

Jokhu Mal And Ors. vs Sudama Mal And Ors. on 4 April, 1955

Equivalent citations: AIR1955ALL526, AIR 1955 ALLAHABAD 526

JUDGMENT

Agarwala, J.

1. This is an application in revision arising out of proceedings under Section 12, Agriculturists' Relief Act. The facts are simple. On 17-6-1913, one Udit Mal executed a simple mortgage of the property in dispute in favour of one Billar Mal for a sum of Rs. 550/-. On the 20th August, 1914, Udit Mal executed a usufructuary mortgage in respect of the same property in favour of four persons, Lalla Mal to the extent of one-third share, Oudh Behari Mal, Jokhu Mal and Palakdhari to the extent of two-thirds share. In 1923, Billar Mal, the first mortgagee, sued upon his mortgage and obtained a decree for sale of the mortgaged property.

The heirs of Udit Mal, the mortgagor, were impleaded as defendants in the suit. The decree was sent to the Collector for execution. The Collector held a sale under the U. P. Regulation of Sales Act 26 of 1934 and instead of auctioning the property transferred it in favour of four persons, Jokhu Mal, Sri Narain Mal, Sheo Shanker Mal and Rama Shanker Mal. The deed of transfer is dated 16-10-1936.

It may be noted that Jokhu Mal was one of the usufructuary mortgagees, Sri Narain Mal and Sheo Shankar Mal were the heirs of Oudh Behari Mal, another usufructuary mortgagee, but Rama Shanker Mal was not one of the usufructuary mortgagees, and the heirs of Lalla Mal, one of the usufructuary mortgagees, were not the transferees under this transfer. On 30-10-1937 the Collector put the transferees in possession of the transferred property. Since the transferees, with the exception of Rama Shanker Mal, were the usufructuary mortgagees, they obviously did not raise objections to this procedure. It does not appear whether Lalla Mal was actually ejected or remained in possession as mortgagee.

2. On 14-2-1938, however, the Board of Revenue set aside the transfer made by the Collector with the result that the title to the equity of redemption that had been transferred by the Collector became re-vested in the heirs of the mortgagor. In 1945 an application was made under Section 12, Agriculturists' Relief Act by the heirs of the mortgagor for redemption of the usufructuary mortgage. The defendants to the application were the heirs of all the usufructuary mortgagees as well as Rama Shanker Mal himself, one of the transferees.

3. The main defence to the suit with which we are concerned in the present application was that the title to the mortgaged property became extinguished by lapse of time, as, after the sale was set aside by the Revenue Court, the plaintiffs did not obtain restitution of possession over the property by means of an application under Section 144, C. P. C. within a period of three years.

4. The trial court held that the suit was not maintainable against Rama Shankar Mal and therefore dismissed it as against him. No appeal was filed by the plaintiffs as against Rama Shankar Mal and the decree became final so far as Rama Shankar Mal was concerned. The trial Court, however, decreed the suit against the heirs of the mortgagees. They went up in appeal, to the lower appellate court. Their appeal was dismissed. They have now come up in revision to this Court.

5. The only point argued before us by the learned Advocate General is that the plaintiffs should have applied for restitution of possession over the property in dispute under Section 144, C. P. C. within three years as provided for by Article 181, Indian Limitation Act and not having done so, their title to the property became extinguished by virtue of Section 28, Limitation Act and they are not entitled to maintain the suit for redemption. This contention raises two distinct points:--

"(1) Whether the plaintiffs were bound to apply for restitution of possession over the property under Section 144, C. P. C., within a period of three years and could not file a suit for possession within 12 years, and (2) whether the plaintiffs not having applied under Section 144, C. P. C. within the period of three years, their title has become extinguished under Section 28, Limitation Act."

Section 144, Civil P. C. provides:

"144 (1) Where and in so far as a decree is varied or reversed, the Court of first instance shall, on the application of any party entitled to any benefit by way of restitution or otherwise, cause such restitution to be made as will, so far as may be, place the parties in the position which they would have occupied but for such decree or such part thereof as has been varied or reversed; and, for this purpose, the Court may make any orders, including orders for the refund of costs and for the payment of interest, damages, compensation and mesne profits, which are properly consequential on such variation or reversal.

(2) No suit shall be instituted for the purpose of obtaining any restitution or other relief which could be obtained by application under sub-section."

This section applies to a case where "a decree is varied or reversed". In the present case the decree passed in the mortgage suit was not varied or reversed but an order for sale of the property made in execution of the decree was set aside. Section 144 therefore does not in terms apply. No doubt if any restitution was needed the court could order it under its inherent powers, but that would not attract the consequence which flows from an omission to make an application under Section 144.

The consequence of the omission to make an application under Section 144, C. P. C. is that no suit can be maintained for relief which could be obtained under that section. This bar applies only to cases to which Section 144 applies. There is no provision in law which makes the bar applicable to cases of restitution under the inherent powers of the Court. If an application for restitution under the inherent powers of the Court is not made, there is nothing in law to prevent a party from obtaining the same relief by means of a suit: vide 'Balram Das v. Umesh Mandal', AIR 1931 Cal 517

(A).

In the present case, therefore, no application under Section 144 could have been made by the plaintiffs. If no application could be made under Section 144, there can be no question of the plaintiffs* title having become extinguished under Section 28, Limitation Act. Certain arguments of the Learned Advocate General have however to be noted.

6. Section 28, Limitation Act provides that at the determination of the period limited in the Limitation Act to any person for instituting a suit for possession of any property, his right to such property shall be extinguished. The limitation prescribed for a suit for possession of any immovable property is admittedly twelve years, and the present suit was filed well within twelve years of the date of transfer. A suit for possession over the property, therefore, was not barred by time and section 28 did not, one would have thought apply to the present case.

7. But it was urged that the phrase "a suit" for possession also includes an application for possession under Section 144, Civil P. C. and that the period fixed for such application is three years under Article 181, Limitation Act and that that period having expired the right to the property itself became extinguished. Reference was made to a decision of this Court in -- 'Amba Prasad v. Mumtaz Ali Khan', AIR 1948 All 400 (B) where it was held that an application under Section 144, C. P. C. was a 'suit' within the meaning of Section 28, Limitation Act, and that where such application was not made within a period of three years, the title to the property became extinguished. The reasons why an application under Section 144 was held to be a suit within the meaning of Section 28 were that Section 144 prohibited the institution of a separate suit for a relief which could be claimed under Section 144, C. P. C. and Section 2(2), Civil P. C. provided that an order determining any question under Section 144 was to be deemed to be a decree.

With the greatest respect to the learned Judges I hardly think that the two reasons given can convert an application under Section 144 into a suit. The mere fact that an order passed under Section 144 is a decree cannot mean that the application itself is a suit. A decree is not necessarily confined to a suit, but may also be passed on an application. It is obvious that the learned Judges' attention was not drawn to the specific provisions of. Section 2(10), Limitation Act which expressly lays down that for the purposes of that Act the word "suit" does not include an appeal or an application.

But, it. is not necessary to pursue this matter further, as according to my finding recorded above, Section 144, C. P. C. could have no application to the facts of this case. Even if an application for restitution could have been made by the plaintiffs, it could have been made under Section 151, C. P. C. and any order thereon could not have been a decree as it would not fall within the definition of 'decree' in Section 2(2), C. P. C. and therefore it could not be treated as a suit within the meaning of Section 28, Limitation Act even upon the reasoning adopted in 'Amba Prasad's case (B)'.

8. It was also urged on behalf of the respondents that no revision lay to this Court from the decision of the Court below. It is not necessary to consider this point in view of what I have stated above.

9. I would, therefore, dismiss this application in revision with costs.

Oak, J.

10. I agree that this revision application should be dismissed.

11. In my opinion in the special circumstances of this case, there was little point in Udit Mal filing an application under Section 144, C. P. C. in 1938. With the greatest respect to the learned Judges who decided the case AIR 1948 All 400 (B), I do not think that a person, who does not file an application for restitution under Section 144, C. P. C. within time, would lose his rights in immovable property in all cases. It was pointed out in that case that, Section 144, C. P. C. was introduced to provide a speedy remedy to a person, who has succeeded in getting an erroneous order of a lower court corrected by a superior Court. A person may not care to take advantage of Section 144, C. P. C., and may rest content with his rights in immovable property apart from restitution proceedings.

12. Again, I am of opinion that the present revision application is not covered by the limited scope of Section 115, C. P. C., as explained by their Lordships of the Supreme Court in -- 'Keshardeo v. Radha Kishan', AIR 1953 SC 23 (C), The question of limitation and connected questions came up for decision before the learned District Judge. It cannot be said that the learned District Judge acted illegally or with material irregularity in deciding those questions in a particular way.

BY THE COURT

13. This application in revision is dismissed with costs.