
(1971) 12 KL CK 0013
In the High Court Of Kerala
Case No : A.S.A. No. 9 of 1969

Bhagwandas Krishnadas and Another	APPELLANT
Vs	
P.S. Sama Iyer and Others	RESPONDENT

Date of Decision : 13-12-1971

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 65
Contract Act, 1872 — Section 70

Citation : AIR 1972 Ker 259

Hon'ble Judges : T.C. Raghavan, C.J;P. Unnikrishna Kurup, J

Bench : Division Bench

Advocate : P.C. Balakrishna Menon, for the Appellant; T.L. Viswanatha Iyer, for the Respondent

Final Decision : Allowed

Judgement

Raghavan, C.J.—This is an appeal against a second appeal; and the appeal is directed against the decision in Bhagavadas Krishnadas and Another Vs. P.S. Soma Iyer and Others, .

2. For the arrears of revenue due from the predecessor-in-interest of the appellants (the appellants are his legal representatives), his property was sold under the Madras Revenue Recovery Act and purchased by the respondents. The sale was on 15th May 1954 and the confirmation of sale on 30th November 1954: and thereafter, the appellants continued to live in some of the buildings in the property, which they surrendered on 21st October 1955. The suit was for mesne profits from the date of sale to the date of confirmation of sale (from 15th May 1954 to 30th November 1954) and for damages for use and occupation of the buildings from the date of confirmation to the date of surrender of the buildings (from 30th November 1954 to 21st October 1955). (Regarding the amount there is no dispute now.) The trial Court dismissed the suit, but the lower appellate Court and the second appellate Judge decreed the suit.

3. The second appellate Judge relied on Section 65 of the CPC for holding that

title to the property passed on the date of sale, in other words, for holding that the confirmation of sale related back to the date of sale. In this view, the learned Judge held that the appellants were liable to pay mesne profits from the date of sale to the date of confirmation. The learned Judge also referred to some decisions of the Supreme Court u/s 65 of the Code of Civil Procedure, which laid down that the confirmation of sale related back to the date of sale. There cannot be any dispute regarding this proposition, because the language of Section 65 of the CPC is itself clear that, where immovable property is sold in execution of a decree and such sale has become absolute, the property shall be deemed to have vested in the purchaser from the time when the property is sold and not from the time when the sale becomes absolute.

4. But the contention is that Section 65 of the CPC does not apply to a sale under the Revenue Recovery Act and that the principle embodied in the section cannot be applied to such a sale. The counsel of the appellants has drawn our attention to some of the provisions of the Madras Revenue Recovery Act. u/s 38 the sale has to be confirmed 30 days after the sale and after the sale is so confirmed the Collector has to register the land sold in the name of the person declared to be the purchaser and has also to execute and grant a certificate of sale bearing his seal and signature to purchaser (vide Sub-section (5) of the section). Sub-section (5) of Section 38 further provides that such certificate shall state the property sold and the name of the purchaser; and that it shall be conclusive evidence of the fact of the purchase in all courts and tribunals, where it may be necessary to prove the same, etc. The counsel of the appellants has also invited our attention to the decision of the Supreme Court in Janak Raj Vs. Gurdial Singh and Another, . Mitter, J. who spoke for the Bench has considered, in paragraphs 7 and 8 of the judgment, the history of Section 65 and the allied provisions of the Code of Civil Procedure. The learned Judge has observed in paragraph 7

"Provisions in the CPC over the years have not been unanimous in this respect. In Sorimuthu Pillai and Others Vs. Muthukrishna Pillai, , Madhavan Nair. J. traced the course of these provisions from the Code of 1859 up to the Code of 1908. The relevant section in the Code of 1859 were Ss. 256, 259 & 260. The net effect of these provisions was that no sale of immovable property would become absolute until the sale had been confirmed by the court and after the sale had become absolute, the Court was to grant a certificate to the purchaser stating that he had purchased the right, title and interest of the defendant in the property sold. Section 314 and Section 316 of the Act of 1877 correspond in part with Section 256 and Section 259 of the Act of 1859. Sec. 316 was amended in 1879. The proviso to this section as amended was to the effect that the purchaser was to have title to the property sold from the date of the confirmation of the sale only if the decree under which the sale took place was subsisting at that date. Section 316 with the proviso was re-enacted in the Code of 1882. In the Code of 1908. Section 316 was split up into Section 65 and Order XXI. Rule 94 but the proviso was not included either in Section 65 or in Rule 94 of Order XXI."

One sentence In paragraph 8 may also be extracted.

"The learned Judge, Madhavan Nair. J., pointed out that neither in the Act of 1859 nor in the Act of 1877 was there any specific statement of law regarding the time when the title to the property vested in the auction purchaser as is to be found in Section 316 of the Act of 1877 after the amendment in 1879 which was repeated as Section 316 of the Act of 1882, and in the present Act of 1908." And Mitter J. has further observed in paragraph 9

"Nothing has been urged before us which would lead us to take a contrary view."

5. From this it is clear that prior to 1879, when Section 316 of the Code of 1877 was amended the provision now contained in Section 65 of the CPC was not in the statute book. In other words, in the language of the Supreme Court, "neither in the Act of 1859 nor in the Act of 1877 was there any specific statement of law regarding the time when the title to the property vested in the auction purchaser": the principle now contained in Section 65 was added For the first time by the amendment of 1879 The result was that in 1864, when the Madras Revenue Recovery Act was passed, the CPC of the day did not contain any provision analogous to Section 65, viz., that the confirmation of sale would relate back to the date of sale. The further consequence of applying Section 65 of the Code to revenue sales is that, as and when the CPC was amended, the date on which the property vested in the purchaser under the Revenue Recovery Act also changed. This could not have been the intention of the legislature when it passed the Madras Revenue Recovery Act in 1864. When this was pointed out the counsel of the respondents himself found it difficult to meet the position. And he had to admit, more or less, that there was no provision in the Revenue Recovery Act which laid down that the confirmation of sale related back to the date of sale; and that Section 65 of the CPC could not apply to a sale under the said Act.

6. It will be interesting to note, in this connection, that there is difference between a sale through court and a sale under the Revenue Recovery Act: see, for instance, the decision of the Bombay High Court in Mahadev Narayan Datar Vs. Sadashiv Keshav Limaye and Raghunath Ramchandra Agarkar, . Therein Macleod. C. J. says:

"It appears to me that there is a very great distinction between sales in execution of Civil Court decrees and sales by the revenue Courts for arrears of assessment. I think that if it were found, as it has been found in this case, that as a matter of fact the defendant in the revenue proceedings was entitled to hold his lands free of assessment, any sale which took place on the footing that he was bound to pay assessment would be invalid and that the purchaser in such a sale would not acquire a good title except by adverse possession". And the other learned Judge. Heaton, J., says:

"But sales held by Civil Courts made after enquiry and after the fulfilment of all the required formalities are in a very different position from sales by Revenue authorities. In the former case you have a Court of Justice at work with its

impartiality and its care. In the other you have fiscal authorities at work, and experience and common knowledge tell us that you certainly cannot expect and do not get the same qualities of impartiality and so forth in fiscal authorities as you are entitled to expect and ordinarily do obtain from the Civil Courts. So to apply to sales by fiscal authorities precisely the same law which it is proper to apply to sales by Civil Courts would seem to me to be a very gross legal extravagance".

7. The other provision relied upon by the second appellate Judge is Section 43 of the Revenue Recovery Act which reads:

"Arrears of rent which on the day of sale may be due to the defaulter from his under-tenants shall, in the event of the sale, be recoverable by him after the sale by any process, except distraint, which might have been used by him for that purpose before the said sale". The learned Judge has extracted this provision and, thereafter, has said:

"This means that the defaulter is not entitled to collect any rent from his under-tenant after the sale".

We find it difficult to agree with this: in our considered opinion, what is provided by Section 43 is that the defaulter has no right, after the sale to collect the arrears of rent due to him from his under-tenant on the date of sale by distraint: he may use only other methods of collecting the arrears. It is also our opinion that, in such a case, the arrears that fell due thereafter (if the defaulter is entitled to them) cannot also be collected by distraint. In other words, this provision does not indicate that the defaulter is not entitled to the arrears from his undertenant subsequent to the date of sale: for that, if at all other provisions should be found in the Act Therefore, on this aspect of the case also, we disagree with the second appellate Judge and hold that, from Section 43 of the Revenue Recovery Act, it cannot be held that the defaulter is entitled to arrears of rent only up to the date of sale and not thereafter.

8. As we have already indicated. Section 38 (5) gives some indication as to the nature of the confirmation, because, on confirmation, the Collector has to Issue a certificate mentioning the property sold, the name of the purchaser, etc., and such certificate shall be conclusive evidence of the fact of the purchase in all courts and tribunals. This, in our opinion indicates, though not conclusively, that the sale becomes absolute only on the date of confirmation and not on the date of sale itself. We also remind that this was the position under the CPC as it existed in 1864, though this may not be a criterion for interpreting the Revenue Recovery Act. In the circumstances, unless there is a provision in the Revenue Recovery Act that revenue sales, on confirmation, will relate back to their dates. It cannot be so laid down as a general principle.

9. The counsel of the respondents has cited two decisions of the Privy Council, viz., AIR 1927 42 (Privy Council) and Venkat Subba Srinivasa Hegde v. Subba Rama Hegde. AIR 1928 PC 86 laying down that, once a gift deed is executed and

has been delivered to the donee, the donor cannot revoke the gift even before the registration of the deed on the ground that the gift is not completed until the deed is registered. The principle of these decisions is found in a passage extracted in the second of these decisions:

"Registration does not depend upon his (the donor's) consent, but is the act of an officer appointed by law for the purpose, who, if the deed is executed by or on behalf of the donor and is attested by at least two witnesses, must register it if it is presented by a person having the necessary interest within the prescribed period. Neither death, nor the express revocation by the donor, is a ground for refusing registration, if the other conditions are complied with".

Obviously, these decisions cannot be pressed into service for holding that the confirmation of sale relates back to the date of sale: the argument, of course, is that confirmation should, as the registration relates back to the date of gift. The gift is complete when the document is signed and handed over; and it is not as if the gift becomes complete only on the registration of the gift deed. These decisions, therefore, do not help the respondents.

10. The next question relates to the damages for use and occupation of the buildings after 30th November 1954. The second appellate Judge has relied on Section 70 of the Indian Contract Act; and we also rely on the same provision. But our consideration of that provision is not as the second appellate Judge has done. Section 70 of the Contract Act reads:

"Where a person lawfully does anything for another person, or delivers anything to him, not intending to do so gratuitously, and such other person enjoys the benefit thereof, the latter is bound to make compensation to the former in respect of or to restore, the thing so done or delivered". The learned second appellate Judge says:

"It is for the defendants to prove by satisfactory evidence that they were allowed to occupy the building free of any obligation to pay rent". This view, we are afraid, is not correct, because in our opinion, the onus is not on the defendant but on the plaintiff, as would be clear from the language of Section 70 itself. Section 70 says that where a person lawfully does anything for another person, or delivers anything to him, not intending to do so gratuitously, etc. The person (the plaintiff) must, not only establish that he did something lawfully for another (the defendant) or delivered something to him but must, in addition, prove that he did so not intending it to be gratuitous: the onus is on the plaintiff to show that the Act or the delivery was not gratuitous.

11. If this position is clear (and It is clear), then the evidence in the case will not justify the conclusion that the respondents discharged the onus. As the learned second appellate Judge himself has pointed out, the respondents did not enter the box and the evidence of the karyastha of the respondents is also of no use.

12. What remains is the reference of the learned Judge to the decision in

Chaterii v. Mukerji (1913) 18 Ind Cas 751 . The learned Judge has extracted a passage from the decision to the effect that, if the defendant could not question the title of the plaintiff, the plaintiff was entitled to maintain an action for recovery of damages for use and occupation of the land, certainly so. But it is interesting to state the facts of the aforesaid case. The plaintiff therein purchased the property at a sale in execution of a decree for rent but was unable to obtain possession. He sued the defendant for declaration of title and recovery of possession and obtained a decree too. And he executed the decree, but obtained only symbolic possession. The defendant continued in possession? and the plaintiff sued successfully four times in 1898. 1902, 1904 and 1907 for recovery of damages for use and occupation of the land. Thereafter, the suit concerned (the suit of 1910) was brought for compensation for use and occupation. The suit was dismissed by the lower court on the ground that the plaintiff was not In possession at the date of the institution of the suit. But the Calcutta High Court held that. If the title of the plaintiff was admitted (the previous suits established the title beyond doubt) then the claim for damages for use and occupation could not be resisted. It is evident that that decision does not as a general proposition, lay down that if the title of the plaintiff is admitted, the defendant is liable to pay compensation for use and occupation: the liability of the defendant is based on an implied contract, which the plaintiff, who relies on such contract, has to establish: in other words, the onus is on the plaintiff, who relies on Section 70, to establish the ingredients of the section. Since the respondents have failed to establish the ingredients of such an implied contract coming within Section 70 of the Contract Act, the respondents are not entitled to claim damages for use and occupation.

13. For the reasons given above, we allow the appeal, set aside the concurrent decision of the lower appellate Court and the second appellate Judge and restore the decision of the trial Court with costs throughout.