

Kok Singh

Vs

Smt. Deokabai

Civil Appeal No. 2354 of 1968

(K. K. Mathew, Syed M. Fazal Ali JJ)

10.12.1975

JUDGMENT

MATHEW, J. -

1. One Deojibhai executed a sale deed on December 30, 1950 in respect of the property in question in favour of the appellant for a sum of Rs. 12,000. No part of consideration was paid at the time of the execution of the sale deed. The appellant promised to pay the amount by May 21, 1951 and covenanted that in case of non-payment, the amount due would be charge upon the property sold. After the execution of the sale deed, the appellant was put into possession of the property and he paid Rs. 3,100 in three instalments. Deojibhai died in 1955 leaving his widow, the respondent, and a son who died subsequently leaving his widow Manibai. Manibai filed a suit in 1956 in the Bombay City Civil Court against Deokabai, the respondent, claiming a share in the property left by her father-in-law, Deojibhai. This suit was compromised and Deokabai was appointed receiver of the estate of Deojibhai with a direction by the Court to realise his assets and to pay a certain amount to Manibai. Deokabai, the respondent, filed the suit from which the appeal arises, on the basis that the appellant defaulted to pay the full purchase money of the property and that she was entitled to the same with interest.

2. The appellant contended that the charge could not be enforced against the property as it formed part of this occupancy holding and that, besides the sum of Rs. 3,100 he has made other payments totalling Rs. 9,500. The trial Court found that no decree could be passed for enforcing the charge against the property as it was held in occupancy right the appellant, but the court gave a personal decree against the appellant for Rs. 21,375. The appellant appealed against the decree to the High Court. The Court found that the respondent was entitled to enforce the charge on the property and granted a decree on that basis, but negatived the claim of the respondent for a personal decree against the appellant on the ground of limitation. In other respects, the decree of the trial Court was confirmed. It is against this decree that the present appeal, by certificate, has been filed.

3. Two points were taken on behalf of the appellant. One was that the Court was not competent to pass a decree creating a charge on the property in view of the fact that the property was held by the appellant as occupancy tenant. This contention was negatived by the High Court on the ground that the prohibition to pass a decree for sale or for closure of any right of an occupancy tenant in his holding was not in existence in 1952 when the suit was filed. We think the High Court was right in its conclusion as Section 12 of the Central Provinces Tenancy Act, 1920, which contained the prohibition, had been repealed before the decree was passed.

4. The second point raised by the appellant was that the respondent did not appeal from the decree

of the trial Court negating her claim in the suit for a charge on the property. It was contended that the High Court was wrong in granting a decree for enforcement of the charge as the decree of the trial Court became final so far as the respondent was concerned as she did not file any appeal therefor. We are unable to accept this contention. Under Order 41, Rule 33 of the Civil Procedure Code, the High Court was competent to pass a decree for the enforcement of the charge in favour of the respondent notwithstanding the fact that the respondent did not file any appeal from the decree. Order 41, Rule 33 provides :

The appellate Court shall have power to pass any decree and make any order which ought to have been passed or made and to pass to make such further or other decree or order as the case may require, and this power may be exercised by the Court notwithstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the respondents or parties, although such respondents or parties may not have filed any appeal or objection :

Provided that the appellate Court shall not make any order under Section 35-A, in pursuance of any objection on which the Court from whose decree the appeal is preferred has omitted or refused to make such order.

5. In *Radhika Mohan v. Sudhir Chandra* (AIR 1937 Cal 10 : 40 CWN 1397 : 168 IC 646), the facts were these : Under an annuity bond, the plaintiff there was granted a certain allowance per month. In a will executed by the executor of the annuity bond, it was provided that the annuity was to be a charge on certain properties. As the annuity allowance fell in arrears, the plaintiff brought a suit to enforce it praying for a charge. The trial Court decreed the suit but did not grant a charge. The lower appellate Court exonerated the defendants from personal liability but held that there should be a charge on the property. In second appeal by the defendants it was contended by them that the lower appellate Court could not create a charge as, in the lower appellate Court the plaintiff had failed to take objection to that part of the trial Court's decree. The High Court held that under Order 41, Rule 33, Civil Procedure Code, the lower appellate Court was competent to vary the decree by providing for enforcement of the charge and that the decree passed by it was right.

6. In *Giani Ram v. Ramji Lal* the Court said that in Order 41, Rule 33, the expression "which ought to have been passed" means "what ought in law to have been passed" and if appellate Court is of the view that any decree which ought in law to have been passed was in fact not passed by the court below, it may pass or make such further or other decree or order as the justice of the case may require.

7. Therefore, we hold that even if the respondent did not file any appeal from the decree of the trial Court, that was no bar to the High Court passing a decree in favour of the respondent for the enforcement of the charge.

8. There is no substance in the contention that all the payments made by the appellant have not been given credit to by the respondent in view of the concurrent findings of the courts.

9. We dismiss the appeal with costs.

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