
(1953) 04 CAL CK 0002
In the Calcutta High Court
Case No : A.F.A.D. No. 201 of 1949

Tincourie Mazumdar and Another	Vs	APPELLANT
Sri Kishan Chand Boral and Another		RESPONDENT

Date of Decision : 17-04-1953

Acts Referred:

Limitation Act, 1908 — Article 138, 180, 28

Citation : AIR 1955 Cal 369 : 59 CWN 220 : (1955) 1 ILR (Cal) 295

Hon'ble Judges : Renupada Mukherjee, J;G.N. Das, J

Bench : Division Bench

Advocate : S.C. Janah and Basanta Kumar Panda, for the Appellant; A.D. Mukherjee and Dwijendra Nath Mukherjee, for the Respondent

Final Decision : Dismissed

Judgement

G.N. Das, J.—This is an appeal by the plaintiffs against the decision of Mr. S.N. Guha Ray, as he then was, learned District Judge, 24-Parganas, whereby he affirmed the decision of Mr. J. P. Mukherji learned Subordinate Judge, 6th Court, Alipore, dismissing the plaintiffs' suit for partition on the ground that the plaintiffs have failed to prove their title to 12 annas share claimed by them.

2. At this stage the question in controversy has narrowed down to a question of law. The question of law arises on, the following facts:

3. The property in dispute belonged to one Kedarnath who died in 1918 having been survived by his four sons Monilal, Chunilal, Tinkari and Satish. Monilal died without leaving any issue. Chunilal's widow is Sushila who figures as plaintiff 2-Tinkari is plaintiff 1. Kedarnath executed a mortgage of the disputed property in favour of the predecessor in interest of one Pannalal Banerjee. To enforce the mortgage debt a suit was instituted and a decree was obtained and in execution of the said decree the mortgage property was brought to sale on 10-7-1931 and was purchased by the decree-holder. The sale was confirmed on 10-9-1931. Pannalal acquired title under the said auction sale.

4. Before the learned District Judge the argument proceeded on the footing that no delivery at possession through court was taken by Pannalal as required by Article 180, Schedule I, Indian Limitation Act, Pannalal entered into an agreement for sale of his purchased property with Satish. This was on 29-5-1934. Thereafter on 29-9-1934 Pannalal executed a conveyance in pursuance of the said agreement for sale in favour of Satish. On 9-10-1936 Satish sold his title acquired by the purchase to defendant 1.

Defendant 1 in his turn sold a portion of his purchased right to defendant 2 by a kobala dated 28-5-1946. The present suit for partition was instituted on 14-12-1946. The plaintiffs, as I have already observed, are Tinkari and Sushila who claim 12 annas share, the remaining four annas share, according to them, remained with Satish. It is the basis of their claim that as the auction-purchaser Pannalal did not take delivery of possession, their pre-existing title revived on the expiration of three years from the date of the auction-purchase by Pannalal, no delivery of possession having been taken by Pannalal. Inter alia the defence to the suit was that the plaintiffs' title was lost by the auction sale and that title has vested in defendants 1 and 2 by the conveyances referred to above.

5. The question therefore is what is the effect of a failure on the part of the auction-purchaser to take delivery of possession within 3 years as required by Article 180, Indian Limitation Act. As regards possession, the finding of the Courts below is that the plaintiffs have occasionally realised rent from some of the tenants in occupation of portions of the disputed property. The finding further is that Satish was in possession of a good part of the disputed property and that such possession now rests with defendants 1 and 2.

6. Both the Courts below have held that the plaintiffs have failed to establish their title to 12 annas share.

7. In this Court Mr. Janah learned Advocate for the appellant has contended that the effect of the auction-purchaser not taking delivery of possession through Court within the time limited by Article 180, is to revive in the judgment-debtors their previous title after the lapse of 3 years from the date of the auction-purchase.

8. It is not pretended that the plaintiffs acquired title by adverse possession of 12 annas share by possession for the requisite period of 12 years or more. The contention is, as I have said, based on the ground that as the auction-purchaser becomes disentitled to recover possession through court after the lapse of 3 years from the date of the auction-purchase, the title of the judgment-debtor which was lost by the auction sale revives.

9. Reliance was placed on two passages in the judgment of the Full Bench in the case of " Kailash Chandra Tarafdar Vs. Gopal Chandra Poddar, (A). These passages merely lay down that the mere fact of an auction purchase does not create in the auction-purchaser a complete title. What is meant by the passages referred to is that in order that the auction-purchaser may reap the fruits of his

auction purchase he must follow it up by an application for delivery of possession in order that his title to the land and his right to possession may become absolute. These passages do not however show that the right of the judgment-debtor revives after the lapse of three years from the date of the auction-purchase in case the auction-purchaser fails to take delivery of possession through Court as required by Article 180, Limitation Act.

10. On the other hand the case of -- Arjun Lal Vs. Banbehari, indicates that mere failure on the part of an auction-purchaser to take delivery of possession within the time limited by Article 180 of Schedule I, Limitation Act is to make it difficult for him to seek the assistance of the Court in order to put him into possession. In spite of his failure in that behalf he may get into possession by an amicable arrangement with the judgment-debtor or in any other way. His title remains alive unless it is lost either by way of a sale gift etc. or by operation of some statute, for example Section 28, Limitation Act. In the Court below an argument was raised that Section 28, Limitation Act, was attracted to the facts of tills case. Mr. Janah, learned Advocate for the appellants, has very fairly conceded the position that it is difficult for him to rely on the express terms of Section 28 which runs as follows:

"At the determination of the period hereby limited to any person for instituting a suit for possession of any property, his right to such property shall be extinguished."

It is undoubtedly true, as was pointed out in the case of -- "Fakirappa v. Nigappa", AIR 1943 Bom 265 (C), that if a judgment-debtor or any person claiming under him remains in possession for the requisite period limited by Section 28, Limitation Act for the institution of a suit for recovery of possession, the right of the auction purchaser would be extinguished and the right so extinguished would become vested in the adverse possessor at the expiration of the period so limited. In this case Article 180, Limitation Act does not prescribe the period of limitation for the institution of a suit by the auction-purchaser. Article 180 merely prescribed the period of limitation for an application for delivery of possession to the auction purchaser.

The period of limitation prescribed for a suit by an auction-purchaser in a case like the present where the judgment-debtors were in possession at the date of the sale is prescribed by Article 138, Limitation Act which prescribes the period of 12 years from the date when the sale becomes absolute. In this case the judgment-debtors did not remain in possession of the property for the said period of 12 years. The judgment-debtors viz., Tinkari and Sushila cannot therefore claim to have acquired any title u/s 28, Limitation Act.

11. In my opinion the view taken by the learned District Judge is correct and his judgment must be affirmed.

12. The result therefore is that this appeal fails and is dismissed with costs.

Renupada Mukherjee, J.

13. I agree.