APPELLATE CIVIL.

Before Suhrawardy and Graham JJ.

KHETRA MOHAN DAS
v.
BISWA NATH BERA.*

1924
April 17.

Accounts, suit for—Right to take accounts and to recover such sums as may be found due, assignment of—Validity of such assignment—Suit by assignee—Maintainability—Transfer of Property Act (IV of 1882) s. 6 (e).

A right to take accounts and to recover such sums as may be found due is not assignable being a mere right to sue within the meaning of s. 6, clause (e) of the Transfer of Property Act, and the assignee is not entitled to maintain a suit for such a purpose.

Varahaswami v. *Ram Chandra Raju* (1), *Sham Chand Kundu* v. *The Land Mortgage Bank of India Ltd.* (2) and *Seetamma* v. *Venkataramannaya* (3) referred to.

APPEAL by Khetra Mohan Das and on his death by Prohlad Chandra Das and others, the defendants.

This was an appeal against an order of remand directing a retrial in a suit for accounts; the case for the plaintiff was that the defendant No. 1 who was a Gomasta under the *pro forma* defendant No. 2 had executed a security kabuliat in favour of his master, the defendant No. 2, for working in Mauzas Borkola and Mirzapur; that the said Mauzas Borkola and

* Appeal from Order No. 32 of 1923, against the order of A. Henderson, Additional District Judge of Midnapur, dated Nov. 23, 1922, reversing the order of Upendra Nath Chatterjee, Munsif of that place, dated Sep. 29, 1921.

(1) (1913) I. L. R. 38 Mad. 138. (2) (1883) I. L. R. 9 Calc. 695.
(3) (1913) I. L. R. 38 Mad. 308.

Mirzapur together with the right to get accounts and papers from the defendant No. 1 and to recover from him the sum due thereon had been sold to the plaintiff on the 5th Falgoon 1327 A. S: that the plaintiff demanded the papers and accounts from the defendant No. 1 but they were not submitted. The defence, *inter alia*, was that the purchase of the right to sue for accounts was illegal and invalid, if such right was purchased by the plaintiff.

The Trial Court dismissed the suit holding that the rights under the security kabuliat were not purchased by the plaintiff and that a mere right to sue for accounts and papers was not transferable under section 6, clause (*e*) of the Transfer of Property Act; the plaintiff then appealed, and the lower Appellate Court reversed these findings and remanded the case for trial on the merits; against this order of remand the defendants appealed to the High Court.

Babu Samarendra Kumar Dutt, for the appellants. The kobala does not specify any consideration for the transfer of the rights under the security mortgage bond, the amount in claim is uncertain and depends upon the taking of accounts, the transfer is of a mere right to sue and is invalid under section 6, clause (*e*) of the Transfer of Property Act.

Babu Jogesh Chandra Roy and *Babu Santosh Kumar Pal*, for the respondents: The suit is for a sum of money embezzled; what the plaintiff purchased was the right to money due from the defendant No. 1, the transfer is valid, it is not necessary that the amount should be ascertained at the date of the transfer.

Babu Samarendra Kumar Dutt, in reply.

Cur. adv. vult.

1924

KHETRA MOHAN DAS *v.* BISWA NATH BERA.

SUHRAWARDY J. This appeal arises out of a suit for accounts and is directed against an order of remand made by the learned Additional District Judge of Midnapur.

The facts of the case have been shortly stated as follows in the judgment of the Court of First Instance:

"This is a suit for accounts. The plaintiff's case is that the defendant No. 1 was Gomastha under the *pro formâ* defendant No. 2 in Mouzas Barkola and Mirzapore and that he executed a security kabuliat for his work in favour of the *pro formâ* defendant on the 7th Kartick 1306 A. S. mortgaging the plaint schedule properties and on the strength of that kabuliat he did the Gomostha work from Kartick 1306 to Magh 1327 A. S., that on the 5th Falgun 1327 A. S. the *pro formâ* defendant No. 2 sold off to plaintiff all his rights in the two Mouzas together with his rights to get accounts and papers from defendant No. 1 and to recover from him the sums due thereon, by a registered kobala taking due and proper consideration thereof, that on the basis of the security kabuliat this defendant No. 1 was to submit all collection papers and explain those and pay off all sums found due thereon and he was to be liable for all rents and decretal dues barred by limitation owing to his default and to get 1 rupee 4 annas monthly pay for his work: that the defendant No. 1 submitted and explained his accounts and papers till 1309 A. S. to *pro formâ* defendant No. 2 and from 1310 A. S. he submitted no accounts and papers to him except a thoka only of 1327 A. S. and as per hisab given in Schedule "Ka" of the plaint the plaintiff, on the basis of the kobala in his favour, asks for such accounts and papers provisionally valuing his claim at Rs. 937-15 annas 18¾ gandas. It is also stated in the plaint

that after the plaintiff's kobala such accounts and papers were demanded from defendant No. 1 on 11th Falgun 1327 A. S. but no such accounts were submitted."

The learned Munsif, on a construction of the deed of sale, held (i) that the plaintiff did not purchase the rights of defendant No. 2 under the mortgage kabuliat executed by defendant No. 1 in favour of defendant No. 2, and (ii) that the plaintiff, if he purchased anything at all, purchased the right to sue for accounts, which is unassignable under section 6(*e*) of the Transfer of Property Act. In the result he dismissed the suit. On appeal the learned Additional District Judge reversed both these findings and remanded the case for determination on the merits, which, in the circumstances of this case, must mean for taking accounts from the defendant No. 1.

When the Courts below have differed on the construction of the deed of sale executed by the defendant No. 2 in favour of the plaintiff it becomes necessary to closely examine the terms thereof. In the heading of the document it is stated that the sale is in respect of the Mouzas belonging to defendant No. 2 together with back rents from tenants for a sum of Rs. 720 which is the full consideration for the transfer. In paragraph 2 after a description of the Mouzas sold and their appurtenances the following passage appears:—

"and Tahbil (cash due to me) and my dues from the Gomastha together with the right of taking accounts from the Gomastha and the right of taking the papers from him."

Paragraph 6 runs thus:—"If the Thoka or the Karcha of the year 1327 filed by the Gomastha be not correct, you will make enquiries yourself and will ascertain the correct amount: you will be entitled to realize the said amount together with the amount

1924

KHETRA MOHAN DAS v. BISWA NATH BERA.

SUHRAWARDY J.

realised by the Gomastha from the date of his kabuliat and the rents which had become time-barred through the negligence of the Gomastha together with damages according to your calculation or as will be ascertained by Court from the said Gomastha." Reading these clauses together and regard being had to the general tenor of the deed, it seems clear that what the plaintiff purchased was the right to take accounts from the defendant No. 1 and to recover such sums as might be found to be due from him upon an account being taken. The deed does not specify any consideration for the transfer of this right and the amount recoverable from the defendant No. 1 if any is uncertain and dependent upon the taking of accounts. Indeed, as the learned Munsif has observed, the suit is for accounts tentatively valued at a certain sum for purposes of jurisdiction and court-fee. The observations of the learned Additional District Judge on the point seem to be somewhat inconsistent and inaccurate. He says:—"The present suit is one to recover sums of money realized on behalf of defendant No. 2 but embezzled by defendant No. 1. In view of the allegation, that the respondent has submitted no accounts, it is not possible for the plaintiff to say what precise sum is due, until an account is taken. Although the plaintiff has been compelled to sue for accounts his claim is really one for a sum of money received on behalf of defendant No. 2 and misappropriated by defendant No. 1." He further observes that the transfer was not a mere right to sue but of a right to a specific sum of money which has been embezzled. It seems to me, however, that the transfer was not of a right to a specific sum but of a right to call for accounts and to recover any sum at present indefinite which may be found to be due on the taking of accounts. The learned vakil for the respondents

1924

KHETRA MOHAN DAS v. BISWA NATH BERA.

SUHRAWARDY J.

has argued on the same lines and contends that what the plaintiff purchased was the right to money due from defendant No. 1 which is an 'actionable claim.' It is conceded that a right to sue for accounts is not assignable in law but it is maintained that the right to a sum of money found due on the taking of accounts is so assignable. I am unable to accede to the proposition of law thus broadly stated. To so hold would be to encourage an evasion of the law which prohibits the transfer of a right to sue for accounts. One useful test for determining the transferability or otherwise of an inchoate right is whether it can be attached in the execution of a decree. That the right to demand accounts or to an indefinite sum which may or may not be found due on the taking of accounts cannot be attached will not, I think, be disputed.

It has been further argued that section 6, clause (*e*), declares rights to damages arising from torts to be incapable of transfer, but does not prohibit the transfer of rights or obligations *ex contractu*. This is not an altogether correct view of the law. Rights arising out of torts are undoubtedly unassignable but there may also be rights arising out of contract which offend against the rules as formulated in the section. *Abu Mahomed* v. *S. C. Chunder* (1). This is indicated by the alteration in section 6(*e*) in 1900 by eliminating the words "for compensation for a harm illegally caused" which formed part of the clause before the amendment.

On a proper construction of the document and regard being had to the frame of the suit it seems to me that the plaintiff is not entitled to maintain the suit since he has purchased, if anything,

(1) (1909) I. L. R. 36 Calc. 345.

1924

KHETRA MOHAN DAS v. BISWA NATH BERA.

SUHRAWARDY J.

a mere right to sue for accounts. A number of cases, English and Indian, have been cited by the learned vakils on both sides, but I do not consider it necessary to refer to them as none of them is exactly in point and every case must be decided with reference to its own particular facts. Some of the reported cases may however be briefly referred to. In *Varahaswami* v. *Ram Chandra Raju* (1), it was held that a mere right to recover damages for the negligence of an agent in failing to collect rent is not assignable. There does not seem to be much difference in principle between failure to collect rent and failure to pay rent collected. A claim for mesne profits is not transferable. *Sham Chand Kundu* v. *The Land Mortgage Bank of India Ld.* (2) *Seetamma* v. *Venkataramanayya* (3). The principle followed in these cases is applicable in the present case. The learned Additional District Judge has relied on the case of *Madho Das* v. *Ramji Patak* (4). There a sum of money was in the hands of the agent on his principal's account to be spent for certain purpose. It was held that that sum or so much of it as had not been actually spent could be attached in execution of a decree. That case having regard to its particular facts is no authority for the view which found favour with the learned Judge. The learned vakil for the respondent has laid great stress on the case of *County Hotel and Wine Coy. Ld*, v. *London and North Western Railway Coy.*, (5). If anything, that case supports the view that we have adopted. There the subject of transfer was an option under a lease and McCardie J. held that a mere right of litigation cannot be transferred.

(1) (1913) I. L. R. 38 Mad. 138.
(2) (1883) I. L. R. 9 Calc. 695.
(3) (1913) I. L. R. 38 Mad. 308.
(4) (1894) I. L. R. 16 All. 286.
(5) [1918] 2 K. B. 251, 260.

1924

KHETRA MOHAN DAS v. BISWA NATH BERA.

SUHRAWARDY J.

In view of the conclusion at which I have arrived above the question whether the plaintiff purchased the rights of the defendant No. 2 under the security *kabuliat* ceases to be of any importance. I may state however that I am unable to agree with the view of the learned Additional District Judge on this point also. The kobala does not mention the transfer of defendant No. 2's right as mortgagee nor does it contain any description of the properties covered by the *kabuliat*. The only mention thereof is to be found in a Schedule at the end of the document. The learned Judge held on two grounds that the defendant No. 2 transferred his lien on the property mortgaged to him by the defendant No. 1 (*i*) that that was the intention of the parties and (*ii*) that the mortgage *kabuliat* was delivered by defendant No. 2 to the plaintiff at the time of the execution of the kobala. I am unable to accept the learned Judge's reasoning. Where the document is not itself ambiguous, the intention of the parties should not be taken into consideration and the mere delivery of a document of title does not constitute a transfer of the right to the property. There are certain well recognised rules relating to the mode of transfer of interest in immovable properties and transfer of such interest can be effected in no other way.

In the above view of the matter, the appeal succeeds. The judgment and decree of the lower Appellate Court are set aside and those of the first Court restored with costs.

GRAHAM J. I agree.

Appeal allowed.

A. S. M. A.