is only one way of saying that the vendor warrants not only the title but also the enjoyment of the fruits of the title and the same form of words must convey the same guarantee in the case of a mortgagor. In other words the mortgagor not only guarantees that he has a title in the property mortgaged and that he has power to transfer it but that the mortgagee shall enjoy the fruits of the interest in the property transferred to him by the mortgage, or in other words that he shall be able to put the property to sale and recover the amount due to him from the price of'' the property sold. It seems to us, therefore, that the mortgagee is entitled to recover compensation from the mortgagor if he is deprived of these fruits at any time and that the cause of action arises in his favour when such an event occurs. We do not think it necessary for us to discuss the authorities at any length. A full discussion of the question involved will be found in Muhammad Siddiq and Others Vs. Muhammad Nuh . There is a further case decided by their Lordships of the Privy Council which seems to us to be conclusive against the appellants. This is the case in AIR 1927 99 (Privy Council) . In that case a person purporting to act on behalf of a minor mortgaged certain property. The minor ultimately got the mortgage set aside and obtained possession of the property which had passed to the mortgagee as a result of a sale in execution of a decree on the basis of the mortgage. The mortgagee was allowed to recover compensation from the mortgagor although, the property was lost many years after the mortgage was executed. Learned Counsel has referred us to the case in AIR 1930 99 (Privy Council) , in support of his contention that the decision of their Lordships of the Privy Council can be distinguished from a case like the present because the mortgagor had paid interest on the debt and consequently the mortgagee had originally enjoyed the full fruits of the interest transferred to him and had not suffered damage till the decree was passed in favour of the minor. It seems to us that the payment of interest was not the basis of the decision. The mere payment of interest would not affect the question of title and if limitation had begun to run from the date when the deed was executed, the mere payment of interest would not have affected the issue. In the case before us the mortgagee had also enjoyed the full fruits of the interest transferred to him because he had instituted a suit and had obtained a decree for the sale of the property as he was entitled to do up to that stage on the basis of the mortgage. It was only when he lost the right to put the property to sale under that decree in consequence of the decision in favour of Babu Lal''s son that he suffered any damage at all.

4. We have no doubt that the cause of action arose on the date of that decision, i.e., 1st September 1936. As the suit which has given rise to this appeal was instituted within a period of three years from that date, it is quite unnecessary for us to consider which article of the Limitation Act would apply. There is no article which would provide a period of less than three years from the date when the cause of action arose. In these circumstances we agree with the learned Judge of the lower Court that the suit could not be dismissed upon the ground of limitation.

5. There are two minor points. It has been urged on behalf of the appellant that no interest should have been allowed on the sum originally advanced because the Courts cannot allow interest merely on a sum granted by way of damages. We have been referred to the case in AIR 1938 67 (Privy Council) . We do not, however, think that the question of interest arises in that way. The mortgagee has been deprived of his security inspite of the guarantee of title given by the mortgagor and he is, therefore, entitled to recover from the mortgagor the money which he has lost because of the failure of his title to the interest of a mortgagee. This sum includes the interest which he would have been able to recover if his security had not been taken from him and it is included in the amount of compensation which is due from the mortgagor. The learned Judge has allowed interest only at the rate of 6 per cent, per annum from the date of the mortgage up to the date of the decree and that in our judgment is by no means excessive. The remaining point urged on behalf of the appellant is that the Court allowed the plaintiffs their full costs although they had claimed Rs. 7727 and have been allowed only Rs. 4742-8-0. It seems that there was an accidental omission in the judgment of the learned Judge of the Court below and there can be no doubt that the plaintiffs were entitled only to their proportionate costs. We, therefore, amend the decree of the Court below upon this point and direct that the costs allowed by the lower Court shall only be the costs proportionate to the amount decreed. In other respects we dismiss the appeal and uphold the decree of the learned Judge of the Court below. As the appellant has not paid any costs on the amount by which the decree of the Court below has been reduced, we direct that he should bear his own costs and the costs of the respondent in this appeal.