

(1957) 03 OHC CK 0004

In the Orissa High Court

Case No : Second Appeal No. 22 of 1954

Narahari and Others

APPELLANT

Vs

Muralidhar Rout and Another

RESPONDENT

Date of Decision : 05-03-1957

Acts Referred:

Trusts Act, 1882 — Section 90

Citation : AIR 1957 Ori 151 : (1957) 23 CLT 280

Hon'ble Judges : P.V.B. Rao, J

Bench : Single Bench

Advocate : L. Mohanty, for the Appellant; L.K. Dasgupta and G.N. Sengupta, for the Respondent

Final Decision : Dismissed

Judgement

P.V.B. Rao, J.—The defendants file this appeal against the confirming judgment of the Subordinate Judge of Balasore decreeing the plaintiff's suit for a declaration of title and confirmation of possession of the suit lands under C. S. plots 881 and 882 in Dharmagatpur village and for damages.

2. The plaintiff's case is that the suit lands were recorded in the names of defendants 2, 3 and 6 and Sama Rout and Dasa Rout. They were put to auction in rent execution case No. 299 of 1933-34 and were purchased by plaintiff No. 1 for a sum of Rs. 50. All the recorded tenants were made defendants in that suit. Plaintiff No. 1 took delivery of possession of the plots on 26-7-34. Defendant No. 1 as the next friend of defendant No. 2 instituted Original Suit No. 93 of 1934 in the Court of the Munsif, Bhadrak, for setting aside the rent sale on the ground that the sale had been obtained by fraud and collusion at the instance of plaintiff No. 1.

But however the suit was withdrawn on 5-3-35 with permission to bring a fresh suit on the same cause of action, on condition that he should pay the costs and pleader's fee at 3 per cent, to defendant No. 1 of that suit. It was ordered that

in default of such payment the suit shall stand dismissed. The costs, as directed, were not paid. But, defendant No. 1 with the other defendants forcibly carried away paddy and bamboos from the suit lands in 1355 Sal. The defendants were convicted for this act, but were ultimately acquitted by the High Court. The defendants again removed the paddy crop and also cut bamboos from the suit lands in 1357 Sal. Hence the suit.

3. The main contesting defendants 1 to 12 alleged that the suit plots were the ancestral properties of themselves and the plaintiffs and corresponded to R. S. and P. C. plot 568. They along with the plaintiffs were in possession of the lands all along. Plaintiff No. 1 was realising rent from two ijmalī touzīs of the parties and was also entrusted with the duty of paying rent of the suit plots. Plaintiff No. 1 fraudulently got obtained a rent decree by the landlady and purchased the suit properties in a rent execution case with a view to deprive the other co-sharers, namely, defendants 1 to 12 from the suit lands. They also stated that there was a settlement after the withdrawal of the original suit that the suit properties would be possessed by the plaintiffs and defendants 1 to 12 as before and consequently there was no necessity to file another suit.

4. The trial Court held that the plaintiffs and defendants 1 to 12 had a common ancestor, that C. S. Plots Nos. 881 and 882 corresponded to R. S. plot No. 588; and that R. S. plot No. 568 originally belonged to the branches of both the plaintiffs and defendants 1 to 12. The learned Munsif also held that there was no evidence of the defendant's case that the suit plots belonged to the plaintiffs and defendants 1 to 12 jointly before they were put to rent execution sale and that even if defendants 1 to 12 had any interest in the suit plots, they had knowledge of the rent sale right from the year 1934. He further held that the defendants could not contest their title in the present suit by virtue of not complying with the conditions in the prior suit and that the plaintiffs were in possession of the lands since the rent sale.

5. On appeal by the defendants, the learned Subordinate Judge confirmed the decision of the trial Court, but on slightly different grounds. He observed that the definite case of the defendants was that plaintiff No. 1 was entrusted with the duty of realising rent of the two ijmalī touzīs and was also entrusted with the payment of rent of the suit plots; and that he deliberately defaulted in payment of the rent of the suit plots and with a view to deprive the other co-sharers of the suit plots got the lands put to rent execution sale and himself purchased the lands for a nominal consideration of Rs. 50 only, and thus the defendants wanted to reap the benefit of the auction purchase made by plaintiff No. 1 as it must be deemed to have been made on behalf of all the co-owners and must enure to the benefit of the defendants as well.

The learned Subordinate Judge was of opinion that the plaintiffs were co-owners with the defendants as Ex. B the deed of ascertainment of shares between the father of the plaintiff and the branches of defendants 1 to 12 shows that plot No. 568 was also the subject-matter of partition and consequently the suit plots-

belonged to the branches of the plaintiffs and defendants 1 to 12. Consequently, according to the learned Subordinate Judge, the defendants want to take the benefit of provisions of Section 90 of the Indian Trusts Act.

Under Section 90 of the Trusts Act, the essential condition that must be fulfilled is not only that the parties were co-owners of the land in question, but also that the plaintiffs by taking advantage of then position must have gained a benefit in derogation of the rights of the other persons interested in the property. The learned Subordinate Judge also held that there was no proof that the default in payment of rent was due to the machination on the part of the auction purchaser and that there was no fiduciary relation between plaintiff No. 1 and the defendants. He further held that there was no proof that plaintiff No. 1 was actually entrusted with the liability to pay rent of the suit plots on behalf of ah* the co-owners and that there was no evidence that plaintiff No. 1 alone, on behalf of all, used to pay the rent of the plots previous to 1932 or 1933. Consequently, the learned Subordinate Judge held that the defendants could not take advantage of Section 90 of the Trusts Act and dismissed the appeal.

6. Mr. L. Mohanty, the learned counsel for the appellants contended very strenuously that the learned Subordinate Judge erred in construing the provisions of Section 90 of the Trusts Act, His contention is that it is enough if the plaintiff No. 1 happens to be a co-sharer and subsequently purchased the properties in auction, He also contends that as plaintiff No. 1 committed default in payment of the rent and taking advantage of the default committed by him, got the properties sold in execution of the rent decree and purchased them himself, he should be deemed to hold the properties on behalf of all the co-owners.

In support of his contention he relied upon a decision in the case of Deo Saran Singh and Others Vs. Barhu Singh and Others, . In that case it was held:

"Where the mortgagee in possession by committing default in payment of the landlord's rent suffers the mortgaged property to be sold and buys it himself in the name of his benamidar, he cannot claim the property to be his own in derogation of the mortgagor's interest in the property.

In other words, the mortgage interest will continue to subsist on account of the trust imposed upon the estate held by the mortgagee and the mortgagor will be entitled to redeem. The mortgagee cannot be allowed to take advantage of his own default. Fraud or misrepresentation or suppression of facts need not necessarily lead to the advantage gained. Section 90 does not contemplate the presence of these elements, which by themselves are sufficient to vitiate all transactions....."

On the authority of this decision, Mr. Mohanty contends that the learned Subordinate Judge erred in holding that there should be proof of any fraud or misrepresentation or suppression of facts in order to apply Section 90 of the Trusts Act. But, in my view, this decision does not apply to the facts of the case.

The learned Subordinate Judge clearly held that there was no proof that plaintiff No. 1 was entrusted with the duty of paying the rent on behalf of all the co-owners and that he was paying the rent on behalf of all. Consequently there was no obligation on his part to pay the rent.

The facts in the Patna case were that the mortgagees were the purchasers in auction sale and the finding of the Munsif was that the documents Exts, 1 to 1-b in that case showed that the mortgagees were liable to pay the rent in respect of the lands mortgaged to them. At p. 288, the learned Judge delivering the judgment held that the rent of the various portions of the holding not having been split up with the consent of the landlord, the liability to pay rent must of necessity imply the liability for the entire rent payable in respect of the holding; that the mortgagees or at least some of them were liable to pay the rent due to the landlord and that they committed default in payment of the rent and purchased the properties in the name of their benamidar.

On these findings, after a discussion of the law on the subject, the learned Judge came to the conclusion that it was a case covered by Section 90 of the Indian Trusts Act. But, as I have already held, plaintiff No. 1 was not entrusted with the duty of paying the rent on behalf of them all. There is also no legal liability on the part of plaintiff No. 1 to pay the entire rent of the suit plots payable by all the co-sharers. Mr. Mohanty tried to contend that if any co-sharer does not pay, the entire holding may be brought to sale and consequently the plaintiff is under an obligation to pay the rent.

I cannot agree with this contention. If any co-sharer defaults in paying the rent or if any portion of the rent remains unpaid, it is no doubt correct that the landlord can bring the entire holding to sale. but that does not imply any obligation on the part of one co-sharer to pay the entire rent.

7. Mr. Mohanty then contended that it is enough even if plaintiff No. 1 defaulted to pay his portion of the rent and if in consequence of that the holding was sold, the equitable principle underlying Section 90 would apply and if that defaulting co-sharer purchased the property he is deemed to hold the property for the benefit of all. In the instant case, in the two settlements, the lands are recorded in the names of the defendants. The plaintiffs' names do not appear in the settlement records and they show the defendants as the tenants.

Though the learned Subordinate Judge held that the plaintiffs as well as the defendants are the co-owners as evidenced by Ext. B, yet the landlord on the strength of these settlement records could never sue the plaintiffs for the rent. The plaintiffs being not the tenants as evidenced by the settlement records cannot be deemed to be liable to the landlord for payment of the rent. Even assuming that the plaintiffs are co-owners and they defaulted in payment of their share of the rent, in my opinion, the principle of Section 90 does not apply.

It is not the case of the defendants that they paid their share of the rent and there is no evidence to that effect. Even if the other co-owners pay their share of

the rent and the person who defaults in paying his share purchases, the property in his name, Section 90 of the Trusts Act would not be attracted unless it is further shown that he by availing himself of his position as such, gains an advantage in derogation of the rights of the other persons interested in the property. Section 90 of the Trusts Act is as follows:

"Where a tenant for life, co-owner, mortgagee or other qualified owner of any property, by availing himself of his position as such, gains an advantage in derogation of the rights of the other persons interested in the property, or where any such owner, as representing all persons interested in such property, gains any advantage, he must hold, for the benefit of all persons so interested the advantage so gained, but subject to repayment by such persons of their due share of the expenses properly incurred, and to an indemnity by the same persons against liabilities properly contracted, in gaining such advantage."

In this case, as already found, there is nothing to show that the plaintiff No. 1 availed himself of his position as such and gained an advantage. In the case of Balabhadra Misra Vs. Srimati Nirmala Sundari Devi and Others, , a Division Bench of this Court held:

"For granting equitable relief u/s 90 a co-sharer who purchased the property in the revenue sale must be guilty of some kind of sharp practice which would be inconsistent with any relation of mutual confidence between co-sharers. Where there can be no question of one co-sharer being misled by the other and the latter is not guilty of any sharp practice the equitable principles of Section 90 cannot be invoked."

The mere default on the part of the plaintiff to pay his share of the rent is therefore not enough to avail oneself of the equitable principle of Section 90 of the Trusts Act. There must be, in addition to that, a relation of mutual confidence between the co-sharers and the plaintiff must be also shown to be guilty of some sharp practice. In the case of Kurshed Ali and Others Vs. Dinanath Surma and Others, , it was held:

"The mere fact that the purchaser of an estate at a revenue sale is one of the co-sharers who did not pay him share of the revenue, is not in itself sufficient to give the other co-sharers an equity to obtain a re-conveyance of their shares from the purchaser on their paying to him their proper proportion of the expenses which he had incurred. To support a claim to this equity there must be something unfair, something amounting at least to sharp practice, in the conduct of the purchaser." This decision directly meets the contention advanced by Mr. Mohanty.

8. In my opinion, therefore, the appellants failed to show that Section 90 of the Indian Trusts Act applies to the present case and they are entitled to an equitable relief. The appeal, therefore, fails and is dismissed with costs.