(1929) 12 CAL CK 0025

In the Calcutta High Court

Jadav Chandra Karmarkar and Others APPELLANT

Vs

Akrur Chandra Karmarkar and Others RESPONDENT

Date of Decision : 17-12-1929

Acts Referred:
Civil Procedure Code, 1908 (CPC) — Section 47

Citation : AIR 1930 Cal 586

Hon'ble Judges : S.K. Ghose, J

Bench : Division Bench

Judgement

S.K. Ghose, J.—This appeal arises out of a suit for khas possession of lands on declaration of title thereto. The plaintiff''s case is that defendant 5 auction-purchaser the lands in suit on 13th February 1914 in execution of a decree on simple mortgage as against defendant 1 and the predecessor-in-interest of defendant 9. On 23rd December 1925 defendant 5 sold the lands to the plaintiff by executing a kabala. The plaintiff''s case is that after the death of Baikuntha the predecessor-in-interest of defendant 2, defendants 1 and 2 entreated defendant 5 not to take possession of the lands and that, in accordance with such entreaty, defendant 5 did not take possession. The plaintiffs after their purchase sought to take possession, but were resisted by the defendants. Hence the suit. The main defence is that the plaintiff, having purchased from the decree-holder-auction-purchaser should come in by way of execution u/s 47, Civil P.C. and not by a separate suit. Both the Courts below have agreed in giving effect to the defence and have dismissed the suit. Hence this second appeal by the plaintiffs. In this appeal the point is whether the suit is maintainable.

2. In support of the appeal it is contended that Section 47, Civil P.C., does not apply. It may be stated here that defendant 5 auction-purchaser on 13th February 1914 and this sale was confirmed on 18th March 1914. He did not however take possession through Court. It is alleged in the plaint, as mentioned already, that defendant 5 refrained from taking possession on account of the entreaties of defendants 1 and 2 and that defendants 1 and 2 were thereafter

allowed to remain in possession of the lands by license on the part of the plaintiff''s vendor. It is contended that in these circumstances it must be held that defendant 5 was in constructive possession and that the actual possession of defendants 1 and 2 was that of licensees. The dispossession occurred when, after their purchase, the plaintiffs sought to take actual possession and were resisted by defendants 1 and 2. It is contended that in these circumstances it is not a matter u/s 47, Civil P.C. and that properly speaking it is a suit which comes under Article 142, Lim. Act. In reply to this it is argued that the law requires that symbolical possession should be taken to avoid the bar of limitation and the fact that defendant 5 actually did not take symbolical possession does not operate in his favour. Under Order 21, Rule 95, Civil P.C., however, it is not necessary that in every case delivery of possession of the property must be taken through Court. Under that rule where the immovable property sold is in the occupancy of the judgment-debtor and the purchaser applies, the Court is to order delivery to be given to the purchaser. It does not follow that in every case the purchaser has no choice but is bound to apply for delivery of possession. It is possible that by an amicable arrangement, possession is given up by the judgment-debtor, and in such a case the law does not require for the purpose of limitation that the auction-purchaser must proceed by way of application under Rule 95. Whether in the present case, defendants 1 and 2 were in possession as licensees is a question of fact. It may be mentioned that in para. 7 of the written statement the allegation in para. 4 of the plaint is not exactly traversed but on the other hand some sort of amicable arrangement with the auction-purchaser is alleged. The trial Court did not go into the question, as to whether this happened in fact and if this allegation of fact on the part of the plaintiffs is proved, it would follow that defendant 5 was in possession through defendants 1 and 2 as his licensees, and therefore, the relief asked for by the plaintiffs cannot be said to be one which should properly be a subject-matter of an application u/s 47, Civil P.C. It is, therefore, necessary that the case should be remanded to the trial Court for decision on the question of fact which is referred to above. If it is decided that defendant 5 was in possession through defendants 1 and 2 as his licensees, then the suit would be governed by Article 142, Lim. Act, and it would be within time. In that case the Court should proceed to try the suit on merits. If on the other hand, it is found that defendant 5 was not in possession then Article 142 would not apply. I may mention here that if Section 47, Civil P.C., does not apply, then the plaintiffs would; be entitled to the benefit also of Articles 136 and 138, Lim. Act, and even then the suit would be within time. On this point, see the decision in Sati Prasad Sen v. Jogesh Chandra Sen [1904] 31 Cal. 681.

3. If, however, it is found that defendant 5 was nob in possession, as stated above, then the question would be whether Section 47, Civil P.C., should apply. On behalf of the appellants it is contended ?that Section 47 would not apply, because the plaintiffs being purchasers on a private kabala from defendant 5, could not be his representatives-in-interest within the meaning of Section 47, Civil P.C. In support of this I am referred to Bhagwati v. Banwari Lal [1909] 31

All. 82, and particularly to the remarks reported at p. 99. In the course of his judgment, Banerji, J., observes as follows:

la the present case the plaintiff cannot at all be regarded as the decree-holder. The decree itself was never assigned to her. It was the property sold by auction which was transferred to her by gift by the auction purchaser. Under that transfer she acquired no interest in the decree itself and in no sense can it be said that she is the holder of the decree or the representative-in-interest of the decree-holder gua the decree.

4. Stress is laid on this passage as laying down the rule that a private transferee from a decree-holder auction-purchaser is not his representative-in-interest. In that case, however, the question that was raised was something entirely different from that in the present case. The question was whether a suit by the auction purchaser or his representative-in-interest against the judgment-debtor or his representative-in-interest for possession of the property sold was barred by the provision of Section 244, Civil P.C. The remarks, on which stress is laid, were made in consideration of a decree which was one for delivery of possession and as bearing on the question whether the private transferee was in the position of the decree-holder auction-purchaser. Those remarks may not exactly apply to the point for determination here. On the other hand the case Sandhu Taraganar v. Hussain Sahib [1904] 28 Mad. 87, directly decided that a private purchaser from the heirs of a decree-holder auction-purchaser was a party who stood in the shoes of the latter for the purposes of an application u/s 244, Civil P.C. This case considered and followed an earlier case : Ishan Chandra Sircar v. Beni Madhav Sircar [1897] 24 Cal. 62. In this latter case the term "representative" was explained as including the purchaser and the test that was laid down was whether he would be bound by the decree. It is pointed out by the learned advocate for the respondents that the present plaintiffs, having purchased from the decree-holder auction-purchaser, cannot fail to be bound by the decree for possession, and this follows from the decision in the Madras case referred to above, which has not been dissented from in any case and which is to be read along with the decision of the Full Bench in Kailash Chandra Tarafdar Vs. Gopal Chandra Poddar, . There it was decided that the question as to delivery of possession under Order 21, Rule 95, comes u/s 47 of the Code. It follows from these decisions that if it is found that defendant 5 was not in actual possession through defendant 1 and 2 as his licensees, then the plaintiffs being his representatives-in-interest, a separate suit would be barred. The plaintiff''s only remedy would be by application u/s 47 and that must be held to be barred by reason of Article 181, Lim. Act, as decided by the learned Subordinate Judge.

5. The result is that I remand the case to the trial Court for determination of the question of fact which is referred to above; and if this question is decided in favour of the plaintiffs, the suit will be heard on merits. Otherwise the suit will stand dismissed with costs. As in the Court of appeal below the question as to the applicability of Article 142, Lim. Act, was not raised, the costs of this appeal

will abide the result. The appeal is allowed on these terms.

