Orissa High Court
Gurrala Jaggarao And Ors. vs Gopisetti Bhaaskara Ramchandra ... on 20 September, 1957
Equivalent citations: AIR 1958 Ori 58
Author: Mohapatra
Bench: Mohapatra, Das
JUDGMENT Mohapatra, J.

1. This is a defendant's first appeal against the judgment and decree dated 19th December 1949 of Sri S.C. Das, Additional Subordinate Judge of Berhampur, arising out of a suit for declaration of title, recovery of possession and for past mesne profits amounting to Rs. 1,500. The plaintiff also has prayed for future mesne profits till delivery of possession. The disputed land appertains to Patta No. 75 with an area 47.60 acres.

2. One Gurrala Kurmayya, who died in the year 1919 had three sons, Ramaswamy, Jaggarao and Ramamurty. The original defendant No. 1 was Jaggarao. His two sons are defendants 2 and 3 in the present suit. Defendant No. 4 is Ramamurty and defendants 5 and 6 are the sons of Ramaswami who died long before, the present suit. Defendant No. 1 died after the decree but before the appeal was filed. His sons were already parties and his widow Gurrala Ramulu has been made a party as defendant-appellant No. 9. Defendants 7 and 8 are strangers to the family and were made parties-defendants on the allegation of the plaintiff that they are in possession of portions of the disputed lands. They were ex parte.

3. Kurmayya and his three sons executed a simple mortgage bond dated 2nd May 1919 (Ex. 1) in favour of the present plaintiff's father G. Venkata Narasaya Dora for a sum of Rs. 2,500. Thereafter on 3rd March 1915, Ramaswami and his brothers executed a second mortgage in respect of all the suit lands for a consideration of Rs. 1,450 in favour of one Ippili Appanna and others.

The third transaction (Ex. 2), is one of sale on the basis of a registered sale-deed dated 10th September 1918, executed by Ramaswami, Jaggarao and Ramamurty in respect of the selfsame lands for Rs. 7,500 in favour of the plaintiff's adoptive father in full payment of the dues under the aforesaid first mortgage. The vendee was put in possession of the properties in suit from the date of the sale.

4. It is to be noted on the basis of the sale-deed dated 10th September 1918, no fresh consideration was paid but it was in full discharge of the first mortgage transaction. The second mortgagees Ippili Appanna and others brought a mortgage suit in the year 1925 in the Court of the Munsif of Chicacole for sale of the suit properties in enforcement of their simple mortgage transaction dated 3rd March 1915.

The present plaintiff was made a party as defendant No. 6 in that suit, the plaintiff's adoptive father having died in the year August 1919. The present defendants 1 to 6, who may be named conveniently as Gurrala family, were made parties-defendants in that suit as original mortgagors. The learned Munsif of Chicacole decreed the suit subject to the mortgage of the first mortgagee (defendant No. 6). The decree having been confirmed in appeal, the present plaintiff, who was defendant No. 6,

brought a second appeal in the High Court of Madras which was disposed of on 18th September 1936.

Varadachariar, J., who disposed of the appeal, ordered finally that the property should be held free of encumbrances of both the mortgages and out of the sale proceeds the first mortgagee, that is present plaintiff, should be paid Rs. 5,000 as due to him under his first mortgage and the balance, if any, would be paid to the second mortgagee who was the plaintiff in the previous suit. The decision is reported in Gopisetti Bhaskara Ramachandra Rao v. Ippili Byragi, 1937 Mad W N 910 (A).

5. It is to be noted that before the disposal of the mortgage suit finally by the High Court, the second mortgagee Ippili Appanna had levied execution of the decree in the Court of the Munsif of Chicacole in Execution Case No. 160 of 1932. It was only in February 1941 that an application was filed before the Munsif for amendment of the execution application by substituting the decree passed by the High Court in the place of the decree passed by the Munsif which was reversed by the judgment of the High Court. The amendment, was allowed and the execution was continued in the Court of the Munsif of Chicacole. It is to be noted here that the parties and the properties are within the town of Berhampur which came within the newly formed province of Orissa from 1936.

Without tracing the history any further it would be sufficient for our purpose to mention that it was finally decided by the order of the Subordinate Judge of Berhampur to which Court the execution case was transferred, that the execution case is barred by limitation. The order is dated 15th December 1947 (Ex. 11). This order has been made final, conclusive and absolutely binding between the parties to the decree in the Madras High Court.

6. The plaintiff's further allegation is that the defendants started disturbing the possession of the plaintiff since November 1937; a theft case was started at the instance of the present plaintiff on the allegation that the defendants had removed crops from the disputed lands between the dates 19-11-37 to 26-11-37; it ended in a conviction which was confirmed in appeal; thereafter the present plaintiff filed an application under Section 522, Criminal Procedure Code, for delivery of possession in respect of the suit lands and it was ultimately held that the removal of crops did not amount to dispossession and as such the petition under Section 522, Cr. P. C., was not maintainable.

Even thereafter there were several proceedings including one under Section 107, Cr. P. C., against the present defendants. The plaintiff asserts that even though there were such attempts to disturb the possession of the plaintiff, the plaintiff continued to be in possession till 1946 when he was actually dispossessed. The suit has been brought on 9th November 1948.

7. The defence case is that the sale-deed dated 10th September 1918 and the mortgage in favour of the plaintiff's father were nominal transactions. This defence of course is abandoned and not pressed. The points of defence that are pressed are:

(i) That all the rights of the plaintiff on the basis of the first mortgage and the sale-deed had merged into the decree passed by the Madras High Court on 18th September 1936; that the plaintiff is not entitled to fall back upon the original transactions, his rights under the transactions having been

extinguished, the matter had really passed from the stage of contract between the parties and had culminated in the decree passed between the parties in the original suit of the year 1925; as the decree was barred by limitation, the present plaintiff, who was bound to execute the decree, is without any remedy whatsoever and he having lost all his title for the reason that the decree was barred by limitation he has no title on the basis of which a decree can be passed in the present suit;

(ii) that in any event the plaintiff has not been able to prove his subsisting title as he was not in possession of the property in dispute within 12 years of the suit; the defendants having been in possession of the suit property for more than 12 years have acquired title by adverse possession; and

(iii) that the suit for recovery of possession is barred by res judicata by reason of the decision in the previous execution case and that it was barred by limitation.

8. We will first take up the point how far the contention of the defendants can stand that whatever right, title and interest the plaintiff had in the disputed property were extinguished for the reason that the previous decree dated 18th September 1936 was barred by limitation. It would be pertinent here to quote the ordering portion of the judgment of Varadachariar, J.:

"The result will be that the mortgaged properties will be directed to be brought to sale free of both the mortgages, i.e., of the plaintiff and of the 6th defendant, and out of the sale proceeds, the 6th defendant will be paid Rs. 5,000 in the first instance as the amount due to him under Ex. II (the first mortgage transaction), and the balance, if any, will be paid over to the plaintiff to the extent necessary to satisfy his claim as per the decree of the lower Court."

After very carefully going through the judgment of Varadachariar, J., in second appeal No. 297 of 1951, we are definitely of the view that the judgment was passed only by way of adjusting the equities as between the first mortgagee, that is, the present plaintiff, and the second mortgagees, that is, Ippili Appanna and others, the plaintiffs in the previous suit. His Lordship was impressed with the position that in fact by the time when the matter came up before the High Court, the first mortgagee's (the present plaintiff's) mortgage transaction was barred by limitation. His Lordship further observed:

"There is the further complication in this case that as the 6th defendant had become owner of the equity of redemption by private purchase, he could not in the ordinary course have sued for sale as a mortgagee. His rights must necessarily be determined only in the puisne mortgagee's suit, and it is obvious that the amount of his mortgage claim is very considerable."

The appeal was adjourned for sometime giving the parties opportunities to settle up their respective dues. Attempts for settlement having failed, his Lordship passed the above order in a reasoned judgment.

It is further clear on a perusal of the judgment that the main contest after remand was regarding the actual dues of the present plaintiff on the basis of his mortgage transaction and whether he was accountable for the profits realised by him after the sale. These considerations and the reasoned

judgment convince us to find that the judgment was only a determination and adjustment of the equities between the first and the second mortgagees.

9. The question remains what are the legal consequences to follow on account of the properties not having been sold and the decree having been barred by limitation. There is no doubt that the decree having been barred by limitation, the second mortgagees Ippili Appanna and others had lost ail their interests on the second mortgage on which they had brought the suit and are without any remedy. It is also crystal clear that the defendants-appellants had lost whatever interests they had in the property after they sold their right, title and interests in the property in favour of the plaintiff's adoptive father on 10th September 1918 (Ex. 2).

The decree having been barred, the property not being put to sale, the defendants cannot in any event claim any rights in the property which they had already parted with in the year 1918. The order was that the property should be sold and out of the sale proceeds the present plaintiff would be entitled to get Rs. 5,000 and the balance would be paid to the second mortgagees.

When the property was not sold at all, the plaintiff has lost his rights to receive a sum of Rs. 5,000 out of the sale proceeds; but that cannot in any event extinguish his rights on the basis of the sale transaction of the year 1918. The net result is that the second mortgagees are without any remedy and the defendants have already extinguished their rights, and so far as the property is concerned, the only man who stands to gain on account of the decree having been barred is the present plaintiff himself.

The contention of Mr. Panda, appearing on behalf of the appellant, that the plaintiff's right to the property had been extinguished can never be acceptable as it leads to an absurd position. The property cannot certainly be hanging in the air. The defendants had extinguished their rights long before which can never be revived on account of the decree having been barred and the second mortgagees have been rendered out of remedy. The property necessarily inhere in the plaintiff whose right had been perfected on account of the extinction of the rights of the second mortgagees.

If the property would have been sold and a third party would have purchased it on the basis of the decree passed by the Madras High Court, the plaintiff's right, title and interest might have been extinguished and he would be falling back upon his Rs. 5,000 only; but the sale not having taken place the plaintiff's right under the sale transaction (Ex. 2) dated 10th September 1918, remains unaffected.

10. Mr. Panda relies upon a few authorities in support of his argument that the plaintiff could and should have executed the decree. The first decision that we want to rely upon is the case of Heramba Chandra v. Jyotish Chandra, AIR 1932 Cal 579 (B). In that case a decree for specific performance of contract was passed in favour of the plaintiffs; but it was provided that the defendants do upon payment to them of the sum of Rs. 72,283 and odd execute and register a proper conveyance in favour of the plaintiffs. Such a conveyance is to be executed and caused to be registered by the Registrar of the Court on behalf of the defendants on defendant failing or neglecting to do so.

The defendants started execution for realisation of the aforesaid sum of rupees seventy thousand and odd and tendered a registered document conveying the property in favour of the plaintiff. it was decided by Rankin, C. J., Pearson, J., having concurred, that a decree for specific performance operates in favour of both parties; the defendant in a suit for specific performance is as much entitled to enforce the decree as the plaintiff; a decree that an agreement ought to be specifically performed is a decree against the plaintiff as well as against the defendant and in favour of the defendant as well as in favour of the plaintiff.

Therefore their Lordships found the execution petition filed by the defendants as maintainable and in order. The same view also was taken in a similar suit for specific performance of contract by Macleod, C. J. and Coyajee, J., in the case of Bai Karimabibi v. Abderehman, ILR 46 Bom 990: (AIR 1923 Bom 20) (C). There is no dispute over the proposition of law laid down by their Lordships in those cases; but the point does not improve the case of the present appellants in the least.

It may be that the plaintiff in the present suit could have executed the decree and brought the property to sale in order to realise the sum of Rs. 5,000. In having failed to do so what he has lost is his claim for realisation of Rs. 5,000 on the basis of the first mortgage; but as we have indicated above, by this he does not lose his interest in the property which he had obtained on the basis of Ex. 2 of the year 1918.

11. Mr. Panda argues that In consequence of the judgment of Varadachariar, J., and that the execution was barred, the right of redemption of the present defendants has been revived. The contention of revival of right of redemption seems to be without any substance whatsoever in the face of the fact that the mortgagors had by an act of theirs extinguished that fully. Mr. Panda however strongly relies upon the decision of the Patna High Court reported in Dhana Koeri v. Ram Kewal, AIR 1930 Pat 570 (D). The judgment was delivered by Rose, J., to which Chatterji, J., concurred. There the plaintiff's father gave a usufructuary mortgage of the land in suit to the father of the defendants in 1900.

Prior to that usufructuary mortgage the father of the defendants had executed a simple mortgage bond in respect of the selfsame land in favour of one. Barhamdeo Rai. Barhamdeo sued upon his simple mortgage without impleading the subsequent usufructuary mortgagee and eventually obtained a decree in execution of which he purchased the land in suit; but being unable to obtain possession from the usufructuary mortgagee, who was not a party to the mortgage suit, he had again to sue the usufructuary mortgagee in 1911 and the present plaintiffs who were descendants of the mortgagee were mortgagors and they were also made parties.

In that suit a decree was passed to the effect that the present defendants, the subsequent mortgagees, should redeem Barhamdeo and if they fail to do so Barhamdeo has the option to redeem them. Barhamaeo was however redeemed. Thereafter the mortgagors, or more accurately, the descendants of the original mortgagor, brought a suit for redemption of the usufructuary mortgage by payment of the amount due thereunder and the amount which the usufructuary mortgagees had paid to Barhamdeo.

It was held that the usufructuary mortgagees having redeemed Barhamdeo, the equity of redemption revived in favour of the original mortgagor, that is, the plaintiff, and they were entitled to redeem; the consequence of redemption by the second mortgagee of the first mortgage was that ipso facto the decree and the sale at the instance of the first mortgagee were vacated, and that equity came back again into the hands of the original mortgagor, because the second mortgagees paid only the dues of the first mortgage. The telling sentences in the judgment of Ross, J., leading to this decision are as follows:

"The learned advocate for the respondents was asked where the equity of redemption was now; and it was claimed that it was either in Barhamdeo Rai or in the defendants. Barhamdeo Rai has no further interest in the property; and it is difficult to see on principle how after he accepted the dues under his mortgage he could claim to retain the equity of redemption. It is also clear that the present defendants had not got the equity because they never purported to acquire it. All that they did was to pay off the prior charge. The equity must therefore be in the original mortgagor. The consequence of redemption by the usufructuary mortgagees was that the mortgage was satisfied and therefore ipso facto the decree and the sale were vacated."

From the facts and observation of their Lordships quoted above, it is clear that the decision of the case was passed on the peculiar facts and circumstances of that particular case and that they are entirely different from the facts of our case where the second mortgagees brought the suit making the first mortgagee (the present plaintiff) as a defendant along with the original mortgagors.

The mortgagors indeed had already executed a deed of conveyance in favour of the first mortgagee. The ultimate result of the suit was that the properties were ordered to be sold off free from all encumbrances and the first mortgagee, the present plaintiff, would receive a sum of Rs. 5,000 and the balance would go in favour of the second mortgagees. It will be sufficient for our purpose to observe that the facts are entirely different and the decision of the Patna High Court is not a guide for the determination of the point of controversy arising in the present suit.

12. Mr. Panda, however, has attempted to argue that the present suit is barred under the provisions of res judicata. Issue No. 3 is on the point of res judicata and runs as follows:

"Whether the plaintiff's suit for recovery of possession is barred by res judicata by reason of the decision of this honourable Court in E. P. 212 of 1941 and M. J. C. 183 of 1947?"

This issue was not pressed separately in the trial Court and it is a well-known principle that an issue once abandoned can never be allowed to be re-agitated in a subsequent stage. But that apart, we do not understand how the principle of res judicata will apply to the present suit on the basis of the decision of the execution case that it was barred by limitation.

The point underlying this issue is almost the same as the point which has been discussed and decided by us in the above paragraphs of the judgment. Mr. Panda wanted to rely upon the position that the present suit is barred by res judicata on account of the decision of Varadachariar, J., of the year 1936. This plea was never raised and the pleadings of the case are not before us. As a general

rule such a new plea is not allowed to be taken at the appellate stage when further materials may be necessary for the purpose of determination of the issue.

But that apart, the present plaintiff and the defendants were all arrayed as defendants in the previous suit of the year 1925 which culminated in the decision of Varadachariar, J., in 1936. As the judgment reported in 1937 Mad WN 910 (A) shows clearly that the only question raised was as between the first and the second mortgagees and his Lordship passed the judgment finally by way of adjustment of equities between the two, the question of title as between the present plaintiff and the defendants was never in controversy in the previous suit. It was not necessary for the purpose of determination of the previous suit nor was it actually decided. On the general principles of res judicata between the co-defendants this plea must be thrown off.

13. The last point taken on behalf of the appellants is that the suit must be thrown off as barred by limitation as the plaintiff has not been able to prove his possession within 12 years of the suit. The learned trial Court has discussed this question at length and negatived the plea of the defence. The defendants in their written statement do not specifically deny the possession of the plaintiff from 1918 onwards. It appears from the judgment of Varadachariar, J., that it goes on the basis of an assumption that the present plaintiff was in possession of the proportion in dispute.

The judgment was passed, as we have already mentioned, on 18-9-36. Indeed the plaintiff has been dispossessed in the year 1946 and prior to that for several years there was a scramble for possession. What transpires from the records filed in the suit is that the first theft case was instituted by the present plaintiff in the year 1937, the date of occurrence being 19-11-37 to 26-11-37 which is well within 12 years from the date of the suit, the date of the suit being 9-11-1948.

Moreover taking away of the crops by the defendants does not amount to dispossession. It was argued that 107 proceedings, which started later, show that the trespass was in the year 1936 and not in 1937. The lower Court has rightly held that the year 1936 transpiring from 107 proceedings is a mistake as the admitted position is that the first case was in respect of the occurrence dated 19-11-37. Moreover, the learned Court below has relied upon the evidence of three other witnesses examined on behalf of the plaintiff.

The fourth witness appears to be a substantial man having lands in the village and he testifies to the possession of the plaintiff for a period which is well within 12 years of the suit. The other two witnesses (P.Ws. 2 and 3) have been in cultivating possession of the lands under the plaintiff for a few years. These witnesses have been believed by the learned trial Court. We see no reason to differ in the matter of appreciation of their evidence. The defendants have examined defendant No. 1 alone.

In this view, the learned Court below was perfectly justified in coming to the conclusion that even though the plaintiff's possession was disturbed since November 1937 and that the plaintiff was never dispossessed prior to 1946 and that the plaintiff has been able to prove his possession within 12 years of the suit, the defendants have signally failed to prove that they are entitled to the property on the basis of adverse possession. The finding regarding mesne profits was not attacked before us,

hence it is confirmed.

14. In conclusion, therefore, the judgment and decree of the trial Court are upheld and the appeal is dismissed with costs.

Das, J.

15. I agree.