
(1938) 04 AHC CK 0006
In the Allahabad High Court

Hakim Enayat Ullah

APPELLANT

Vs

Khalil Ullah Khan and Another

RESPONDENT

Date of Decision : 01-04-1938

Acts Referred:

Encumbered Estates Act, 1934 — Section 4, 7(3)

Citation : AIR 1938 All 432

Hon'ble Judges : Iqbal Ahmad, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

Iqbal Ahmad, J.—This is an appeal against an order of the Court below rejecting an application for the execution of a sale deed in pursuance of a decree for specific performance of a contract of sale. The appellant obtained a decree for specific performance of a contract of sale against Khalil Ullah and Mt. Kaniz Amna Khanam so far back as in the year 1928 or 1929. It is stated that by an oversight the Court did not, by its decree, direct that on the execution of the sale deed possession of the property covered by the decree would be delivered to the decree-holder. This led to an application by the decree-holder for the correction or amendment of the decree. This application was rejected by the trial Judge, but this Court allowed the application and directed the amendment prayed for by the decree-holder. Armed with this amended decree the decree-holder applied to the Court below for execution of the sale deed in terms of the decree. In the meantime Khalil-Ullah had applied to the Collector u/s 4, Encumbered Estates Act and it is admitted before us that the Collector did forward the application to the Special Judge in accordance with the provisions of Section 6 of the Act.

2. Khalil Ullah objected to the application of the decree-holder on the ground that as the Collector had forwarded the application to the Special Judge his proprietary rights in land could not be transferred in view of the provisions of Clause (3) of Section 7. This contention of Khalil-Ullah was given effect to by the Court below and the application for execution was dismissed. In appeal before us

it is argued on behalf of the decree-holder that Clause (3) of Section 7, Encumbered Estates Act had no application to the case. It is contended that title to the property covered by the decree was transferred by the decree itself and that the execution of sale was a mere formality to evidence the transfer of the title by the decree. It is therefore urged that there was no question of any transfer being made by the Court. Secondly, it is contended that that Clause (3) merely prohibits transfer by the owner of the property and has no application to a transfer by the Court in pursuance of a decree for specific performance of a contract of sale. The arguments advanced on behalf of the decree-holder appear to us to be without substance. A decree for specific performance only declares the right of the decree-holder to have a transfer of the property covered by the decree executed in his favour. The decree by itself does not transfer title. That this is so is apparent from the fact that in order to get title to the property the decree-holder has to proceed in execution in accordance with the provisions of Order 21 of the Code. So long as the sale deed is not executed in favour of the decree-holder either by the defendant in the suit or by the Court the title to the property remains vested in the defendant and till the execution of the sale deed the decree-holder has no right to the possession of the property. It is only the execution of the sale deed that transfers title to the property.

3. The sale deed executed by a Court in pursuance of a decree for specific performance is a transfer by the Court on behalf of the judgment-debtor and it is the title of the judgment-debtor to the property that is transferred by the sale deed executed by the Court. If the judgment-debtor is precluded from transferring his property by some statutory provision, the Court cannot, in violation of that provision, execute a sale deed of the property. Clause (3) Section 7, Encumbered Estates Act provides that until the happening of certain contingencies the landlord shall not be competent, without the sanction of the Collector, to make any exchange or gift of or to sell, mortgage or lease his proprietary rights in land. It is admitted that the contingencies referred to in Clause (3) have not yet happened. It is therefore clear that the judgment debtors were not themselves competent, without the sanction of the Collector, to transfer the property. As the Court was asked to execute the sale deed on behalf of the judgment-debtors, the Court could not ignore the statutory provision just referred to and could not execute the sale deed without the sanction of the Collector. The learned Judge of the Court below observed in the course of his judgment that "he would even go so far as to write to the Collector for the necessary sanction," provided he was satisfied on certain points. We consider that it is not for the Court to apply for the sanction of the Collector. If the decree-holder is so advised it would be open to him to file an application before the Collector. In our judgment the decision appealed against is perfectly correct and accordingly we dismiss this appeal with costs. The receiver appointed will be removed.