Kamta Rai vs Nand Kishore And Ors. on 25 October, 1950

Equivalent citations: AIR1952ALL287, AIR 1952 ALLAHABAD 287

Author: V. Bhargava

Bench: V. Bhargava

JUDGMENT

V. Bhargava, J.

1. Both these appeals arise out of one single suit under Section 33, Agriculturists' Belief Act for accounts in respect of a mortgage which was executed on 11-7-1873, by one Sm. Rupa Kunwar in favour of one Newaj Rai. The appellant in both these appeals is the successor in interest of Newaj Rai, the mortgagee. The respondents in S. A. No. 1501 of 1946 are the successors-in-interest of Sheo Saran Das, brother of Ram Baram Das who was the husband of the mortgagor, Sm. Rupa Kunwar. The respondents in the other S. A. No. 1270 of 1947 are the successors-in-interest of Ritu Baran Das, another brother of Ram Baram Das. The mortgage was executed by Sm. Rupa Kunwar in respect of one third share in Mahal Ritu Baran Das, which was at first designated as 4 pies Angruzi out of anna and later as anna 5 pies 4 share out of 16 annas The suits had been filed by the respondents of both these appeals for account in respect of that mortgage against the successor of their common mortgagee, Newaj Rai. The appellant contested the suit inter alia on two grounds. One ground was that the appellant had acquired title to the property which was included in the mortgage by adverse possession, the mortgage had been extinguished and, therefore, there can be no suit for accounting in respect of it. The second ground was that there had been a decision inter partes in Suit No. 262 of 1903 which was followed by App. No. 138 of 1904 and it operated as res judicata and the plea taken by the respondents that the mortgage still existed and there can be accounting in respect of it was, therefore not open to them. Various other grounds were also taken in the two lower Courts but I am not concerned with them in this second appeal. The trial Court had dismissed the suit but the lower appellate Court set aside that decree and decreed the suit in favour of the respondents granting a declaration that on accounting no money at all was due under the mortgage in suit. It is against this decree that these two appeals have been filed in this Court. Two separate appeals have been filed because in one appeal the decree passed by the lower Court in respect of the mortgage deed and the property belonging to the successors of Sheo Saran Das is in dispute and in the other in, respect of the mortgage deed and the property belonging to the successors of Ritu Barun Das is in dispute. Except for the two grounds mentioned by me above no other ground has been pressed before me in this appeal. Even in support of the ground that the appellant had acquired title by adverse possession, no arguments were advanced. There is a concurrent finding of both the Courts that no title has been acquired by the appellant by adverse possession and, therefore, there is no reason to

disturb that finding. The only ground that has been strenuously pressed is that of operation of the principle of res judicata based on the decision in Suit No. 262 of 1903 and App. No. 138 of 1904. This question arises only in S. A. No. 1501 of 1946 and does not concern the S. A. No. 1270 of 1947 at all. The judgment in Suit No. 262 of 1903 was only in respect of property which was alleged to have passed into the hands of the successors of Sheo Saran Das and not the property which passed into the hands of the successors of Ritu Baran Das. Since this issue does not affect the S. A. No. 1270 of 1947 at all, this appeal obviously fails. The learned Counsel for the appellant him-self stated that he could not prets this appeal.

2. Coming to the S. A. no. 1501 of 1946, we have to examine the facts and circumstances in which Suit No. 262 of 1903 came to be filed and decided. The mortgagee, Rupa Kunwar, died in the year 3899; thereafter in 1903, this Suit No. 262 of 1903, was brought by the successors in interest of Sheo Saran Das alleging that they were owners of half the share in the property which had stood in the name of Sm. Rupa Kunwar. Their allegation was that Ram Baran Das, the husband of Sm. Rupa Kunwar had been a member of undivided Hindu family with his brothers, Sheo Saran Das and Ritu Baran Das and he was still a member of this joint Hindu family at the time of his death. No property, therefore, passed to Sm. Rupa Kunwar by succession from Ram Baran Das. However, for her satisfaction and maintenance, certain property was put in her name. She died and the mortgage executed by her in favour of Newaj Rai, therefore, ceased to exist thereafter. The mortgage could only be effective at the moat for the life-time of Sm. Rupa Kunwar. On this ground possession was claimed as against Newaj Rai, In contesting the suit, Newaj Rai also pleaded that Ram Baran Das had died as member of the joint Hindu family and that Sm. Rupa Kunwar was not in possession as an heir of a separate brother but only in lieu of maintenance. It was further alleged that in execution of a simple money decree against Sheo Saran Das the rights of Sheo Saran Das in this property had been sold and had been purchased by Newaj Rai himself. Consequently, no rights remained in the heirs of Sheo Saran Das who could, therefore, not claim possession over the property. The trial Court accepted the plea of Newaj Rai, held that the rights of Sheo Saran Das in this property had been sold in execution of the simple money decree in 1875 and on this finding dismissed the suit. Appeal No. 138 of 1904, was filed against this judgment, but that was also dismissed. The question is whether this decision in that suit operates as res judicata in the present suit. The learned civil Judge of the lower Court has held that the judgments in Suit No. 262 of 1903 and in Appeal No. 138 of 1904, cannot operate as res judicata because the respondents in this case are litigating under a different title from that in which they were litigating in that case. Mr. Khare, appearing on behalf of the appellant has not been able to show that the title under which the respondents are litigating was the same in Suit No. 262 of 1903 as the title under which the claim has been raised in the present suit. In Suit No. 262 of 1903, the respondents had claimed the right to the property as full owners of it by survivorship on the death of Ram Baran Das. They did not claim as reversioners of Ram Baran Das nor did they allege that Ram Baran Das was a separated brother. In the present case the title claimed is entirely different. Hence the respondents are claiming title as reversioners of Ram Baran Das treating him as a separated brother. They have accepted that Sm. Rupa Kunwar had succeeded to the property as heir of Ram Baran Das and they claim title to this property only as reversioners of Ram Baran Das on the death of Sm. Rupa Kunwar, the last limited owner. Thus the title is clearly different. The case law on this point has been well discussed by the learned civil Judge and it appears to be unnecessary for me to go into it again. The learned counsel for the appellant has not

discussed the case law before me and has not attempted to point out that the lower Court has incorrectly applied it.

3. An alternative argument was also advanced by the learned counsel for the appellant that, even if the decision in Suit No. 262 of 1903 does not operate as res judicata, the determination in that suit must be treated as bringing into operation the principle of estoppal against the respondents. His contention was that the decision in that suit shows that the respondents had allowed this property to be sold as their property in year 1875 and even if they had no title in that property at that time they acquired it subsequently as reversioners of Ram Baran Das on the death of Sm. Rupa Kunwar. Consequently it is argued that on principle of "feeding the estoppel" it must be held that the respondents are now stopped from denying that the property had belonged to Sheo Saran Das in year 1875 and had been sold and purchased by the appellant's predecessor. This argument, in my opinion, has no force at all. The principle relied upon by the learned counsel for the appellant is in India incorporated in Section 43, T. P. Act. Section 43, T. P. Act is, however, entirely inapplicable in the present case because the transfer of the property rights of Sheo Saran Das to Newaj Rai in 1875 was not a voluntary transfer but by an auction sale. Section 43, T. P. Act does not apply to auction sale at all. In the auction sale, it cannot be said that the heirs of Sheo Saran Das who were the judgment-debtors had given any assurance to the auction purchaser that they had no right, title or interest in this property, apart from that which was being sold. In fact there was no guarantee by Sheo Saran Das at all that he had any right in that property. It is only in the case of voluntary transfers that the transferor is presumed to guarantee his title and it is on this account that under Section 43, T. P. Act, he is estopped from denying his title even if be acquires it subsequently. The case law on this point in this country is quite clear. It has always been held that the principle of Section 43, T. P. Act cannot be applied to auction sales. The learned counsel for the appellant referred me in this connection to the case of Prosanna Kumar v. Srikantha, 40 cal. 173 at pp. 184 and 185. I, however, find that that case is of no assistance at all to him. In that case also, the Division Bench of the Calcutta High Court remarked as follows :

> "The case of an execration sale, however, stands on an obviously different footing. The decree holder does not guarantee the title of the judgment-debtor; the intending purchaser knows that under the law he can acquire nothing beyond the right, title and interest of the judgment-debtor. No doubt, the decree holder himself, who is bound to notify before the sale all encumbrances on the property about to be sold, cannot subsequently set up against the execution purchaser a secret encumbrance in his own favour."

4. It will be seen that in that case all that was held was that the principle of estoppel could be invoked against the decree-holder who, having had the property sold as property of the judgment-debtor, might subsequently try to claim a title in himself by virtue of some secret encumbrance. There was no question of any principle of estoppel arising as against the judgment-debtor. It is true that on p. 185 there was a mention of an American case of Varnum v. Ahbat, (1815) 12 Mass 474 wherein it had been held "that the extent of an execution raises an estoppel as much as in the case of conveyance," but at the same time it was also mentioned that, in a large number of cases from California, Indiana and other places the contrary view had been taken

that an execution sale of property not belonging to the judgment-debtor does not stop him from asking against the purchaser's title subsequently acquired. Thus, this Calcutta case also indicates that the concensus of opinion is that a judgment-debtor cannot be deemed to have guaranteed any title in himself when his property is sold in execution of a decree and he is, therefore, not barred by the principle of estoppel from asserting any subsequently acquired title. In the present ease, the respondents claimed that Sm. Rupa Kunwar was in possession as heir of Ram Baran Das. This necessarily implies that in the year 1875 that they had no title at all in this property. The fact that this property was sold as the property of Sheo Saran Das in 1875 does not estop the respondents from now claiming title as reversioners of Bam Baran Das. While Sm. Rupa Kunwar was alive, the respondents were merely reveraioners and had no title or interest in the property. In these circumstances it is clear that in this ease no principle of estoppel shuts out the respondents from claiming the title as mortgagors which they have claimed in this suit.

5. In view of this decision on this contested point there is no force in the S. A. No. 1501 of 1946 either. Both these appeals fail and are dismissed with costs.