

(1957) 03 PAT CK 0007

In the Patna High Court

Case No : Letters Patent Appeal No. 17 of 1954

Rajendra Prasad and Others

APPELLANT

Vs

Jai Prakash Pandey and Others

RESPONDENT

Date of Decision : 05-03-1957

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 47

Citation : AIR 1957 Patna 700 : (1957) 5 BLJR 441

Hon'ble Judges : Ramaswami, C.J.;Kanhaiya Singh, J

Bench : Division Bench

Advocate : Lal Narain Sinha and N.P. Agrawalal, for the Appellant; G.P. Das, D. Goswami and Keshri Kishore Saran, for the Respondent

Final Decision : Dismissed

Judgement

1. This appeal is brought on behalf of the plaintiffs from a judgment of Das, J., dated the 3rd of May, 1954, under the Letters Patent.

2. It appears that on-the 11th of October, 1919, the plaintiffs executed a mortgage bond in favour of defendant No. 1 for certain properties described in Schedule 1 of the compromise petition dated the 28th of January, 1931 (Exit. A). The description of the plots was made with reference to the survey of 1899-1900. On the 13th of February, 1930, defendant No.1 brought a mortgage suit, namely, Mortgage Suit No. 14 of 1930, for the sale of the properties. In the plaint of the mortgage suit the property in dispute was described in two schedules. Schedule 1 describing the property with reference to the old survey numbers and Schedule 2 describing the property with reference to the new survey numbers.

On the 28th of January, 1931, the suit ended in a compromise, the compromise decree being exhibit A. In pursuance of terms of the compromise the properties were sold in execution, and on the 26th of December, 1933, the defendants first party purchased the properties and obtained possession. On the 30th of July,

1944, the defendants second party purchased, the properties from the defendants first party. The present suit was instituted by the plaintiffs on the 7th of August, 1945, for a declaration of title and delivery of possession with regard to 8 bighas 6 dhurs of land described- in Schedule 3 of the plaint.

The case of the plaintiffs was that this area of land was not included in the mortgage bond of 1919 and the property was wrongly sold in the execution case and purchased by the defendants first party on the 26th of December, 1933. The trial court dismissed the suit, but on appeal the lower appellate court took the view that the land of Schedule 3 was not covered by the mortgage and that the plaintiffs were entitled to recover possession of the land. In second appeal Das, J. referred to the plaint and the written statement of the mortgage suit, namely, Mortgage Suit No. 14 of 1930, and came to the conclusion that there was a question at issue between the parties with regard to the identity of mortgaged land, the plaintiffs claiming that the mortgaged land was described correctly in Schedule 1 and not in Schedule 2, and the defendant asserting that the lands have been described correctly in Schedule 2.

The learned Single Judge held that as a result of the compromise the parties agreed that the properties covered by Schedule 2 are the subject-matter of the mortgage; and if the defendants of the mortgage suit did not pay the amount within the stipulated date agreed upon in the compromise, it was open to the plaintiffs of the mortgage suit to sell the properties described in Schedule 2. It was held by Das, J. that the consent decree estopped the plaintiffs from pleading that a mistake had been made and that some properties which were sold in execution of the decree could not be sold in that manner. It was also held by Das, J. that the suit was barred by the provisions , of Section 47 and Order 21, rule 92, of the Code of Civil Procedure.

3. In support of this appeal Mr. Lal Narain Sinha made the submission that Das, J. was not entitled to refer to the plaint and the written statement of the mortgage suit in reaching the conclusion that the identity of the mortgaged land was also a point in dispute between the parties and the effect, of the compromise decree was that the question of identity was settled in favour of the present defendants and the parties agreed that the land compromised in Schedule 2 was the subject-matter of the mortgage bond. We do not think there is much substance in the argument of Mr. Lal Narain Sinha. It is true that there is no formal order of the court taking the additional evidence under Order 41, Rule 27, of the Code of Civil Procedure, but we understand from Mr. G. P. Das . who argued for the respondents in this appeal that both parties had proceeded upon the basis that the plaint and the written statement would be taken as additional evidence and reference was made to these documents before Das J., in the course of the argument of the appeal.

It was perhaps due to some clerical mistake that Das, J. did not make a formal order admitting the written statement and the plaint in the mortgage suit as evidence. A supplementary paper-book had already been prepared on behalf of

the appellants and it appears to have been used by both the parties in the course of argument before the learned Single Judge. We do not, therefore, consider that there is any substance in this argument.

4. In any event we are satisfied that the suit has been rightly dismissed on the ground that it was barred under the provisions of Section 47 of the Code of Civil Procedure. That was the view taken by Das, J. and we consider that that is the correct view. This view is supported by a decision of a Division Bench of the Calcutta High Court in *Sarada Churn Goho Vs. Prativa Sundari Debi and Others* , in which a sale proclamation and notice had been settled in a number so as to include properties not included in the mortgage and the judgment-debtor with full knowledge allowed this property to be sold.

It was held that the judgment-debtor cannot subsequently object that the whole proceeding had been vitiated and, therefore, the sale ought to be set aside and that Section 47 operated as a bar. A similar view has been expressed by the Privy Council in *Ramchandra Naidu v. Kadirivasami Naicker* 48 IA 155: (AIR 1922 PC 252) (B), in which the purchaser in a sale under a mortgage decree had been given a sale certificate which plainly included certain property and had been put in possession. It was held by the Privy Council that in these circumstances it was not open to the court in a subsequent suit by the mortgagor's representative to hold by reference back to the mortgage deed that the property in question was not sold under the decree.

It was further observed by the Privy Council that u/s 47 of the CPC the title of a purchaser can be questioned only by a petition in the execution proceedings, and not by a separate suit, and when a petition was barred by limitation the sale could not be questioned. We think the principle of this decision applies to the present case and that the suit is barred u/s 47 of the Code of Civil Procedure.

5. For these reasons we hold that there is no substance in this appeal and it must be dismissed with costs.