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(1946) 03 CAL CK 0019

In the Calcutta High Court

Case No : Appeal No. 1055 of 1941

Sm. Hemanta Kumari Bose — APPELLANT

Vs

Sree Sree Iswar Sridhar Jiu and others — RESPONDENT

Date of Decision : 27-03-1946

Acts Referred:

Citation : (1946) 03 CAL CK 0019

Final Decision : Dismissed

Judgement

B. K. Mukherjea, J.—This appeal is on behalf of defendant 1 and it arises out of a suit commenced by the plaintiffs for recovery of possession of the land described in schedule ka to the plaint on establishment of title of plaintiff 1, Sri Sri Iswar Sridhar Jiu, deity to the same. The plaintiffs are four in number of whom plaintiff 1 is the Deity Sri Sri Iswar Sridhar Jiu, while the other three purport to be the managing shebaits of the idol. The other shebaits have been impleaded as pro forma defendants in the suit. The plaintiffs allege that the land in suit along with other lands are the absolute debuttar property belonging to the Idol Sri Sri Iswar Sridhar Jiu and are covered by taidad No. 24198 of the Burdwan Collectorate. Some time before 1905, all these lands were mortgaged by the then shebaits of the deity, who were four in number, to one Baburam Bose, the predecessor of defendants 2 to 6, to secure an advance received from the latter. Baburam brought a suit to enforce the mortgage, and in execution of the decree obtained by him, the mortgaged properties were put up to sale and purchased by him some time in the year 1908. Since then Baburam and after his death, his successors were in possession of these properties. In the year 1932, the last of the shebaits who mortgaged the property to Baburam died, and in 1934 the present plaintiffs instituted a suit, being suit No. 436 of 1934, against defendants 2 to 6 upon whom the interest of Baburam had devolved, to recover possession of the debuttar property which was alleged to have been improperly sold in execution of the decree obtained by Baburam against the then shebaits. The suit was fought up to this Court, and eventually a decree was passed in favour of the plaintiffs declaring the property to be debuttar and giving the plaintiffs the right

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to recover khas possession of the same. This decree was executed in Execution Case No. 46 of 1939, and the plaintiffs took delivery of possession of all the properties in respect of which they obtained a decree. Thereupon, defendant 1 who is the wife of defendant 5 preferred a claim under O. 21, R. 100, Civil P. C., complaining of dispossession from the land described in schedule ka to the present plaint, which she alleged, she held and possessed in her own right on the strength of a purchase in Title Execution Case No. 7 of 1929. This claim petition was allowed and thereupon the plaintiffs brought the present suit under O. 21, R. 103, Civil P. C., for recovery of possession of the ka schedule land on the allegation that this was a part of the debuttar endowment belonging to plaintiff 1 and that defendant 1 did not acquire any title to it by reason of her purchase at the sale held in execution of a decree obtained by a third party against defendants 2 to 6.

2. Two written statements were filed in the suit: One by defendant 1 and the other by defendants 2 to 6 jointly, defendants 2 to 6 subsequently dropped out of the proceeding, and defendant 1 remained the only contesting defendant in the suit. The contentions of defendant 1, in substance, were that the property in suit was not debuttar property belonging to the idol Sri Sri Iswar Sridhar Jiu, but it was the secular personal property of the previous mortgagors which was mortgaged and sold to Baburam, the predecessor of defendants 2 to 6 along with other properties in the year 1908; subsequently the suit property was sold in execution of a decree obtained by another person against the heirs of Baburam, and it was purchased by defendant 1 on 14th May 1929, who thereby acquired a good and indefeasible title to it. It was further averred that as defendant 1 and her predecessors had been in possession of the property all along since 1908 adversely to the endowment, the title of the deity, if any, was extinguished by adverse possession and the plaintiffs'' suit was barred by limitation. The trial Court negatived the contentions raised on behalf of defendant 1 and gave the plaintiffs a decree as prayed for. There was an appeal taken to the Court of the District Judge of Hooghly, and the learned Subordinate Judge who heard the appeal dismissed the same and upheld the findings of the trial Court. Defendant 1 has now come up on second appeal to this Court. Mr. Sarkar who appears on behalf of the appellant has not challenged the finding of fact arrived at by the Courts below, that the property in suit is the debuttar property of idol Sri Sri Iswar Sridhar Jiu. The contentions he has raised in support of the appeal are of a twofold character. In the first place, he has argued that as the appellant and her predecessors were in possession of the property ever since 1908 adversely to the deity, the plaintiffs'' suit is barred by limitation. The second contention raised is that as all the shebaits of the deity have not joined as plaintiffs in the suit, and there is no averment in the plaint that those who have been impleaded as pro forma defendants were not willing to come as plaintiffs, the suit as framed is not maintainable.

3. So far as the first ground is concerned it is conceded on both sides that Arts. 134A to 134C, Limitation Act, which were introduced by the Amending Act 1 [I]

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of 1929 have no application to the facts of the present case. The appropriate article which governs the present case is Art. 144, Limitation Act, and therefore, the question for our determination is as to when the possession of the purchaser, became adverse to the endowment. In 48 I. A. 302 Vidya Varuthi Thirtha v. Balusami Ayyar (''22) 9 A. I. R. 1922 P. C. 123 : 44 Mad. 831 : 48 I. A. 302 : 65 I. C. 161 (P. C.), it was held by their Lordships of the Judicial Committee that when the improper alienation of a debuttar property by the manager was in the form of a permanent lease there was no adverse possession by the alienee within the meaning of Art. 144, Limitation Act, until the determination of the office of alienating mohunt by death or otherwise. Soon after the pronouncement of the Judicial Committee in the above case, a question arose as to whether the same principle was applicable when the transfer was not of a limited interest merely, but was by way of sale out and out. There was some conflict of opinion expressed on this point by the Indian High Courts, but the conflict has been set at rest by the subsequent pronouncement of the Judicial Committee in 60 I. A. 124 Ramcharan Das v. Naurangi Lal (''33) 20 A. I. R. 1933 P. C. 75 : 12 Pat. 251 : 60 I. A. 124 : 142 I. C. 214 (P.C.), and it has been held that alienation of particular items of endowed property by the manager by way of sale is valid during his term of office, and consequently the possession of the alienee would not be adverse until the alienating mohunt ceases to be mohunt by reason of death, retirement or otherwise. This was a case of a private sale of some portion of the endowed property following a permanent lease of the same by the mohunt. When a trust property was sold in execution of personal decree against the trustee, it was held by their Lordships of the Judicial Committee in 50 I. A. 295 Subbaiya Pandaram v. Mahamad Mustapha Maracayar (''23) 10 AIR 1923 P. C. 175 : 46 Mad. 751 : 50 I. A. 295 : 74 I. C. 492 (P.C.) that the possession of the execution sale purchaser is adverse to the trust from the date of the sale and a suit for possession would have to be instituted within 12 years from such date. Lord Buckmaster expressly referred to the cases in 48 I. A. 302 Vidya Varuthi Thirtha v. Balusami Ayyar (''22) 9 A. I. R. 1922 P. C. 123 : 44 Mad. 831 : 48 I. A. 302 : 65 I. C. 161 (P. C.) and 33 I. A. 76 Ishwar Shyam Chand Jiu v. Ram Kanai Ghose (''11) 38 Cal. 526 : 38 I. A. 76 : 10 I. C. 683 (P.C.), in course of his judgment and repelled the contention advanced on the authority of these decisions that the possession of the transferee was not adverse till the tenure of office of the alienating trustee came to an end. "Such an argument", so runs the judgment, "has no relation to the case where, as here, property has been acquired under an execution sale and possession retained throughout."

4. Mr. Sarkar, in support of his contention relies strongly upon this decision, and his argument is that although in the case before the Judicial Committee, the property was sold in execution of a money decree against the trustee personally, the same principle applies when the sale is in execution of a mortgage decree against the manager. In support of the last proposition, he relies upon the decision of a Division Bench of this Court in 62 C. L. J. 10 Ronald Dunkan Cromatic v. Sri Sri Ishwar Damodar Jiu (''35) 62 C. L. J. 10. The Court of appeal

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below, on the other hand, practically based its decision upon a pronouncement of Jack J. in 43 C. W. N. 102 Charu Chandra Basu v. Nritya Gopal Basu (''39) 26 A. I. R. 1939 Cal. 21 : 180 I. C. 679 : 43 C. W. N. 102, where the learned Judge distinguished the case in 50 I. A. 295 Subbaiya Pandaram v. Mahamad Mustapha Maracayar (''23) 10 AIR 1923 P. C. 175 : 46 Mad. 751 : 50 I. A. 295 : 74 I. C. 492 (P.C.), on the ground that it dealt with a trust property and not the property of an endowment, and held further that the view indicated in this as well as other earlier cases was no longer sound in view of the subsequent decision of the Judicial Committee in 60 I. A. 124 Subbaiya Pandaram v. Mahamad Mustapha Maracayar (''23) 10 AIR 1923 P. C. 175 : 46 Mad. 751 : 50 I. A. 295 : 74 I. C. 492 (P.C.). The point undoubtedly is of some importance and requires careful consideration.

5. In 48 I. A. 302 Vidya Varuthi Thirtha v. Balusami Ayyar (''22) 9 A. I. R. 1922 P. C. 123 : 44 Mad. 831 : 48 I. A. 302 : 65 I. C. 161 (P. C.), as well as in that of 60 I. A. 124 Ramcharan Das v. Naurangi Lal (''33) 20 A. I. R. 1933 P. C. 75 : 12 Pat. 251 : 60 I. A. 124 : 142 I. C. 214 (P.C.), their Lordships of the Judicial Committee proceeded on the view that the shebait or manager of an endowment is at liberty to dispose of, not the endowment itself, but particular items of endowed property during the period of his life-time. The grant may be for a larger period-be it by way of sale or permanent lease, but if it is not supported by legal necessity, it would be good only to the extent of the life-time of the alienating manager. It follows, therefore, that the possession of the alienee is not adverse to the endowment so long as the alienating mohunt is in office and it becomes adverse only when the office of the latter ceases by death or otherwise. The successor of the alienating mohunt is consequently entitled to institute a suit for recovery of possession of the property improperly transferred, within 12 years from the date of his assumption of the office. In 50 I. A. 295 Subbaiya Pandaram v. Mahamad Mustapha Maracayar (''23) 10 AIR 1923 P. C. 175 : 46 Mad. 751 : 50 I. A. 295 : 74 I. C. 492 (P.C.) the Judicial Committee held that this principle was not applicable when the trust property was sold in execution of a decree against the trustee personally. We cannot agree with the view taken by Jack J. that the proposition of law enunciated in 50 I. A. 295 Subbaiya Pandaram v. Mahamad Mustapha Maracayar (''23) 10 AIR 1923 P. C. 175 : 46 Mad. 751 : 50 I. A. 295 : 74 I. C. 492 (P.C.) was not accepted as correct in the subsequent pronouncement of the Judicial Committee in 60 I. A. 124 Ramcharan Das v. Naurangi Lal (''33) 20 A. I. R. 1933 P. C. 75 : 12 Pat. 251 : 60 I. A. 124 : 142 I. C. 214 (P.C.). Lord Russell of Killowen while delivering judgment in 60 I. A. 124 Ramcharan Das v. Naurangi Lal (''33) 20 A. I. R. 1933 P. C. 75 : 12 Pat. 251 : 60 I. A. 124 : 142 I. C. 214 (P.C.) referred with approval to certain observations of Lord Buckmaster in 50 I. A. 295 Subbaiya Pandaram v. Mahamad Mustapha Maracayar (''23) 10 AIR 1923 P. C. 175 : 46 Mad. 751 : 50 I. A. 295 : 74 I. C. 492 (P.C.) and his Lordship expressly observed that having regard to the facts of that case, the decision was not unnatural. In our opinion, the view taken in 50 I. A. 295 Subbaiya Pandaram v. Mahamad Mustapha Maracayar (''23) 10 AIR 1923

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P. C. 175 : 46 Mad. 751 : 50 I. A. 295 : 74 I. C. 492 (P.C.) has not been overruled, either expressly or impliedly, by the decision in 60 I. A. 124 Ramcharan Das v. Naurangi Lal (''33) 20 A. I. R. 1933 P. C. 75 : 12 Pat. 251 : 60 I. A. 124 : 142 I. C. 214 (P.C.). In fact, the two decisions stand on entirely different grounds, and there is no conflict between them.

6. The true principle deducible from the cases mentioned above is, that when an endowed property is alienated by a manager, the possession of the alienee becomes adverse as soon as he is without any title to the property. If the transfer is void ab initio, the possession of the transferee is adverse from the very date of the transfer. If on the other hand, it is not void but is only voidable at the instance of the succeeding manager, possession cannot be adverse until the office of the alienating mohunt ceases.

7. The question now is under what circumstances will a transfer by a manager be void ab initio. The answer is that the alienation is void when the manager acts in negation of the trust. In the first place, if the alienation is not merely of certain items of the endowed property, but of the endowment as a whole, the possession of the transferee is unlawful from the very beginning, and limitation would run from the date of transfer: vide 27 I. A. 69 Gnanasambanda Pandara Sannadhi v. Velu Pandaram (1900) 23 Mad. 271 : 27 I. A. 69 : 7 Sar. 671 (P. C.) and 37 I. A. 147 Damodar Das v. Lakkhan Das (''10) 37 Cal. 885 : 37 I. A. 147 : 7 I. C. 240 (P. C.). In the second place even if the subject-matter of transfer is only particular item or items of endowed property the question whether the transaction is void or voidable would depend upon the fact whether the shebait or the manager purported to transfer the same in his capacity as manager or in his own individual capacity as the secular owner of the property. A shebait or manager has the right to alienate portions of endowed property for purposes of legal necessity. He may exceed his powers, but if the transfer of the deity''s property is by the shebait or the manager as such, the transferee would, at least, acquire an interest which would be valid during the life-time of the transferring mohunt, but if the manager transfers the property belonging to the deity as his own property asserting his own personal interest in the same, his act itself is adverse to the trust. The transferee in such cases would acquire no title to the property, and his possession would be unlawful from the beginning.

8. The same principle, we think, applies to involuntary transfers as well. In fact, it was observed by Lord Buckmaster in 50 I. A. 295 Subbaiya Pandaram v. Mahamad Mustapha Maracayar (''23) 10 AIR 1923 P. C. 175 : 46 Mad. 751 : 50 I. A. 295 : 74 I. C. 492 (P.C.), that there is little difference in principle between a transfer under an adverse execution and a sale by the trustee himself. If a decree is obtained against the manager in his personal capacity, and if in execution of the decree, the trust property is sold, the purchaser cannot acquire any title by his purchase and his possession would be adverse to the trust from the very beginning. This is exactly what happened in 50 I. A. 295 Subbaiya Pandaram v. Mahamad Mustapha Maracayar (''23) 10 AIR 1923 P. C. 175 : 46

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Mad. 751 : 50 I. A. 295 : 74 I. C. 492 (P.C.) and that is why the possession of the execution sale purchaser who did not acquire any right by his purchase was held to be unlawful from the date of the sale.

9. We think that it is not quite accurate to say that the decision in 50 I. A. 295 Subbaiya Pandaram v. Mahamad Mustapha Maracayar (''23) 10 AIR 1923 P. C. 175 : 46 Mad. 751 : 50 I. A. 295 : 74 I. C. 492 (P.C.) is to be justified merely on the ground that it was an involuntary alienation, the sale in that case being in execution of a money decree against the trustee personally; and that the same principle cannot be applied to the case of a mortgage sale. It is true that a mortgage sale cannot rank as an involuntary sale, for it presupposes a voluntary act of transfer in the form of mortgage, on the basis of which the decree is passed and the property is sold. In our opinion, whether the possession of the purchaser at a mortgage sale is or is not adverse to the endowment would depend upon the fact as to whether the mortgage was executed by the manager qua manager on behalf of the deity or in his own individual capacity as secular owner of the property in denial of the rights of the deity. In the first class of cases, the mortgage is not void altogether, and the purchaser at a mortgage sale would, at least, acquire an interest which will enure during the life-time of the manager. If, on the other hand, the manager asserts his own individual ownership in the property in denial of the rights of the deity and purports to act not as shebait but as proprietor of the endowed property, the mortgagee would not acquire any interest by such transaction. The purchaser at the mortgage sale would be a trespasser out and out, and his possession would be adverse from the date of his purchase.

10. This, we think, is the correct principle that is deducible from the cases referred to above. We are glad to find that the same view has been taken by the Madras High Court in two of its recent pronouncements: vide A. I. R. 1938 Mad. 60 Venkatasubramania v. Sivagurunatha (''38) 25 A. I. R. 1938 Mad. 60 : 180 I. C. 462 at p. 64 and A. I. R. 1938 Mad. 415 Alam v. Karuppanaswami (''38) 25 A. I. R. 1938 Mad. 415 : 183 I. C. 88 at p. 416. The observation of D. N. Mitter J. in 62 C. L. J. 10 Ronald Dunkan Cromatic v. Sri Sri Ishwar Damodar Jiu (''35) 62 C. L. J. 10, expressed as it is in very wide language, seems to us to be open to criticism, but it is not necessary to discuss the matter any further, as in that case the property was expressly held not to be debuttar property and, therefore, the expression of opinion on the question of law cannot rank higher than a mere obiter. Applying this test to the facts of the present case we are of the opinion that the appellant is entitled to succeed on the question of limitation. It seems clear to us that the former shebaits when they mortgaged the property did so not in their capacity as shebaits, but as secular owners of the property which they purported to hold in niskar right. The mortgage decree has not been made an exhibit in this case, but the sale certificate makes it clear that the decree in execution of which this property was sold was not against the previous shebaits qua shebaits but against them in their own personal capacity, and only the right, title and interest of the defendants personally vested in the purchaser. This being

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the position, we are bound to hold that the purchase was void altogether, and the possession of the purchaser was adverse from the date of the sale. As more than 12 years have elapsed since that date, the suit must be deemed to be barred by limitation. In view of our decision of the first point, it is not necessary to consider the second contention raised by Mr. Sarkar. The result, therefore, is that this appeal is allowed. The judgments and decrees of the Courts below are set aside and the plaintiff''s suit dismissed. Defendant 1 is entitled to her costs in all the Courts.

Sharpe, J.

11. I agree.

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