(1930) 09 BOM CK 0024

Bombay High Court

Case No: None

Essa Abdulla Khatri		APPELLANT
	Vs	
Khatijabai and Others		RESPONDENT

Date of Decision: Sept. 23, 1930

Acts Referred:

- Dekkhan Agriculturists Relief Act, 1879 - Section 3

Citation: AIR 1931 Bom 161 : (1931) ILR (Bom) 536

Hon'ble Judges: Beaumont, C.J; Blackwell, J

Bench: Full Bench

Judgement

Beaumont, C.J.
This is an appeal from a decision of Baker, J., in which he held that he had no jurisdiction to entertain the action having regard to the terms of the Dekkhan Agriculturists'' Relief Act. The learned Judge did not express any opinion of his own upon the point. He dealt with the authorities, and came to the conclusion that, although the authorities were conflicting, the greater weight of the. authorities was in favour of the view that there is no jurisdiction to entertain the action, and therefore ho considered himself bound to adopt that view.

2. The question really turns on the construction of two sections of the Dekkhan Agriculturists'' Relief Act. That Act provides in Section 3 that

The provisions of this chapter shall apply to(b) suits of the descriptions next here in after mentioned.

Then it provides:

The descriptions of suits referred to are the following, namely: (w) suits for the recovery to money alleged to be due to the plaintiff on account of money lent or advanced to, or paid for, the defendant, or as the price of goods sold, or on an account stand between the plaintiff and defendant, or on a written or unwritten

engagement for the payment of money not hereinbefore provided for;

then,

(x) suits for recovery of money duo on contracts other then the above and suits for rent or for moveable property, or for the value of such property, or for damages;

3. So far you get money claims only. Then (y) is for

suits for foreclosure or for the possession of mortgaged property, or for sale of such property, or for foreclosure and sale, when the defendant, or any one of the defendants, is an agriculturist;

and (z) is for suits for redemption.

4. Pausing there for a moment, it seems to me clear that an ordinary action to enforce a mortgage may fall within Clause (w) and Clause (y). Where a mortgage contains a covenant for payment and a conveyance of property as security for the debt, an action to enforce the mortgage may involve a claim for a money judgment which would fall Under Clause (w), and it may include a claim to enforce the mortgage by foreclosure or sale which would fall Under Clause (y). But those two forms of relief are really quite distinct. In many cases you have a mortgage without any covenant for payment, in which casa your only relief is for foreclosure or sale; or you may desire to enforce a mortgage by an originating summons, in which case you must confine your relief to foreclosure or sale and you cannot ask for a money judgment. So that the two forms of relief which you can ask for in the action seem to me to be quite distinct.

5. Then, when one goes to Section 11 of the Act, it provides that:

Every suit of the description mentioned in Section 3, Clause (w), may if the defendant, or, when there are several defendants, one only of such defendants, is an agriculturist, be instituted and tried in a Court within the local limits of whose jurisdiction such defendant resides, and not elsewhere.

6. The words of that section seam to me to be perfectly plain. They provide that suits mentioned in Clause (w), Section 3, that is suits for money lent so far as mortgage actions are concerned, must be brought within the local limits of the Court with in whose jurisdiction the defendant re-sides. But that clause says nothing about suits which fall within Section 3, Clause (y), that is, suits to enforce a mortgage by foreclosure or sale. Why the legislature should have drawn a distinction between the two forms of suits I do not know. It seams somewhat illogical to provide that if you are suing a defendant on his personal covenant for payment, you cm only sue him in the place where he resides, but if you are suing him to enforce your mortgage by foreclosure or sale, you can then sue, him in Bombay, which may be hundreds of miles away from the place where he resides and probably from the place where the land is situated. Possibly, as Mr. Billimoria suggests, the legislature did not

anticipate the decision of this Court in Hatimbhai v. Framroz Eduljee AIR 1927 Bom. 278, to which I will refer presently, but however that may be, the language of the legislature is clear and this Court can only give effect to it.

7. Turning to the plaint in this case, the plaintiff asks (a) that the defendants may be ordered to pay to the plaintiff the sum of Rs. 5,500 with interest. Then he asks (b), that in the event of the defendants failing to pay the said sum with interest the mortgaged properties may be sold. And then he asks (c), that in case the proceeds of sale are found to be in insufficient to pay the amount due to the plaintiff and the costs of the suit, liberty be reserved to the plaintiff to apply for a decree for the balance. It seams to me that prayers (a) and (c) of the plaint both involve claims for personal payments, and as to those prayers of the plaint, the action is not competent. But I think that the action is competent as to the relief claimed in prayer (b) of the plaint, which asks for foreclosure or sale. The learned Advocate General says that prayer (a) of the plaint is generally construed as merely meaning that the plaintiff requires an account of what is due, and that the claim for payment is really included in prayer (c). But it seems to me that the wording of prayer (a) is perfectly plain. It asks that the defendant may be ordered to pay, and I think that is not an application for an account. I think therefore that if the action proceeds, it can only do so as far as the relief claimed in prayer (b) of the plaint is concerned, and that any form of order should be so framed as to exclude any judgment for payment either to the plaintiff or into Court as in the form at p. 1107 of Sir Dinshah Mulla''s book on the Civil Procedure Code.

8. So far I have dealt with the matter without referring to the authorities with which I will now deal. The first case to which I must refer is the case of Gulam hussain v. Clara D''Souza (2), before Rangnekar, J. That was a case in which the learned Judge was dealing with a promissory note and mortgage of move able property. So that he had to consider the provisions of Clauses (w) and (x), Section 3, Dekkhan Agriculturists'' Relief Act, and not the provisions of Clause (y) with which we are concerned. I do not propose therefore to discuss that case.

9. The next case, and the case which has really given rise to the trouble and the conflict of authority is the case of Chhaganlal v. Abdul Gafur O.C.J. Suit No. 443 of 1928, Decided on 1st January 1929 by Kemp, J. That was an ordinary mortgage suit, and N.W. Kemp, J., held that the Court had no jurisdiction to entertain it, if the defendant came within the Dekkhan Agriculturists'' Relief Act, having regard to Section 11 of the Act. The learned Judge seems not to have considered very carefully the wording of the Act. Ho based his decision very largely on the decision of a Full Bench of this Court in Hatimbhai Hassanally v. Framroz Eduljee AIR 1927 Bom. 278, (to which I have alluded), in which the Court held that a suit to enforce a mortgage by sale was not a suit for land within the moaning of Clause 12 of the Letters Patent, and the learned Judge seems to have thought that it would be inconsistent for the Court to say that a suit to enforce a mortgage by sale is not a suit for land within

Clause 12 of the Letters Patent but nevertheless is a suit for foreclosure or sale within Section 3, Clause (y), Dekkhan Agriculturists'' Relief Act. I do not myself see any such inconsistency since those two Acts, the Charter and the Dekkhan Agriculturists'' Relief Act, are dealing with totally different subjects; and the more fact that this Court has held that a suit to enforce a mortgage by sale is not a suit for land Under Clause 12 of the Charter seems to me no ground for holding that it is not a suit within Section 3, Clause (y), Dekkhan Agriculturists'' Relief Act, and still loss for holding that Section 11, Dekkhan Agriculturists'' Relief Act, applies to Section 3, Clause (y), when in terms it only refers to Clause (w).

10. Then the next case was Vitkal Deoji v. Rajaram Tukaram O.C.J. Suit No. 2156 of 1927, Decided on 15th January 1930 by Blackwall, J., in which Black well, J., followed Kemp J.''s view. That was really a different case, because a decree nisi had already been passed, and the only question before the learned Judge was whether the decree for sale should be made absolute having regard to the point under the Dekkhan Agriculturists'' Relief Act which had then been taken. The learned Judge held that the decree should be made absolute, and that decision was upheld by the Court of appeal.

11. Then the next case is Ramchand Rajaji v. Chimanlal Harakchand (5), which raises exactly the same point as the suit before Kemp, J. Mirza, J. dealt with the matter very fully in his judgment, and he came to the conclusion that the decision of Kemp, J., was inconsistent with the reasoning of Rangnekar, J., in the case to which I have referred, and he refused to follow Kemp, J.''s decision. In my view the decision of Mirza, J., was quite right.

12. The next case was another case before Rangnekar, J.: K.N. Malpekar v. Khan duji Dagduji O.C.J. Suit No. 2004 of 1927, Decided of 20th January 1930 by Rangnekar, J. He considered the case before Kemp, J., and refused to follow it. So that in my judgment, the greater weight of authority is in favour of the view which I have expressed. I think Blackwell, J., in the case before him, did not really consider the point, but merely followed Kemp, J.''s decision. In my view the decision of Kemp, J., should be treated as overruled, and I think that we should allow this appeal, and refer the matter back to the Court below to deal with.

13. By consent, no order as to costs of this appeal.

Blackwell, J.

14. I am of the same opinion. I regret that we have to coma to this conclusion because of the anomaly to which the learned Chief Justice has drawn attention in his judgment. It is, indeed, a curious thing that in a suit for recovery of money, an agriculturist can be sued only in the place in which ha resides, but that that should not be the case if the suit is for foreclosure or sale of mortgage property or for redemption. We are however not entitled to speculate on what the intention of the legislature may have been, but can only have regard to the words in Section 11,

Dekkhan Agriculturists'' Relief Act. That section provides that in cases coming within Section 3, Clause (w), the suit must be brought in the Court where the defendant resides. It says nothing whatever about cases coming within Section 3, Clause (x), (y) or (z).

15. It is quite true that the decision of Rangnekar, J., in Gulamhussein v. Clara D''Souza (1), is not strictly germane to the discussion before us, inasmuch as he was dealing with the question whether a case fell within Clause (w), Section 3, or Clause (x), Section 3. I desire however to say this, that, in my opinion, if any suit is brought in this High Court which either is a suit for or includes a claim for the recovery of money in the cases provided for by Section 3, Clause (w), the Court would have no jurisdiction to pass a decree for the money claimed unless the defendant, being an agriculturist, resides within the jurisdiction of the High Court.