Nagoo And Anr. vs Pt. Shiv Dularey Dixit And Ors. on 21 July, 1955

Equivalent citations: AIR1955ALL665, AIR 1955 ALLAHABAD 665, ILR (1956) 2 ALL 652

JUDGMENT

Agarwala, J.

1. This is a defendants' appeal arising out of a suit for sale on a mortgage. The mortgage in question was executed by one Kalika for himself and as guardian of his two sons, Thakur and Kedar and also by his two other sons, Nagu and Bhola who were then major. Nagu and Bhola mortgagors filed a suit under Section 33, U. P. Agriculturists' Relief Act, for a declaration of the amount due to the mortgagee under the mortgage.

This was in 1942. The plaintiffs claimed that they were agriculturists and entitled to sue for accounts. The parties came to terms and entered into a compromise which may be quoted here in full:

> "(a) The total balance due under the mortgage deed, the basis of the suit, has been settled at Rs. 700/- regarding mortgage deed and Rs. 25/-lawyer's fee of the defendant, total Rs. 725/-,
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> (b) The full amount settled viz. Rs. 725/-mentioned above between the plaintiffs and the defendants 2 and 3 will be paid to defendant No. 1 through his counsel by hand in 2 monthly instalments before court and the first instalment will become due on the 19th of September 1942 and the second instalment on 19th October, 1942.
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> (c) In case of default of payment of the instalments mentioned above the plaintiffs' suit shall be deemed to be dismissed.
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> (d) Parties will bear their own costs.

2. Parties therefore pray that the suit may be decided in terms of the compromise mentioned above.

Dated 19th August, 1942."

Therefore a decree in terms of the compromise was passed.

2. The plaintiffs of that suit paid one instalment according to the terms of the compromise but failed to pay the second instalment in time. We are told that the amount of the second instalment was ultimately deposited in Court one month after the due date, but the creditor did not withdraw the amount. On 13-7-1944 he instituted a fresh suit which has given rise to the present appeal.

In this suit he gave credit to the amount of the first instalment which had been paid to him and sued for the balance of the amount that was due under the mortgage. He did not confine himself to the amount of Rs. 700/- as had been settled in the compromise in the previous suit. The suit was for recovery of Rs. 800/-.

3. The defence of the mortgagors was that, in view of the compromise in the previous suit, even though there was default in making the payment of the second instalment, since one of the instalments had been paid, the default clause in the compromise did not come into operation and the previous suit did not stand dismissed in accordance with that clause, with, the result that the present suit was not maintainable.

It was also urged that, in any case, the agreement in the previous suit that the amount of the mortgage was to be taken as Rs. 700/- bound the parties in the present litigation and lastly it was urged that since the defendants were agriculturists, they were entitled to the relief under the Agriculturists' Relief Act. It may be mentioned at this stage, that in the plaint of the second suit the plaintiffs made a declaration under Section 4, U. P. Debt Redemption Act, but at the same time stated that this declaration was made by way of precaution in case the court should hold that the defendants were agriculturists.

4. The suit was dismissed by the trial Court but was decreed 'by the lower appellate Court. A second appeal to this Court was dismissed by a learned single Judge of this Court.

5. In this special appeal three points have been urged before us. It has been urged that the defendants, having paid one of the two instalments, it could not be said that the default clause of the compromise came into operation. In our opinion this contention has no force.

The clause in the compromise that "in case of default of payment of the instalments mentioned above the plaintiffs' suit shall be deemed to be dismissed"

> clearly meant that if the defendants failed to pay either of the instalments within the time stipulated the plaintiffs' suit shall be deemed to be dismissed; The word 'instalments' in the context meant either of the two instalments.
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> If the meaning were as alleged by the appellants it would lead to a very strange result. The defendants could claim not to pay the second instalment at all after paying the first and yet say that the suit could not be deemed to be dismissed. We do not think that this could have been the intention of the parties.

6. The next point urged is that, even though the previous suit would be deemed to have been dismissed' because of the non-payment of one of the instalments, nevertheless the amount due under the mortgage was settled between the parties to be a sum of Rs. 700 and that the plaintiff was bound by that settlement. Learned counsel has urged that the amount thus settled is 'res judicata' between the parties in the present case.

He has relied upon several decisions, viz. --'Maina Bibi v. Vakil Ahmad', AIR 1925 PC 63 (A); -- 'Raghunath Singh v. Sheo Pratapsingh', AIR 1929 All 409 (B); -- 'Secretary of State v. Ateendra-nath', 63 Cal 556 (C) and has referred to Spencer Bower on 'res judicata' at pp. 23 and 24. In AIR 1925 PC 63 (A) and AIR 1929 All 409 (B) it was held that, even though a redemption suit was ultimately dismissed because the mortgage-money was not paid by the mortgagor within the time allowed by the Court, yet the decisions on several issues decided by the Court in the suit were binding in a subsequent suit between the parties, where the same questions were agitated afresh. In 63 Cal 550 (C) it was held that "a decree passed by consent is as effective a bar to a subsequent suit as one passed on contest, not only with reference to the conclusions arrived at in the previous suit, but also with regard to every step in the process of reasoning on which the said conclusions are founded."

There can be no doubt about these propositions. A judgment by consent or by default raises an estoppel just in the same way as a Judgment after the Court has exercised a judicial discretion in the matter. The basis of the estoppel is that, When parties have once litigated a matter, it is but fair that litigation should come to an end.

And, if they agree upon a result, or upon a verdict or upon a judgment, or upon a verdict and judgment, as the case may be, an estoppel is raised as to all the matters in respect of which an estoppel would have been raised by judgment if the case had been fought out to the bitter end. The same proposition has been laid down in Spencer Bower on 'res judicata' :

> "Any judgment or order which in other respects answers to the description of 'res judicata' is nonetheless so because it was made in pursuance of the consent and agreement of the parties."

7. The case of a compromise falling through, however, by reason of the default of one of the parties in not carrying out its terms, is quite a different matter. In the case of a compromise the presumption is that it is arrived at because there has been a give and take between the parties.

All 'the terms of a compromise are presumably to be taken together and unless the contrary is expressed in the compromise itself or necessarily implied in the circumstances of a particular case an individual term of the compromise cannot be picked out by one party and the other party cannot be said to be bound by it in spite of the fact that the compromise, as a whole, has fallen through by default of the very party who wishes to take advantage of its terms.

The amount of Rs. 700/- which was fixed by compromise to be due under the deed of mortgage was presumably settled because the defendant agreed to pay it quickly in two instalments. It may or may

not have been agreed upon as the, amount due under the mortgage if the plaintiff were told that the amount may not be paid within the time agreed.

As has been found in the present case, a sum much larger than the amount of Rs. 700/- was due under the mortgage-deed. We are, therefore, not prepared to bind the plaintiff with the settlement arrived at between the parties in the previous suit and the figure of Rs. 700/- as the amount due cannot be taken to be binding on the plaintiff on the ground of 'res judicata'.

8. Lastly it was urged that the appellants were agriculturists and the lower appellate Court has recorded a finding that there is no evidence on the record to show that the defendants-appellants were agriculturists. It was, however, urged that since the plaintiff in the present suit gave a declaration under Section 4, U. P. Debt Redemption Act, it must be presumed that he accepted the position that the defendants were agriculturists.

This contention has no force. As already stated, the plaintiffs clearly alleged that the defendants were not agriculturists. They gave a declaration under Section 4, Debt Redemption Act, only to safeguard their Interest in the event of the court finding the defendants to be agriculturists.

9. There is no force in this appeal. It is dis missed with costs. .

As the plaintiffs in the present case hare not given credit for the amount of the second In stalment which, we are told, the defendants paid in the previous suit and the amount is in deposit with the court, the defendants-appellants are en titled to withdraw that amount from the court unless it has been attached in execution proceedings.