

(2007) 04 JH CK 0004

In the Jharkhand High Court

Case No : Appeal from Appellate Decree No. 174 of 1988

Srimati Sita Devi and Others

APPELLANT

Vs

Lalita Devi, Anapurna Devi, Bahuria Itarbas Kuer and Ganesh
Prasad Singh

RESPONDENT

Date of Decision : 18-04-2007

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 89, Order 21 Rule 90, 144, 144(2)
Criminal Procedure Code, 1973 (CrPC) — Section 145
Limitation Act, 1877 — Article 166, 181, 182
Limitation Act, 1963 — Article 135, 18

Citation : AIR 2007 Jhar 101 : (2007) 2 BLJR 2166 : (2007) 3 JCR 370

Hon'ble Judges : M.Y. Eqbal, J

Bench : Single Bench

Advocate : V. Shivnath and Shekhar Sinha, for the Appellant; Jay Prakash Jha, Kanhaiya Kr. Singh, Rajiv Ranjan Tiwary and O.P. Tiwary, for the Respondent

Final Decision : Dismissed

Judgement

M.Y. Eqbal, J.—This Second Appeal by the defendants-appellants is directed against the judgment and decree passed by the Ist Addl. District Judge, Palamau at Daltonganj in Title Appeal No. 19/1996 whereby he has reversed and set aside the judgment and decree passed by Sub-judge, Garhwa in Title Suit No. 37/66 and thereby decreed the suit filed by the plaintiffs-respondents.

2. The facts of the case lie in a narrow compass: The Plaintiffs-respondents filed the aforementioned suit for declaration of title of plaintiff No. 1 over the suit land described in schedule I of the plaint as occupancy raiyat and over the compensation money payable for four annas share in village Gonda. The plaintiffs also claimed title over Schedule -2 land and further for confirmation of their possession on the land wherefrom they were allegedly dispossessed during the pendency of the suit in execution of a decree. Plaintiffs' case is that during the period between 1939 to 1945 when the suit land was under the management of the Court of Wards, some of the co-sharers filed partition suit No. 6 of 1941

impleading the Manager of the Court of Wards as defendant No. 8. In the said partition suit a preliminary decree was passed on 25.2.1943 holding that defendant No. 8 is entitled to four annas share. In execution of the said decree vide Execution Case No. 2/7 of 1950-51 one Akhoura Ramchandra Prasad purchased the entire property in a auction sale on a consideration amount of Rs. 200/- for realization of Rs. 111/- as the cost of partition. The suit property was purchased by the defendants in the name of their brother-in-law, defendant No. 1. On the basis of that auction sale the defendants took possession of the land on 28.3.1953. Plaintiffs' further case was that actually no delivery of possession was given rather it was a paper transaction and the suit property all along remained in possession of the plaintiffs. The plaintiffs' after knowing about the auction sale, filed a petition under Order XXI Rule 90 C.P.C for setting aside the auction sale which was ultimately rejected. Then the plaintiffs filed appeal in the High Court being Miscellaneous Appeal No. 367 of 1955. The said appeal was allowed by this Court vide order dated 28.2.1985. The auction purchaser then filed Letters Patent Appeal which was also dismissed on 30.7.1958. Even the SLP preferred by the auction purchaser was dismissed by the Supreme Court on 7.7.1960. In the meantime, a proceeding u/s 145 Cr.P.C. was initiated and the same was decided in favour of the plaintiffs. In spite of the aforesaid facts the defendants started threatening the plaintiffs to dispossess them from Schedule-2 land. The plaintiffs' case is that since the possession of the suit land was not actually delivered in favour of the decree-holders of that suit, there was no necessity of filing an application u/s 144 C.P.C. for restitution of the property. However, since possession was not given by the defendants, the plaintiffs filed the aforesaid suit for declaration of their title and confirmation of possession.

3. The suit was contested by the defendants- appellants on the ground, inter alia, that the suit was not maintainable and that the same was barred by limitation. It was further contended that possession of the property in question was taken over by the defendants in execution of the aforesaid decree after auction purchase was confirmed by the executing court.

4. The trial court framed as many as 8 issues and after considering the entire facts and circumstances of the case held that by reason of lapse of time the plaintiffs-respondents lost their title over the suit land as they did not move the court within 12 years from the date the possession was delivered to the defendants. On this finding, the trial court dismissed the suit. Para 23 of the trial court judgment is worth to be quoted herein below:

From the evidence of both the sides I find that the defendants are in possession of the land after auction purchase in the year, 1952-54. The above auction sale was set aside by the Hon'ble Court but the plaintiffs have not taken any step u/s 144 CPC for restitution of recovery of the possession. The plaintiffs in their plaint have said that since they were in possession, so question of taking any step u/s 144 CPC does not arise, From this statement it is clear that the plaintiffs have not taken any step u/s 144 CPC. The period of limitation for taking steps u/s 144

CPC was 3 years under Article 182 of the old Limitation Act and 12 years under Article 135 of New Limitation Act, 1963. Now the period of limitation for filing the petition u/s 144 CPC is barred by limitation and the defendant No. 75 in possession of the suit land excepting plot No. 319. Defendant No. 1 has acquired title by adverse possession by remaining in the suit land for more than 12 years and as such I find that the plaintiffs have lost their interest over suit land excepting plot No. 319. The issues are decided accordingly."

5. The appellate court reversed the finding of the trial court by holding that since the plaintiffs-respondents were found in possession of the suit land, it cannot be held that the suit is barred by limitation.

6. This Second Appeal was admitted for hearing on 10.1.1989 on the following substantial question of law:

Whether the suit was maintainable in view of Sub-section (2) of Section 144 of the Code of Civil Procedure?

7. Mr. V. Shivnath, learned Counsel appearing on behalf of the appellants assailed the impugned judgment passed by the appellate court as being illegal and wholly without jurisdiction. Learned Counsel mainly contended that since the appellants, being the auction purchasers, were given possession of the auction sold property on 8.3.1953, the only remedy available to the plaintiffs was to file an application u/s 144 CPC for restitution of the property within the period of limitation of 3 years from the date when they were dispossessed from the property. Learned Counsel further submitted that in view of Sub-section (2) of Section 144 CPC the suit was not maintainable. According to the learned Counsel, in any view of the matter, the suit which was filed after 12 years from the date when the delivery of possession was effected, is hopelessly barred by limitation.

8. The admitted facts are that the plaintiffs"/respondents" four annas share in the entire estate was auction sold only at Rs. 200/-and that too for recovery of the cost of partition suit which was Rs. 111/. When the plaintiffs filed objection for setting aside the auction sale, the same was dismissed and against that the plaintiffs filed Misc. appeal before this Court being Misc. appeal No. 367/1955. This court, while setting aside the auction sale and the entire procedure adopted for auction sale of the property, held as under:

In the result, therefore, I do not agree with the court below that the allegations made in this case in support of fraud and irregularities are not sufficient. On the contrary, my view is that the entire execution proceeding for the reason stated above was the result of fraud and conspiracy on the part of the decree holder, Sureshwar Prasad, the auction purchaser and the amlas of the court and that the appellant was deliberately kept by them from the knowledge of this execution for costs in order to deprive him of his valuable property until his manager came to know about the sale for the first time on 18th November, 1952. Had it not been so, it is difficult for me to understand as to why all on a sudden on 18th November, 1952, the manager could have made frantic efforts to get the sale set

aside under Order 21 Rule 89 and, thereafter to rush to the residence of his master for collecting necessary fund for the same. It is not denied that all attempts possible were made by the manager to get the deposit made as early as possible. After all a delay of k two days or so made by the manager in collecting money from the residence of his master cannot be held to be such as to lead to the conclusion that the payment made by him was nothing but a got up one to make out a case for setting aside the sale and not to deposit the decretal amount in court. The court below has unnecessarily in this connection taken pains to enter into discussions on matters which are not only on the face of it irrelevant but hopelessly absurd. Can any court of experience suggest that the manager should have borrowed the money from the lawyer and paid it then and there instead of going to the residence of his master. At least I do not know that there is any such practice among the lawyers or it is a part of their duty that in times of need they should not only help their clients with legal advice but also play the part of a money lender or a banker. Neither can it be laid down as a rule of law that a judgment-debtor in order to establish his bona fide should necessarily prove that had he known the execution sale he could have deposited it at a moment's notice Likewise the mere fact that the judgment-debtor in this case was then not in a very sound financial position cannot be a ground for drawing inference against him that he was so insolvent that he could not deposit even this petty amount of Rs. 111/- or so, or that the sale of his property though for a nominal value was not the result of any fraud or lack of knowledge on his part but due to his inability in paying the decretal amount. The very circumstance that the manager did all that he could do to deposit the amount by 21st November, 1952, is sufficient to indicate that had he known it earlier he would have never allowed the sale to be confirmed within 30 days from the date of the sale. That being so, the period of limitation of 30 days as laid down under Article 166 of the Limitation Act has to be computed from 19th November, 1952, and the period prior to it commencing from 27st October, 1952, when the sale was held, has to be condoned u/s 18 of the Limitation Act. The contention of Mr. Chatterji, however, on this point is that if even the allegations made by the appellant in his application under Order 27 Rule 90 are accepted as true they are not sufficient to constitute in law any fraud on the part of the decree-holder and, therefore, the judgment-debtor is not entitled to any remission of time u/s 18 of the Limitation Act. In my opinion, there is no substance in this contention. The decision of this Court in Mahabir Ram Vs. Rambahadur Dubey and Another, and that of the High Court at Calcutta in Ambika Prasad Singh v. R.H. Whitwell and Sitaram Singh 6 Calcutta Law journal 111 are clear authorities to establish that in a case like this it is not necessary that the fraud may be necessarily that of the decree holder. It may be either of the decree holder or that of the auction purchaser. Here I have already field that the fraud in this case was the result of a conspiracy amount a number of persons including the decree holder, the auction purchaser, the amlas of the court as also the among Sureshwar Prasad and there can be no doubt, as is evident from the facts stated above that as a result of this fraudulent sale the appellant has been put to heavy and substantial loss. I,

therefore, think that on the facts of this case the provision of law as laid down in Section 18 of the Limitation Act is clearly applicable and, therefore, the period of limitation has to be computed from 19th November, 1952, when in my judgment the judgment debtor and his manager came to know about the execution for costs for the first time. And, in this view of the matter, the other submission made on the question of limitation, namely, that the decree under execution was void and as such the period of limitation applicable to this case is one as given in Article 181 of the Limitation Act, does not call for any specific finding.

Accordingly the appeal is allowed with costs and the order passed by the trial court as also the sale held in the execution proceeding are set aside.

9. From the aforesaid order passed by this Court it is clear that although delivery of possession of auction sold property was taken by the defendants but that remained on paper only and the possession of the suit land actually remained with the plaintiffs at all point of time. Even assuming that by virtue of auction sale the defendants alleged to have come in possession of the suit property, but the auction sale having been set aside, the defendants cannot be allowed to become the owner of the property on the alleged plea of adverse possession. It is well settled that Section 144 CPC is not an exhaustive provision but there are various circumstances in which restitution is to be ordered to restore status quo ante for the ends of justice. The court has inherent power to grant restitution even in such cases where Section 144 CPC does not apply.

10. In the case of Chinnamal and others Vs. P. Arumugham and another, the Supreme Court observed that it is the duty of the court to take care that no act of the court in the course of whole proceeding does any injury to the suitor in court. It is worth to be considered that the CPC is a body of procedural law designed to facilitate the justice and it should not be treated as an enactment providing for punishment and penalties. Their Lordships observed:

It is well to remember that the CPC is a body of procedural law designed to facilitate justice and it should not be treated as an enactment providing for punishment and penalties. The laws of procedure should be so construed as to render justice whenever reasonably possible. It is, in our opinion, not unreasonable to demand restitution from a person who has purchased the property in court auction being aware of the pending appeal against the decree

11. Having regard to all the facts and circumstances of the case and having regard to the fact that the entire procedure adopted for auction sale of the property has been set aside by this Court in the earlier miscellaneous appeal, I do not find any error in the impugned judgment passed by the appellate court. The appellate court rightly set aside the finding recorded by the trial court and decreed the suit.

12. For the aforesaid reason I do not find any merit in this appeal which is, accordingly, dismissed.