Privy Council Appeal No. 62 of 1938

Khan Bahadur Mian Feroz Shah - - - - *Appellant*

v.

Honourable Nawab Sir Mohammad Akbar Khan - *Respondent*

FROM

THE COURT OF THE JUDICIAL COMMISSIONER OF THE NORTH WEST FRONTIER PROVINCE

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 23RD MAY, 1939

Present at the Hearing:

LORD RUSSELL OF KILLOWEN.
LORD ROMER.
SIR LANCELOT SANDERSON.
SIR GEORGE RANKIN.
MR. M. R. JAYAKAR.

[*Delivered by* SIR GEORGE RANKIN]

This appeal is brought by the plaintiff from a decision (23rd May, 1936) of the Court of the Judicial Commissioner for the North-West Frontier Province affirming a decree of the Subordinate Judge of Peshawar dated 25th March, 1935, whereby the appellant was awarded Rs.8,110. The appellant complains of this sum as inadequate; partly but not solely, on the ground that a three-year period of limitation has been applied to his claim and not a six-year period under article 120 of the schedule to the Limitation Act of 1908.

On the 12th March, 1917, one Sohbat Khan, who was the owner of a considerable area of land in the village of Sheikhu in the Peshawar District, mortgaged 1,011 kanals 8 marlas of his land to the appellant and his brother. The mortgage was for a term of 10 years and was a mortgage with possession, the sum secured being Rs.44,233. Possession was not, in fact, taken by the mortgagees, but by a second document of even date the mortgaged land was leased by the mortgagees to Sohbat Khan for the same term at a rent of Rs.1,224 per annum which was taken to represent the yearly interest on the mortgage debt. The appellant, for reasons which need not here be detailed, became solely entitled to the mortgage. On the 31st March, 1920, the respondent obtained against Sohbat Khan a money decree and thereafter applied for and obtained attachment of the land above mentioned and of certain other land. As Sohbat Khan was a member of an agricultural tribe the sale of his land was prohibited by section 16 of the Punjab Alienation

of Land Act, 1900. On some date prior to June, 1927, which does not appear from the record, the Naib Tehsildar of Charsadda was appointed by the Revenue Court to be Receiver of the land of Sohbat Khan, including the 1,011 kanals now in question. On the 6th June, 1927, the Receiver applied to the Court of the Collector for a warrant of possession in order that he might lease out the land and thereby realise money on account of the respondent's judgment debt. An order for possession was granted on 16th June, 1927, and on the 21st July, 1927, possession of the land was delivered to the Receiver. The appellant, on 16th August, 1927, lodged objections against this in the Court of the Collector, but his objection was disallowed by an order dated 17th May, 1928, on the ground that the appellant, though the mortgagee, was not in possession of the land; and execution was permitted to proceed, subject to any order that might be obtained in a civil suit.

It appears that in 1924 the appellant's mortgage of 1917 had been renewed at a higher figure and that a new lease of the land to Sohbat Khan was granted by the appellant for four years at a rent of Rs.2,000, with conditions which entitled the appellant to cancel the lease in the event of failure to pay the stipulated rent or to comply with any other term of the lease. This lease by its terms extended until June or July, 1928. In July, 1928, the Receiver reported to the Assistant Commissioner of Charsadda that a proper rent for the land of which he had obtained possession would be Rs.3,000, and prayed for sanction to the grant of a lease to four named persons in equal shares for a period of one year. This lease was sanctioned and was continued from time to time.

On the 25th April, 1929, the appellant sued, in the Court of the District Judge, Peshawar, Sohbat Khan, the present respondent, the lessees and the respondent's brother, asking that it might be declared that the land was not liable to attachment at the instance of the respondent, and asking for possession of the land by ejectment of the Receiver. By his plaint, the appellant, among other reliefs, claimed a declaration that the relation of landlord and tenant still subsisted between himself and Sohbat Khan. This suit, on the 22nd August, 1929, was dismissed by the District Judge and an appeal to the Judicial Commissioner's Court was dismissed on the 8th March, 1930. The Judicial Commissioner held that the present appellant was not entitled to obtain a decree for possession of the land because his mortgage from Sohbat Khan was not a usufructuary mortgage, but only a simple mortgage which did not entitle him to possession of the land. The matter was taken on appeal to His Majesty in Council, and the judgment of this Board, delivered on 11th April, 1933, was to the effect that the appellant's mortgage deed entitled him to enter into possession of the land, and that a decree should be made giving him possession as mortgagee of the 1,011 kanals 8 marlas now in question and of a further 140 kanals claimed in that suit.

It is a noticeable feature of the appellant's plaint in that case, that it contained no claim for damages against the present respondent in respect of the possession taken by the Receiver of the 1,011 kanals 8 marlas. Indeed one of his prayers for relief was in the following terms:—

> " That in the event of the relation of landlord and tenant being held to exist between the plaintiff and defendant No. 1 Judgment-Debtor, separate proceedings with regard to his ejectment and for recovery of the share of produce in accordance with the terms of the lease deed will be taken in a court of competent jurisdiction."

On the 2nd August, 1933, however, he brought the suit out of which the present appeal arises. In this suit the respondent is the sole defendant and the case made against him by the amended plaint is that having obtained a decree from the Revenue Court on 31st March, 1920, he applied in 1920 and in 1924 for attachment of the 1,011 kanals 8 marlas aforesaid; that he had done this without reserving the rights of the present appellant; that in these proceedings the Receiver had dispossessed the appellant, and that this was an illegal act for which the respondent was liable to pay to the appellant " the sum equivalent to the price of the produce as damages which should have accrued to the plaintiff from the land in dispute ". Certain sums are mentioned in the plaint as due upon this basis for the period 1927 to 1933 according to the record of crops kept by the village accountant or patwari. The cause of action in respect of damages was pleaded as arising both on the 10th June, 1927, which is said to have been the date of the attachment, and on the 19th April, 1933, the date of the decision of the Privy Council. Rs.66,000 was the figure claimed " on account of price of produce including interest on account of damages ". By a further pleading, the appellant stated that the plaintiff's cause of action was not that the defendant took possession of the property against the will of the plaintiff, but that the defendant procured wrongful attachment wilfully or without caring to find out whether the plaintiff's property is attachable or not.

The Subordinate Judge on 6th December, 1934, held that, for purposes of limitation, time did not run against the appellant until the date of the Board's judgment in 1933, that article 109 of the schedule to the Limitation Act applied to the case, that the possession of the Receiver was the possession of the respondent and that it was wrongful as against the appellant. On this view he awarded mesne profits for three years prior to the date of the present plaint. The lessees from the Receiver had paid Rs.9,000 in three years out of which Rs.890 were allowed to Sohbat Khan for maintenance. Accordingly the learned Subordinate Judge put the mesne profits payable at the figure of Rs.8,110.

On appeal, the Court of the Judicial Commissioner took the view that the respondent had not acted illegally in applying for execution, but that he was in equity bound to pay to the appellant any profits which he had obtained as a result of erroneous decisions of the Revenue and Civil Courts

whereby the Receiver had been kept in possession. The appellant's claim for damages was negatived as also was his claim for mesne profits as defined in the Civil Procedure Code, but his suit was held to be well founded in so far as it was one for profits of immoveable property wrongfully received by the defendant, that is, actually received by the defendant. As such it was held to be governed by article 109. The learned Subordinate Judge had omitted to include any interest in the sum which he had decreed, but he had taken into account more land than the 1,011 kanals 8 marlas, and upon balance a rectification of his figure would not have been in favour of the appellant. Accordingly the decree of the trial Court was sustained (23rd May, 1936).

Before their Lordships a number of contentions have been urged by Mr. Lionel Cohen in a clear and thorough argument on behalf of the appellant.

The evidence which was adduced before the trial Court to support a contention that the lease granted by the Receiver had been granted at a rent unduly low, was of a manifestly unreliable character, and the learned trial Judge appears to have given no weight to it. It is difficult in the circumstances to see how wilful default could be imputed to the respondent in this regard, as the matter was under the control of the Revenue Court, which appears to have made careful inquiry. The sum decreed by the trial Court being sufficient to include interest in accordance with the Code, the proper amount to be awarded does not turn upon any distinction between mesne profits on the one hand and money had and received upon the other, unless the appellant can claim to recover further sums by showing that the period of limitation applicable to the case is longer than three years.

Their Lordships are not prepared to depart from a long series of decisions to the effect that article 109 applies to a claim for mesne profits. Whether it is necessary to regard the language of the article as limiting its application to claims to such profits as have actually been received and requiring recourse to some other article to be had where part of the sums claimed are claimed on the ground of wilful default is a question which in the present case does not arise.

It was contended by Mr. Cohen on the strength of *Saroda Prosad Chatterjee* v. *Saudamini Debya* (1906, 3 Cal. L.J. 182) that article 109 was inapplicable to the case by reason that the Receiver having been appointed by the Court there was nothing wrongful in the respondent's receipt of the rents, and that accordingly article 120 should be applied to the present case. Their Lordships, however, are unable to appreciate how the appellant can consistently maintain that the respondents receipt of the profits was not wrongful unless he confines himself to a claim for money had and received which would fall under article 62. The reasoning of the case just cited appears to their Lordships to have been

answered in the case of *Saraj Ranjan Choudhury* v. *Premchand Choudhury* (1916, 22 Cal. Weekly Notes 263), in which case it was pointed out that as the words in the third column of article 109 stood before 1908, even if the possession had been obtained under a decree of Court which was afterwards set aside on appeal, the article would have applied and the profits would have been said to have been wrongfully received. The omission from the third column of certain words in 1908 was due to the provisions of section 144 of the Civil Procedure Code.

It remains, however, to consider whether the case of the plaintiff can be otherwise framed than as a claim for money had and received or for mesne profits. As already pointed out, the plaint in the present case proceeded partly upon the ground that the respondent's proceedings in execution were recklessly or maliciously taken. This has not been persisted in and is quite unfounded. Apart from this, the illegal act charged against the respondent was that the appellant's right of possession had been interfered with from the date of the attachment, 10th June, 1927, and his cause of action was said to arise upon that date, and also upon the date of the previous decision of the Board. It now appears that Sohbat Khan had been granted by the appellant a lease for four years in 1924 and that so late as 1929 and 1930 the appellant was maintaining that the relationship of landlord and tenant still subsisted between himself and Sohbat Khan. In these circumstances it is not possible to maintain that the attachment of the land or the appointment of the Receiver or the granting to the Receiver of a writ of possession in June or July, 1927, were wrongful as against the appellant. The respondent was fully entitled, so long as Sohbat Khan was tenant under the appellant, to take the interest of Sohbat Khan in execution under his decree. It does not appear that the decision of the Revenue Court dismissing the appellant's objection was in anyway erroneous in its result; and though the ultimate decision in the suit of 1929 involves that Sohbat Khan's tenancy had determined prior to 25th April, 1929, the date of the plaint in that suit, their Lordships are not in a position to assign a date at which the tenancy of Sohbat Khan under the appellant was duly determined by the appellant or by the effluxion of time. In these circumstances it would not be right to permit the appellant to make a new case so as to complain of a wrong, entitling him to damages, to which article 120 might possibly be applied. Their Lordships are not in possession of the grounds of any claim by the appellant which would not be a claim for mesne profits or otherwise specifically provided for by the schedule to the Limitation Act, 1908, and they are of opinion, upon any view of the case, that the appellant has recovered everything to which he is entitled.

It was objected by Mr. Dunne that by not including the present claim in his previous suit of 1929 the appellant, by Order 2, Rule 2, of the Civil Procedure Code, has become

precluded from maintaining it now. This contention, however, raises a question of law upon which conflicting decisions have been given by the High Courts in India. As the point does not appear to have been taken at any previous stage and as it is not now necessary to decide the matter, their Lordships do not entertain this argument.

Their Lordships will humbly advise His Majesty that the appeal should be dismissed: the appellant must pay the respondent's costs of the appeal.

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In the Privy Council

KHAN BAHADUR MIAN FEROZ SHAH

v.

HONOURABLE NAWAB SIR MOHAMMAD AKBAR KHAN

DELIVERED BY SIR GEORGE RANKIN

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