

Sheo Ram And Ors. vs Gauri Shankar And Ors. on 1 December, 1953

Equivalent citations: AIR1954ALL452, AIR 1954 ALLAHABAD 452

JUDGMENT

Randhir Singh, J.

1. This is a plaintiffs' appeal against the concurrent findings of the trial court and the Civil Judge in a Suit for possession.

2. Gauri Shankar defendant executed a sale deed in, favour of Ram Bir on 31-5-1935 in respect of the property which was the subject of the suit which has given rise to this appeal. On the basis of this sale deed a suit for pre-emption was instituted by the appellants and this suit was decreed on 3-1-1936. The amount found to have been paid by the vendee as consideration was deposited by the plaintiffs, but they were unable to obtain possession as vendee was not in possession. On 3-1-1936, Smt. Ram Piari a member of the family of Gauri shanker, instituted a suit against Gauri Shanker for a declaration that the property belonged to her and could not be subject of transfer by Gauri shanker. The allegations on which the suit for a declaration was based are not material for the purposes of this appeal, and they need not be mentioned. This suit resulted in a compromise decree by means of which Ram Piari was declared to be the owner of the property.

On 8-1-1936, the plaintiffs Instituted another suit for a declaration that the compromise decree obtained by Ram Piari against Gauri Shanker was a collusive decree, but the suit was finally dismissed, and the compromise was held to be good. Ram Piari, however, died during the pendency of the appeal and was substituted by Smt. Jasoda mother of Ram Piari's husband. Litigation then ensued between Smt. Jasoda and Gauri Shanker with regard to the property declared to be the property of Ram Piari under the terms of the compromise decree and this litigation also ended in a compromise between Jasoda and Gauri Shanker and both of them agreed to have the property in equal shares. This compromise was made on 21-1-1944.

On 2-1-1945, Jasoda sold her half share, which she obtained under the compromise decree, to Gauri Shanker and Gauri, Shanker became the full proprietor of the property in suit. On 22-5-1945, the plaintiffs instituted the present suit which has given rise to this appeal for possession on the allegation that Gauri Shanker having acquired an interest in the property in suit the plaintiffs were entitled to recover it from Gauri Shanker under Section 43, T. P. Act.

3. The suit was resisted on several grounds. It was contended that the plaintiffs had not become entitled to the property simply because Gauri Shanker had become owner of it subsequently. It was

also pleaded that Section 47, Civil P. C. barred the suit. The learned Munsif who tried the case held that the plaintiffs were not entitled to recover possession of the property and that the suit was barred by Section 47, Civil P. C. The plaintiffs then went in appeal to the District Judge and the Additional Civil Judge of Hardoi, who heard the appeal, concurred with the findings of the trial Court and dismissed the appeal. The plaintiffs have now come up in second appeal.

4. The only point which arises for consideration in this appeal is whether in view of the provisions of Section 43, T. P. Act the plaintiffs are now entitled to recover the property from Gauri Shanker. It is not disputed that Gauri Shanker has become the owner of the entire property which was the subject of sale in the sale deed dated 31-5-1935, and which was also the subject of preemption by the plaintiffs. It is also obvious that when Gauri Shanker executed the sale deed in favour of Ram Bir on 31-5-1935, he represented that he was the owner of the property while in fact, he was not. If, therefore, he subsequently acquires an interest in this property, the vendee shall be entitled to recover the property from Gauri Shanker. There are, however, two conditions which should be fulfilled before this relief can be granted, and they are firstly that the contract was entered into by a person who was competent to contract and secondly that the contract of transfer subsists. It cannot be disputed that Gauri Shanker was otherwise competent to make a transfer.

As regards the second condition, that the contract of transfer should subsist when a claim for recovery of the property on the principle of feeding the estoppel can be made, it has been contended on behalf of the respondents that the sale deed executed by Gauri Shanker in favour of Ram Bir no longer subsisted inasmuch as a decree for pre-emption on the basis of the sale deed had been passed in favour of the appellants. It appears that this contention has no force. The right of pre-emption is a right of substitution, and the effect of a decree for preemption, is to substitute the pre-emptor for the vendee. All rights available to, and all duties cast upon, the vendee, are taken over by the pre-emptor. Beyond this substitution there is no other change in the contract of transfer evidenced in the sale deed. Rights which were available against the transferee or vendee will also be available to the vendor against the pre-emptor. In effect, therefore, the contract of sale which existed previously between the vendor and the vendee would now be deemed to be subsisting between the vendor and the successful pre-emptor. A contract of transfer would therefore subsist even after a decree for pre-emption is passed and the pre-emption money is paid.

5. It is admitted that the plaintiffs deposited the pre-emption money in time and were thus substituted in place of the vendee in the transaction of sale entered into by Gauri Shanker and Ram Bir. All the essential conditions which entitle a person to seek relief on the principle of feeding the estoppel have therefore been fulfilled & the plaintiffs are evidently entitled to recover possession of the property which Gauri Shanker transferred on 31-5-1935, but in which he acquired interest on 2-1-1945.

6. It has also been found by the trial Court as also by the lower appellate Court that Section 47, Civil P. C. barred the present suit inasmuch as possession could have been obtained by the appellants in execution of the decree for pre-emption passed in the pre-emption suit. It is unnecessary to discuss the question as to whether a suit would or would not be barred under Section 47, Civil P. C. in view of the fact that Gauri Shanker was not a party to the pre-emption decree. As he was not a party to

the pre-emption decree, no relief by way of execution could have been obtained by executing' the decree and Section 47, Civil P. C. cannot bar the present suit, it appears that both the Courts below overlooked the fact that Gauri Shanker was not a party to the pre-emption decree.

7. As a result the plaintiffs are entitled to recover possession of the property in suit. The appeal is, therefore, allowed and the suit for possession is decreed with costs in all the Courts.