(1938) 05 PAT CK 0002

In the Patna High Court

Parmeshwar Dayal Amist and Others APPELLANT

Vs

Rambrichh Singh and Others RESPONDENT

Date of Decision : 05-05-1938

Acts Referred:
Civil Procedure Code, 1908 (CPC) — Order 34 Rule 5, 47

Citation : AIR 1939 Patna 113

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

Bench : Full Bench

Judgement

Chatterji, J.—The facts necessary for the determination of this appeal may be stated as follows: Deonarayan, Hari Charan and Kashi Singh were three brothers. They had some ancestral share in the proprietary interest in mauza Bishunpur Kashba bearing tauzi No. 338 of the Gaya Collectorate. Plaintiffs 1 and 2 are the sons of Deonarayan. The remaining plaintiffs, i.e. plaintiffs 3 to 7, are the sons and grand, sons of Hari Charan. The pro forma defendants 4 to 7 are the descendants of Kashi by his wife Mungo Kuer. Defendants 8 to 10 are the sons of Mahesh Dutt deceased who had originally 1 anna 4 dams share in the said village Bishunpur. In November 1900, Mahesh Dutt mortgaged 10 dams out of the 1 anna 4 dams share to Deonarayan. Again on 8th July 1901 Mahesh mortgaged 1 anna to Debi Prashad, father of the principal defendants 1 to 3. On 9th May 1903 Mahesh sold 12 dams out of his 1 anna 4 dams to Deonarayan, Hari Charan and Munga Kuer (widow of Kashi) in equal shares for Rs. 600 out of which Rs. 119 was set off against the dues on the mortgage executed in November 1900 in favour of Deonarayan. Mahesh also sold the remaining 12 dams share to his son Rama Nand who in his turn sold that share to his nephew Rang Bahadur.

2. In the meantime Mahesh had acquired by purchase an additional 12 dams share out of which he mortgaged 10 dams to Kashi Nath Ram. The latter in due course enforced his mortgage and purchased the 10 dams share. So out of the subsequently acquired 12 dams share 2 dams were left to Mahesh. In 1915 Debi Prashad sued to enforce his mortgage dated 8th July 1901 in respect of 1 anna

share impleading, besides the sons of the mortgagor who was then dead, Deonarayan, plaintiffs 3 to 7, defendants 4 to 7 and also Rang Bahadur who were subsequent transferees. Deonarayan and plaintiffs 3 to 7 contested the suit, claiming priority on the basis of their mortgage of November 1900. A preliminary decree was passed with a direction that 14 dams out of the mortgaged 1 anna should be first sold free from encumbrance and in case the sale proceeds thereof were found insufficient then the remaining 6 dams would be sold subject to the prior encumbrance of November 1900. The decree was made final in September 1919 but the final decree directed the sale of the mortgaged 1 anna in it entirety without specifying the prior encumbrance in respect of 6 dams as mentioned in the preliminary decree. Debi Prashad executed the final decree and in execution purchased the mortgaged 1 anna share on 21st December 1920.

3. He took delivery of possession on 4th March 1922 and then got his name mutated in the Land Registration Department in respect of the purchased share. In the D Register the shares of the plaintiffs and the pro forma defendants 4 to 7 including their ancestral share were recorded as follows:

A.d.k.b. ph.rew. rain.phen. (1) Entry No. 14: Plaintiffs 3 to 7: 1. 8. 18. 6. 13. 10. O. 0. (2) Entry No. 15: Plaintiffs 1 and 2 and Mt. Jasoda Kuer: 2. 5. 13. 6. 12. 13. 7. 0. (3) Entry No. 16: Pro forma defen dants 4 to 7: 1. 12. O. 19. 19. 16. 13. 0. As a result of the mutation effected in the name of Debi Prashad in respect of his purchased 1 anna share 10 dams were taken out of the entry No. 14 in the names of plaintiffs 3 to 7 and 10 dams out of the entry No. 15 in the names of plaintiffs 1 and 2. The plaintiffs being aggrieved by this mutation brought the suit which has given rise to this appeal. Their main allegations are that the final mortgage decree and the execution sale and the mutation proceedings were all fraudulent and they came to know of the same for the first time on 2nd May 1932. They pray for a declaration of their title to the 1 anna share in respect of which Debi Prashad got his name mutated in the D Register and for confirmation or recovery of possession thereof and in the alternative for redemption of 6 dams share out of the said 1 anna share. The suit was contested by defendants 1 to 3 who are the sons of Debi Prashad, as already stated. Their substantial defence is that the suit is barred u/s 47, Civil P.C. and by res judicata.

4. The learned Subordinate Judge who tried the suit dismissed it, holding that the plaintiffs failed to establish fraud and that they are bound by the final mortgage decree and by the execution sale. On appeal by the plaintiffs to the learned District Judge, he reversed the decision of the learned Subordinate Judge and decreed the suit in part, declaring the title of plaintiffs 1 and 2 to 2 annas 2 dams and odd share less two third dam and of plaintiffs 3 to 7 to 1 anna 8 dams and odd share less two third dam and confirming their possession in respect thereof. Hence this second appeal by defendants 1 to 3.

5. As will appear from the statement of facts given above, the plaintiffs'' case rests mainly on the question whether the final decree was obtained by fraud and could override the preliminary decree and whether the execution proceedings

were vitiated by fraud. In the appeal before the learned District Judge the finding of the learned Subordinate Judge that there was no fraud was not challenged. The learned District Judge however has held that the rights of the parties having been declared by the preliminary decree, 6 dams out of the 1 anna purchased by Debi Prashad must be subject to the prior encumbrance in favour of Deonarayan. In his view Debi Prashad had the right to follow 14 dams only out of the mortgaged 1 anna share in the hands of any of the defendants in the mortgage suit, and out of the 14 dams, 12 dams being in the possession of one Bang Bahadur who was not a party to that suit. Debi Prashad must be held to have lost his right to the said 12 dams and therefore by his auction purchase he acquired only 2 dams share out of the shares of the plain, tiffs and the pro forma defendants 4 to 7. Accordingly the learned District Judge has reduced the claim of plaintiffs 1 and 2 by two third dam and of plaintiffs 3 to 7 also by two third dam. It is contended on behalf of the appellants before us that no fraud having been established with regard to the final decree and the execution proceedings, the plaintiffs must be held to be bound by the final decree and the execution sale. This contention, in my opinion, must prevail.

6. Indeed the question of priority of the mortgage in respect of 6 dams was declared by the preliminary decree, but for some reason or other, in all likelihood by mistake, the direction with regard to the prior mortgage was omitted from the final decree. A Court in passing a final decree under Order 34, Rule 5, Civil P.C. has to follow the terms of the preliminary decree. If however the Court passes a final decree in variance with the terms of the preliminary decree, the Court when executing the decree will execute the final decree as it stands. It is of course open to the executing Court to interpret the final decree in the light of the preliminary decree. But where no objection is taken to the passing of the final decree in variance with the terms of the preliminary decree or to the execution of such final decree and in execution the mortgaged property is sold and the sale is confirmed the judgment-debtor will not be heard to say that the final decree or the execution sale is not binding on him or does not affect his rights under the preliminary decree. In the present case the final] decree directed the sale of the mortgaged 1 anna share in its entirety without any mention of the prior encumbrance in respect of the 6 dams share and in execution, proceedings the 1 anna share was sold free from encumbrance, as the sale certificate shows. At the time of the final decree it was the duty of the plaintiffs or their predecessors to see that it was passed in conformity with the preliminary decree. Even assuming that the final decree as it stands, is not really in conflict with the preliminary decree but is capable of being interpreted as being consistent with that decree when in execution proceedings the 1 anna share was brought to sale free from encumbrance it was open to the plaintiffs or their predecessors to object to the sale on the ground that it was not warranted by the terms of the decree. No such objection having been taken and the sale having been allowed to take place and to be con firmed it no longer lies in the mouth of the plaintiffs to say that their rights have not been at all affected by the sale. They must be held to be bound

by the execution sale.

7. The question then arises as to how much of the plaintiffs'' share is affected by the sale. As already stated, the plaintiffs and the pro forma defendants 4 to 7, rather their predecessors, purchased 12 dams share out of the original 1 anna 4 dams share of Mahesh Dutt. The remaining 12 dams came to the hands of Bang Bahadur by process of transfer. These transferees of the entire 1 anna 4 dams share were parties to the mortgage decree obtained by Debi Prasad. The mortgage being in respect of undivided 1 anna share out of 1 anna 4 dams would operate in the proportion of five-sixths on the 12 dams share purchased by the predecessors of the plaintiffs and the pro forma defendants 4 to 7; in other words, out of their 12 dams only 10 dams would be subject to the mortgage. So also 10 dams out of 12 dams share in the hands of Rang Bahadur would be subject to the mortgage. Out of the 12 dams purchased by the predecessors of the plaintiffs and the pro forma defendants 4 to 7 plaintiffs 1 and 2 have one third share, plaintiffs 4 to 7 one third and defendants 4 to 7 one third. Consequently 34 dams out of the share of the plaintiffs 1 and 2, 3 dams out of the share of the plaintiffs 4 to 7 and 34 dams out of the share of the defendants 4 to 7 must be held to have been affected by the execution sale. Defendants 1 to 3, while getting their names mutated in the D Register in respect of the purchased 1 anna share took out 10 dams from the share of plaintiffs 1 and 2 and 10 dams from the share of plaintiffs 3 to 7. This was not justified.

8. The shares recorded in the names of the plaintiffs in entries Nos. 14 and 15 included their ancestral share as well as the share purchased from Mahesh Dutt. Similarly, defendants 4 to 7 also are recorded in respect of some share which includes their ancestral share as well as the purchased share. Eang Bahadur who, as already stated, is a subsequent purchaser of 12 dams share out of the 1 anna 4 dams share of Mahesh Dutt, is recorded in respect of that share in the D Register. Defendants 1 to 3 are entitled to get their purchased 1 anna share, so far as the entries in the Register are concerned in the following proportions: 34 dams from the share of plaintiffs 1 and 2, 34 dams from the share of plaintiffs 3 to 7, 34 dams from the share of defendants 4 to 7 and 10 dams from the share of Rang Bahadur. Here it may be mentioned that the learned District Judge was in error in supposing that Rang Bahadur was not a party to the mortgage suit of 1915 brought by Debi Prashad. In fact he was defendant 4 (vide decrees Exs. 6 and 6a). From the judgment Ex. 5 it appears that he was impleaded a one of the heirs of the deceased mortgagor, but that does not make any difference so far as his interest is concerned.

9. It is contended on behalf of defendants 1 to 3 that the plaintiffs'' case being based entirely on fraud, and fraud not having been established, they are not entitled to any relief in this suit. It is said that had the plaintiffs made out a case in their plaint based on any other ground apart from fraud for obtaining relief in respect of the shares which defendants 1 to 3 have got recorded in their names as a result of the mutation proceedings they might have met that case in various

ways. This contention does not at all appeal to me. The plaintiffs distinctly stated in the plaint that as a result of the mutation proceedings defendants 1 to 3 have wrongfully taken the entire 1 anna share from their shares only. Defendants 1 to 3 if they liked might have put forward any defence which would justify them in retaining the benefit of the apparently erroneous order passed in mutation proceedings. The plaintiffs are, in my opinion, entitled to relief to this extent that the order passed in the mutation proceedings will not affect their shares except to the extent of 34 dams out of the share of plaintiffs 1 and 2 and 34 dams out of the share of plaintiffs 3 to 7.

10. In the result I would allow the appeal in part and decree the plaintiffs'' suit only to this extent that out of the 1 anna share in respect of which defendants 1 to 3 have got their names mutated in the D Register out of the plaintiffs'' share the title of plaintiffs 1 and 2 be declared with respect to 6? dams out of the 10 dams taken from their share appertaining to entry No. 15 in the D Register and the title of plaintiffs 3 to 7 be declared with respect to 61 dams out of 10 dams taken from their share appertaining to entry No. 14 in the D Register and they do recover their possession of the same. The parties do bear their own costs throughout.

Fazl Ali J.

I agree.

