

Vithal Das

Vs

Rupchand & Ors.

Civil Appeals Nos. 926 and 927 of 1965

(K. Subha Rao, V. Ramaswami-I JJ)

07.04.1966

JUDGMENT

RAMASWAMI, J.-

These appeals are brought by certificate on behalf of the defendant from the judgment of the High Court of Madhya Pradesh, Indore Bench, dated November 20, 1962 in First Appeals Nos. 19 and 23 of 1957.

The plaintiffs, Rup Chand and Hukam Chand instituted Civil Suit No. 8 of S. 1999 in the Court of District Judge, Ujjain, against the defendant Vithal Das and three others, for partition of houses and for rendition of accounts. Two of the defendants, Bheronlal and Indermal died in the course of the suit and the suit was continued against Vithal Das. The plaintiffs alleged that the immovable property constituting Blocks Nos. 206 and 207 in Freeganj, Ujjain was purchased with the capital of the partnership firm in which the plaintiffs firm in which the plaintiffs and the defendant were, at one time, partners and by two documents dated July 2, 1937 and July 16, 1937, the properties continued to remain in the ownership of the partnership firm, though the firm had been dissolved in the year 1937. The plaintiffs claimed that the properties were managed by the defendant on behalf of the plaintiffs and the defendant realised rents from the tenants on their behalf and plaintiffs were therefore entitled to receive half the amount realised as rent and the defendant was liable to render accounts thereof. The plaintiffs also claimed portion of the joint properties, or in the alternative, the sale of the property by auction and after deducting the cost of auction, half of the sale proceeds. The defendant contested the suit on the ground that at the time of the execution of the document dated July 2, 1937 there were only three blocks in partnership which were at that time open land. The defendant claimed that Block No. 206 and the building constructed thereon was not a partnership property. It was further alleged that the defendant had invested Rs. 10,000 in the three blocks of land which were held in partnership for constructing a building. The trial court accepted the plaintiffs' case and granted a decree for partition of the blocks and for an account of income realised in respect of the property situated on block No. 207. As regards block No. 206 and the property standing thereon the trial court directed the defendant either to remove the construction or accept his share of money spent by the defendant over it and created a charge over the property in respect of the amount so held payable. Both the parties preferred appeals in the High Court of Madhya Pradesh against the judgment of the trial court which partially allowed the appeals and remanded the case to the trial Court. The High Court held that the plaintiffs were entitled to claim half share in both the properties built on blocks Nos. 206 and 207 and the defendant was liable to account for the income of the properties on block No. 207 from the date of dissolution i.e., from July 2, 1937 and of block No. 206 from the year 1939. The High Court also held that the plaintiffs were liable to pay half the costs spent by the defendant in constructing the building on block No. 206. After the order of

remand the trial Court appointed a Commissioner for examining the accounts of rent realised by the defendant. After considering the report of the Commissioner, the trial Court determined the total amount of rent of both the blocks Nos. 206 and 207 at Rs. 41,829/3/7 and the half share of the plaintiffs was determined at Rs. 20,914/4/9. The trial Court also awarded interest to the plaintiffs on the half share of the income to the extent of Rs. 6,676/7/3 calculated upto April 11, 1957. The total amount thus due to the plaintiffs was determined at Rs. 27,591/1/-. Out of this amount the trial court allowed a sum of Rs. 9,755/7/3 on account of the half costs of construction and interest thereon and expenses incurred for house-tax, water-tax, legal expenses and repairs. The net amount thus awarded to the plaintiffs was Rs. 17,670/9/9. As regards the partition of blocks Nos. 206 and 207, the trial court held that in view of the method of construction of the blocks it was not possible to make partition in equal shares and therefore the trial court directed that the two blocks should be auctioned in separate lots and the parties should be at liberty to bid at the auction and the parties would have equal rights to the amount of the auction. Aggrieved by the judgment of the trial court both the parties preferred appeals to the High Court of Madhya Pradesh, namely, First Appeals Nos. 19 and 23 of 1957. The defendant's appeal was registered as Civil First Appeal No. 19 of 1957 and the plaintiffs' appeal was registered as Civil First Appeal No. 23 of 1957. Both the appeals were heard and disposed of by a common judgment by the High Court which modified the trial court's finding as to the income of blocks 206 and 207 to the extent of Rs. 803/5/3 by reducing the income of the two blocks by that figure. The total income was thus reduced from Rs. 41,829/3/7 to Rs. 41,015/14/4 with the corresponding reduction in the amount of interest. The High Court affirmed the finding of the trial court that the defendant was liable to pay interest on the half share of the rental income on the ground that the relationship between the parties was in the nature of a trust under s. 90 of the Trusts Act (Act II of 1882). The plaintiffs' appeal No. 23 of 1957 was allowed to the extent of Rs. 4,942/9/- and after adjustment, the plaintiffs' claim was decreed for Rs. 22,103/-.

The first question for consideration in these appeals is whether the High Court was right in granting interest to the plaintiffs on their share of rental income to the extent of Rs. 6,676/7/3 for the period prior to the institution of the suit. It was argued by the Solicitor-General on behalf of the appellant that the High Court was in error in holding that the relationship between the parties was governed by s. 90 of the Trusts Act and the plaintiffs were therefore entitled to interest on their share of rent under the provisions of s. 23 of that Act. In our opinion, the contention put forward by the Solicitor-General is well-founded and must be accepted as correct.

It is well-established that interest may be awarded for the period prior to the date of the institution of the suit if there is an agreement for the payment of interest at fixed rate or interest is payable by the usage of trade having the force of law, or under the provisions of any substantive law as for instance s. 80 of Negotiable Instruments Act or s. 23 of the Trusts Act. It is admitted in the present case that the two agreements between the parties dated July 2, 1937 and July 16, 1937 did not provide for payment of interest on the rental realised by the defendant on the joint properties. Nor is interest payable by virtue of any provision of the law governing the case. Under the Interest Act, 1839, the Court may allow interest to the plaintiff if the amount claimed is a sum certain which is payable at a certain time by virtue of a written instrument. But it is conceded that the position in the present case is different. It was suggested by Mr. S. P. Sinha on behalf of the respondents that interest may be awarded under the Interest Act which contains a provision that "interest shall be payable in all cases in which it is now payable by law". But this provision only applies to cases in which the Court of Equity exercises jurisdiction to allow interest. The legal position has been explained by the Judicial Committee in *Bengal Nagpur Rly. Co. Ltd. v. Ruttanji Ramji* [65 I.A. 66] at p. 72 as follows :

"As observed by Lord Tomlin in *Maine and New Brunswick Electrical Power Co. v. Hart*, (1929) A.C. 631, at p. 640; (AIR 1939 PC 185 at p. 188), 'In order to invoke a rule of equity it is necessary in the first instance to establish the existence of a state of circumstances which attracts the equitable jurisdiction, as, for example, the non-performance of a contract of which equity can give specific performance'."

The decision of the Judicial Committee in *Bengal Nagpur Rly. Co. Ltd. v. Ruttanji Ramji* [65 I.A. 66] was relied upon by this Court in *Thawardas Pherumal v. Union of India* [[1955] 2 S.C.R. 48] in rejecting a claim for interest. In that case, a contractor entered into a contract with the Dominion of India for the supply of bricks. A clause in the contract required all disputes arising out of or relating to the contract to be referred to arbitration. The dispute having arisen, the matter was referred to arbitration. The dispute having arisen, the matter was referred to arbitration and the arbitrator gave an award in the contractor's favour. The Union of India which has succeeded to the rights and obligations of the Dominion, contested the award on various grounds one of which was the liability to pay interest on the amount awarded. It was held by this Court that the interest awarded to the contractor could not, in law, be awarded and the arbitrator is not a Court within the meaning of the Interest Act, 1839 and, in any event, interest could only be awarded if there was a debt or a sum certain payable at a certain time or otherwise by virtue of some written contract and there must have been a demand in writing stating that interest will be demanded from the date of the demand. The same view has been expressed by this Court in two later cases - *Union of India v. Rallia Ram* [A.I.R. 1963 S.C. 1636] and *Union of India v. Watkins Mayor and Co.* [A.I.R. 1966 S.C. 275].

It was, however, pointed out for the respondents that the defendant was in possession of the entire properties as co-owner after the dissolution of the partnership by the document dated July 16, 1937. It was argued that the defendant was realising rents of all the properties and he was in the position of a constructive trustee under s. 95 of the Trust Act and was liable therefore to pay interest on the plaintiffs' share of rent under s. 23 read with s. 95 of the Act. We do not consider there is any justification for this argument. Section 90 of the Act states :

"Where a tenant for life, co-owner, mortgagee or other qualified owner of any property, by availing himself of his position as such, gains an advantage in derogation of the rights of the other person interested in the property, or where any such owner, as representing all persons interested in such property, gains any advantage, he must hold, for the benefit of all persons so interested, the advantage so gained, but subject to payment by such persons of their due shares of the expenses properly incurred, and to an indemnity by the same persons against liabilities properly contracted, in gaining such advantage."

Section 95 provides as follows :

"The person holding property in accordance with any of the preceding sections of this Chapter must, so far as may be, perform the same duties and is subject, so far as may be, to the same liabilities and disabilities, as if he were a trustee of the property for the person for whose benefit he holds it :

Provided that (a) where the rightfully cultivates the property or employs it in trade or business, he is entitled to reasonable remuneration for his trouble, skill and loss of time in such cultivation or employment; and (b) where he holds the property by virtue of a contract with a person for whose benefit he holds it, or with any one

through whom such person claims, he may, without the permission of the Court, buy or become lessee or mortgagee of the property or any part thereof."

Section 23 reads as follows :

"Where the trustee commits a breach of trust, he is liable to make good the loss which the trust property or the beneficiary has thereby sustained, unless the beneficiary has by fraud induced the trustee to commit the breach, or the beneficiary, being competent to contract, has himself, without coercion or undue influence having been brought to bear on him, concurred in the breach, or subsequently acquiesced therein, with full knowledge of the facts of the case and of his rights as against the trustee.

A trustee committing a breach of trust is not liable to pay interest except in the following cases :-

- (a) where he has actually received interest;
- (b) where the breach consists in unreasonable delay in paying trust money to the beneficiary;
- (c) where the trustee ought to have received interest, but has not done so;
- (d) where the may be fairly presumed to have received interest.

He is liable, in case (a), to account for the interest actually received, and, in cases (b), (c) and (d) to account for simple interest at the rate of six per cent. per annum, unless the Court otherwise directs....."

We do not agree with the contention of the respondents that s. 90 of the Trusts Act applied to this case. A co-owner in possession of all the joint properties does not become a trustee by the mere fact of his collection of the full amount of rent from the tenants. If the co-owner is to be clothed with the status of a trustee it must be shown that he was gained some advantage in derogation of the other co-owners interested in the property and that he gained such an advantage by availing himself of his position as co-owner. In the present case, there is no allegation made by the plaintiffs that the defendant has gained any advantage in derogation of the rights of the plaintiffs, nor is there any finding of the lower courts that the defendant gained any advantage by availing himself of his position as co-owner. We shall, however, assume in favour of the respondents that the defendant is in the position of a constructive trustee in view of the provisions of s. 90 of the Trusts Act. Even upon that assumption we are of opinion that the defendant is not liable to pay interest to the plaintiffs for their share of the rent of the properties. The reason is that the trustee is liable to pay interest only if he commits a breach of trust under s. 23 of the Trusts Act. There is also the restriction contained in s. 23 of the Trusts Act, namely, that a trustee committing a breach of trust is not liable to pay interest except in the cases mentioned in that section. it was argued by Mr. S. P. Sinha for the respondents that the defendant was liable to pay interest under s. 23(b) of the Trusts Act because there was unreasonable delay in paying the trust money to the beneficiary. We are unable to accept this argument as correct. In our opinion, s. 23(b) contemplates cases there is an obligation on the part of the trustee to pay the trust money to the beneficiary at fixed intervals or on demand. In our opinion, there is no question of breach of trust on the part of the defendant in the present case and the provisions of s. 23(b) of the Trusts Act are not attracted. The view that we have

expressed is borne out by several authorities. In *Blogg v. Johnson* [1867 2 Ch.A. 225], Lord Chelmsford, L.C. stated that "the Court will not charge an executor who has been guilty of delay in accounting, with interest on arrears of income unpaid by him". In that, case. X was entitled to a life income from the estate of her husband, and died in 1861. A bill was filed by her executor, in 1862, against the executor of her husband's will, who had been his partner in business, for an account of income due to her estate; in 1863 accounts were directed. In 1866 a certificate was made, finding that a large sum was due from the husband's executor. It was held by Lord Chelmsford, L.C. that he was not chargeable with interest before the date of the certificate. Again, in *Silkstone and Haigh Moor Coal Co. v. Edey* [[1900] 1 Ch. 167], it was held by the Chancery Court that upon the setting aside of a sale by a trustee of trust property to himself, and the reconveyance of the property to the beneficiaries, it is not the practice of the Court to charge the trustee with interest on the rents and profits received by him since the date of the sale. Interest was, however, charged on arrears in some cases as in *Malland v. Gray* [63 E.R. 744] and *Guildrey v. Stevens* [46 L.T. 761], but these cases fall within the range of another principle of equity that where an executor or a trustee unnecessarily detains money in his hand which he ought either to have invested or to have paid over to the person entitled to it, he will have to pay interest for it. As Lord Chelmsford, L.C. observed in *Blogg v. Johnson* [1867 2 Ch. 225] at p. 228 :-

"Where money is thus improperly retained, it appears to me to be immaterial how the sum has arisen, whether from a legacy, or a distributive share, or a residue, or the arrears of income. In the latter case, the claim for interest is not made on account of the arrears, but for the improper keeping back or a sum of money, from whatever source derived, which the executor or trustee ought to have paid over."

We have already given reasons for holding that the provisions of s. 23(b) of the Trusts Act do not apply to the present case and the plaintiffs are not entitled to claim any interest on arrears of rent and the High Court has fallen into an error in granting such interest.

The next contention raised on behalf of the appellant is that the Commissioner examined the accounts and submitted his report from July 2, 1937 to December 31, 1954 and the High Court was not justified in granting a decree to the plaintiffs for the subsequent period from January 1, 1955 to April 11, 1957 on the basis of the figures found from the Commissioner's report. It was argued that the High Court had no basis for assuming that the same rental income was received by the defendant for the period from January 1, 1955 to April 11, 1957 as for the prior period. In our opinion, there is great force in this argument and we should, in the normal course, remand the case to the High Court for a finding as to the accounts of the subsequent period. Mr. Sinha, however, pointed out that the litigation commenced in 1942 and has already been protracted too long. We do not, therefore, wish to remand the case to the High Court for further inquiry. Having examined the evidence on the record of this case, we consider that, in the circumstances, a sum of Rs. 2,400/- (instead of Rs. 3,100/-) for the period from January 1, 1955 to April 11, 1957 should be granted to the plaintiffs as their share of profits.

We direct that the interest may be granted to the plaintiffs at the rate of 6 per cent p.a. from November 20, 1962 which is the date of the final decree on the amount found due to the plaintiffs.

Two other points were raised by the Solicitor-General in the course of argument. It was pointed out, in the first place, that First Appeal No. 23 of 1957 filed by the plaintiffs in the High Court was barred by limitation and the High Court should have dismissed the appeal on that ground. It was argued that the trial court's judgment was delivered on April 11, 1957 and the appeal to the High

Court was filed on July 22, 1957. A certified copy of the judgment was delivered to the plaintiffs on May 4, 1957 but the endorsement on the certified copy with regard to the date was fraudulently made. An application was made by the defendant to the High Court on November 20, 1961 drawing the attention of the High Court with regard to the endorsement on the certified copy of the judgment. There is, however, no reference in the judgment of the High Court on the question of limitation and it should, therefore, be taken that the point was not pressed on behalf of the defendant at the time of the hearing of the appeal by the High Court. It is, therefore, not possible for us to entertain the argument of the appellant at the present stage, in the absence of any finding of the High Court. The other objection put forward by the Solicitor-General is that the High Court has not taken into account vacancies in the computation of the rental income due to the plaintiffs. It was said that the High Court was wrong in holding that the defendant was liable as a trustee for the rents he ought to have realised even though there was no letting of the building. The Solicitor-General may be right in his argument that the defendant cannot be held liable as a constructive trustee for the rent he has not realised from the tenants and for the premises which were not let out to tenants and which had been lying vacant, but the ground upon which the High Court has made the defendant liable is different. The High Court has taken the view that the defendant has not kept proper accounts of the income of the rents realised from the shops. In the absence of proper accounts it is not possible to accept the case of the defendant regarding the vacancies. In our opinion, the finding of the High Court on this point is not vitiated by any error of law and the argument of the Solicitor-General must be rejected on this aspect of the case.

For the reasons already expressed, we hold that these appeals should be partly allowed with proportionate costs and the decree of the High Court dated November 20, 1962 should be modified to the extent indicated in this judgment.

Appeals allowed in part.

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