

(1920) 09 BOM CK 0027
In the Bombay High Court
Case No : Second Appeal No. 769 of 1919

Balwant Daso Betgiri

APPELLANT

Vs

Umabai Shankarrao Godbole

RESPONDENT

Date of Decision : 10-09-1920

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 47
Transfer of Property Act, 1882 — Section 41

Citation : (1921) 23 BOMLR 254 : 61 Ind. Cas. 287

Hon'ble Judges : Shah, J; Norman Macleod, J

Bench : Division Bench

Judgement

Norman Macleod, Kt., C.J.—In a Suit No. 221 of 1891 filed in the Belgaum Court the 1st defendant in this suit obtained a decree against one Khanderao Babasaheb Desai. That decree was made payable by instalments and it was declared in the decree that the decretal amount was charged on certain lands of the judgment-debtor. The decree was not registered. In 1896, the judgment-debtor sold three of the lands mentioned in the previous suit to the present plaintiffs and put them in possession. In 1912, the 1st defendant filed a Darkhast in execution of the decree of 1891, and under that Darkhast certain lands were put up to sale including the lands which had been sold to the plaintiffs in 1896. The execution proceedings were transferred to the Collector of Belgaum and that Officer ordered the Mamlatdar of Gokak to sell the lands in accordance with the Court's order. It appears that the plaintiffs' father raised objections to the sale and filed an application that the property other than the three lands sold to the plaintiffs father in 1896 should be sold first but in spite of that the sale took place. The plaintiffs father then applied to the Collector complaining that the Mamlatdar should not have held the sale in the face of his objections. The sale, however, was confirmed by the Collector although under the rules the Collector ought to have referred the objections to the Court executing the decree. It has been on more than one occasion held that once an objection has been raised as to a sale, then the Collector's powers to confirm the sale are suspended. It is his

duty to refer the objecting party to the Court. Until that objection has been dealt with in the proper way the sale cannot be confirmed. However in this case in spite of the objection the sale was confirmed, and thereafter the plaintiffs filed this suit to set aside the sale which had been held under Darkhast No. 125 of 1912. The suit has been dismissed in both the Courts on the ground that the proper procedure had not been followed, that the plaintiffs were representatives of the judgment-debtor and therefore they were bound to apply to the Court which executed the decree u/s 47 for the determination of the question which had arisen between them and the auction purchaser. The learned Appellate Judge came to that conclusion, because he considered that the plaintiffs knew that they had only purchased the equity of redemption from the judgment-debtor as their father had made an application to the Mamlatdar that the other properties mentioned in the Darkhast should be sold first. But it seems to me that that was not the proper question to be considered. The question was whether in 1896 when the plaintiffs' father purchased the property apparently as a freehold, X he knew or ought to have known that he was buying the property subject to the charge created by the decree. I do not think the plaintiffs can in any way be damnified by any application their father may have made to the Mamlatdar at the time the sale proceedings were being held. If an outsider buys a property from a person who, as far as he can judge, is the ostensible owner and can give him a good title to the property, the mere fact that the ostensible owner is a judgment-debtor cannot possibly make his purchaser his representative within the meaning of Section 47 of the Civil Procedure Code. It may very well be that the ostensible owner has mortgaged the property and there has been a mortgage decree and that therefore all that is left to him is the equity of redemption. But that is not the case here. All that was standing against the judgment-debtor was the few words in the decree to the effect that the decree created a charge on the property and if the judgment-debtor sold the property to an innocent purchaser, then I cannot see how that purchaser can on those facts be considered a representative of the judgment-debtor, so that if the decree holder endeavours to execute the decree with reference to the property mentioned in the decree, the purchaser is debarred from proceeding by separate suit and must apply to the Court executing the decree. If there had been no words of charge in the decree, then clearly the purchaser could not possibly be considered as a representative of the judgment-debtor, supposing the decree-holder sought to execute his decree and put up the property which had already been sold for sale in execution. It does not appear to me to make any difference if there are as a matter of fact words in the decree creating a charge of which the first purchaser has no knowledge. But apart from all that it appears to me that both Courts have failed to see that a question of fact had first to be proved in the case before they could dismiss the suit on the ground that the plaintiffs ought to have proceeded u/s 47, because if the plaintiff could prove that he was an innocent purchaser, then in my opinion it could not be held that he was a representative of the judgment-debtor. He was entitled, if he was assailed by the decree-holder or by an auction-purchaser in an execution sale, to resist, and

then the question which had to be decided by a suit was whether he was entitled to remain in possession under his sale deed or whether he should have to give way to the auction-purchaser. It is then the person who is obstructed from getting possession who has to make an application in the first instance to the Court which executed the decree under Order XXI, Rule 97, I do not think that the reverse holds good, so, if a person who is in possession desires to get the slander on his title removed, there is nothing to prevent him from filing a suit in a proper Court to do that. I do not see why he should apply to the Court executing the decree.

2. In this case, therefore, certain evidence ought to have been taken before the suit could have been dismissed on the ground mentioned in the judgments of the Courts below, for if the plaintiff was able to prove that he was an innocent purchaser who had taken all reasonable precautions before completing his purchase to ascertain whether his vendor had power to make the transfer and that he himself acted in good faith, then it must be that on the merits plaintiff is entitled to succeed. It does not appear to me to make any difference whether he is a representative of the judgment-debtor or not. If he was, it would be absurd that if it were held that he was entitled to the benefit of Section 41 of the Transfer of Property Act, it should nevertheless be decided that he was not entitled to get a decree in this suit, because he ought to have applied u/s 47 of the Civil Procedure Code. If, on the other hand, he fails to prove or satisfy the Court that he has taken reasonable care to ascertain that his vendor had power to make the transfer or that he acted in good faith, then necessarily he must fail and he holds the property subject to the charge created by the decree. But in any event unless the sale had taken place in the proper way he was not bound by the sale which was carried out by the Mamlatdar. It appears to be that on a very simple state of facts the proper issues have not been considered by the Courts below and that the best course now to take is to set aside the proceedings in both the Courts and remand the case to the trial Court for decision on the issues :-

(1) Whether the plaintiffs' father purchased the suit lands in 1896 after taking reasonable care to ascertain that his transferor had power to make the transfer and had acted in good faith ?

(2) Whether the plaintiffs' father had notice of the charge created by the decree when he purchased the suit lands in 1896 ?

(3) Whether the judgment-debtor was the ostensible owner of the suit lands with the consent, express or implied, of the decree-holder within the meaning of the words of Section 41 of the Transfer of Property Act ?

3. Costs in the trial Court to be costs in the cause. The appellants must get their costs in this Court and in the Court below.

Shah, J.

4. I concur in the order proposed by my Lord the Chief Justice. I desire to add that I am satisfied on the facts of this case that the plaintiffs are not shown to be the representatives of the judgment-debtor for the purpose of Section 47 of the Civil Procedure Code. It is clear that the real dispute is between the present plaintiffs, who claim to be the full owners and not to be bound by the charge on the property, and the auction-purchasers, who maintain that the plaintiffs purchased the property subject to the charge. In such a case it is difficult to accept the view taken by the lower Courts, that the purchasers from the judgment-debtor in the position of the present plaintiffs, are the representatives of the judgment-debtor and that they are bound to proceed by an application u/s 47 of the Code. The result reached in the lower Courts is due to a certain extent to the form in which the plaintiffs put forward their claim in this suit. I am clearly of opinion that the questions arising between the parties must be ultimately decided in a suit, and may be appropriately decided in this suit. On the merits the issues now suggested by this Court represent the real questions to be determined between the parties. I do not say anything as to what the proper form of relief would be if the issues are decided in favour of the plaintiff. It will be for the trial Court to consider the nature of the relief to be granted in case the plaintiffs are able to establish the case set up by them. As to the merits of the plaintiffs' claim I express no opinion; nor do I express any opinion as to the effect of the application (Exhibit 56) on the question of fact, which the plaintiffs have to establish.