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(1941) 05 PAT CK 0002

In the Patna High Court

Mt. Bibi Kaniz Ayesha and Another APPELLANT

Vs

Mojibul Hassan Khan and Others RESPONDENT

Date of Decision : 02-05-1941

Acts Referred:
Civil Procedure Code, 1908 (CPC) — Section 66

Citation : AIR 1942 Patna 230

Hon'ble Judges : Harries, J;Fazl Ali, J

Bench : Full Bench

Judgement

Harries, J.—This is a second appeal preferred by the defendants from concurrent decrees of the Courts below passed in favour of the plaintiff. The facts giving rise to the case can be shortly stated as follows: One Matwar Ali Khan mortgaged the property in question to one Rangu Lal. Subsequently the mortgagee transferred his interest in the mortgage to Mt. Fasihunnissa. In the year 1924 Mt. Fasihunnissa instituted Suit No. 89 of 1924 against the mortgagors and obtained an ex parte decree. This decree was put in execution in Execution Case No. 136 of 1928. During the pendency of the execution case some of the judgment-debtors filed Miscellaneous Case No. 21 of 1929 under Order 9, Rule 13, Civil P.C., to set aside the ex partevdeoree. During the pendency of this miscellaneous case Mt. Fasihunnissa died leaving her two daughters, Mt. Kaniz Aisha (defendant 1 in the present suit) and Umatul Fatma (defendant 2). Her husband Abdul Rahim (defendant 3) also survived her, and it was alleged that her father one Fazal Hassan Khan was also alive. All these four persons were substituted in place of Mt. Fasihunnissa deceased in Miscellaneous Case No. 21 of 1929, and later that miscellaneous case was dismissed. In the Execution Case No. 136 of 1938, which was proceeding, the property was eventually brought to sale and sold; but some of the judgment-debtors questioned the validity of the auction sale, and the two daughters, the husband and defendant 4, who was said to be the father of Mt. Fasihunnissa, were made parties to the proceedings The sale was ultimately set aside. The two daughters (defendants 1 and 2) then commenced fresh execution proceedings on their own behalf and again the property was put up to sale and purchased by them in full discharge of the mortgage decree, and on 5th September 1930, they obtained possession of the property so purchased.

2. Defendant 4, who is alleged to be the father of Fasihunnissa, claimed a 2/13ths share in the property, which would be a father''s share and later assigned his share to the present plaintiff. An attempt was made by the present plaintiff to have the sale set aside under Order 21, Rule 90, Civil P.C., but that attempt failed. He then brought the present suit praying for a declaration that defendant 4 was the father of Mt. Fasihunnissa and that he had inherited 2/13ths share in the mortgage decree and that by virtue of the assignment the plaintiff was now entitled to the said 2/13ths share. He claimed recovery of possession of such share, and mesne profits. In the alternative, he prayed for a decree for 2/13ths share of the decretal money.

3. Defendant 4, who claims to be the father of Mt. Fashihunnissa, filed a written statement supporting the plaintiff. Defendants 1 and 2, however, who are minors and daughters of defendant 3, denied that defendant 4 was the father of Mt. Fasihunnissa and further they denied that even if the plaintiff had acquired the share of defendant 4, yet he was not entitled to possession of any share of the property purchased by defendants 1 and 2 in execution of the mortgage decree.

4. Both the Courts below came to the conclusion that defendant 4 was the father of Mt. Fasihunnissa and was entitled at the date of the assignment to the plaintiff to a 2/13th share in this mortgage decree. They further held that as defendants 1 and 2 alone had put the decree in execution and purchased the property, they purchased the property on behalf of all the heirs and that the plaintiff who had a 2/13th share in the estate was entitled to possession of such share of the property purchased. The Courts below also granted the plaintiff mesne profits, in respect of the share for which possession was granted.

5. In second appeal before us, Dr. Dwaraka Nath Mitter who appeared for the defendants-appellants has contended that the findings of the Court below on the question of the relationship between defendant 4 and defendants 1 and 2 is vitiated by the admission of inadmissible evidence. Whether defendant 4 was or was not the father of Mt. Fasihunnissa is a pure question of fact and cannot be disturbed unless the finding is vitiated by some error of law. In the trial Court defendant 3, who was the father of defendants 1 and 2, did not give evidence, but a deposition which he had made in an earlier case was put in. In that deposition defendant 3 admitted that the father of Mt. Fasihunnissa was alive but said that the father was not defendant 4 but somebody else. The evidence on behalf of defendants 1 and 2 was that the father of Mt. Fasihunnissa died before her death. The Courts below pointed out the difference between these two versions and came to the conclusion that they could accept neither. However, there was a mass of other evidence and eventually the Courts came to the conclusion that it had been established that defendant 4 was Mt. Fasihunnissa''s father. Dr. Dwarka Nath Mitter has asked us to hold that the deposition of

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defendant 3 in the earlier case was inadmissible, and as it had been admitted it must have affected the view of the Courts below on this question. As defendant 3 did not give evidence a previous statement which he had made could be put in evidence as an admission made by him and would be admissible against him. The admission, however, of one defendant is not admissible against his co-defendants, and Dr. Dwarka Nath Mitter is quite right when he contends that the deposition of defendant 3 in an earlier case is not admissible in the present proceedings against defendants 1 and 2, his minor daughters. On a fair reading of the judgments, however, it is clear that the Courts below did not admit this in evidence against defendants 1 and 2. Had defendant 3 given evidence and given the same version, it would be open to the Courts to point out that the versions of the various defendants differed and to come to the conclusion that no reliance could be placed on either version. It is true in the present case defendant 3 did not give evidence, but previous admissions of his were put in. The position was very much the same as if all the defendants had given evidence and had given conflicting versions. In any event, I am satisfied that the learned Judge does not rely upon the admission in this deposition. He, in fact, rejects it. The only use he makes of it is to point out that the version of defendant 3 did not agree with that of defendants 1 and 2. His finding of fact; however, is based entirely upon other evidence, and in my view the finding that defendant 4 was the father of Mt. Fasihunnissa cannot be assailed in this second appeal.

6. It was next contended on behalf of the appellants that even if the plaintiff had acquired a 2/13ths share held by defendant 4, yet he could not succeed in claiming any portion of the mortgaged property which had been purchased by defendants 1 and 2. If he had any remedy at all, it was in respect of a share of the decretal amount, and any claim for such share, it was said, was long since barred by time.

7. There can be no doubt upon the evidence that after the death of Mt. Fasihunnissa there were four heirs, defendants 1 and 2 (the daughters), defendant 3 (the husband) and defendant 4 (the father). They were the persons entitled to the fruits of the decree. It was urged that they were joint decree-holders, and as such one or more could execute the decree under the provisions of Order 21, Rule 15, Civil P.C., but if such was done, the person or persons executing the decree would be deemed to be executing it on behalf of all the decree-holders, and in such an event the plaintiff would be entitled to his share of the property. If the four heirs could be regarded as joint decree-holders, it appears clear from a decision of their Lordships of the Privy '' Council, Ganga Sahai v. Kesri AIR 1915 P.C. 81 , that the plaintiff would be entitled to a share in the property. Dr. Dwarka Nath Mitter, however, has contended that the four heirs cannot be regarded as joint decree-holders for the purposes of Order 21, Rule 15, Civil P.C. It is unnecessary to deal with this matter further, because a Bench of this Court in Mt. Amiran and Another Vs. Mt. Kaniz Aisha and Others, has held in earlier proceedings in this execution that the heirs were not joint decree-holders within the purview of Order 21, Rule 15, Civil P.C. Whether that view be

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correct or not, it would be impossible at this stage to take a different view as the earlier view was expressed in these very same execution proceedings between the same parties.

8. Even if these heirs cannot be regarded as joint decree-holders, the matter does not end there. There can be no doubt that defendants 1 and 2, were not entitled to reap the fruits of this decree. They were two out of four persons interested in the decree, yet they put the decree into execution, brought the property to sale and purchased it themselves. The purchase price of the property was the decretal amount and that sum clearly did not belong to defendants 1 and 2 alone but belonged to the four heirs of Mt. Fasihunnissa. It was urged on behalf of the plaintiff that the purchase by defendants 1 and 2 was a purchase on behalf of all the heirs, and it inured for their benefit. Dr. Dwarka Nath Mitter, however, has contended that if this purchase by defendants 1 and 2 is regarded as a purchase not on behalf of themselves alone but on behalf of themselves and the other co-heirs, then a claim by one of the co-heirs is barred by reason of Section 66, Civil P.C. The terms of that section are as follows:

No suit shall, be maintained against any person claiming title under a purchase certified by the Court in such manner as may be prescribed on the ground that the purchase was made on behalf of the plaintiff or on behalf of some one through whom the plaintiff claims.

9. It is urged that the moment the present plaintiff alleges that this purchase was made for the benefit of all the co-heirs his claim is bound to fail by reason of this section. The scope of Section 66 has been frequently considered by their Lordships of the Privy Council. In Ganga Sahai v. Kesri AIR 1915 P.C., Mr. Ameer Ali, who delivered the opinion of the board, observes at p. 554:

In their Lordships opinion the provisions of that section (an earlier section corresponding to Section 66, Civil P.C.) have no application to the present ease. They were designed to create some check on the practice of making what are called benami purchases at execution sales for the benefit of judgment-debtors, and in no way affect the title of persons otherwise beneficially interested in the purchase.

10. In this case their Lordships were following an earlier case in Bodh Singh v. Gunesh Chunder (''73) 12 Beng. L.R. 317. This section has very recently been considered by the Allahabad High Court in Bishen Dayal Vs. Kesho Prasad and Another A Bench consisting of Sulaiman C.J. and Bajpai, J. held that the section did not apply to the case of those persons who by operation of law, and not by virtue of any private agreement or understanding, are entitled to treat as joint property an acquisition, made by the use of joint funds, by one or other of them in his own name; e.g., members of a joint Hindu family, or members of a partnership firm, or joint decree-holders where one of them executes the decree for the benefit of all and purchases the property in lieu of the joint decretal amount.

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11. It is to be noted that it is not the plaintiff''s case that defendants 1 and 2 purchased on his behalf as well as on behalf of themselves. His complaint is that they wrongfully put this property up to sale and purchased it themselves for their own benefit. The plaintiff does not allege that this was a benami transaction, but what he does allege is that by reason of the fact that the property was purchased with joint funds the purchase enured to the benefit of all the persons interested in that joint fund. The case of the plaintiff is not that the purchase was benami. On the contrary, he says it was a purchase made with intent to benefit only defendants 1 and 2 and to deprive the plaintiff of his right, but as the purchase was made with funds which was the property of all the heirs the Courts must presume that the purchase was made for the benefit of all.

12. In the case of joint decree-holders, their Lordships of the Privy Council in Ganga Sahai v. Kesri AIR 1915 P.C. 81 held that a purchase by one decree-holder, even if he did not purport to act for the other, would enure for the benefit of the other. The claim by the decree-holder who had been deprived of his share would not be barred by Section 66, and he would be entitled to recovery of possession of his share. Dr. Dwarka Nath Mitter has distinguished the Privy Council case from the present case on the ground that in the present case the parties were not joint decree-holders in the true sense of the word. Be that as it may, there is, in my view, no real distinction. There are a number of cases decided by the Allahabad High Court in which it has been consistently held that in circumstances such as the present a person interested in the decree is entitled to recover his share from another person interested in the decree who has put the decree in execution and purchased the whole of the property. The earliest case is the case in Ganeshi Lal v. Jagan Nath AIR 1916 All. 100 . In that case one of several mortgagees brought a suit on the basis of a mortgage making the other mortgagees pro forma defendants and obtained a decree in his own name. Subsequently, the property was put to sale in execution of the decree and was purchased by the decree-holder alone. It was held that the other mortgagees, though in no sense of the term joint decree-holders, had an equity in the purchase money and could recover their share in it. It was however held in that case that they had no equity in the property purchased and therefore a claim to recover a share of that would fail.

13. The view that the persons interested in the mortgage money had an equity has been accepted in a number of cases which followed this case but in those cases it has been held that he has an equity not only in the decretal money but in the property which has been purchased by that sum. In Pandit Khub Chand Vs. Todar Mal and Others Sulaiman, J. (as he then was) referring to the case in Ganeshi Lal v. Jagan Nath AIR 1916 All. 100 stated:

It may be that that case is distinguishable from the present case inasmuch as the facts of that ease were somewhat different. There the co-mortgagees had not joined in the suit at all, but had been arrayed as pro forma defendants. The decree was

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favour of one mortgagee alone. Then at the time of the auction sale it appears that the decree-holder had purchased the property for himself in spite of the protest raised by the other mortgagees. On those circumstances the Court was of opinion that the other mortgagees had no interest in the property purchased at auction sale though they might have had a right to insist on the deposit of the purchase money in Court. But even if that case on principle were not distinguishable from the present case it would be impossible for me to follow it as it would then be contrary to the view expressed by their Lordships of the Privy Council in Ganga Sahai v. Kesri AIR 1915 P.C. 81 .

14. His Lordship then held that where the property had been purchased by one decree-holder his co-decree-holders could recover possession of their respective shares in the property purchased. This view was followed by a Bench in Dwarka Prasad and Others Vs. Mahadeo Prasad and Others in which it was held that where there is a fund belonging jointly to several persons and one of these persons makes a purchase of land with that fund that purchase enures to the benefit of all the persons entitled to share in the fund. There the persons were not joint decree-holders in the true sense of the word, yet a purchase by one of them was held to enure for the benefit of the others and gave a right to the others to recover their shares in the property so purchased. A similar view was taken by another Bench of the Allahabad High Court in Jain Glass Works Vs. Secy. of State, . in that case it was held that in the absence of anything definite to show the contrary, the purchase made by a joint decree-holder, though in his own name, would undoubtedly enure for the benefit of all the persons interested in the joint fund which has been utilised in the acquisition of the property. Other persons would be beneficially interested in the purchase and would be entitled to recover a share of the properties purchased at auction, conditional on the payment of a proportionate share of costs incurred in the litigation. Sulaiman C.J. was a party to this judgment and expressly approved of the decision in Dwarka Prasad and Others Vs. Mahadeo Prasad and Others . In the view of the Court, the principle enunciated by their Lordships of the Privy Council in 37 All. 5451 applied to cases where the parties were not joint decree-holders in the true sense of the term such as where one of a number of persons interested in a decree purchased the property out of what was in law and fact a fund belonging to himself and others.

15. In my judgment, these cases decided by the Allahabad High Court should be followed, and that being so, I would hold that the purchase made by defendants 1 and 2 enured for the benefit of all the heirs interested in the decree. That being so, it gave the plaintiff who claimed through defendant 4 a right to 2/13ths share of this property and the suit for recovery of possession of the same was rightly decreed.

16. It was further contended that the Court below should not have granted mesne profits in this ease but this is a point which does not appear to have been taken in the memorandum of appeal to this Court. In any event whether the

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claim was for mesne profits or compensation is academic. Having regard to all the circumstances, I see no ground for interfering with the decree upon this ground. I would hold therefore that the plaintiff is entitled to recover possession of a 2/13ths share in this property but equity requires, as was held in the Allahabad oases to which I have already made reference that the plaintiff should pay proportionate share of the costs of the execution proceedings leading to this sale. As the parties cannot agree as to the amount of these costs, it will be necessary for the Court below to ascertain what is the amount of such costs before a decree can finally be passed. I would therefore direct the lower appellate Court to ascertain the plaintiff''s proportion of these costs and to remit its finding to this Court within a period of three months.

Fazl Ali, J.

17. I entirely agree,

18. fter getting the finding as to costs incurred; their Lordships allowed half the costs to the plaintiffs-respondent]

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