

(1924) 05 CAL CK 0048
In the Calcutta High Court

Bhabataran Chattopadhyaya and Others	APPELLANT
Vs	
Durgeshnandini Debi	RESPONDENT

Date of Decision : 12-05-1924

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 66
Evidence Act, 1872 — Section 115

Citation : AIR 1925 Cal 164

Judgement

1. This is an appeal by the plaintiffs against a decision of the Additional Subordinate Judge of Burdwan, modifying a decision of the First Munsif of Katwa. The facts are as follows.

2. The original plaintiff and the defendant on the 10th of September 1918 applied to purchase certain property at an execution sale. Their application provided that six annas of the purchase price was to be paid by the original plaintiff and that in proportion the property was to belong to him and that the balance of the purchase-money should be paid by the defendant and that a share of the property, namely 10 annas should belong to her. A deposit of twenty-five per cent of the price was made, this was paid by the original plaintiff and by the defendant in the proportion which I have already mentioned. When the time, within which the balance of the purchase money was to be paid came the original plaintiff was unable or unwilling to pay his six annas share of the balance of the purchase consideration and accordingly the defendant alone put in the balance of the purchase-money. The executing Court issued a sale certificate to the defendant alone as a purchaser of the whole of the property. In the result the original plaintiff commenced this suit claiming to be entitled to six annas share of the property and to other reliefs. The suit was brought immediately after the issue of the sale certificate in the sole name of defendant and, therefore, there was no laches or acquiescence by the original plaintiff in the position.

3. The Munsif gave the plaintiffs who are the heirs and legal representatives of the original plaintiff a decree for a six pice share of the property this representing his six annas of the 25 per cent, deposit. But the lower appellate Court has

dismissed the entire suit for the reasons stated in the judgment. Hence this appeal to us.

4. Now it seems to us that, under the provisions of Order XXI as the purchase was made jointly by the original plaintiff and the defendant, the executing Court) had no jurisdiction to grant the sale certificate to the defendant alone, When the balance of the purchase price was paid by the defendant it seems to us that, that payment was made within the terms of Order 21, Rule 85, on behalf of the purchasers, that is to say, on behalf of both the original plaintiff and the defendant and it seems to us to follow from this that the plaintiffs are entitled to the relief which they now claim, namely, a declaration that they are entitled to a six annas share in the property. But it is urged before us on behalf of the respondent that, having regard to the terms of the contract whereby the purchase-money was to be contributed in certain shares, it is inequitable that we should make any declaration in favour of the plaintiffs. Secondly, it is said that according to the findings of both the Courts below the original plaintiff when the time came to pay the balance of the purchase price refused to pay and in effect repudiated the contract.

5. We do not think that what happened when the time came to pay the balance of the purchase consideration amounted in this case to a repudiation of the contract. I can understand a case where there has been delay in making the claim when a purchaser in the position of the original plaintiff must be debarred from succeeding in the suit on the ground that he had acquiesced in the property being made over to the defendant. But that is not the case.

6. Reliance is placed upon Section 66 of the CPC and on Section 115 of the Indian Evidence Act. If one reads Section 66 of the CPC I think that it will be clear that that section has no application to the case because there has been no consent of the purchaser as provided by clause (2) of Section 66. Then so far Section 115 of the Indian Evidence Act is concerned, it is difficult to say how there has been estoppel in this case and indeed the estoppel which the lower appellate Court purported to find is not such as to bring the matter within the provisions of Section 115 of the Evidence Act.

7. The result is that the appeal succeeds and we declare that the plaintiffs are entitled to a six annas share in the property and to possession. thereof. There will be a liberty to the defendant to withdraw the amount of the purchase-money which has been deposited by the plaintiffs in Court.

8. There will be no order as to costs in any Court in the circumstances.