

(1923) 01 PAT CK 0014
In the Patna High Court
Case No : F.A. No. 82 of 1920

Medni Prasad Singh and others

APPELLANT

Vs

Nand Keshwar Prasad Singh and others

RESPONDENT

Date of Decision : 16-01-1923

Acts Referred:

Citation : (1923) 01 PAT CK 0014

Judgement

Das, J.—Sometime in 1917 the defendants instituted a suit against the plaintiffs 1 and 2 to recover a sum of money upon a chitta and obtained a decree for money as against plaintiffs 1 and 2. They put the decree in execution and put up to sale the right, title and interest of plaintiffs 1 and 2 in certain properties which it is now alleged by the plaintiffs were the joint family properties of all the plaintiffs. On the 14th of December 1918, the defendants purchased a 10 annas 13 dams proprietary interest in the properties which in their view was the share of the plaintiffs 1 and 2 in the properties. plaintiffs 1 and 2 thereupon applied under the provision of Order 21 rule 90, C.P.C., for setting aside the sale. That application was dismissed for default and the plaintiffs 1 and 2 thereupon applied for restoration of that application under Order 9, rule 9, and it appears that that application was ultimately dismissed. On the 3rd of March 1919 the suit out of which this appeal arises was instituted by the plaintiffs for recovery of possession of the properties which, as I have mentioned, were taken possession of by the defendants in execution of their decree against plaintiffs 1 and 2, Plaintiff No. 4 is the son of plaintiff No. 1 and plaintiff No. 3 is the brother of plaintiffs 1 and 2.

2. The allegations in the plaint are the necessary allegations which an applicant in an application for setting aside a sale under Order 21, rule 90, is required to make; but in the 12th paragraph of the plaint, the plaintiffs did allege that plaintiffs 1 and 2 had no specific share in the joint family properties and that no definite share in the joint family properties could in law be purchased by the defendants. The defendants in their written statement contended that the plaintiffs had no cause of action and resisted the plaintiffs' suit on the merits. They also alleged that the plaintiffs were all separate from each other and that all

that they had purchased was the right, title and interest of plaintiffs 1 and 2 and that the plaintiff No 3 could not join them in recovering possession of the share purchased by the defendants.

3. The learned Subordinate Judge has come to the conclusion that the plaintiffs have no cause of action as against the defendants and in that view has dismissed the whole suit without discussing the other issues which were framed by him.

4. It has been pointed out by the Judicial Committee over and over again that the Courts in India ought to decide all the issues in order to save a remand, and in my opinion the learned Subordinate Judge should certainly have recorded the evidence in the case and decided all the (sic) that arose in the case. Held he adopted that course, it would not have been necessary for us to remand the case to him.

5. On the question whether the plaintiffs have a cause of action as against the defendants, I agree with the learned Subordinate Judge that the plaintiffs 1, 2 and 4 have no cause of action as against the defendants; but I entirely differ from him on the question whether the plaintiff No. 3 has a cause of action as against the defendants. The view of the learned Subordinate Judge is this:- "The plaintiff No. 3 is a person whose interests are affected by the sale. He could have come under Order 21, rule 90 C.P.C. to have the sale set aside. He did not do so. Rule 92 provides that where no application is made under Rule 90 and where such an application was made and disallowed, the Court is to confirm the sale and no suit would lie to set aside the order confirming the sale, or in other words the sale. Thus the case of the plaintiff No. 3 comes under the provision where no application is made." In my view it was not necessary for the plaintiff No. 3 to apply under the provision of Order 21, rule 90 C.P.C.; he was not a party to the suit and his case is that under cover of a decree obtained by the defendants as against plaintiffs 1 and 2, they have seized and taken possession of property which was the joint family property and in which he has an interest. Clearly he has a right to enforce his claim by a suit and it was not at all necessary for him to apply under the provision of order 21, rule 90. That being so, the case must go back to the learned Subordinate Judge in order that he may determine the other issues that arise in this case.

6. But in order to avoid a failure of justice it is necessary to point out what the plaintiff No. 3 would be entitled to if he succeeds in his contention that the family was joint at the time when the interest of plaintiffs 1 and 2 were attached in execution of the decree obtained by the defendants as against them. It is quite clear that a member of a joint Hindu Mitakshara family has an interest which is capable of being attached in execution of a decree as against him. In this view the attachment and the sale of the interest which was of plaintiffs 1 and 2 would be good and binding upon the joint family. But though a creditor can attach and purchase the interest of a member of a joint Mitakshara Hindu family, it is not open to him to take possession of that interest. The position is clearly indicated in the case of *Deendyal Lal v. Jugdeep Narain Singh* [1877] 3 Cal. 198: 4 I.A.

247: 1 C.L.R. 49: 3 Sar. 730: 3 Suth. 468 (P.C.). In that case their Lordships of the Judicial Committee pointed out the distinction between the rights of a purchaser under a voluntary conveyance and those of a purchaser under an execution sale. They said that just as a partner could not himself have sold his share so as to introduce a stranger into the firm without the consent of all the partners although the purchaser at the execution sale could acquire the interest sold, with the right to have the partnership accounts taken in order to ascertain and realise its value, so also though a member of a joint Hindu family could not himself have sold his share so as to introduce a stranger into the joint family, the purchaser, by purchasing at an execution sale, acquires the right to compel the partition which his debtor might have compelled had he been so minded, before the alienation of his share took place. In other words the purchaser of the share of a member of a joint Mitakshara Hindu family acquires the right to compel a partition but not a right to enter into joint possession with the other members of the joint family.

7. If the learned Subordinate Judge comes to the conclusion that the family was joint at the time when the defendants purported to purchase the right, title and interest of plaintiffs 1 and 2 in the joint family properties, he will give a decree for possession to plaintiff No. 3; but he will make a declaration that the defendants as purchasers at the execution sale have acquired the share and interest of plaintiffs 1 and 2 in the property and that they are entitled to take such proceedings as they shall be advised to have that share and interest ascertained by partition. We are unable ourselves to pass a decree to that effect because there is a contention of the defendants that the family was separate. This is an issue which it is necessary for the learned Subordinate Judge to try.

8. We allow the appeal of Plaintiff No. 3, set aside the judgment and decree passed by the learned Subordinate Judge, and remand the case to the learned Subordinate Judge for disposal according to law in accordance with the observations made in this judgment.

9. The decision of the learned Subordinate Judge with regard to the plaintiffs 1, 2 and 4 will, however, stand. I think that in the circumstances the defendants are entitled to their costs of this appeal. The costs incurred in the Court below will abide the result and will be disposed of by lower Court.

Kulwant Sahay, J.

10. I agree.