

(1932) 07 CAL CK 0029
In the Calcutta High Court

Dwarikanath Par

APPELLANT

Vs

Krishna Barai and Another

RESPONDENT

Date of Decision : 26-07-1932

Acts Referred:

Citation : AIR 1933 Cal 464

Hon'ble Judges : Mukerji, J

Bench : Division Bench

Judgement

Mukerji, J.—Defendant 1 against whom a decree for confirmation of possession after declaration of plaintiff's title to an 8 annas share of a certain jama has been made by the Courts below, has preferred the appeal. The facts of the case are not at all complicated. They are, in so far as it is necessary to be stated here, the following: The jama belonged originally to two persons of the names of Nritya Bewa and Feli Bewa. They held it in equal shares. Feli Bewa's sons are the two plaintiffs in the suit, one of whom is Krishna Barai and the other is a minor of the name of Debi Charan Barai. Nritya Bewa had a son who died leaving a widow named Damayanti Bewa who is defendant 2 in the suit. Nritya Bewa's interest devolved on defendant 2 and Feli Bewa's on the plaintiffs. Feli Bewa and defendant 2 jointly executed a usufructuary mortgage in respect of the entire jama in favour of defendant 1. It is also said that subsequent to the execution of this usufructuary mortgage defendant 2 sold his 5 annas share of the jama to defendant 1. Thereafter, there was default in the payment of the rent due on account of this jama to the landlord. For such default there was a suit for rent instituted by the landlord against the plaintiffs and defendant 2.

2. There was a decree obtained in that suit and in execution of that decree the landlord purchased the entire jama and thereafter defendant 1 obtained a settlement of the jama from the landlord. Defendant 1 had also got his name recorded in the record of rights as the holder of this entire jama. It is on the basis of these facts that the two plaintiffs instituted the present suit for declaration of their title to the 8 annas share in the jama, for a declaration that

the entry in the Record of Rights to the effect that defendant 1 was the tenant in respect of this jama to the exclusion of;the plaintiffs was wrong for a decree for confirmation of possession in the 8 annas share and also for other reliefs. It may be stated here that the plaintiffs' case also was that after the sale in execution of the rent decree had taken place and the landlord had made his purchase at such execution, the said sale had on the application of the plaintiffs, been set aside. The contention of defendant 1 was that he was not a party to nor aware of the proceedings relating to the setting aside of the sale, that he was not bound by any decision that had been made in those proceedings in plaintiffs' favour and that he had taken settlement of the land in jamai right from the landlords and was lawfully in possession of the jama. The Courts below have decreed the suit, and, as already stated, defendant 1 has preferred this second appeal.

3. A preliminary objection was taken as regards the competency of this appeal. This objection rests on the fact that there was an order made by this Court for proper representation of plaintiff 2 who was a minor, but that order not having been complied with, the appeal, in so far as it was against that plaintiff, was dismissed, leaving it open to the appellant to proceed with the appeal as against the other plaintiff, namely, plaintiff 1, at the appellant's risk. A good deal of argument has been addressed to me, based upon what has subsequently transpired to be a misconception as regards the exact nature of the case and of the decree that has been made therein. The argument first of all proceeded on the footing that there have been decrees made by the Courts below in favour of plaintiff 2, and for the matter of that in favour of both the plaintiffs, declaring the entry in the Record of Rights as incorrect. On an examination of the decrees passed by the Courts below however it appears that neither of those decrees contains any such declaration.

4. The suit undoubtedly is based upon a prayer to the effect that it should be declared that the entry in the Record of Rights, to the extent that it affects the property concerned in the suit, namely, the 8 annas share in the jama, was wrong; but that declaration evidently was asked for as ancillary to the other reliefs which the plaintiffs prayed for and have been granted by both the Courts below, namely, a declaration of their right and confirmation of possession. The maintainability of the appeal is also disputed on behalf of the respondents on the ground that the appeal arises out of a suit for correction of an entry in the Record of Rights under the provision of Chap, 10, Ben. Ten. Act. This argument also is not well founded, because the suit for correction of an entry in the Record of Rights is entirely different from a suit of the present nature in which declaration of title to and confirmation of possession of property is made, based though the suit may be upon a prayer in the nature of an ancillary declaration that the entry in the Record of Rights is incorrect.

5. The real point of view from which the matter has got to be considered is whether having regard to the fact that a Joint decree has been made by both the Courts below in favour of the two plaintiffs declaring their title to an 8 annas

share in the jama and giving them possession in respect-of the said 8 annas share as against defendant 1, it is open to defendant 1 to challenge the validity of that decree in the absence of one of the plaintiffs and only to the extent of a 4 annas share which the other plaintiff may have out of the 8 annas share in the jama. I am clearly of opinion that the appellant is not entitled to proceed with the appeal on such a basis. I am of opinion that if the appeal is allowed to proceed on that basis the result will be that defendant 1 will be allowed to get rid of his liability under the decrees of the Courts below to the extent of a four annas share out of the eight annas share in the jama in respect of which a joint decree has been made in favour of the two plaintiffs and which decree will always stand good so far as the minor plaintiff against whom the present appeal had been dismissed is concerned. The two decrees therefore will be utterly inconsistent with each other. Because plaintiff 2 will be entitled to realize that decree as against defendant 1 by applying for its execution and obtaining jointly with plaintiff 1 possession in respect of the eight annas share of this jama as against defendant 1, whereas, on the other hand, defendant 1 will have in his favour declaration to the effect that in so far as four annas share of plaintiff 1 is concerned out of the said eight annas share he is not liable to make over possession of that share to anybody. These decrees will be in conflict with each other and will never be allowed to stand. For this reason, I am of opinion that the present appeal cannot succeed.

6. My attention has been drawn on behalf of the appellant to a number of cases as supporting the view that notwithstanding what has happened the appeal should be allowed to continue. One of these cases is the decision of the Judicial Committee in the case of Mohammad Wajid Ali Khan v. Puran Sing AIR 1929 PC 58. That was a case in which in a suit for pre-emption and recovery of possession a decree had been obtained by several plaintiffs in the Court below. On appeal the defendant in the suit challenged the validity of the decree of the trial Court, but one of the plaintiffs who had obtained such decree was not properly on the record. It was held by the Allahabad High Court that the appeal had abated as against all the plaintiffs and therefore was not maintainable. Their Lordships of the Judicial Committee, while holding that the representatives of the deceased respondent could not be bound by the decree that would be passed on such an appeal by the appellate Court and would still have the right to pre-empt the whole property under a decree of the first Court, held that it was not a correct view to take that in those circumstances the whole appeal had abated, but that it was possible for the appellant to proceed effectively against the surviving respondents. His case, in my opinion, does not support the appellant's contention in any way and for the simple reason that even though the representatives of the deceased respondent were not parties to the appeal and by reason of the decree which stood in their favour, as having been passed by the trial Court they would be competent to pre-empt and obtain possession of the properties, such a decree in their favour would not be inconsistent with a decree which the appellate Court might pass negating the right of the other two

plaintiffs who were properly parties to the appeal.

7. A decree for pre-emption, as pointed out by their Lordships, was a decree in favour of each of the co-sharers to preempt in respect of the entire property leaving the said co-sharers to adjust their shares and properties amongst themselves. Their Lordships' decision, in substance, was that the persons who would be entitled to pre-empt on the strength of the decree made by the trial Court would be competent to do so even though other persons who were properly parties to the appeal would be precluded from doing so by reason of the decree which the appellate Court might pass. This case therefore in my opinion, has no application to the position which the appellant desires to maintain. Another case has been referred to and that is the case of Hari Charan Kalipada Chakravarty AIR 1929 Cal 51. The facts of that case also stand on a very different footing. There several plaintiffs had instituted a suit for ejectment. They had failed in the trial Court. Then they preferred an appeal before the lower appellate Court, and when that appeal was pending one of the plaintiffs-appellants died and his heirs did not come forward to be substituted in the place of the deceased. The question that arose was whether in those circumstances it was open to the other plaintiffs-appellants who were on the record to proceed with the appeal. It was held that by an amendment which ought to have been allowed in that case the latter should have been allowed to proceed with the appeal in order to get a somewhat different form of relief from that which he had originally claimed. There was no question of any conflicting decrees resulting. In the present case the position is entirely different and the appeal cannot, in my opinion, proceed. This is my view as regards the maintainability of the present appeal. But the case has been argued in very great detail, and upon the merits the one question of importance that arises is whether defendant 1 is bound by the proceedings relating to the setting aside of the sale and the order that was passed in those proceedings.

8. It appears that under Order 21, Rule 90, of the Code, if an application is made for setting aside a sale, notice of such application should be given to all parties who may be affected by the sale being set aside. That is what is stated in Order 21, Rule 92 of the Code, which lays down that no order for setting aside a sale should be made without notice to the parties affected thereby. The question is whether if such an order is made without notice being given to parties who may be affected by the setting aside of the sale the order may be regarded as one passed without jurisdiction and entirely a nullity or whether it should not be held that the order is a good one though in certain circumstances it may not be binding on the party to whom such notice has not been given. Now the decision which has been relied upon by the Court of appeal below for the view that such an order cannot be regarded as one passed without jurisdiction and as a nullity, the learned advocate for the parties could not produce before me. I have subsequently found that it was one of my own decisions. I held in that case that an order setting aside a Court sale cannot be treated as a nullity merely because notice of the application for setting aside the sale was not issued to a party who

was affected by the order and that if such a party does impugn the validity of the order in a proceeding directed against the order he cannot attack it collaterally in any other proceeding. I see no reason to change my view expressed in that case.

9. In that view of the matter the question that arises is as to whether defendant 1 can rely upon his title as against the plaintiffs. Defendant 1 was a usufructuary mortgagee both in respect of the eight annas share which the plaintiffs claimed and in respect of the other eight annas share which belonged to Nritya Bewa. As regards the alleged purchase under the kabala from defendant 2 that did not relate to the eight annas share which formed the subject-matter of the suit. And the other title on which defendant 1 relied was the one which he derived from the landlord after the latter had made his purchase at the sale which was subsequently set aside. In these circumstances, the purchase which defendant 1 is alleged to have made from defendant 2 does not require any consideration in this suit. As regards the usufructuary mortgage the finding of the trial Court is that defendant 1 himself was bound to pay the rents due to the landlord and that this finding is correct appears from the very terms of the mortgage deed itself which is on the record. That being the position, any settlement which defendant 1 may have obtained from the landlord on a sale held in execution of a decree which had been brought about by the non-payment of the rent which defendant 1 was bound to pay under the terms of this document must enure to the benefit of the plaintiffs. It is quite true that the Subordinate Judge has not come to any finding with regard to this matter. But there is a finding to the above effect in the judgment of the trial Court, and inasmuch as it is, more or less, a finding on a legal position which in my opinion is correct, I do not see why I should not uphold it. The result is that, in my opinion, the appeal fails and must be dismissed with costs.