

Hathi Ram vs Hazi Mohammad on 4 March, 1953

Equivalent citations: AIR1954ALL141, AIR 1954 ALLAHABAD 141

ORDER

1. This is a defendant's application against an order of the learned Civil Judge of Gorakhpur refusing to stay further proceedings in a suit.

2. The present suit was brought by the plaintiff on the basis of a mortgage executed by the defendant on 5-1-1939. The mortgage was in favour of one Mitra Nand and the plaintiff has purchased the mortgagee rights from Mitra Nand. Before the institution of the present suit the mortgagors filed a suit numbered as Suit No. 1 of 1944 in the same Court against the mortgagee under Section 33, U. P. Agriculturists' Relief Act for accounting. That suit, filed by the mortgagors, was dismissed by the learned Civil Judge and an appeal is now pending in this Court against the decision of the Civil Judge. In the present suit an application was made before the learned Civil Judge under Section 10, Civil P. C. praying that the hearing of the present suit be stayed, in view of the fact that the previous suit between the same parties was pending in appeal before the High Court. The learned Civil Judge dismissed this application and held that Section 10, Civil P. C. did not apply to the facts of this case. The present revision has been filed against the order of the learned Civil Judge refusing to stay further proceedings in the present suit.

3. A preliminary objection has been taken to the hearing of this revision on the ground that the order of the learned Civil Judge does not amount to a "case decided" within the meaning of Section 115, Civil P. C. It is not necessary to decide this point, as, in our opinion the order of the learned Civil Judge is correct and he rightly refused to stay further proceedings in the suit.

4. The learned counsel for the applicant has contended that the question arising in the two suits is directly and substantially the same, because in both the suits the main question for decision was as to what is the amount due on the mortgage in question; and the Court below was, therefore, bound to stay further proceedings in the present suit because Section 10, Civil P. C. contains a mandatory direction to the effect that further proceedings in the subsequent suit must be stayed if the matter directly and substantially in issue in the two cases is the same. He has further contended that an appeal is a continuation of a suit and the previous suit should be deemed to be pending in this Court. We agree with the learned counsel that an appeal is a continuation of a suit and Suit No. 1 of 1944 should still be deemed to be pending in appeal. The proposition is well settled and it is not necessary to cite any authorities in support of the proposition. The main point, therefore, for decision is whether the matter in issue in the previous suit is also directly and substantially in issue in the present suit. The previous suit, as stated above, was filed under Section 33, U. P. Agriculturists' Relief Act for a declaration of the amount due to the opposite party from the applicant. In the present suit the trial Court will also have to determine whether the property should be sold in enforcement of the mortgage. The previous suit was dismissed on the ground that the applicant was not an agriculturist and therefore not entitled to bring a suit under Section 33, U. P. Agriculturists' Relief Act in case the Court had declared what amount was due under the mortgage,

the mortgagee would have been entitled to apply under Sub-section (2) of Section 33 for a decree in his favour. But the mortgagee is not bound so to apply; it is open to him to obtain a decree under Section 33, Sub-section (2) or to bring a, separate suit for sale of the property in enforcement of the mortgage. In the present case the mortgagee opposite party has exercised the latter option. The position, therefore, is that in the present suit the Court will have to determine the question of the saleability of the mortgaged property. The present suit will have to proceed to a decree, in any case, and it is only in execution of the decree that would be passed in the present case that the mortgagee would be able to realize the amount due to him. Irrespective of the result of the previous suit, the present suit has to be tried in order to give a relief to the mortgagee opposite party. In our opinion, under these circumstances, it cannot be said that the matter in issue in the two suits is directly and substantially the same.

5. It has been held in a number of cases that the words "matter in issue" in Section 10, Civil P. C. mean the entire matter in controversy and not one of several issues in the case. In -- 'Gargi Din v. Debi Charan', AIR 1929 All 805 (A), it was held by this Court that the words "matter in issue" could not be held necessarily to mean the subject-matter in dispute, but they must clearly mean the entire matter in controversy and not one of several issue in the case. This case was followed in --'Mt. Nasiban Bi v. Mt. Iqbal Begum', AIR 1935 Lah 816 (B). The Madras High Court has taken the same view, vide -- 'Murugesu Mudaliar v. Bala-sundarammal', AIR 1935 Mad 24 (C), -- 'Mahaganpathi v. Natesa Iyer', AIR 1935 Mad 112 (D) & --'Munuswami v. Raghupathi', AIR 1940 Mad 7 (E). The High Court of Calcutta has also taken the same view in a case reported in -- 'Naskarpara Jute Mills Co. Ltd. v. Nirmal Kumar', AIR 1941 Cal 434 (F).

6. The learned counsel for the applicant relied on a case of this Court reported in -- 'Wahid-un-nissa Bibi v. Zamin Ali Shah', AIR 1920 All 70 (G). In this case' one of the learned Judges was of the view that Section 10, Civil P. C. applied to the facts of that case and the proceedings were ordered to be stayed, but the other learned Judge only observed that if Section 10, Civil P. C. did not apply the proceedings of the second suit could be stayed under Section 151, Civil P. C. The facts of the case were different, but certain observations made in the case were relied upon by the learned counsel. There does not appear to be any discussion of the question whether the matter in dispute meant the entire matter in controversy or only one of the matters in controversy. No other case was cited by the learned counsel for the applicant in support of his proposition that Section 10, Civil P. C. applied to the facts of the present case.

7. The Court below relied upon a case reported in -- 'Behari Lal v. Mt. Durga', AIR 1940 Oudh 440 (H). The facts of the case are absolutely similar to those of the present case and the two suits in that case were similar to the two suits in the present case, that is, one was a suit for the declaration of the amount due. It was filed by the mortgagor under Section 33, U. P. Agriculturists' Relief Act, and the other suit was a suit brought by the mortgagee to enforce his mortgage. It was held in that case that the proceedings of the latter suit were not to be stayed under Section 10, Civil P. C. because the Court seized of the first suit had no jurisdiction to pass a decree which could be obtained in the subsequent suit. It was observed that in the suit under Section 33 there could not be a decree for the sale of the property until the mortgagee filed an application under Sub-section (2), and as the mortgagee in that case had filed a separate suit, he was not likely to file an application under

Sub-section (2) of Section 33. It was said that for this reason the Court seized of the case under Section 33 had no jurisdiction to pass a decree which the mortgagee claimed in the subsequent suit. With all respect to the learned Judges, we find it difficult to accept this reasoning. The words used in Section 10 are a Court "having jurisdiction to grant the relief claimed". In our opinion, what is to be seen is the jurisdiction of the Court to grant a relief claimed, and it is difficult to say that the Court seized of the case under Section 33 had no jurisdiction to grant the relief. In case the mortgagee filed an application under Sub-section (2), the Court could pass a decree in favour of the mortgagee. The jurisdiction in the Court to pass the decree was not wanting; but, of course, it could not grant the relief unless the mortgagee claimed that relief. So that as it may, we consider it safer to base our decision on the ground that the matter directly and substantially in issue in the two cases is not the same.

8. We agree with the Court below in the order that that Court has passed, though for different reasons. The revision is consequently dismissed with costs.