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(1909) 01 CAL CK 0040

In the Calcutta High Court

Case No : Appeal From Appellate Decree No. 2611 of 1907

Panchkouri Ghosh APPELLANT

Vs

Pran Gopal Mukerjee and Others RESPONDENT

Date of Decision : 08-01-1909

Acts Referred:

Citation : (1909) 01 CAL CK 0040

Judgement

Breti, J.—Two points have been taken in support of this appeal. The first is that the lower Appellate Court has erred in law in holding that the present suit is barred under the provisions of sec. 33 of Act XI of 1859, and the second is that the lower Appellate Court has erred in law in not having taken up or decided the other point which, was raised on the plaint, namely, whether the Plaintiff''s right was not affected by the sale on the ground that the sale had been brought about by fraud on the part of his co-sharer and that his co-sharer was the actual purchaser of the properly in the benami if the ostensible purchaser. In support of the first point, it has been argued that sec. 7 of the Indian Limitation Act must be taken to apply to a case like the present in which the Plaintiff was a minor at the time of the institution of the suit (and, in fact is still a minor) because the same limitation is provided under Art. 12 of the Second Schedule of the Indian Limitation Act as is provided under sec. 33 of Act XI of 1859 and sec. 7 would apply to a suit brought under the provisions of Art. 12 of the Second Schedule of the Indian Limitation Act. The question is not free from difficulty, but it seems to me that the view which the lower Courts have taken is correct and that it could not have been the intention of the Legislature that the rights by purchase at an auction sale should remain in doubt and be liable to be defeated during a period of 18 years or more from the date of the confirmation of the revenue sale. It. seems to me that the provisions of Act XI of 1859 are complete and that, in these circumstances, it must be held that the present suit having been brought more than one year after the date of the confirmation of the sale was barred by limitation.

2. As regards the second point, however, I think the contention of the Appellant

must prevail. The prayer in the plaint was that a decree should be granted in favour of the Plaintiff declaring that his share was not affected by the sale by reason of the fraud of his co-sharer and there was a further prayer that the Plaintiff should be restored to possession of his share in the property. The learned pleader for the Respondents has argued that, as in the plaint there was only a prayer for declaration and no prayer for the necessary consequential relief, that is to say, for a decree in favour of the Plaintiff directing the execution in his favour of a conveyance of his share by the purchaser, as the suit is framed, the Plaintiff is not entitled to any relief on this ground. I find, however, that the suit was valued at the full value of the share claimed by the Plaintiff and, therefore, in a suit so valued there was no obstacle or objection to the granting of the prayer for the consequential relief. The suit was one not in the nature of a declaratory suit but was for a declaration that the Plaintiff''s title was not affected by the sale and for recovery of possession. It seems to me, in these circumstances, that the prayer in the plaint must be taken to have included a prayer for such consequential relief as was necessary in order to restore the Plaintiff to possession of his share which had been lost in consequence of the revenue sale. The lower Appellate Court has held that it was unnecessary to enter into the second question, because the learned Subordinate Judge was of opinion that, after the finding as regards limitation had been arrived at, the further question could not be gone into. But the Subordinate Judge appears not to have noticed that the limitation applicable to a suit for this portion of the relief claimed would be that fixed by Art. 95 of the Second Schedule of the Indian Limitation Act and not by sec. 33 of Act XI of 1859. The limitation prescribed by Art. 95 of the Second Schedule of the Indian Limitation Act is three years and the suit was certainly instituted within that period. I am, therefore, of opinion that the case should be sent back to the lower Appellate Court in order that that Court may consider and come to a decision on the further point raised by the Plaintiff, namely, whether he is entitled to a decree declaring that his share was not affected by the sale by reason of the fraud of his co-sharer and also whether he is entitled to the necessary reliefs in order to enable him to recover possession of his share. The decree of the lower Appellate Court is accordingly set aside and the case sent back to that Court in order that this point may be considered and determined and the case disposed of. Costs will abide the result. I notice that the date of the institution of the suit is November 1905. The present case should, therefore, be taken up and disposed of by the lower Appellate Court as soon as possible after the receipt of the record from this Court.

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