

(1871) 03 CAL CK 0009
In the Calcutta High Court
Case No : Special Appeal No. 2000 of 1870

Lala Gundar Lal

APPELLANT

Vs

Habibannissa and Others

RESPONDENT

Date of Decision : 23-03-1871

Acts Referred:

Citation : (1871) 03 CAL CK 0009

Final Decision : Allowed

Judgement

Ainslie, J.—The plaintiff in this suit is seeking to establish his right under two conveyances from Mussamat Bhikun in respect of a one-anna share of certain property. In the first Court he obtained a decree. When the case was taken on appeal before the District Court, the Judge of that Court held that, inasmuch as the plaintiff had come in, in the course of an execution suit u/s 246 of the Code of Civil Procedure, and had failed in his intervention, and had allowed more than twelve months to elapse before he commenced this suit, he was barred by limitation.

2. In special appeal it has been contended, in the first place, that there was no investigation u/s 246 of the Civil Procedure Code; in the second place, that, supposing that there was an investigation under that section, even then limitation would not apply, inasmuch as the plaintiff is actually in possession; and, thirdly, that the sale under which the defendant claims was held under a decree of the Small Cause Court, which was in the form of a mortgage decree, and therefore one which that Court had no jurisdiction to make, and that the sale consequently was null and void. As to there having been no investigation, we find that an application was submitted by the plaintiff on the 1st August 1867, u/s 246; that that application was registered, and the petitioner was ordered to produce evidence in support of his case, and the opposite party was called on to reply; and that on the 25th September of that year, partly with reference to the finding in a similar intervention on behalf of Mussamat Bhikun, but also because the intervenor had failed to produce any evidence in support of his claim, his

application was dismissed. This application having been dismissed on default, the order must be treated as of equal force with a finding on the merits after investigation. I now come to the next ground. Granting that there was an investigation u/s 246, it is said that under the ruling in *Lakhi Priya Debi v. Khyrulla Kazi*¹, limitation will still not apply. On examining that case, however, it will be found that there is a very material distinction between it and the present case, because it appears that in that case it was held that there had been no proper adjudication u/s 246 on the question of possession, the only question which could be investigated under that section. Such investigation as had taken place had been directed to ascertain title, and was held not to be a proper investigation.

3. But the third ground taken in special appeal appears to us to be good. The decree under which the sale was held, by which the defendant became a purchaser of this property, was a decree of the Small Cause Court in a suit on a mortgage-bond; and the terms of the decree are that the defendant is to pay certain moneys to the plaintiff, or, that is, in default of his payment, the plaintiff is to recover the sum by the sale of the property pledged.

4. This was a decree which, when transferred to the Civil Court for execution against immoveable property, might have been rejected by the Court u/s 288 of the Code of Civil Procedure. It was not so rejected; but as it is patent on the face of the decree that the Small Cause Court had no jurisdiction to make it, and therefore that the Civil Court had no jurisdiction to allow any sale to take place under it, I think that we must allow this ground of appeal now, and declare that the sale was made entirely without authority, and was a nullity. Accordingly we overrule the plea of limitation, and remand the case to the lower Appellate Court to be tried on the merits with reference to the above remarks.

Special Appeal No. 1370 of 1870

14.11.1870

Lakhi Priya Debi Vs. Khyrulla Kazi and Anr.

Bayley and E. Jackson, JJ.

Baboo Iswar Chandra Chucherbutty

Baboo Khettranath Bose

Jackson, J.

This was a suit brought by the plaintiff to establish her right in 18 bigas 4 1/2 katas of lakhiraj lands, which were sold in execution of a decree against her husband in the year 1868. The plaintiff alleged that the said land was purchased by her with her stridhan; that she was always in possession of it; and that her husband had no connection whatever with it. The defendant, the purchaser in execution of that decree, in his first objection against the plaintiff's case, contended that the suit was barred by the Law of Limitation as contained in the

final clause of section 246, Act VIII of 1859, viz., that, when the execution proceedings were being carried on against her husband in the year 1866, the plaintiff came in, and preferred a claim u/s 246, objecting to the sale of this particular land; that her claim was heard and decided, and rejected in December 1866; and that she was bound to bring her suit to establish her title to the land within one year of the date of the order, whereas she has allowed more than two years to elapse without doing any such thing.

The first Court decided that the order passed u/s 246 was no bar to the plaintiff's suit, as the plaintiff proved that, notwithstanding that order, she remained in possession down to the time of a subsequent sale in August 1868 and ouster in July 1869, and also because the proceedings which took place in 1866 were not carried out so as to result in the sale of the land, but were struck off the file on default of the decree-holder to carry them on, and were subsequently revived: a second attachment was made, and a sale thereupon held. The first Court accordingly went into the merits of the case, found that the plaintiff purchased the property with her own stridhan, and that she was therefore entitled to a decree.

The Subordinate Judge of Rung-pore has reversed that decision, and held that the plaintiff was bound to bring the suit within one year of the decision u/s 246. This special appeal has been brought on this point, and it is urged on two grounds: firstly, that the Court which decided the objection of the plaintiff u/s 246 passed no order under that section; that the decision did not refer to the question of possession, but solely went into the question of title, and that therefore it cannot be considered to be an order within the meaning of that section; and, secondly, that the proceedings in execution against which objection was taken in the first instance, were not carried out, but were struck off, and subsequently revived. No doubt, there is something peculiar in the case, but we think there is some force in the argument that there was no decision as to possession in the order passed on the plaintiff's claim u/s 246. Whether the plaintiff was then able to prove that the property was purchased by her stridhan or not, if she had proved that she was in possession, the property could not be sold. Here it has been found by the first Court that she was in possession, and continued in possession for two years and a half after the order was passed. The order was not acted upon; the property was not then put up to sale; and under all the circumstances of the case, we think that the plaintiff was not bound to sue within one year of the decision said to be a decision u/s 246, but which in reality was no decision at all under that section. We therefore set aside the decision of the Subordinate Judge, and remand the case for trial on the merits. The costs of this appeal will follow the result of the suit.