

Inayat Ali And Anr. vs Natthu Khan on 24 September, 1952

Equivalent citations: AIR1954ALL18, AIR 1954 ALLAHABAD 18

ORDER

Kaul, J.

1. This is an application for revision of an order passed under Order 23, Rule 1, Civil P. C. by the Sub-Divisional Officer, Shahabad (Hardot district) in a case under Section 12, Agriculturists' Relief Act. The material facts are as follows :

2. On 29-11-1950, an application was made by one Natthu Khan for redemption of a mortgage alleged to have been executed by his father Yusuf Khan in 1920 in favour of the opposite parties, Inayat Ali and Basharat Ali. A number of defences were taken to the claim for redemption. ONE of these was a total denial of the alleged mortgage-Natthu Khan contended in reply to this defence that the mortgagees had instituted a suit in the Court of the Munsif Shahabad for possession of the mortgaged property on the basis of that deed of mortgage and obtained a decree in that suit in 1931. He applied for summoning the record of the case on which that decree was passed. His contention was that the original mortgage deed could be found in that record. It appears, however, that he was remiss in summoning of his evidence. Accordingly, on. 27-4-1951, Natthu Khan made an application for permission to summon and adduce some further evidence in support of his averment. This application was not disposed of till 10-5-1951, when evidence that was ready and available was recorded. The application for permission to summon and adduce further evidence was dismissed, on that date and the case was closed. Thereupon Natthu Khan put in an application under Order 23 Rule 1, Civil P. C. praying for permission to withdraw the suit with liberty to bring a fresh suit. It was vaguely mentioned in his application that there were certain formal defects ('naqais canuni') on account. of which the suit was bound to fail. The learned Sub-Divisional Officer without considering what these defects were, or if they were of a character on the basis of which permission to withdraw the suit with liberty to bring a fresh suit could be given under Order 23 Rule 1, Civil P. C., allowed the application and granted permission to withdraw the suit with liberty to bring a fresh suit. Dissatisfied with this order, the mortgagees have come up in revision.

3. It was held in -- 'Abdul Ghafoor v. Abdul Raham', A. I. Rule 1951 All 845 (FB) (A), following a number of cases of the Oudh Chief Court, that the words "other sufficient grounds" in Order 23 Rule 1 (2) (b), Civil P. C. cover grounds analogous to those mentioned in Rule 1 (2) (a). It was further held that if the Court purports to exercise discretion under Clause (b) but the grounds are not analogous to the defects referred to in Clause (a), the discretion, even though judicial, can be interfered with under Section 115, Civil P. C. It has been held in a number of cases that if a court disposes of an application under Order 23 Rule 1. Civil P. C. Without applying its mind to the determination of the question whether the defects referred to as the basis for the prayer to withdraw the suit are of the

character mentioned in Order 23 Rule 1, Civil P. C., its order is without jurisdiction. In the present case the learned Sub-Divisional Officer did not apply his mind to this aspect of the matter. No specific reference was made in the application of 10-5-1951, to any defect on account of which the suit was bound to fail, nor do we find any reference to such defects in the order passed by the learned Sub-Divisional Officer. In these circumstances, the order granting permission to withdraw the suit with liberty to bring a fresh suit is set aside.

4. I am of opinion, however, that in the circumstances of the case permission should be granted to Natthu Khan to substantiate the averments made by him in his application of 27-4-1951. It is true that the order dismissing that application has not been challenged by an application for revision. All the same, as I am interfering with the order passed upon the application for permission to withdraw the suit with liberty to bring a fresh suit, which was passed very shortly after the order for dismissal of the application of 27-4-1951, it will not be proper to allow the order disposing of the application of 27-4-1951, to stand. I do so because I am of opinion that the two applications appear to have been disposed of practically simultaneously and the learned Sub-Divisional Officer was influenced in passing each of these orders by what he intended to do with regard to the other application. I am satisfied that the order dismissing the application of 27-4-1951, was passed by the learned Sub-Divisional Officer not wholly uninfluenced by the view which he entertained of the authority conferred upon him by Order 23 Rule 1, Civil P. C. I am of opinion that in the view of the learned Sub-Divisional Officer it was not a matter of any consequence what the defects were upon which permission to withdraw the suit with liberty to bring a fresh suit was asked for. Had he taken the correct view of the provisions of Order 23 Rule 1, Civil P. C., in all probability, he would not have dismissed the application of 27-4-1951.

5. For the reasons given above I allow this application, set aside the order granting permission to withdraw the suit with liberty to bring a fresh suit and direct that the case go back to the Sub-Divisional Officer, Shahabad, with the direction that he should dispose of it in accordance with the law. The applicant Natthu Khan will be given an opportunity to summon and adduce evidence in support of the averments made by him in his application of 27-4-1951, and such other evidence, if any, which the sub-Divisional Officer may consider proper. Of course, if any evidence is adduced by Natthu Khan, the present petitioner shall be allowed an opportunity to rebut the same. The applicant shall get his costs from the opposite party. The order dated 13-12-1951, is vacated.

6. The result of the order passed by me today is that when the present case goes back to the lower Court there will be pending in the Court of the Sub-Divisional Officer two applications by Natthu Khan made under Section 12 of the Agri culturists' Relief Act for redemption of the same mortgage. It will be open to Natthu Khan not to proceed with the second of these applications if he is so advised.