1937

KUNJ BEHARI LAL v. SANT PRASAD

the appellate court in that suit. I have looked into these judgments and am satisfied that no question of jurisdiction was raised in this suit. All that was decided in it was that the claim for canal dues could not be joined with the claim for profits in a suit under section 108, clause 15 of the Oudh Rent Act. Thus it being clear that no question of jurisdiction was raised by the defendant in the previous suit it cannot be said that he is estopped from objecting to the jurisdiction of the civil court to try the present suit. I accordingly dismissed the application. As the opposite party does not appear I make no order as to costs.

Srivastava, C. J.

Application dismissed.

APPELLATE CIVIL

Before Mr. Justice E. M. Nanavutty and Mr. Justice Ziaul Hasan

1937 *January*, 21.

NAWAB ZAKIA BEGAM AND OTHERS (DEFENDANTS-APPELLANTS) *v.* THE LUCKNOW IMPROVEMENT TRUST, PLAINTIFF AND ANOTHER DEFENDANT (RESPONDENTS)*

Civil Procedure Code (Act V of 1908), section 11 and order II, rule 2—Sale—Former Suit for rectification of sale-deed and possession of property wrongly shown as exempted—Sale-deed—Subsequent suit for possession of property shown as sold but of which possession not delivered—Subsequent suit, if barred by res judicata *or order II, rule 2—Easement of necessity, when to be granted—Evidence Act (I of 1872), section 115—Estoppel—Defendant incurring expenditure on property knowing it to have been sold to plaintiff—Defendant, if entitled to raise plea of estoppel.*

Where in a former suit the plaintiff alleged that in the plan attached to the sale-deed certain property was by mistake shown as exempted from the sale and prayed for a decree for rectification of the sale-deed and for possession of such property, but in a subsequent the plaintiff claimed that the portions of the building which were marked as sold in the plan attached to the sale-deed and in respect of which the defendant failed to deliver possession in accordance with the sale-deed and wrong-

*First Civil Appeal No. 14 of 1935, against the decree of Babu Bhagwati Prasad, Civil Judge of Lucknow, dated the 21st of September 1933.

fully retained possession, be decreed in his favour, the subsequent suit is not in respect of the same cause of action as the former suit although both suits arose out of the same transaction of sale and the subsequent suit is not barred either by the provisions of section 11 of the Code of Civil Procedure or under order II, rule 2 of the said Code.

An easement of necessity is not to be granted merely on the ground of convenience or advantage, but solely on the ground of absolute necessity.

In order to bind a person by estoppel, it must be shown that the person incurring the expenditure did so under a *bona fide* belief that he was entitled to the land over which he was incurring the expenditure. Where, therefore, the defendant knew that the buildings in dispute did not belong to them, but had been sold to the plaintiff, and if, in spite of this fact, he chooses of his own accord to incur expenditure by repairing these buildings, he cannot raise any plea of estoppel based upon his own conduct.

Messrs. *H. D. Chandra* and *Taashuq Mirza*, for the appellants.

Mr. *M. H. Qidwai*, for the respondents.

NANAVUTTY and ZIAUL HASAN, JJ.—This is a defendants' appeal against a judgment and decree of the learned Civil Judge of Lucknow decreeing the plaintiff's claim.

The facts, out of which this appeal arises, are briefly as follows:

Nawab Sultan Bahadur, defendant no. 1, sold his property known as Maqbara Amjad Ali Shah situate in mohalla Hazratganj in the city of Lucknow to the Lucknow Improvement Trust, whose chairman is the plaintiff of the suit, out of which this appeal arises. The sale deed was executed on the 14th of October, 1921 and it recited that the whole property, with the exception of the Imambara proper and the mosque which were coloured yellow in the map attached to the sale-deed, was sold. The property that was sold was coloured green in the plan attached to the sale-deed, and the yellow portion, which was exempted from the sale, included the Imambara proper and the mosque.

1937

NAWAB ZAKIA BEGAM v. THE LUCKNOW IMPROVEMENT TRUST

Nanavutty and Ziaul Hasan, JJ.

On the 25th of May, 1923, the then Chairman of the Lucknow Improvement Trust sued Nawab Sultan Bahadur on the allegation that the property exempted in the sale-deed of the 14th of October, 1921, had not been correctly shown in the map attached to the sale-deed and that the two *"mahal-sarais"*, which were in the possession of Nawab Sultan Bahadur, were really part of the property sold. The suit was for rectification of the sale-deed on the ground of mistake and for possession over the land and the buildings apart from the Imambara and the mosque. This suit was unsuccessful and it was held that the map correctly represented what had been sold and what had been exempted from sale. The judgment of the late Court of the Judicial Commissioner finally rejecting the suit of the Lucknow Improvement Trust is dated the 29th of April, 1925 and is marked exhibit 3.

On the 15th of December, 1926, a usufructuary mortgage of the two *"mahals-sarais"* was executed by Nawab Sultan Bahadur (exhibit B-3) in favour of Khurshed Husain, whose mortgagee rights were subsequently purchased by Nasir Husain, defendant no. 2, on the 13th of April, 1932, by means of a sale-deed (exhibit B-4). Nawab Sultan Bahadur owed money to Debi Das, defendant no. 3, respondent no. 2, who got a simple money decree in execution of which he sold the equity of redemption of Nawab Sultan Bahadur on the 8th of January, 1933 (see decree exhibit A-1, page 66 of the paper-book).

The present suit was filed by the Chairman of the Lucknow Improvement Trust on the 13th of October, 1933, on the allegation that the defendant no. 1 Nawab Sultan Bahadur failed to deliver possession of certain portions of the property admittedly sold by him to the plaintiff and included in the portion which had been coloured green in the map attached to the sale-deed. The plaintiff has based his cause of action on the sale-deed dated the 14th of October, 1921 and has sued for

possession and mesne profits. The defence raised by the defendant no. 2, who is the sole contesting defendant, is that the present suit is barred by the rule of *res judicata* under section 11 of the Code of Civil Procedure as well as under order II, rule 2 of the Code of Civil Procedure. He also pleaded estoppel by acquiescence and he set up a right of easement over the property in dispute. The defendant no. 1 pleaded that he was an unnecessary party, but in effect he adopted the defence of defendant no. 2. The defendant no. 3 was absent and the case proceeded against him *ex parte*. Upon the pleadings of the parties, the learned Civil Judge of Lucknow framed the following issues:

"1. Is the claim to the portions of the land now in suit barred by *res judicata* and by order II, rule 2, of the Code of Civil Procedure?

2. What kind of easement, if any, exists over the portions of the land in suit and in connection with what building?

3. Is the plaintiff estopped, as alleged in paragraph 19 of the written statement of the defendant no. 2?

4. Is the defendant no. 1 an unnecessary party? If so, to what effect?

5. To what relief and mesne profits is the plaintiff entitled?"

The learned Judge of the Court below decided issue 1 in favour of the plaintiff and against the defendants, and held that the plaintiff's suit was not barred either under section 11 of the Code of Civil Procedure, or under order II, rule 2 of the Code of Civil Procedure. He decided issues 2 and 3 also in favour of the plaintiff, and held that no kind of easement existed over any portion of the land in suit, and that the plaintiff was not estopped by reason of any alleged act of acquiescence and latches on the part of the plaintiff. He accordingly decreed the plaintiff's suit for possession and mesne profits to the extent of Rs.270 with costs. He also directed that the defendants should close all the doors opening on to the land in suit. The decree for costs and mesne

1937

NAWAB ZAKIA BEGAM v. THE LUCKNOW IMPROVEMENT TRUST

profits was passed only against defendant no. 2. Dissatisfied with the judgment and decree of the trial court, defendants 1 and 2 have filed this appeal. During the pendency of this appeal, defendant-appellant no. 1 died and his heirs have been brought on the record.

Nanamutty and Ziaul Hasan, JJ.

We have heard the learned counsel of both parties at some length. In our opinion, there is no force in this appeal. It has been strenuously contended before us by the learned counsel for the defendants-appellants that the cause of action of the previous suit of 1923 is the same as the cause of action in the present suit, that both suits were suits for possession based upon the sale-deed in favour of the plaintiff and that therefore this present suit is barred by section 11 of the Code of Civil Procedure as also by order II, rule 2 of the said Code. We have carefully examined the plaint in the former suit of 1923. In that suit the plaintiff alleged that in the plan attached to the sale-deed, the land and the buildings mentioned in para. 2 of his plaint in that case were by mistake coloured yellow instead of being coloured green and that the mistake in colouring that portion as yellow instead of green led to a mistake in the measurement of the property as sold in the sale-deed. The plaintiff accordingly prayed that the sale-deed be rectified so as to show that the area of the property purchased was 481,766 square feet, and that the portions marked A and B in the plan attached to the plaint be shown coloured green, and the very same portion, which was shown yellow in the plan attached to the sale-deed, be now shown as green and that possession over this land and building marked A and B in the plan attached to the plaint be decreed in favour of the plaintiff against the defendant Nawab Sultan Bahadur. In the present suit the allegation of the plaintiff is that, in accordance with the sale-deed and the plan attached to the sale-deed, the portions of the building which were marked green in the plan attached to the sale-deed and in respect of which the defendant no. 1 Nawab Sultan Bahadur failed to deliver possession and wrongfully retained possession be

now decreed to the plaintiff. It is clear, therefore, that the present suit is not in respect of the same cause of action as that which was filed by the plaintiff in 1923, although both suits arose out of the same transaction of sale which took place in 1921. It is further to be noted that the description of the property in dispute in the plaint of 1923 does not include the verandahs, which are now in suit and which were coloured green in the plan attached to the sale-deed of 1921 and in respect of which the plaintiff understood then as well as now that they had been sold to him, but by some curious oversight on the part of the Lucknow Improvement Trust and its servants, possession over this land which, accordingly to the sale-deed and the plan attached to the sale-deed, had been sold to the Lucknow Improvement Trust, was never actually taken by that corporation. Hence the necessity for filing of the present suit. We are, therefore, clearly of opinion that the learned Civil Judge of Lucknow was perfectly right in holding that the present suit is not barred either by the provisions of section 11 of the Code of Civil Procedure or under order II, rule 2 of the said Code.

As regards the plea of easement of necessity which has been claimed by the appellants under section 13, clause (*c*) of the Indian Easement Act (V of 1882), we are clearly of opinion that no such right of easement can be claimed by the appellants. As pointed out by the learned trial Judge, an easement of necessity is not to be granted merely on the ground of convenience or advantage, but solely on the ground of absolute necessity. The report of the Commissioner as well as the inspection notes of the learned trial Judge make it abundantly clear that whatever inconvenience the tenants occupying the rooms rented to them by the appellants may experience, no right of easement can be granted to the appellants on that ground. As pointed out by the learned trial Judge, the appellants can open doorways leading into the *sahan* or courtyard through which the tenants can have a right of ingress and exit. We are clearly of opinion that the

1937

NAWAB ZAKIA BEGAM v. THE LUCKNOW IMPROVEMENT TRUST

learned trial Judge was right in holding that no case of an easement of absolute necessity had been established by the appellants. We accordingly uphold the finding of the trial Court on issue no. 2.

As regards the plea of estoppel, we also agree with the learned trial Judge that no question of estoppel can possibly arise. It has not been shown by any evidence adduced on behalf of the appellants that they were led to alter their position to their detriment by any act or representation made by the plaintiff or by any one on his behalf. Further, as pointed out by the learned Judge of the court below, in order to bind a person by estoppel, it must be shown that the person incurring the expenditure did so under a *bona fide* belief that he was entitled to the land over which he was incurring the expenditure. In the present case, the verandahs in dispute were coloured green in the plan attached to the sale-deed and therefore constituted part of the property which had been sold to the plaintiff and the appellants knew that all such properties which were marked green did not belong to them, but had been sold to the plaintiff, and if, in spite of this fact, they chose of their own accord to incur expenditure by repairing these buildings, they cannot raise any plea of estoppel based upon their own conduct. We accordingly uphold the finding of the lower court on issue no. 3.

Nanavutty and Ziaul Hasan, JJ.

No other plea was urged before us in this appeal. The result, therefore, is that this appeal fails and is dismissed with costs.

Appeal dismissed.