

(1971) 06 CAL CK 0008
In the Calcutta High Court
Case No : A.F.A.D. No. 78 of 1961

Mofazzel Mondal and Another

APPELLANT

Vs

Anachhaddin Sardar and Others
 Anachhaddin Sardar
and Others Vs Mofazzel Mondal and Another

RESPONDENT

Date of Decision : 07-06-1971

Acts Referred:

Bengal Agricultural Debtors Act, 1936 — Section 37A

Citation : AIR 1972 Cal 74 : 76 CWN 156

Hon'ble Judges : Salil Kumar Datta, J

Bench : Single Bench

Advocate : Syama Charan Mitter, Mukunda Behari Mullick, Mahendra Kumar Ghosh and Bishnu Ranjan Samajpati, for the Appellant;

Final Decision : Dismissed

Judgement

Salil Kumar Datta, J.—This is the defendants' appeal against the judgment of concurrence decreeing the plaintiffs' suit for declaration of title and joint possession. The plaint case is as follows :

The suit property is comprised in Dag No. 1973 in Khatian No. 46 measuring 60 acres in P. S. Hanskhali in District Nadia. The suit land was settled by the landlord in 1926 by registered pattah to Moala Bux and Mahiruddi Mondal. The defendants are the heirs and legal representatives of Mahiruddi. After the death of Moala Bux his brother Jalil Mondal and on his death Fakir Chand inherited the property and had been in joint possession. Fakir sold the suit property to the plaintiffs by a kobala dated August 13, 1956, but as the plaintiffs went to take possession, they were prevented from taking possession by the defendants. Accordingly, the suit was filed on August 20, 1956 by the plaintiffs for a declaration of their 8 annas title and joint possession with the defendants.

2. The suit was contested by the defendants Nos. 1 and 2 who filed their joint written statement stating that the settlement was, in fact, taken by Mohiruddi

and Moala Bux had no title to it. This jama was sold in auction for arrears of rent and Mohiruddi instituted proceedings u/s 37-A of the Bengal Agricultural Debtors' Act before the Special Debt Settlement Board, Ranaghat and obtained return of the jama on the basis of the decree under the award and the decretal dues had been paid off. Moala Bux having no title. Jalil and thereafter Fakir obtained no interest in the property and never had any possession. The suit was, accordingly, misconceived, not maintainable in law and barred by limitation.

The suit was tried on evidence before the learned Munsif who came to the finding that the settlement was taken both by Moala Bux and Mohiruddi, and, exclusive possession of Mohiruddi was not established. It was further held that the plaintiffs acquired 8 annas interest in the suit property and they were entitled to the reliefs prayed for in the suit. The suit was, accordingly, decreed.

3. An appeal was preferred by the defendant and the appellate court affirmed the findings of the trial court. A new point was taken in respect of the proceedings u/s 37-A of the said Act. Mohiruddi got back the property under the provisions of the award passed in the said proceedings and duly paid the amount under the award. According to the appellate court the title of Moala Bux was not thereby affected though possession was given to Mohiruddi by the Board. There was also no case of ouster or assertion of any hostile title by the defendants. Accordingly, the plaintiffs were entitled to the declaration and point possession prayed for in the suit. The present appeal is against the said decision by the appellants.

4. Mr. S. C. Mitter, the learned Advocate appearing for the appellants, has contended that on an interpretation of the relevant provisions of the Section 37-A of the Act. it would appear that the sale in the execution of the decree extinguished the title of the judgment-debtors in the jama- When one of the debtors applied for setting aside the sale, and on the basis of the award passed in his favour the sale is set aside and the land was restored to him, such act amounts to a negation of the title of the other co-sharers. The other co-sharers accordingly could claim no interest or title in the property and there was no provision for reverting title to them.

5. Mr. Mukunda Beharf Mullick, the learned Advocate for the plaintiffs-respondents contended that the award, which set aside the sale that extinguished the title of all co-sharers, revived the title of all co-sharers. He referred to Section 9 (3) of the Act which provided that in case of payment of the debt by a debtor applicant pursuant to an order of the Board, the other persons so liable for the debt, would be liable to contribute to the debtor applicant in respect of the sum paid by him under the said order. This Section 9 provides for settlement of ancestral or joint debts and not of debts which culminated in a decree and an auction sale of the holding. According to Mr. Mullick the same principle should be extended to the cases covered by Section 37-A of the Act.

6. There Is no dispute that the application u/s 37-A can be made by any of the debtors as provided in Sub-clause (III) of Clause (b) of subsection (1) of Section

37-A, reserving such right to "such person" which may be liable for the debts jointly with others. This was so held in Sudarshan v. Karunasindhu AIR 1949 Cal 625 and it was also held that for relief u/s 37-A, it is not necessary that all the debtors should join the application, following the decision in Goppi Ballav Mondal Vs. Aswini Kumar Mondal and Others, .

7. In Gopi Ballav's case, it was noted that though the sale was set aside, nothing was said about title and it was observed by Chakravarti, J. : (as his Lordship then was) speaking for the Court as follows :

"If such an order (setting aside the sale under Sub-section (8) is made, the position which results is that since the section says nothing about this, title apparently reverts to all the original owners, although the application might have been made by some of them, but possession is restored only to the applicant or applicants. (P. 862) (of Cal WN) = (at p. 33 of AIR).

The Court also noted that possession is to be given to the applicants who are to be deemed as the debtors and the non-applicants, if the title reverted to them, may alienate their shares, but neither they nor their transferees can obtain possession so long as the debt is not paid off, for which period the property must remain in possession of the applicants under the terms of the section. The real question was posed in the above case in the following terms :--

"When the debt is paid off, a question may well arise, as to whether the applicants will be entitled any longer to retain then : exclusive possession. It will then have to be decided whether the section really revives the title of even the non-applicants and, In effect, makes a gift of them of their shares, although gift of a deferred character, or whether title really vests in the applicants alone, although it is not expressly so said."

The question was not finally answered as it was not necessary in the facts of the case before the Court. Mr. Mitter also referred to a decision in Lankeswar Haldar and Another Vs. Ram Gopal Das Naskar and Others, where it was held that to give the joint debtors the right of the benefit of the provisions of Section 37-A, it was necessary for them to make application within the period of limitation. The Court was concerned, in this case, with the question as to whether the application by other co-sharers was barred by limitation, and the case really was not concerned with the question of title in the property the sale of which was set aside.

8. Section 37-A provides an elaborate scheme for setting aside sales of Immovable property in execution of the decrees and restoration of possession thereof. In fact the object of the Amending Act II of 1942 which was inserted as Section 37-A was for the protection of the holdings of the debtors who lost them by hurried decrees and sales effected by the landlords and creditors. In short, the material provision in Sub-section (1) is that the application for relief can be made by anyone of the joint debtors when the property is sold in execution of a decree relating to a debt. Under subsection (2) the application has to be made to

the Board. Sub-section (4) gives the power to the Board to make an estimate of the average annual gross receipts derivable from the property sold during 1934 to 1938. Under subsection (5). after the estimate is made, an award shall be made by the Board directing the applicant to pay annually in cash to the decree-holder half of the value of annual gross receipts until debt is extinguished or until 20 years have expired from the award and also annual rent, with further direction to Pay in cash half of the cash receipts toward bona fide mortgage subject to which the property was sold. Under Sub-section (7), after the award is made, the applicant shall be deemed to be the debtor. In Sub-section (8) it is provided that on presentation of the copy of the award to the Civil Court, at whose order the property was sold, such Civil Court shall direct that the sale be set aside and the debtor, meaning the applicant, with his under raiyat. If any, shall be restored to possession of the property. By Sub-section (9) the debtor so restored to possession under Sub-section (8), shall not, during the period the debt remains unsatisfied or until expiration of 20 years, alienate by sale, lease, gift or other form of transfer or create any charge thereon and any alienation or charge so made shall be void.

9. These sub-sections do not make any provision about title In respect of the property, and, it appears to me that no provision was necessary In the circumstances. If the sale is set aside, the legal effect would be that there was no sale at all, the further effect whereof would be that the title of the original holders in the property was never disturbed but remained in them all through and we have seen that protection of holdings sold in execution of a decree for debt is the purpose of the Act including the amending Acts. Though the title of the original holder thus remains with them in spite of the sale since set aside, the applicant who moves for the award is put in possession of the property, for enabling him to pay of the instalments under the award from the usufructs of the property so long as the debts or subsisting mortgage are not paid off. This is an indirect mode of obtaining contribution from the co-sharers which, in case of other debts, is provided in Section 9 (3). For securing the due payment under the award, the debtor in possession has been denied the right to alienate the property or create any charge thereon during the period the award remains unpaid or until expiration of twenty years from the award. The other co-sharers are not under any restriction as to transfer but their transferees will not be entitled to possession of the property till the debt is paid off or the expiration of twenty years from the award when the debt is to be deemed to have been satisfied. On such satisfaction of the debt, the right of the co-sharers to possession springs into force, while their title to the Immovable property remains unaffected on account of the sale being set aside on the filing of the award.

10. Accordingly. I am unable to accept the contention of Mr. Mitter that only the applicant for the award which in due course sets aside the sale would be entitled to the property. Further, the preservation of the title will not mean a gift of the property to the non-applicant debtors, as the payments for satisfaction of the debts under the award will be made from the usufructs of the property. This

interpretation is, thus, consistent with the notions of equity and if legislature thought otherwise, we would find express provisions conferring title of the property to the applicant debtor, which in view of the manner, as provided in which the debt is to be satisfied, could mean an unfair advantage to the applicant debtor at the cost of his co-sharers who failed to join or apply for some reason or other, thereby frustrating the objects for which the Act and its amendments have been enacted. Accordingly the transferee from a co-sharer would be entitled as in the present case to a declaration of title and possession jointly with the defendant as prayed for in view of the satisfaction of the debt under the award.

11. As the contentions raised on behalf of the appellants fail, this appeal is dismissed, without, however, any order as to costs in this Court-Leave under Clause 15 of the Letters Patent is prayed for and is granted.