

APPELLATE CIVIL.

Before Das and Ross, J.J.

JAI NARAYAN PANDE

1924.

v.

Feb., 27.

KISHUN DUTTA MISRA.

Mesne profits, assignment of—whether “actionable claim”—Transfer of Property Act (Act IV of 1882), section 3 and 6(e).

Where there was a gift of immovable property and also an assignment of mesne profits which had accrued due to the donor, and the donee brought a suit for the recovery of the mesne profits, *held*, that the mesne profits were unliquidated damages; and as a claim thereto was not a claim to any debt, or a claim to any beneficial interest in movable property not in the possession, either actual or constructive, of the claimant, it could not be said that the subject-matter of the assignment was property falling within the definition of “actionable claim” in section 3 of the Transfer of Property Act, 1882, but was a mere right to sue within the meaning of section 6(e).

Appeal by the plaintiffs.

The facts of the case material to this report were as follows:—

The plaintiff's case was that Kamla Kant Panday, Raj Kumar Panday and Nand Kumar Panday were three brothers separate in mess and in business. Kamla Kant Panday died leaving him surviving a widow named Badamo Kuer and four daughters. The widow died in 1906 and Umeda Kuer (plaintiff No. 1) was the only surviving daughter at the date of the institution of the suit. On the 21st of February, 1916, Umeda Kuer made a gift of 12-annas interest in the properties in dispute, with mesne profits, to one Kishun Dutt (plaintiff No. 2) son of Jasoda Kuer, one of the deceased daughters of Kamla Kant.

* Appeal from Original Decree No. 125 of 1920, from a decision of Maulavi Wali Muhammad, Additional Subordinate Judge of Chapra, dated the 10th March, 1919.

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Plaintiff No. 3 was the purchaser of certain properties from plaintiffs Nos. 1 and 2. These plaintiffs, who were entitled to the properties left by Kamla Kant, brought a suit in March, 1916, for a declaration of title and recovery of possession from defendants 1 to 7 who were the representatives in interest of Raj Kumar and Nand Kumar, and defendants 8 to 16 who were subsequent purchasers and mortgagees of the disputed properties. Umeda Kuer died during the pendency of the suit. Thereupon plaintiff No. 2 became entitled to the remaining 4-annas share as heir. The defendants pleaded *inter alia* that the three brothers were joint in mess and in business and that on the death of Kamla Kant the properties passed by survivorship to his two brothers and descendants, that Kishun Dutt, plaintiff No. 2, was not the son of Jasoda Kuer, that the suit was barred by limitation, *etc.* The Subordinate Judge overruled the contentions of the defendants and decreed the suit. A question, however, arose before him as to whether the deed of gift conferred any right on plaintiff No. 2 to sue for mesne profits which had accrued due to Umeda Kuer on the 21st February, 1916. The Subordinate Judge disallowed the claim in so far as it related to mesne profits accrued due before the date of the deed of gift.

Ram Prasad and *Janak Kishore*, for the appellants.

W. H. Akbari (with him *Shiva Narain Bose*), for the respondents.

DAS, J.—There are two points in this appeal: first, whether the learned Subordinate Judge was right in disallowing the plaintiffs' claim for mesne profits in regard to the period prior to the deed of gift dated the 21st of February, 1916; and, secondly, whether the learned Judge was right in deciding a portion of Issue No. 12 against the plaintiffs. Now it appears that some of the properties in dispute are in possession of persons who are not members of the joint family. They are defendants Nos. 8 to 12, defendant No. 13

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and defendants Nos. 14 to 16. Some of them claim under mortgages executed in their favour by the predecessors in title of defendants Nos. 1 to 7 and some claim under sale deeds executed by them. The learned Subordinate Judge says as follows :

"I do not think that the properties which have passed to third persons can be recovered by plaintiffs. They are apparently innocent purchasers for value from ostensible owners. Besides both Umeda Kuer and Khisun Dutt Missir had the right to sue for setting aside the sale deeds within three years of the date of execution of such deeds. This none of them did. The prayer for setting aside the sale deeds becomes time barred and plaintiffs cannot recover possession of properties covered by the sale deeds unless they clear the ground by first getting the sale deeds set aside which they cannot do."

I am unable to agree with this view. These deeds of sale were executed by the predecessors in title of defendants Nos. 1 to 7. There is no privity between them and the plaintiffs and I know of no authority which lays down that a person who is entitled to possession of property has, as a preliminary to that, to set aside a document which may have been executed by some body else in order to defeat his title. Nor do I think it can be considered that defendants Nos. 8 to 16 are *bonâ fide* purchasers. They have taken the title from a person who had no right whatever to convey that title. In my opinion the plaintiffs are entitled to recover possession of the properties claimed in the suit.

There is a question as to whether defendant No. 13 was actually in possession of three of the properties alleged by the plaintiffs to be in her possession in the plaint. These properties are *mauza* Sohnag, *mauza* Babhouli and *mauza* Sakrauli. It was the plaintiff's case that the defendant No. 13 is in possession of these properties by virtue of a conveyance executed in his favour by the predecessors in title of the principal defendants. Defendant No. 13, however, filed a written statement stating that she was not in possession of those properties. Thereupon the plaintiffs filed a petition after the judgment was pronounced but before the decree was drawn up, bringing the facts to the notice of the Court, and asking the Court to pass a

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proper direction in regard to those properties. The Court, however, has not passed any order upon this petition, except to say "Petition as required by Order No. 162 stating separation shares of the defendants filed. Let the decree be prepared now." The decree as drawn up, however, did not give effect to the petition of Kishun Dutt, dated the 27th of March, 1919. The question is now important only in regard to the claim for mesne profits. Defendants Nos. 1 to 7 maintain that they are not in possession of any of these *mauzas* and that defendant No. 13 is in fact in possession of these *mauzas*. The question as between defendant No. 13 and defendants Nos. 1 to 7 has not been tried by the Court below; and, we direct that this question should be tried at the time of the ascertainment of mesne profits.

The next question is whether the learned Subordinate Judge's decision on the question of mesne profits is right. In order to understand this point it is necessary to remember the following facts. At the time when the suit was instituted Kishun Dutt had no interest whatever in the properties. Umeda Kuer was the only surviving daughter of Kamla Kant and she was entitled to maintain the action. On the 21st of February, 1916, Umeda made a gift of 12-annas interest in the properties in dispute to Kishun Dutt. The question is whether at the same time she made a gift of the mesne profits which had already accrued due to her, and, whether, if she purported to do so, it conferred any right upon Kishun Dutt to sue for mesne profits which had accrued due to Umeda Kuer on the 21st of February, 1916. The suit was instituted on the 16th of March, 1916: Umeda Kuer died on the 25th of August, 1918. Thereupon Kishun Dutt became entitled to the remaining 4-annas interest in the properties as heir. The direction of the learned Subordinate Judge on the question of mesne profits is as follows:

" So long as Musammat Umeda Kuer was alive she and not Kishun Dutt Missir was entitled to recover mesne profits. Kishun Dutt Missir is therefore entitled to recover mesne profits in his own right from the

date of Umeda Kuer's death. The question is if the deed of gift, dated the 21st February, 1916, conferred on him the right to recover mense profits to the extent of 12-annas share. As, under the deed he was entitled to immediate possession to the extent of 12-annas share, he is entitled to recover mense profits from the said date to the extent of such share. Musammat Umeda Kuer is now dead and the mense profits which accrued due to her before the deed gift cannot be recovered by anybody. The result, therefore, is that the plaintiffs shall recover mense profits to the extent of 12-annas share in the properties decreed from the 21st of February, 1916, till the death of Umeda Kuer's death which took place according to the plaintiffs petition on the 25th August, 1918, and full mense profits for the properties decreed from the date of Umeda Kuer's death till recovery of possession. Plaintiffs may get the same determined by a separate petition."

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In my opinion the decision of the learned Subordinate Judge on this point is right and must be affirmed.

The solution of the problem must, in my opinion, depend on whether, in regard to the mesne profits which had already accrued due to Umeda Kuer, the assignment of the 21st February, 1916, was an assignment of an actionable claim or an assignment of a mere right to sue. In England, ordinarily choses in action were not assignable at law, but were, speaking generally, assignable in equity. The general rule formulated by the Courts of Equity has been adopted in the Transfer of Property Act which defines "an actionable claim" and provides how such a claim can be transferred. This is the general rule; but an exception was engrafted on this rule. Equity, on the ground of public policy, did not give validity to the assignment of what is in the English cases referred to as a bare right of action. Our own Statute has accepted this view of equity in section 6(e) of the Transfer of Property Act which provides that "a mere right to sue cannot be transferred". As was pointed out in *Gregg v. Bromley* (1), "there is no doubt in the cases about the rule, and there is no doubt in the cases with regard to the exception, but difficulties often arose in deciding whether a particular right was within the exception or was within the rule". Having considered the whole subject with care, the learned Judges came to the conclusion that the "the question was whether the subject-matter of the assignment was, in the view

(1) (1912) 3 K. B. 474.

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of the Court, property with an incidental remedy for its recovery, or was a bare right to bring an action either at law or in equity ”.

I think we may usefully apply that principle to this case; and the question at once arises what exactly was assigned by Umeda Kuer to the plaintiffs on the 21st February, 1916. There was undoubtedly an assignment of property and with regard to that, there is no question before us. But there was also an assignment of mesne profits which had accrued due to her at the date of the assignment. The property was in her at the date of the assignment, and she says in effect to the plaintiffs, “ I am transferring by the deed a share of the property which is in me but of which I am not in possession. But, in addition to the property, I am assigning to you my claim in regard to the mesne profits which have accrued due to me by right of my title to the property, which title vests in you as from the 21st February, 1916 ”. Can it be said that the subject-matter of the assignment in regard to the mesne profits was property which an incidental remedy for its recovery? Mesne profits are unliquidated damages. A claim to mesne profits is not a claim to any debt; it is not a claim to any beneficial interest in movable property, not in the possession, either actual or constructive, of the claimant. How can it then be suggested that the subject-matter of the assignment is property falling within the definition of “ actionable claim ” in the Transfer of Property Act? In my opinion, the subject-matter of the assignment was “ a mere right to sue ”, and the decision of the learned Subordinate Judge on this point must be affirmed.

The result is that F. A. No. 125 of 1920 succeeds in part. The decree passed by the learned Subordinate Judge must be varied in the manner indicated in this judgment, and the appellants must have the general costs of the appeal, but will not be entitled to a separate hearing fee.

Ross, J.—I agree.

Decree varied.