
(1946) 04 CAL CK 0026
In the Calcutta High Court

Jagatbandhu Biswas and Others

APPELLANT

Vs

Iswar Chandra Nandy and Others

RESPONDENT

Date of Decision : 18-04-1946

Acts Referred:

Transfer of Property Act, 1882 — Section 2(d), 77

Citation : AIR 1948 Cal 61

Hon'ble Judges : Sharpe, J;B.K. Mukherjea, J

Bench : Full Bench

Judgement

B.K. Mukherjea, J.—This appeal is on behalf of the plaintiffs and it arises out of a suit commenced by them for establishment of their title to one-third share of the property in suit and for recovery of joint possession along with the defendants. The material facts lie within a very short compass and are not in controversy. The subject-matter of dispute is a tank which appertains to noabad taluk Bhabani Charan which originally belonged to one Gour Hari Nandi in taluki right. On Gour Hari's death, it devolved on his three sons, namely, Iswar Chandra (defendant 1), Chandra Kumar (defendants) and Sasi Kumar. Sasi Kumar made a gift of his one third share in the property to his wife Mallikabala who is defendant 2 in the suit. It is not disputed that the tank was and is enjoyed as a part of the dwelling house owned by this family of three brothers. On 15-9-1929, the interest of Chandra Kumar in the tank was put up to sale in execution of a money decree against him obtained by a third party, and it was purchased by one Mohendra Chandra Majumdar. Mohendra took symbolical possession of one-third share of the tank on 22-11-1928 (sic). Later on, he sold his share of the tank along with other properties to Syama Charan Biswas, the predecessor of the plaintiffs, by a kotala, dated 23-3-1930. Syama Charan, it is said, enjoyed the tank jointly with the other co-sharers while he was alive, and after his death, his successors, the present plaintiffs, were also in joint possession, but they were dispossessed by the defendants on 10-12-1939, which led to the institution of the present suit.

2. The defence, in substance, was that the disputed tank being a part and parcel

of the defendants" homestead, the plaintiffs who were strangers to the family were not entitled to any relief by way of joint possession, and their only remedy was by a suit for partition. Both the Courts below gave the plaintiffs a declaration of title to the extent of one-third share in the tank in suit, and they concurred in dismissing the plaintiffs' claim for joint possession on the ground that they, being outsiders, were not entitled to joint possession under the provision of Section 44, T.P. Act. The plaintiffs have now come up on second appeal to this Court. Mr. Chandra Sekhar Sen, appearing in support of the appeal, has contended before us that the Courts below erred in law in holding that the provision of Section 44, T.P. Act, was applicable to the facts of the present case. It is argued that the plaintiffs' title being based upon an involuntary sale in execution of a decree of a Court, Section 2 (d), T.P. Act, would exclude the operation of Section 44 of the Act; and if Section 44, T.P. Act, is out of the way, there is no other law which stands in the way of the plaintiffs' obtaining joint possession of their share of the property to which they admittedly have title.

3. Now, para. 1 of Section 44, T.P. Act, lays down the general rule that the transferee of a share in a joint property acquires all the right, title and interest which the transferor had at the date of the transfer, subject to all conditions and liabilities affecting the interest thus transferred. This includes the right to joint possession which his predecessor had, but as the presence of a stranger in a family dwelling house might lead to serious breaches of the peace, para. 2 which is a sort of proviso to the main provision lays down that:

Where the transferee of a share of a dwelling house belonging to an undivided family is not a member of the family, nothing in this Section shall be deemed to entitle him to joint possession or other common or part enjoyment of the house.

4. We agree with Mr. Sen that Section 44, T.P. Act, does not directly apply to a sale in execution of decree. The Transfer of Property Act, as its preamble shows, is enacted "to define and amend certain parts of the law relating to the transfer of property by acts of parties;" and Section 2(d) expressly lays down that nothing in the Act shall be deemed to affect "any transfer by operation of law or by, or in execution of, a decree or order of a Court of competent jurisdiction;" save as provided by Section 57 and chap. 4 of the Act. We are also unable to accept the view taken by the lower appellate Court that as Syama Charan, the plaintiffs' predecessor, was himself a purchaser at a private sale, he could not claim exemption from the operation of Section 44, T.P. Act, even though his vendor was an execution sale purchaser. If the purchase of the share of Chandra Kumar by Mohendra at an execution "sale was not affected by Section 44, T.P. Act, and Mohendra could get joint possession of the property although he was a stranger to the family, anybody deriving title from Mohendra no matter by private purchase or otherwise, could not certainly be placed in the different position.

5. The learned Advocate for the respondent has candidly stated to us that he is not prepared to support the decision of the Court of appeal below on the ground

mentioned above. He argues, however, that although Section 44, in terms, may not apply to a sale in execution of a decree, yet the principle underlying the Section is applicable to an execution sale. We think that this contention is right and must succeed. It is to be noted that prior to the passing of the Transfer of Property Act, 1882, there was some conflict of judicial opinion on the point as to whether the purchaser by a judicial sale of the share of a member of a joint family was entitled to be placed in physical possession of any part of the family dwelling house. Though there are certain authorities which decided the question in favour of the execution sale purchaser, there was expression of opinion in the other way too. Thus in *Koonwar Bejoy Keshub Roy v. Shama Soonduree Dossee* (1865) 2 W.E. Mis. 30 Kemp J. observed that it was inequitable with reference to Hindu customs and prejudices to permit a stranger to intrude himself upon the privacy of a joint Hindu family residence, more particularly when, as happens in many instances, a stranger is actuated by motives of enmity, and the learned Judge suggested that the difficulty might be met if instead of joint possession in execution of the decree, partition, proportionate to the share of the purchaser was effected. The Bombay High Court in several cases took the view that when the purchaser of a coparcener's share had already obtained joint possession peacefully of the share purchased, he would not be ousted at the instance of the coparceners, but no suit for joint possession would lie at the instance of the stranger purchaser: *Mahabalaya v. Timaya* (1975) 12 Bom. H.C.E. 138 *Babaji Laxman v. Vasudev Vinayak* (1975) 1 Bom. 95 and *Kallapa v. Venkatesh* (1976) 2 Bom. 676.

6. These cases were considered by Westropp C.J. and N. Haridas J. in *Balaji v. Ganesh* (1980) 5 Bom. 499. In that case, a judgment-creditor attached in execution and caused to be sold the judgment-debtor's undivided share as a member of a joint Hindu family in seven parcels of land of which the applicant was in possession as manager. At the sale, Y became the purchaser, and subsequently and without having himself entered into possession, Y assigned his interest in the purchase to G.G. claimed to be put into possession, and obtained a Court's order, directing that possession should be given to him. The applicant, however, obstructed the execution of the said order, and applied to the High Court to declare G not entitled to the possession he sought. No division of the property had ever been made, and the judgment-debtor had no separate occupancy of any definite share in the properties. It was held that G's proper remedy was by a suit for partition, and he could not claim to be put into joint possession with the applicant and the other members of the undivided Hindu family, of the family property. Westropp G.J. observed in the course of his judgment:

We also deem it a far safer practice and less likely to lead to serious breaches of the peace, to leave a purchaser to a suit for partition than to place him by force in joint possession with members of a Hindu family, which may be not only of a different caste from his own but also different in race and religion.

7. This judgment was delivered in January 1881. In the draft bill on the Transfer of Property Act prepared in 1879, the proviso to Section 44, as mentioned above, did not find a place. It was because of this observation of Westropp C.J. that the proviso was inserted in the final bill. It seems to us to be quite clear that the Legislature in inserting para. 2 in Section 44, T.P. Act, was embodying a principle of law which was already recognized by the Courts of law, and although Section 44 does not in terms apply to involuntary sales, it does not follow that the application of the same principle to involuntary sales as a rule of equity, justice and good conscience is excluded. Whatever might be said about cases where the stranger purchaser who has obtained joint possession peacefully is sought to be ejected by other coparceners, we think that we would be justified, on the authority of the cases mentioned above, in holding that a suit for possession by such a purchaser against the other coparceners would not lie. It is to be noted that in *Balaji v. Ganesh* (1980) 5 Bom. 499 the case was of a purchaser at a judicial sale, and we also find that in some decisions of this Court, the principle of Section 44, T.P. Act, has been applied to involuntary sales, although this specific question was neither raised nor decided: *Kshirode Chunder v. Saroda Prosad* (1910) 12 C.L.J. 525 and *Girija Kanta v. Mohlm Chandra* AIR 1916 Cal. 170. In our opinion, therefore, the decision of the Court of appeal below is right though the reason assigned for that decision cannot be upheld. The result is that this appeal is dismissed. We make no order as to costs in this Court.

Sharpe J.

8. I agree.