(1938) 08 PAT CK 0037

In the Patna High Court

Chatdradhari Lal APPELLANT

Vs

Bhagwati Prashad and Others RESPONDENT

Date of Decision : 30-08-1938

Acts Referred:
Bengal Land Revenue Sales Act, 1859 — Section 36, 36

Citation : AIR 1939 Patna 168

Hon'ble Judges : Rowland, J;Dhavle, J

Bench : Full Bench

Judgement

Rowland, J.—The plaintiffs-respondent are the holders of a mortgage dated 15th> November 1920, secured on the sixteen annas of tauzi No. 1281, situated in Mauza Sikatia. They brought a suit on their mortgage in 1933. During its pendency there was default by the propraetors, who were the mortgagors, in payment of land revenue as a result of which the entire estate was put up for sale under the Bengal Land Revenue Sales Act, 1859, on 30th April 1934. It was knocked down at a price of Rupees 17 odd, the bidder being defendant 7 of this litigation, defendant second party. The plaintiffs obtained: their preliminary mortgage decree on 31st July 1934 and the defendant second party took out delivery of possession in pursuance of his auction-purchase in December 1934 and followed it up by taking mutation of his name in the Collectorate Register D. The present suit, which was instituted on 12th March 1935, claims a declaration that the revenue sale was altogether fraudulent and was, as against the plaintiffs, void and inoperative, that the plaintiffs'' mortgage lien was not extinguished and that the plaintiffs could put the disputed property to sale for the satisfaction of their preliminary decree. The suit was resisted on the ground that the defendant second party was a genuine and independent purchaser who was holding the property in his own right.

2. The Subordinate Judge came to the conclusion that he was not so, that the defendant in question (defendant 7) was an old and trusted servant and mukhtar-i-am of the father-in-law of defendant 4, who is maternal grandfather also of

defendant 5, that in the mortgage suit this very defendant 7 filed vakalatnama on behalf of Bishambhar Nath, the guardian ad litem for the minor defendant. The Subordinate Judge thought it was clear that defendant 7 had full knowledge of the mortgage suit. He found that admittedly this defendant knew that the defendants first party were owners of the mauza. He found that the defendants first party were also fully aware that the mauza had been advertised for sale and that they deliberately made default so as to cause the property to be sold for a paltry sum of Rs. 17 odd which was the actual amount of the revenue. He held that the defendants first party wilfully and deliberately defaulted and brought about the sale in order to defeat the mortgage rights of the plaintiffs and subsequent mortgagees, and that defendant 7 merely lent his name in furtherance of the fraudulent design which these defendants proceeded to carry into effect by making over to defendant 7 the collection papers of the mauza as well as the survey khatian and allowing him to enjoy the services of their own patwari Thakur Prasad.

3. His opinion was that actually the defendants first party had retained possession and enjoyment of the property for themselves. On this view he held that the plaintiffs were entitled to the declaration prayed for, and he decreed the suit declaring that the revenue sale in respect of the disputed Mauza Sikatia was fraudulent and inoperative against the-plaintiffs and that the defendant second party has acquired no title as against the plaintiffs and that the plaintiffs are entitled to proceed against the disputed mauza in satisfaction of their mortgagee decree,

4. Mr. Mahabir Prasad for the defendant, second party, who appeals, has contended that on the findings, the plaintiffs could not be given the relief asked for, that if it-be conceded that the mortgage lien of the plaintiffs could not be extinguished by the transactions entered into, a declaration of this sort could not be granted, because Section 36 of the Revenue Sale Law bars a suit to oust the certificate purchaser. Therefore he said on the findings the plaintiffs might, be entitled to an order directing the defendant second party to reconvey the property to defendants first party, or the plaintiffs-might be entitled to get a decree on their mortgage in the presence of defendant second party as defendant to a mortgage-suit. He referred us to the decisions in Satish Kantha Roy v. Satish Chandra A.I.R (1920) Cal. 26 and Deonandan Prasad v. Janki Singh A.I.R (1916) P.C. 227 in which the final order was for a reconveyance of property to the plaintiff. But both those were cases in which the plaintiffs had a titles which had matured into a-right to possession at the time of the suit. In this case it is not so. The plaintiffs are still in the position of creditors claiming to be entitled to execute their decree against the property.

5. As regards the construction of Section 36, I do not think it necessary to interpret afresh the words of this Section as they have-been the subject of previous judicial decisions. It will be sufficient perhaps to cite firstly Chandra Caminy Debea v. Ram Ruttun Pattuck (1886) 12 Cal. 302 where, following

previous authorities, it was said that the object of Section 36 is that with the view of discouraging benami purchases at sales of this nature, the Legislature says that a suit to oust the benamidar shall not lie. The Section evidently contemplates this: that the purchaser having elected to make his purchase in a benami name, then wishes to come into Court to have it established that the purchase was a benami one and to have the benamidar ousted by the Court and that appears to be what the Legislature intends to prohibit. But in the vast majority of benami transactions no controversy ever does arise between the benamidar and the real owner. The Section is not to be construed as meaning that where a creditor of the real owner has to bring the property to sale, the sham title of the benamidar may be set up against the purchaser. That would be making this provision, which was intended to discourage fraud, an instrument of fraud.

6. It was pointed out that there were express decisions that in such a case as the present the property may be attached and sold as the property of the real owner. That case was decided as far back as 1885, but it has been followed in subsequent decisions of which it may suffice to instance Jagabandhu Dutt v. Ranjani Kanta Pal A.I.R (1918) Cal. 430. Having regard to these decisions, it appears to me that the technical objection to the form of the final order and decree fails and the relief granted was the correct relief to be given in accordance with the findings arrived at.

7. The other point argued was that the Subordinate Judge should not have found the defendant second party to be merely the benamidar of the defendants first party. As for that Mr. Mahabir Prasad read the judgment and contended that the evidence which was mainly circumstantial was in. sufficient to discharge the burden of proof which lay on the plaintiff to establish the fact alleged and not on the defendant to disprove it. But Mr. Mahabir Prasad could not satisfy us that the facts taken as a whole lead a reasonable man to any other conclusion than that arrived at by the Subordinate Judge, I am of opinion that the view taken by the first Court was correct regarding facts as well as regarding the law. I would dismiss the appeal with costs.

Dhavle J.

8. I agree. The question of farzi was not Mr. Mahabir Prasad''s first ground of attack. He began his argument by saying that assuming that defendant 7 was benamidar for defendants first party, the proper order for the lower Court to pass would have been to declare that it was open to the plaintiffs to proceed against the appellant after giving him an opportunity to redeem their mortgage, as u/s 36, Bengal Land Revenue Sales Act, 11 of 1859, the sale must stand. But that Section, as my learned brother pointed out on the case from Chandra Caminy Debea v. Ram Ruttun Pattuck (1886) 12 Cal. 302 does not enable the sham title of a benamidar to be set up against a creditor of the real owner. Appellant''s being a mere benami purchase on behalf of the mortgagors, the beneficial title has not yet passed from the latter and is available for the mortgagees to proceed

against. In the cases referred to by the learned Counsel from Satish Kantha Roy v. Satish Chandra A.I.R (1920) Cal. 26 and Deonandan Prasad v. Janki Singh A.I.R (1916) P.C. 227 the revenue sales had not been held during the pendency of a suit by a mortgagee against the owner sold up ostensibly or otherwise, as in the present case.

9. It is however not necessary to decide what the effect of a real revenue sale (as distinguished from a fraudulent sale under the sale law to a benamidar of the mortgagor owner) would have been on the rights of the mortgagees in the pending mortgage suit. The appellant benamidar''s title, it is true, cannot be attacked by the mortgagors owners, but so far as the mortgagees are concerned, that title affords no defence either to the beneficial owners, the mortgagors or to the appellant, their benamidar.