
(1976) 08 CAL CK 0002
In the Calcutta High Court
Case No : S.A. No. 1353 of 1966

Mahananda Mazumdar and Others

APPELLANT

Vs

Kunja Behari Achari and Others

RESPONDENT

Date of Decision : 06-08-1976

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 92

Citation : 81 CWN 25

Hon'ble Judges : R. Bhattacharya, J

Bench : Single Bench

Advocate : Kanan Kumar Ghosh, for the Appellant; Joygopal Ghosh, for the Respondent

Final Decision : Dismissed

Judgement

R. Bhattacharjee, J.—This second appeal is by the principal defendants against the judgment and the decree passed by an Additional District Judge, 24-Parganas in an appeal reversing those of the Munsif of the trial court. The trial court dismissed the suit brought by the plaintiff. But, in the first appeal the plaintiff was successful. According to the plaint allegation, the suit land originally belonged to one Bashi Bibi. She had 12 annas share in the jama. After the vesting of the estate of the intermediary in the state according to the provisions of the West Bengal Estates Acquisition Act, Bashi Bibi became a tenant under the State Government in respect of 12 annas share. Remaining 4 annas share belonged to Kadvanu Bibi. When they were in possession of the suit land previous to the introduction of the West Bengal Estates Acquisition Act, a Rent Suit was filed by the landlord for arrears of rent. In execution of the decree obtained in that suit, the Execution Case No. 1160 of 1953 was started and there the suit land was sold in auction. Subsequently, however, Bashi Bibi filed a petition u/s 174 (3) of the Bengal Tenancy Act for setting aside that sale and a Miscellaneous case was started being Case No. 133 of 1954. In the said Miscellaneous case the auction sale was set aside by the court in terms of the

petition of compromise filed by the auction purchaser and the petitioner, Bashi Bibi, thus continued in possession of the suit land and on January 3, 1963 she sold her interest in the suit jama to the plaintiff Kunja Behari Achari by a registered kobala. After the purchase when Kunja Behari went to take possession of the land, he was resisted by the defendants Mahananda and others. Plaintiff came to know on enquiry that the relevant khatian was recorded in the name of the principal defendants. According to the plaintiff, the settlement record was collusive and baseless. He started the suit for declaration of his title and recovery of possession of the suit land by evicting the defendants who were trespassers.

2. The principal defendants contested the suit. Their case is that the suit jama which originally belonged to Bashi Bibi and others was sold in auction in the Rent Execution Case as mentioned by the plaintiff and the same was purchased by one Sunil Biswas on March 13, 1954. Thereafter, on August 16, 1954 Haripada Dey, Upendra Nath Dey, Sudhir Kumar Dey and Ajit Kumar Dey purchased the suit land by a registered kobala and on that very day the principal defendants Mahananda Mazumdar, Rasharaj Mazumder Harendra Nath Mazumdar and Sashi Bhusan alias Shambu Nath Mazumdar purchased the same by another registered kobala from Haripada Dey and three others and since then they have been possessing the same lawfully and with proper title without knowing that the auction sale was set aside as alleged by the plaintiff. It has been alleged by the defendants that their title would not be affected as the order setting aside the sale was made by the court without notice to them and as they were not parties to that proceeding.

3. The learned Munsif in his judgment found that the order setting aside the auction sale in the Rent Execution Case was illegal because no notice in terms of proviso to sub-section (2) of section 174A of the Bengal Tenancy Act was served upon the defendants who had interests in the suit land by virtue of purchase, no deposit of money was made as required under clause (b) of sub-section (3) of section 174 of the Bengal Tenancy Act and there was no sufficient material regarding fraud or material irregularity in publishing or conducting the sale. In the first appeal the learned Additional District Judge was of the view that the order setting aside the auction sale as passed by the court could have been challenged in a proceeding but not collaterally in the present suit. According to the learned Judge, the learned Munsif was not justified in finding fault in the present suit with the order setting aside the auction sale as if in a judgment against that order. It has been found by the learned Additional District Judge that when the principal defendants purchased the suit property within six months, a period within which an application could be filed u/s 174(3) of the Bengal Tenancy Act, he was not entitled to get any notice. The plaintiff, according to the learned Judge, proved his title to the suit land on the basis of the purchase from Bashi Bibi by a kobala executed in January, 1963. After the setting aside of the auction sale, on the question of limitation there was no difficulty for the first appellate court because the suit was filed on 27.2.1963 and the auction sale which was set aside took place on 15.3.1954. As the learned Judge found that

the plaintiff had title to the suit land and as the defendants were trespassers, the trial court's judgment was set aside and the suit was decreed.

4. I have heard Mr. Kanan Kumar Ghosh, the learned Advocate appearing on behalf of the appellant and Mr. Joygopal Ghosh for the respondent. The contention of Mr. Ghosh for the appellant is that the learned Judge in the first appellate court was wrong in holding that in the present suit the defendants could not challenge the legality and propriety of the order setting aside the auction sale on the basis of which the defendants claimed their title. The second point urged is that the order passed in the Rent Execution Case setting aside the auction sale was illegal and not binding upon the defendants on two grounds - first, no notice was issued to the principal defendants regarding that proceeding and they were not made parties thereto and secondly, the said order was illegal for non-compliance of the provisions of section 174 of the Bengal Tenancy Act, viz., for non-deposit of money as required. Mr. Ghosh for the plaintiff-respondent, however, opposes the contentions.

5. With regard to the first point, namely, whether the principal defendants could challenge, by way of defence of their title, the order passed in the Rent Execution Case for setting aside the sale, the learned Advocate for the appellant has submitted that whenever there is any question of title in a suit property, particularly when the plaintiff alleges the defendants to be trespassers in a suit for recovery of possession, the latter, by way of defence and in order to establish their title to the suit land, can challenge the legality of the order of the court on which the plaintiff relies when the defendants are not party to the proceedings or the suit in which the order was passed giving benefit to the plaintiff. There may be various facts and circumstances in different suits connected with the question of title. We are, however, concerned with the facts and circumstances appearing in the present case and the same only will be relevant for our consideration and decision. There is no necessity for discussing theories of law for making general propositions. The defendant certainly has the right to challenge the title of the plaintiff and the basis on which his right rests and also at the same time establish his own right. Unless the challenge to plaintiff's title is effective, the defendant will get no relief. If the plaintiff fails to prove his title to the suit land, he cannot get any decree for recovery of possession against the defendant. The plaintiff must prove his own case and his success will not depend only upon the weakness of the defendants' case. In the present case the plaintiff has relied upon the order of the court setting aside the auction sale in Rent Execution Case, of course, on the basis of a petition of compromise filed by the auction purchaser Sunil Biswas and Bashi Bibi. Clearly, therefore, the sale on the basis of which Sunil Biswas purchased the suit property in the Rent Execution Case has been set aside and the effect of the sale is no longer in existence. The title to the suit property based upon the sale has been nullified due to the order of the court. Admittedly, the principal defendants, who are the appellants before me, derived their title to the suit land on the basis of the sale held in the Rent Execution Case. That sale took place, no doubt, within 12 years prior to the institution of

the present suit. There is no dispute also before me that in the proceedings started by Bashi Bibi for setting aside the sale, no notice was served upon the principal defendants who purchased the suit land from persons who purchased the said property from the auction purchaser Sunil Biswas. The question, therefore, is whether the defendants can challenge the propriety and legality of the order setting aside the auction sale passed in a proceeding u/s 174 of the Bengal Tenancy Act in which they were not parties. In my view in a case like the present one, the defendants cannot challenge the correctness or legality of the order passed setting aside the sale by a court having jurisdiction to pass an order u/s 174 of the Bengal Tenancy Act. This sort of challenge cannot be entertained in a collateral suit like the one before me. Mr. K Ghosh has submitted that the defendants can challenge the order as not binding upon the defendants as they were not given notice of the proceeding and as they were not parties thereto. The difficulty in the present case is that although they were not impleaded in the proceedings for setting aside the sale, yet the order for sale on the basis of which the defendants claim their title to the suit land is no longer there. The sale has been cancelled and the effect of the sale has disappeared with that order. As the sale has been made nugatory, the title of the auction purchaser which is the basis of the defendants' right to the suit land has been wiped away. Unless the sale is restored by an order of the court, the principal defendants in the present case will have no title to the suit land. For the purpose of restoration of the order of sale and to revive the title of the defendant, some proceeding must be started. That sort of proceeding cannot be commenced by the defendants by way of defence in a suit. A separate proceeding has got to be started for recalling or setting aside the order passed in the Rent Execution sale u/s 174 of the Bengal Tenancy Act setting aside the relevant sale. Until and unless that is done, the title of the defendant will not be revived or brought back to countenance the title of the plaintiff. That purpose cannot be achieved by the principal defendants in the present suit because no order in the present suit can set aside the order passed u/s 174 of the Bengal Tenancy Act.

6. In view of my discussion above when the first point urged by Mr. Ghosh fails, it would be unnecessary for me to go into the second question whether the order setting aside the sale u/s 174(3) of the Bengal Tenancy Act is illegal. In this connexion before I come to a close, I will refer to the decision of Manmatha Nath Mukherji, J. in the case of Dwarik Nath Par vs. Krishna Barai & Another, reported in XXVII C.W.N. at page 84 relied upon by Mr. J. Ghosh for the respondent. This case has been referred to by the learned Additional District Judge. This case was in connection with the order 21 Rule 92 of the CPC which lays down that no order should be passed setting aside the same without notice to the parties affected thereby. The view of the learned Judge in that case is "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." In the present case we are concerned with an application to set aside the sale u/s 174 of the Bengal Tenancy Act. Mr. Ghosh has, however, contended that the principle accepted by Mukherji, J. should have also been applicable here. However, I have already given my decision earlier without considering the interpretation of section 174 of the Bengal Tenancy Act given by the appellate court below regarding the second point and I have rejected the first contention urged from the side of the appellant as indicated above. I need not go over to any other point raised and in view of my decision on the first point, the appellants can get no relief.

7. However, in view of the evidence and the allegations of the plaintiff in the plaint, the judgment and the decree of the learned Additional District Judge require a little modification. The plaintiff has prayed for recovery of khas possession by evicting the defendants there from on the allegation that he has got title to the extent of 12 annas share in the land in dag no. 1050 measuring 1.05 in all under R.S. Khatian No. 89 of mouza Simulpur, P.S. Gaighata within 24-Parganas as mentioned in the Schedule to the plaint. It has been established that the plaintiff has title only to the extent of 12 annas share in the entire dag and that the defendants are in actual possession of the same. There had been no partition by metes and bounds between Bashi Bibi and Kadvanu Bibi, the latter having only 4 annas share in the suit property as alleged in the plaint. In these circumstances the plaintiff shall be entitled to get the declaration of his title as prayed for, but he cannot get recovery of khas possession by evicting the defendants in this suit. The plaintiff is entitled to the joint possession with the principal defendants who are the trespassers and the defendant no. 8 impleaded as a co-sharer with the plaintiff. In the result, the appeal is dismissed on merit but with certain modifications in the relief and the decree granted by the learned first appellate, court below as indicated above. I pass no order as to cost in this appeal.

The prayer for leave under clause 15 of the Letters Patent is refused.