Lala Shanti Swarup vs Munshi Singh & Ors on 3 January, 1967

Equivalent citations: 1967 AIR 1315, 1967 SCR (2) 312, AIR 1967 SUPREME COURT 1315, ILR 1967 1 ALL 770

Author: V. Ramaswami

Bench: V. Ramaswami, J.C. Shah

PETITIONER:
LALA SHANTI SWARUP

Vs.

RESPONDENT:
MUNSHI SINGH & ORS.

DATE OF JUDGMENT:
03/01/1967

BENCH:
RAMASWAMI, V.
BENCH:
RAMASWAMI, V.
SHAH, J.C.

CITATION:
1967 AIR 1315 1967 SCR (2) 312

ACT:
Indian Limitation Act (9 of 1908), Arts. 83 and 116--Sale of encumbered property--Covenant by purchaser to pay off encumbrance--Failure by purchaser--Loss to vendor--Suit to recover loss--Period of limitation.

HEADNOTE:
The respondents executed a simple mortgage for a sum of Rs. 12,000 in 1914. 'Later.. they sold half of the mortgaged property to the appellants. Out of the consideration a sum required to pay the amount (principal and interest) due to the mortgagees, was left with the appellants. The appellants took possession of the property conveyed, but did not make any payment to the mortgagees. The mortgagees brought a suit for the recovery of the amount due to them and in 1937, a final decree was passed against the respondents. The respondents then applied under the U.P. Encumbered Estates Act, and the liability was

apportioned between the appellants and respondents. In 1943, the Collector took proceedings under that Act for-the liquidation of the debt and directed the respondents to execute a self-liquidating mortgage of three-fourths of their half-share for a sum of about Rs. 20,8000. The mortgage was executed on 25th February 1943. As a result, the respondents had to deliver possession of the three-fourths share of their property to the mortgagees. On 30th July 1943, they filed a suit for the recovery of about Rs. 18000 and interest, representing the loss they sustained owing to the failure of the appellants to discharge the original mortgage of 1914.

On the question whether the suit was time-barred,

HELD : When a conveyance contains a covenant by a purchaser to pay off an encumbrance on the property sold it is nothing more than an implied contract of indeminity. In such a case, in addition to the right to bring an action to have himself put in a position to meet the liability which the purchaser has failed to discharge, the vendor has also a right to bring a suit on the contract of indemnity if, as a result of the purchaser's failure, the vendor incurs a loss. Under Art. 83 of the Limitation Act, 1908 which applies both to express and implied contracts of indemnity, the cause of actio n arises when the vendor was actually damnified.

Therefore, in the present case, as the sale deed in favour of the appellants was a registered document, the respondents had six years under Art. 83 read with Art. 116, for bringing the suit., from 25th February, 1943, when they were actually damnified, and so the suit was within time. The mere fact that a mortgage decree was passed against the respondents in 1937 was not sufficient to start limitation against them as time starts running only when there is actual damnification.

[314 F, B; 315 D-E; 316 D-E, H)

Case law referred to.

JUDGMENT:

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 784 of 1964.

Appeal from the judgment and decree dated January 23, 1959 ,of the Allahabad High Court in First Appeal No. 139 of 1946.

B. C. Misra and P. K Ghose, for the appellant. S. T. Desai, Sardar Bahadur and Arun B. Saharya, for respondents Nos. 1-9.

The Judgment of the Court was delivered by Ramaswami, J. This appeal is brought, by certificate, from the judgment of the High Court of Allahabad dated January 23, 1959 in First Appeal No. 139 of 1946.

Some of the plaintiff-respondents and the predecessor-in- interest of other plaintiff-respondents owned lands in mahal Narain Singh village Khetalpur Sahruiya. They executed a simple mortgage of this property on May 9, 1914 in favour of two persons Bansidhar and Khub Chand, for a sum of Rs. 12,000. Subsequently a sale deed of half of this property which had been mortgaged was executed by the owners (now represented by the plaintiff-respondents) on February 9, 1920, in favour of Shanti Saran, the first appellant and three others, the remaining appellants. The consideration for the sale-deed was a sum of Rs. 16,000 out of which a sum of Rs. 13,500 was left with the purchasers for payment of the amount due to the mortgagees on account of principal and interest under the mortgage dated May 9, 1914. The purchasers entered into possession of the property conveyed to them but neither they nor the appellants made any payment to the mortgagees who in due course brought a suit against the respondents for the recovery of the amount due to them under the mortgage. On February 4, 1937, a final mortgage decree was passed in their favour for a little over Rs. 26,000. Thereafter the respondents made an application under the U.P. Encumbered Estates Act, and by an order dated May 22, 1939, the Special Judge apportioned the liability for the mortgage debt between the respondents and the purchasers as owners of half the mortgaged property. As a result of this apportionment the respondents and the appellants were each held to be liable for the sum of Rs. 14,307/9/6. It was further provided in this order that the respondents would be liable to pay interest at 6 percent per annum on the amount due by them from August 1, 1933 uptil September 28, 1936, and thereafter at 41 per cent per annum. The Collector subsequently took proceedings for liquidation of the debt and on January 30, 1943 the Collector directed the execution by the respondents of a self-liquidating mortgage of three-fourths. of the half share of the property of which they were the owners. That mortgage which was for the sum of Rs. 20,803/4/3 was executed on February 25, 1943, and as a result the respondents had to deliver possession of this share of the property to the mortgagees. The respondents thereafter filed the suit out of which this appeal arises for the recovery of the sum of Rs. 18,500 and interest representing the loss they had sustained owing to the failure of the appellant or of his predecessors-in-interest to discharge the original mortgage of May 9, 1914. This suit was instituted on July 30, 1943. The case of the plaintiff-respondents was that they had actually suffered loss and injury as a result of the breach of trust by the defendant appellant on February 25, 1943 when they were compelled to execute the self-liquidating mortgage and to deliver possession of the property in the proceedings for liquidation of that debt which had been decreed by the Special Judge under the U.P. Encumbered Estates Act. On behalf of the defendant- appellant it was pleaded that the suit was time-barred. The contention was that the claim of the plaintiff-respondents was a claim for compensation for breach of contract which was entered into by a registered document, so that the period of limitation was six years from the date on which the breach of contract had been committed. It was said that the breach of contract should be deemed to have been committed in the year 1920 when the defendant-appellant undertook to pay the money to the mortgagees and failed to do so within a reasonable time. The trial court over-ruled the objection of the defendant and decreed the suit. The defendant appealed to the High Court. The Division Bench which heard the appeal in the first instance referred the question of limitation to a Full Bench of five Judges which held that the suit was governed by Art. 83 read with Art. 116 of the Limitation Act and that time ran from February 25, 1943 which was the date upon which the respondents were compelled to execute a self-liquidating mortgage for the purpose of satisfying the mortgage debt. On receipt of the decision of the Full Bench, the Division Bench of the High Court dismissed the appeal and affirmed the judgment of the trial court.

The question to be considered in this appeal is whether the High Court was right in taking the view that in the circumstances of the present case the suit is governed by Art. 8 3 read with Art. II 6 of the Limitation Act and whether the terminus a quo for the limitation was February 25, 1943 which was the date upon which the respondents were compelled to execute a self-liquidating mortgage. On behalf of the appellant Mr. B. C. Misra put forward the argument that a provision in a conveyance whereby the purchaser agrees to pay off an encumbrancer does not give rise to any contract of indemnity and that the appropriate article of Limitation Act was Art. 116 and not Art. 83 and time began to run from the date from which the covenant to pay off the encumbrancer is broken. We are unable to accept this argument as correct. If a conveynace contains a covenant by a purchaser to pay off an encumbrance on the property sold the failure of the purchaser to do so may give rise to two different causes of action. In the first place, the failure of the purchaser to discharge the encumbrance within such time as is provided expressly or by implication entitles the vendor to bring an action to have himself put in a position to meet the liability which the purchaser has failed to discharge. In such a case, limitation will run under Art. 116 of the Limitation Act (or under Art. II 5 if the sale deed is unregistered) from the date on which the purchaser ought to have paid off the mortgage. In the second place, it is also open to the vendor to bring a suit on the contract of indemnity if as a result of the failure of the purchaser to discharge the encumbrance the vendor incurs a loss. It was contended on behalf of the appellant that there was no express contract of indemnity in the sale deed executed on February 9, 1920 in favour of the appellant. But the contract of indemnity is implicit in this case because of the covenant on the part of the purchaser to pay off the previous encumbrance on the property sold. Under s. 124 of the Indian Contact Act "a contract of indemnity" is a contract by which one party promises to save the other from loss caused to him by the conduct of the promisor himself, or by the conduct of any other person. Under Art. 83 of the Limitation Act a suit based upon the contract of indemnity is required to be brought within three years from the time when the plaintiff was actually damnified. In the present case there is no express contract of indemnity. But, in our opinion, the provisions of Art. 83 are also applicable to a case where the contract of indemnity is implied and not express. It was observed by the Judicial Committee in Musammat Izzat-un- Nissa Begam v. Kunwar Pertab Singh (1) that a contract of indemnity may be express or implied and if the purchaser covenants with the vendor to pay the encumbrances, there is nothing more than a contract of indemnity. At page 208 of the Report the Judicial Committee clearly expressed the proposition as follows :

> "it seems to depend on a very simple rule. On the sale of property subject to encumbrances the vendor gets the price of his interest, whatever it may be, whether the price be settled by private bargain or determined by public competition, together with an indemnity against the incumbrances affecting the land. The contract of indemnity may be express or implied. If the purchaser covenants with the vendor to pay the incumbrances, it is still nothing more than a contract of indemnity. The purchaser takes the property subject to the burthen attached to it. If the incumbrances turn out to the invalid, the vendor has nothing to complain of. He has got what he bargained for. His indemnity is complete. He cannot pick up the burthen of which the land is relieved and seize it as his own property. The notion that after the completion of the purchase the purchaser is in some way a trustee for the vendor of the amount by which the existence, (1) 36 1. A. 203.

or supposed existence, of encumbrances has led to a diminution of the price, and liable, therefore, to account to the vendor for anything that remains of that amount after the encumbrances are satisfied or disposed of, is without foundation. After the purchase is completed, the vendor has no claim to participate in any benefit which the purchaser may derive from his purchase. It would be pedantry to refer at length to authorities. But their Lordships, under the circumstances, may perhaps be excused for mentioning Tweddel v. Tweddel [(1787) 2 Bro C.C. 151)], Butler v. Butler [(1800) 5 Ves. 534 e.)], and Waring v. Ward[(1802) 7 Ves. 332)]."

This decision was followed by the Full Bench of the Allahabad High Court in Tilak Ram v. Surat Singh(1). In our opinion, the principle applies to the present case and we accordingly hold that the covenant undertaken by the predecessor-in-interest of the appellant was not only one to purchase the vendor's property but also one to relieve the vendor from the liability of the mortgage, and in that sense there was an implied contract of indemnity in favour of the vendor. It follows therefore that Art. 83 of the Limitation Act applies to this case and as the sale deed is a regi- stered document the plaintiff has six years for bringing the suit from the time when he is damnified or actually suffers loss. The view that we have expressed is borne out by a long catena of authorities.-Kumar Nath Bhuttacharjee v. Nobo Kumar Bhuttacharjee,2 Ratan Bai v. Ghasiram Gangabisan Wani(3) Harakchand Tarachand V. Sumatilal Chunilal(4) Gulabrao Vithoba v. Shamrao Jagoba,(5) Naima Khatun v. Sardar Basant Singh,(6) Ram Barai Singh v. Sheodeni Singh(7) and Venkatanarayaniah v. Subramania Iyer(8). It was then contended by Mr. B. C. Misra that even if there was a contract of indemnity the cause of action for the plaintiff arose on February 4, 1937 when the final mortgage decree was passed and not on February 25, 1943 when the plaintiff was dispossessed. It was argued that the suit must be held to be brought beyond the period of limitation and the plaintiff was not entitled to succeed. It is not possible for us to accept this argument as correct The vendees, in the present case, covenanted to the vendors not only to purchase the property mentioned in 'the sale deed but also to relieve the vendors from the liability of the mortgages and in that sense there was an implied contract to indemnify the vendors. The cause of action in such a case arises when the plaintiff-vendors are actually damnified. The mere fact that a mortgage decree has been ,obtained against the plaintiff is not sufficient to put the statute (1) I.L.R. [1938] All. 500.

(3) I.L.R. 55 Bom, 565.

(5) A.I.R. 1948 Nag. 401.

(7) 16 C.W.N. 1040.

(2) I.L.R. 26 Cal, 241.

(4) 33 Bom, L.R. 1200.

(6) I.L.R. 56 All. 766.

(8) 74 Indian Cases 209.

in motion. In other words, the statute runs not when the event. happens which caused the loss but on the actual damnification. "Where the covenant is to indemnify or save harmless, no action can be brought till some loss has arisen; so it is also where the covenant is to acquit from damage by reasons of a bond or some particular thing; and in either case the proper plea is non damnificatus". (1 Wms. Saund. 117, n. 1;). In Collinge v. Heywood (1) the plaintiff at the request of the defendant prosecuted an action, on receiving an undertaking to indemnify him from the said distress, actions, costs, damages, and expenses, which are now, or may be hereafter, commenced or otherwise incurred by reason of the claim of the distraining party. The plaintiff incurred costs of the suit, and his own attorney thereafter delivered him a bill on account of them. But it was held by the King's Bench that he was not damnified till he had paid the bill. In the present case, the damage occurred to the plaintiffs not on February 4, 1937 when the final mortgage decree was passed in favour of the mortgagees but on February 25, 1943 when the Collector directed the execution by the plaintiffs of a self- liquidating mortgage of three-fourths of' the half share of the property of which they were the owners. We are therefore of the opinion that, 'in the present case, time runs under Art. 83 of the Limitation Act from February 25, 1943 when the plaintiffs were compelled to execute the self-liquidating mortgage for the purpose of satisfying the claim of the mortgagees.

For the reasons expressed we hold that there is no merit in this appeal which is accordingly dismissed with costs.

V.P.S. Appeal dismissed'

(1) (1839),9 A. & E.B. 633.