MANU/BH/0131/1967

Equivalent Citation: AIR1967Pat423

IN THE HIGH COURT OF PATNA
FULL BENCH

A.F.A.D. No. 535 of 1961

Decided On: 08.02.1967

Appellants:**Jichhu Ram and Ors.**
Vs.
Respondent:**Pearey Pasi and Ors.**

Hon'ble Judges/Coram:
R.L. Narasimham , C.J., R.K. Choudhary and Udai Sinha , JJ.

Counsels:
For Appellant/Petitioner/Plaintiff: Amla Kant Choudhary and S.N. Misra, Advs.

For Respondents/Defendant: R.S. Chatterji, Rajeshwar Dayal and Ram Nandan Sahay Sinha, Advs.

JUDGMENT

R.L. Narasimham, C.J.

1. This is a second appeal by the plaintiffs against the concurrent decisions of the two lower courts (Munsif of Bihar Sharif and Additional Subordinate Judge of Bihar Sharif) dismissing their suit solely on the ground that it was barred by the provisions of Order 2, Rule 2, Civil Procedure Code.

2 . The plaintiffs are the usufructuary mortgagees in respect of a house, the mortgagors being the two defendants who are father and son, respectively The date of the mortgage bond was the 29th October, 1949, and the period as specified in the mortgage bond was five years. It was alleged that after the execution of the mortgage bond the mortgagees were put in possession of the property hypothecated, but two days later, on the 31st October, 1949, the mortgagor-defendants were put in possession of the house as tenants of the mortgagees on the basis of a kerayanama executed in favour of the plaintiffs

The defendants defaulted in payment of the stipulated rent and then the plaintiffs brought a rent Suit, No. 24 of 1956, for recovery of arrear rent, and obtained a decree in due course. It was put into execution in Execution Case No. 1560 of 1956, and sprayer was made by the plaintiffs for realization of the decretal amount by sale of the equity of redemption of the mortgaged property. An objection was filed by the judgment debtors in that suit (the defendants) under Section 47, read with Order 34, Rule 14, Civil Procedure Code.

That application was allowed by the executing court (see Ex. A) which held that the mortgage and the kerayanama were part of the same transaction and that the equity of redemption could not, therefore, be sold in execution of that rent decree. The execution case was thus dismissed on the 14th March, 1957 The plaintiffs then instituted the suit under appeal on the 7th October, 1958, claiming either possession

of the house with mesne profits or, in the alternative, decree for the mortgage money with interest.

3. Defendant No. 1 in his evidence expressed his willingness to pay one-half of the mortgage money in instalments. His son, defendant No. 2, though a joint executant of the mortgage bond, contested the litigation, urging that he was in reality a minor at the time of the execution of the bond, that his father (defendant No. 1) was a drunkard and that the loan was not taken for legal necessity. The trial court rejected all these contentions, and held the mortgage bond to be a valid and genuine document executed at a time when defendant No. 2 was also a major. It rejected his contention that the loan was not taken for legal necessity; hut it dismissed the suit on a purely technical plea that Order 2, Rule 2, Civil Procedure Code, will operate as a bar in view of the previous litigation between the parties in the said rent suit and execution case. On appeal the learned Additional Subordinate Judge endorsed the findings of the trial Court on almost all the points and dismissed the appeal.

4. This second appeal was referred to a larger Bench by a Division Bench of this Court because that Bench thought that there were conflicting decisions of this Court and of other High Courts as regards the applicability of Order 2, Rule 2, Civil Procedure Code, where a second suit is brought by a mortgagee to enforce a mortgage though he had previously instituted a suit for recovery of a claim arising out of the mortgage.

5. Mr. Choudhary for the appellants invited our attention to a judgment of the Supreme Court in Gurbux Singh v. Bhooralal, AIR 1964 Supreme Court 1810 as regards the circumstances under which the plea of bar under Order 2, Rule 2, could be raised, and urged that the plaintiffs' suit must succeed because the plaint in the previous rent suit was not filed in the present litigation and consequently there was no evidence for a court to hold that there was identity of the cause of action in the suits.

6. In my opinion this preliminary contention must prevail and it is unnecessary for me to discuss the vexed question of law for the decision of which this appeal was referred to a larger Bench. Their Lordships in the abovementioned judgment pointed out that as the plea of a bar under Order 2, Rule 2, is basically founded on the identity of the cause of action in the two suits, the defence which raises the plea of the bar must prove the plaint of the previous suit in support of its plea. To quote their Lordships' own words:

> "Without placing before the Court the plaint in which the facts were alleged, the defendant cannot invite the Court to speculate or infer by a process of deduction what those facts might be with reference to the reliefs which were then claimed. It is not impossible that reliefs were claimed, without the necessary averments to justify their grant. It is because of these reasons that we consider that a plea based on the existence of a former pleading cannot be entertained when the pleading on which it rests has not been produced."

7. These observations are fatal to the defendants' contention in this litigation. Though the bar of Order 2, Rule 2, was one of the issues expressly raised before the original court ((issue No. 5)), the defendants did not prove the plaint in the previous rent suit. The only documents proved on their behalf are copies of the order sheets in the execution case (Exts. A and B). Mr. Chatterji, however, urged that from certain admissions made in the plaint in this litigation this Court should reasonably infer

what was the nature of the allegation in the previous rent suit, and by this process of reasoning decide whether the cause of action in the two suits was identical. This approach was condemned by their Lordships of the Supreme Court in the aforesaid judgment with these words:

> "As the plea is a technical bar it has to be established satisfactorily and cannot be presumed merely on the basis of inferential reasoning."

Their Lordships condemned the action of the learned trial Judge In that court in inferring "what the cause of action should have been from a reference to the previous suit contained in the plaint as a matter of deduction." I must, therefore, reject this contention of Mr. Chatterji.

8 . Following the aforesaid decision, therefore, I must hold that on the evidence adduced by the defendants in this case the plea of a bar under Order 2, Rule 2, could not be successfully raised. As on all other points the plaintiffs have succeeded in the lower courts, there is no reason why their claim should not be decreed. For these reasons the judgments of the two lower courts are set aside, the plaintiffs' suit for recovery of the mortgage money is decreed with costs. Interest from the date of the commencement of the suit and future interest at 6 per cent per annum.

R.K. Choudhary, J.

9. I agree

Udai Sinha, J.

10. I agree.