(1949) 03 PAT CK 0012

Patna High Court

Case No: None

Mt. Parbati Kuer and Another		APPELLANT
	Vs	
Durga Prasad Missir and Others		RESPONDENT

Date of Decision: March 4, 1949

Acts Referred:

- Contract Act, 1872 - Section 73
- Transfer of Property Act, 1882 - Section 68

Citation: AIR 1949 Patna 487

Hon'ble Judges: Manohar Lall, J; Mahabir Prasad, J

Bench: Full Bench

Judgement

Mahabir Prasad, J.
This appeal from a decision of the Additional District Judge of Motihari, reversing a decision of the Additional Subordinate Judge of the same place, by the plaintiffs, raises the question, whether in the circumstances, to be stated presently, the suit is barred under Order 2, Rule 2, Civil P.C.

2. The suit is for recovery of a sum of Rs. 2,500 being the balance due under a zarpeshgi deed, dated 18th October 1922 and Rs. 350 as interest thereon, or, in the alternative, for possession of the mortgaged property and for mesne profits.

3. The facts are not in dispute. Some of the defendants first party and ancestors of others executed the zarpeshgi deed on 18th October 1922 in suit, in favour of the plaintiffs for Rs. 9,000 hypothecating three items of properties, namely, (1) four annas interest in village Kanhaulia, (2) four annas interest in village Barbiro, and (3) 7 bighas, 9 kathas and 5 dhurs of brit lands in village Sarahawa. The zarpeshgi was for a term of three years, that is, 1330 to 1332. It appears that the first two items of property, that is to say, four annas interest in villages Kanhaulia and Barbiro along with other properties were subject to a prior simple mortgage in favour of another person, the existence of which was not disclosed to the plaintiffs. As a result of a suit

instituted for the enforcement of the mortgage on the first two items of properties, there was a decree, in execution of which, these two properties were sold and purchased by the other person. The auction purchaser obtained delivery of possession, and these plaintiffs were dispossessed from villages Kanhaulia and Barbiro. They were left in possession of the brit lands in village Sarahawa. The plaintiffs thereupon instituted a money suit being suit No. 554 of 1938 against the defendants first party for recovery of Rs. 5500 being the proportionate amount of zarpeshgi money and Rs. 650 representing the income for two years of the property from which they had been dispossessed. This suit was decreed. In the judgment decreeing the suit it was stated that the plaintiffs not having claimed the entire mortgage money, which they were entitled to claim owing to dispossession from a part of the mortgage security u/s 68, T.P. Act, they would not be entitled to recover the balance of the zarpeshgi money by reason of Order 2, Rule 2, Civil P.C. It was stated in the judgment that the plaintiffs were no longer entitled to retain possession of a part of the mortgage security, namely, the brit lands in village Sarahawa. It appears that the defendants 1st party, therefore, began to interfere with the possession of the plaintiffs over the land in village Sarahawa, and succeeded in dispossessing the plaintiffs from these lands in Baisakh 1350 Fasli. The plaintiffs, therefore, instituted the present suit, as already stated, for recovery of the balance of the zarpeshgi money with interest,, and, in the alternative, for possession of the mortgaged property and mesne profits.

4. The defendants contested the suit only on the ground that the present suit was barred under Order 2, Rule 2, Civil P.C., as the plaintiffs, omitted to claim the entire mortgage money at the time of the previous suit, as they were not only entitled to, but bound to include the whole of the claim, which they could claim in respect of the cause of action, which was dispossession from a part of the mortgage security.

5. The learned Additional Subordinate Judge held that the suit was not barred under Order 2, Rule 2, Civil P.C., as the cause of action in the present suit is not the same as the cause of action in the previous suit, and accordingly decreed the plaintiffs'' suit.

6. The learned Additional District Judge on appeal disagreed with the Subordinate Judge and held that the plaintiffs had a right to institute a suit for the entire zarpeshgi money when the first suit was instituted, and having failed to do so, they could not now be permitted in the present suit to recover the balance. He, therefore set aside the decree passed by the Subordinate Judge and dismissed the suit of the plaintiffs.

7. It is contended on behalf of the appellants that the learned Additional District Judge has erred in taking the view of the question at issue which he has done. The cause of action of the present suit was dispossession by the defendants 1st party from the brit lands in village Sarahawa which is different from the cause of action which, gave rise to the first suit, namely, dispossession of the plaintiffs from the two

items of the properties by reason of their being sold and purchased in execution of a decree based on a prior mortgage. It is no doubt true that the plaintiffs could have, if they so desired, sued for the recovery of the entire mortgage money but they were under no obligation to do so. If they had not now been dispossessed from the brit lands, there would have been no occasion for them to bring the suit, and they would have been perfectly satisfied holding the brit lands as security for the balance of the mortgage money. The learned Subordinate Judge was perfectly right in his finding'' that the nature of the suit and the cause of action in the present suit are different from those of the previous suit, and holding that Order 2, Rule 2, Civil P.C., had no application to the present suit and that it was not barred.

8. It appears that the answer to the question, raised in the appeal depends on as to whether, when the plaintiffs were dispossessed of a park of the mortgage security, they were, either under the terms of Section 68, T.P. Act or any other provision of law, bound to relinquish possession also of the part of the mortgage security of which they were in possession and to institute a suit for recovery of the entire mortgage amount. If the plaintiff a were under no such obligation, it is obvious that they could claim to recover a part of the mortgage amount as being damages for breach of contract committed by the defendants by causing dispossession of the plaintiff''s from a part of the mortgaged property, the amount claimed being proportionate to the loss occasioned by the part of the properties going out of possession. Section 68, T.P. Act is in the nature of an enabling section. A mortgagee ordinarily in the absence of a present covenant has no right to sue for the mortgage money. Section 68 relates when and under what circumstances a mortgagee can exercise the right to sue for the mortgage money. The section certainly does not preclude a mortgagee from claiming damages for a breach of contract committed by the mortgagor conferred by Section 73, Contract Act. In case, where a mortgagee is dispossessed from a part of his security, he may, if he so chooses, instead of repudiating the whole contract of mortgage and relinquishing possession of the part of the mortgage security in his possession, suing for the entire mortgage money and obtaining simple money decree, hold to the contract of the mortgage, retain possession of the part of the mortgaged property from which he is not dispossessed and sue the mortgagor for damages for a breach of contract measuring the damages suffered by him having regard to the value of the property from which he is dispossessed. It is clear that if the mortgagee adopts the latter course, his suit for recovery of the portion of the mortgage money proportionate to the value of the property from which he is dispossessed is not a suit u/s 68, T.P. Act, but one u/s 73, Contract Act. The Court of first instance rightly held that the mortgage Suit No. 584 of 1938 was one u/s 73, Contract Act, and very rightly observed:

On account of the passing of the Milkiyat properties out of the hands of the plaintiffs they suffered loss and the suit was brought substantially for compensation, which was valued at Rs. 5,500 in proportion to the value of the

milkiyat properties plus Rs. 650 as mesne profits. The suit was evidently not one u/s 68, T.P. Act.

9. In this view of the matter it is perfectly clear, as correctly pointed out b y the learned Subordinate Judge that.

the cause of action is also different. In the present suit plaintiffs claimed for recovery of possession of the brit lands. This claim they could not have made in the previous money suit and there was absolutely no cause of action for the same as they were admittedly in possession thereof at that time. The money suit was decided in 1939 and according to the defence case the defendants took possession of the lands in 1941. It was the act of dispossession by Ghansham Das on 19th February 1936 in respect of the milkiat properties which had given cause of action to the plaintiffs in the previous case. In the present suit, however, it is the subsequent Act of dispossession from the brit lands by the defendants which has given cause of action to the plaintiffs. I find that both the nature of the suit and the cause of action in the present suit are different, from those of the money suit.

That the plaintiffs were entitled to bring a suit u/s 73, Contract Act, in the circumstances in which the previous suit for recovery of the part of the mortgage money was instituted finds ample support from a decision in the case of Mt. Nanhi Vs. Mt. Ketki, , relied on by the learned Subordinate Judge. The learned Additional District Judge, while agreeing with the learned Subordinate Judge that the plaintiffs were entitled to institute a suit for damages u/s 73, Contract Act, came to the conclusion that the previous suit was not one for such a relief. He construed the plaint in the previous suit as being one u/s 68, T.P. Act, claiming recovery of the part of the mortgage money. Ho took the view that the plaintiffs were entitled to claim two reliefs, one as an alternative to the other. The plaintiffs not having claimed both the reliefs when they instituted the previous suit, their claim in the present suit was barred by the provisions of Order 2, Rule 2. He relied upon a decision of the Privy Council in the case of Md. Hafiz v. Mirza Muhammad Zakariya A.I.R.1922 P.C. 23 and held that the plaintiffs having been entitled to two reliefs and having elected to sue for one of the reliefs and not for the other, they could not sue for the other relief subsequently. What the learned Additional District Judge missed to appreciate is that in the circumstances of the present case the only relief to which the plaintiffs were entitled when they were dispossessed from a part of the mortgage security, was, if they wanted to retain possession of the brit lands as mortgagee, to sue only for a part of the mortgage money proportionate to the value of the property from which they were dispossessed, u/s 73, Contract Act, and not for the whole of mortgage money. Their relief to recover the whole of the mortgage money could be enforceable only if they repudiated the contract of mortgage and gave up possession of these brit lands and not otherwise. The cause of action for recovering the entire mortgage money u/s 68, T.P. Act was certainly not availed of by the plaintiffs in the previous suit inasmuch as they did not relinquish possession of the

brit lands of which they were in possession as mortgagees and, therefore, the previous suit instituted by them must be deemed to be one u/s 73, Contract Act, as rightly held by the learned Subordinate Judge. The learned Additional District Judge was wrong in holding that the eases of. Muhammad Siddiq and Others Vs. Muhammad Nuh and Mt. Nanhi Vs. Mt. Ketki, , having been cases of sales were of no assistance in deciding the point at issue in the present case, What was held in the case of Mt. Nanhi Vs. Mt. Ketki, , was that the covenant in the sale deed to the effect that if whole or part of the vended property went out of possession of the vendee on account of any transfer or encumbrance etc., by the vendor, the vendee shall have right to recover the consideration money along with damages and costs from the property of the vendor, merely conferred a right in addition to the right which the law gave to the vendee to recover damages for breach of implied warranty of title contemplated by Section 55(2), T.P. Act, and that the covenant was only an enabling clause intended for the benefit of the vendee. In the case of Muhammad Siddiq and Others Vs. Muhammad Nuh , it was held that in a suit for damages for a breach of contract of warranty of title and quiet enjoyment deemed to have been entered into by the seller u/s 55(2), T.P. Act, by the dispossessed vendee against the vendor and not for recovery of original price on the ground of failure of consideration, the measure of damages is the loss suffered by the vendee. It will be seen that under 8. 65 (e), T.P. Act "in the absence of a contract to the contrary, the mortgagor shall be deemed to contract with the mortgagee--

* * * * *

(e) and, where the mortgage is a second or subsequent incumbrance on the property, that the mortgagor will pay the interest from time to time accruing due on such prior incumbrance as and when it becomes due, and will at the proper time discharge the principal money due on such prior incumbrance.

When, as in the present case, the mortgagor defaults in discharging the prior encumbrance, and on that account part of the mortgaged property goes out of possession of the mortgagee, the mortgagor commits a breach of the contract contemplated by Section 65(e), T.P. Act. The mortgagee, therefore, becomes entitled, to recover damages for such a breach, measure of damages being loss suffered by the mortgagee, on the same principle as that enunciated in the Allahabad cases, just cited, for breach of warranty of title in cases of sales u/s 55(2), T.P. Act. It will be further seen that before the passing of the T.P. Act, in the absence of a covenent in the mortgage deed providing that if for any reason the rehandar is dispossessed from the whole or a portion of the mortgaged property, the mortgagee would be entitled to sue for the mortgage money; the mortgagee in the event of being dispossessed from the part of the mortgaged property had no right to treat the mortgage as rescinded and to sue for the entire mortgage money. The only right which a mortgagee had, on the happening of such an event, was to recover from the mortgagor only so much of the consideration money as was in

proportion of the land of which he had been dispossessed: Pitambar Missir v. Ram Saran Sukul 25 W.R. 7. Section 68, T.P. Act, removed this disability and conferred an additional right on the mortgagee entitling him to sue for the entire mortgage money when dispossessed from the part of the mortgaged property. In other words, Section 68 enables the mortgagee when dispossessed from a part of the mortgaged property to repudiate the mortgage and to recover the entire amount of mortgage money personally from the defendant as money lent without any security. There is nothing in Section 68 to indicate that it takes away the right of the mortgagee when deprived of the part of the mortgage security to claim only the portion of the mortgage money as. da mages for breach of implied contract u/s 65, T.P. Act.

10. Mr. B.N. Rai very strongly relied on the decision of the Privy Council in the case of AIR 1949 78 (Privy Council) , in Support in his contention that this suit was barred by Order 2, Rule 2, Civil P.C. It will be seen that this decision is of no assistance in deciding the point of issue in this case. The set of facts constituting the cause of action in the previous suit and one instituted subsequently in the case which was before their Lordships of the Privy Council, were the same, and the relief claimed in the subsequent suit directly flowed from the same set of facts alleged in the plaints of the two suits. The situation is entirely different so far as the present case is concerned. What had to be established by the plaintiffs in order to get relief in the previous suit was default on the part of the mortgagor to pay the prior encumbrance and consequent dispossession from the part of the mortgaged property, while in the present case what the plaintiffs had to establish and have established are entirely other set of facts, namely, dispossession from the brit lands by the defendants long after the date of dispossession from the portion of the property involved in the previous suit. It is clear, as already held, that the cause of action in the present suit is not the same as that in the previous suit. The matter in controversy in the present suit has been rightly dealt with by the learned Subordinate Judge, the Court of first instance, and I am in '' entire agreement with the view taken by him.

11. I accordingly hold that the present suit is not barred by Order 2, Rule 2, Civil P.C., and the plaintiffs are entitled to a decree.

12. In the result, the appeal is allowed, the judgment and decree of the Court of appeal below are set aside and those of the Court of first. Instance restored. The appellants will be entitled to their costs throughout.

Manohar Lall J.

I agree.

13. The test to decide whether a subsequent suit is barred under the provisions of Order 2, Rule 2, Civil P.C., has been clearly pointed out in the recent judgment of the Privy Council in AIR 1949 78 (Privy Council) ; but the difficulty in each case is to apply

the law to the facts in order to find out whether the cause of action in the previous suit and the subsequent suit is the same and whether the plaintiff could have and should have claimed the relief which he claims in the subsequent suit in the former suit. In the present case, the plaintiff need not have sued for the payment to him of the entire mortgage amount because he was still in possession as a mortgagee of the lands of which he had not then been dispossessed. Could the plaintiff have sued in the former suit for being put in possession of any land which was given to him in security? The answer is in the negative, because the mortgagor could not have put him in possession of the land from which a person with a prior title had dispossessed the mortgagee and the plaintiff was in possession of the remaining land. The matter would have been different if the plaintiff had been dispossessed of the remaining land also by that prior title holder or by the defendant. I cannot understand how the plaintiff, if he did not want, could be compelled to sue in the former suit for being paid the mortgage amount. In effect, the result has been that the mortgage amount has become reduced by the plaintiff being awarded damages for dispossession of a portion of the land. For these reasons, I agree that the present suit is not barred under Order 2, Rule 2, Civil P.C.