Deokuer & Anr vs Sheoprasad Singh And Ors on 8 April, 1965

Equivalent citations: 1966 AIR 359, 1965 SCR (3) 655

Author: A.K. Sarkar

Bench: A.K. Sarkar, M. Hidayatullah, Raghubar Dayal

PETITIONER:
DEOKUER & ANR.

Vs.

RESPONDENT:
SHEOPRASAD SINGH AND ORS.

DATE OF JUDGMENT:
08/04/1965

BENCH:
SARKAR, A.K.
BENCH:
SARKAR, A.K.
HIDAYATULLAH, M.
DAYAL, RAGHUBAR

CITATION:
1966 AIR 359 1965 SCR (3) 655

ACT:
Specific Relief Act (Act 1 of 1887), s. 42--Declaratory suit--Property in dispute attached under s. 146 Criminal Procedure Code-Omission to sue for relief of possession whether bars suit.

HEADNOTE:
There was dispute about the property in suit between theappellants and the respondents. The property was attached by the Magistrate under s. 145 of the Criminal Procedure Code. Subsequently the appellants filed a suit for declaration of their title to the property but made no prayer for the cansequential relief of possession. The suit was decreed by the trial court but the High Court set aside the decree on the ground that the suit was bad under s. 42 of the Specific Relief Act for failure to sue for possession. Appeal to this Court was filed with certificate of fitness.

HELD: In a suit for declaration of title to property,

filed when it stands attached under s. 145 of the Criminal Procedure Code, it is not necessary to ask for the further relief of delivery of possession. The fact, if it be so, that in the case of such an attachment the Magistrate holds possession on behalf of the party whom he ultimately finds to have been in possession, is irrelevant. [656H-657B]

Moreover the further relief contemplated by the proviso to s. 42 of the Specific Relief Act is relief against the defendant only. In the present case the Magistrate was in possession and he was not a party to the suit. [657C-D]

Further it is not necessary to ask for possession when the property is in custodia legis. There is no doubt that property under attachment under s. 145 of the Code is in custodia legis. [657E3

Sunder Singh Mallah Singh Sanatan Dharam High School, Trust v. Managing Committee, Sunder Singh-M.allah Singh Rajput High School, (2937)L.R. 65 I.A. 10,6 and Nawab Humayun Begum v. Nawab Shah Mohammad Khan, A.I.R. 1943 P.C. 94, relied on.

K. Sundarama Iyer v. Sarvajana Sowkiabil Virdhi Nidhi Ltd. I.L.R. [1939] Mad. 986, approved.

Dukhan Ram v. Ram Nanda Singh, A.I.R. 1961 Pat. 425, disapproved.

JUDGMENT:

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 329 of 1962.

Appeal from the judgment and decree dated September 26. 1957 of the High Court in Appeal from Original Decree No. 253 of 1949.

Sarjoo Prasad and R.C. Prasad, for the appellants. A.V. Viswanatha Sastri and D. Goburdhun. for respondents nos. 1 to 4 and 6.

The Judgment of the Court was delivered by Sarkar, J. This appeal arises out of a suit brought by the appellants in 1947 for a declaration that the defendants first party had acquired no right or title to a property under certain deeds and that the deeds were inoperative and void. The suit was decreed by the trial Court but on appeal by the defendants first party to the High Court at Patna that decree was set aside. The High Court having granted a certificate of fitness, the appellants have brought the present appeal. The defendants first party have alone contested the appeal and will be referred to as the respondents.

The High Court held that as the appellants were not in possession of the property at the date of the suit as found by the learned trial Judge and the respondents were, their suit must fail under the proviso to s.42 of the Specific Relief Act as the appellants had failed to ask for the further relief of recovery of possession from the respondents. In this view of the matter the High Court did not

consider the merits of the case. The fact however was that at the date of the suit the property was under

attachment by a magistrate under powers conferred by s. 145 of the Code of Criminal Procedure and was not in the possession of any party. This fact was not noticed by the High Court but the reason why it escaped the High Court's attention does not appear on the record.

The only point argued in this appeal was whether in view of the attachment, the appellants could have in their suit asked for the relief for delivery of possession to them. If they could not, the suit would not be hit by the proviso to s. 42. The parties seem not to dispute that in the case of an attachment under s. 146 of the Code as it stood before its amendment in 1955, a suit for a simple declaration of title without a prayer for delivery of possession is competent. The respondents contend that the position in the case of an attachment under s. 145 of the Code is different, and in such a case the magistrate holds possession for the party who is ultimately found by him to have been in possession when the first order under the section was made. It was said that a suit for declaration of title pending such an attachment is incompetent under the proviso to s. 42 unless recovery of possession is also asked for. It appears that the attachment under s. 145 in the present case is still continuing and no decision has yet been given in the proceeding's resulting in the attachment. In our view, in a suit for declaration of title to property filed when it stands attached under s. 145 of the Code, it is not necessary to ask for the further relief of delivery of possession. The fact if it be so, that in the case of such an attachment, the magistrate holds possession on behalf of the party whom he ultimately finds to have been in possession is, in our opinion, irrelevant. On the question however whether the magistrate actually does so or not, it is unnecessary to express any opinion in the present case.

The authoritie's clearly show that where the defendant is not in possession and not in a position to deliver possession to the plaintiff it is not necessary for the plaintiff in a suit for a declaration of title to property to claim possession: see Sunder Singh Mallah Singh Sanatan Dharm High School, Trust v. Managing Committee, Sunder Singh-Mallah Singh Rajput High School.(1) Now it is obvious that in the present case, the respondents were not in possession after the attachment and were not in a position to deliver possession to the appellants. The magistrate was in possession, for whomsoever, it does not matter, and he was not of course a party to the suit. It is pertinent to observe that in Nawab Humayun Begam v. Nawab Shah Mohammad Khan(2) it has been held that the further relief contemplated by the proviso to s. 42 of the Specific Relief Act is relief against the defendant only. We may add that in K. Sundaresa lyer v. Sarvajana Sowkiabil Virdhi Nidhi Ltd.(3), it was held that it was not necessary to ask for possession when property was in custodia legis. There is no doubt that property under attachment under s. 145 of the Code is in custodia legis. These cases clearly establish that it was not necessary for the appellants to have asked for possession.

In Dukkan Ram v. Ram Nanda Singh(1) a contrary view appears to have been taken. The reason given for this view is that the declaratory decree in favour of the plaintiff would not be binding on the magistrate and he was free inspite of it to find that possession at the relevant time was with the defendant and deliver possession to him. With great respect to the learned Judge deciding that case, the question is not whether a declaratory decree would be binding on the magistrate or not. The fact that it may not be binding would not affect the competence of the suit. The suit for a declaration without a claim for the relief for possession would still be competent in the view taken in the cases earlier referred to, which is, that it is not necessary to ask for the relief of delivery of possession where the defendant is not in possession and is not able to deliver possession, which, it is not disputed, is the case when the property is under attachment under s. 145 of the Code. We think that Dukkan Ram's(4) case had not been correctly decided. We may add that no other case taking that view was brought to our notice.

(1) (1937) L.R. 65 I.A. 106. (2) A.I.R. 1943 P.C. 94. (3) I.L.R. (1939) Mad. 986. (4) A.I.R. 1961 Pat. 425.

For these reasons, we hold that the suit out of which this appeal has arisen was competent. We, therefore, allow the appeal but as the merits of the case had not been gone into by the High Court, the matter must go back to that Court for decision on the merits. The appellant will get the costs here and below.

Appeal allowed and case remanded.