

Supreme Court of India

Ghanshyamdas And Another vs Om Parkash And Another on 22 March, 1993

Equivalent citations: AIR 1994 SC 1292, 1993 (3) ALT 14 SC, JT 1993 (3) SC 563, 1993 (2) SCALE 187, 1993 Supp (3) SCC 368

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Bench: K Singh, S Mohan

ORDER S. Mohan, J.

1. This appeal by special leave is directed against the judgment dated 3.9.91 of the High Court of Bombay, Nagpur Bench in Second Appeal No. 351 of 1991.

2. Om Parkash and Shantabai, original plaintiffs (hereinafter referred to as Respondents) filed Special Civil Suit No. 44 of 1985 for recovery of possession and damages at Rs. 10,000 on the following averments.

3. A money decree was obtained in Civil Suit No. 133/64 against Balkishan and Laxminarayan. In execution of that decree, the suit house was attached and sold in court auction. Gian Chand purchased the auction sale on 26th of August, 1969 for Rs. 6771/-. He executed a gift of the same by a deed dated 7th of May, 1975 in favour of respondents 1 and 2. Since Ghanshyamdas and Gokuldas, original defendants (hereinafter referred to as the appellants) are relations, they were permitted to occupy the southern side of the suit house. On 21st of August, 1984 a notice was issued calling upon them to vacate. This was not complied with. Hence, they filed a suit for recovery of possession and damages of Rs. 10,000/- for wrongful occupation.

4. The appellants in their written statement denied permissive occupation. According to them, the suit house was jointly purchased in the year 1948 by their grandfather, Jamnadas along with Balkishan and Laxminarayan. By reason of such purchase Jamnadas became entitled to 1/2 share in the suit house. Civil Suit No. 554 of 1964 was filed for partition and separate possession of his 1/2 share. That was decreed on 8.8.67. Pursuant to that decree possession of 1/2 share was obtained and the appellants were put in possession. On 5.12.71 Jamnadas executed a will with reference to this 1/2 share in favour of the appellants. He died on 18.1.76. Thus, the appellants became the owners of the suit house.

5. Jamnadas was not a party to Civil Suit No. 133 of 1964. Therefore, no decree was passed against him. The execution of the said decree, resulting in court auction sale in favour of Gian Chand, would not be binding. Therefore, with respect of this 1/2 share of Jamnadas no title passed in favour of Gian Chand. Besides, Gian Chand was only an ostensible purchaser, the sale consideration having been furnished by judgment-debtor, Balkishan himself. The court auction sale took place during the pendency of Civil Suit No. 554 of 1964 for partition filed by Jamnadas and was, therefore, hit by Section 52 of the Transfer of Property Act (hereinafter referred to as the Act). The trial court, on a consideration of the various issues, dismissed the suit. The matter was taken up in appeal. Pending appeal, an application for amendment was preferred to the effect that since the appellants have denied the title of the respondents and set up title in themselves, their possession had become adverse. Therefore, the claim for recovery of the possession was based alternatively on title. This

amendment was allowed. The revision filed by the appellants to the High Court was unsuccessful.

6. The Appellate Court, on a consideration of the matter, directed remand. On remit, the trial court again dismissed the suit. The matter was appealed against in Civil Appeal No. 147 of 1987. The appellate court came to the conclusion that the court auction purchaser Gian Chand acquired valid title in view of the sale certificate issued in his favour. The plea of benami could not succeed in view of Section 66 of the CPC (hereinafter referred to as the Code). The court auction sale was not hit by Section 52 of the Act. The appellants were precluded from challenging the sale in view of dismissal of the proceedings under Order 21 Rule 58 of the Code and the claim suit under Order 21 Rule 63 of the Code preferred by Jamnadas. They would constitute *res judicata*. In this view, the suit was decreed. Challenging the correctness of the decree Second Appeal No. 351 of 1991 was preferred to the High Court of Bombay. The High Court concluded that in the absence of any objection or claim by Jamnadas the attachment on the consequent sale had attained finality. Gian Chand secured indefeasible title. The partition decree obtained by Jamnadas in Civil Suit No. 554 of 1964 would not, in any way, militate against that title. Section 52 of the Act will have no application to involuntary sales. Though the finding of the lower court that the proceedings under Order 21 Rule 58 and Rule 63 of the Code would constitute *res judicata*, was not correct, yet the appellants were not entitled to succeed. The plea of benami was liable to be rejected in view of Section 66 of the Code. In the result, the appeal was dismissed. Under these circumstances, this appeal by special leave arises.

7. Mr. Bobde, learned Counsel for the appellants urges only the following points for our consideration.

1. Admittedly, Jamnadas was one of the joint owners of the suit house. In Civil Suit No. 133 of 1964 he was never impleaded as a party. Therefore, his 1/2 share could not have been attached or sold. Mere description of the entire suit house in the proclamation of sale could not convey any title with reference to 1/2 share. Even the sale certificate would not conclude the issue.

2. The High Court having held that the proceedings taken by Jamnadas under Order 21 Rule 58 and Order 21 Rule 63 of the Code would not operate as *res judicata*, should have further held that the failure of the party to raise objection would not disentitle him from questioning the title. The decree obtained by Jamnadas in Civil Suit No. 554 of 1964 cannot be set at naught by these execution proceedings to which admittedly Jamnadas was never a party.

3. Lastly, it is urged, in any event, having regard to the fact that the appellants have been in possession for long, this is a case in which, as measure of equity, the respondents could be compensated by directing the payment of money for 1/2 share instead of ousting the appellants from possession.

8. learned Counsel for the respondents would urge that both the lower appellate court and the High Court have considered all the issues thoroughly and no exception could be taken to the same. Even though Jamnadas was not a party in Civil Suit No. 133 of 1964, in execution of that decree obtained against Balkishan and Laxminarayan, the joint owners, the entire suit house had come to be sold.

The sale certificate is conclusive of the title of Gian Chand from whom the respondents obtained a valid gift. If really, the share of Jamnadas had come to be sold wrongly, there are remedies under the Code to set aside the sale. As rightly pointed out by the High Court under Order 21 Rule 92(1) the title of auction purchaser, could not be questioned. It is true that the proceedings taken by Jamnadas under Order 21 Rules 58 and 63 of the Code would not constitute *res judicata* but that does not mean the appellants are entitled to succeed when the auction purchaser acquired indefeasible title.

9. Merely because the appellants have been in possession for long, this is not a case where any equity could arise in their favour, more so, when they had chosen to deny the title. The award of monetary compensation cannot be permitted.

10. On a careful consideration of the above, we are of the view that the first two submissions made on behalf of the appellants are untenable. Notwithstanding the fact that Jamnadas was not a party in Civil Suit No. 133 of 1964 yet what came to be sold was the entire suit house as described in the sale proclamation. Gian Chand purchased the property for Rs. 6771/-, court auction, the entire suit house. The sale certificate is conclusive of the sale. No question of benami could be permitted to be raised in view of Section 66 of the Code. Nothing prevented Jamnadas from seeking to set aside the sale. In fact, two abortive steps were taken by him when he filed M.J.C. No. 192 of 1969 under Order 21 Rule 58 which came to be dismissed for default on 15.12.73 and Special Civil Suit No. 74 of 1974 under Order 21 Rule 63 which was dismissed for non-prosecution on 9.8.76. Therefore, it is too late in the day, for the appellants, to contend that the auction sale would not render the partition decree in Civil Suit No. 554 of 1964 ineffective. As rightly pointed out by the High Court under Order 21 Rule 92(1) of the Code there is a bar to question the title of the auction purchaser.

11. It is correct to hold, as the High Court has done, that the proceedings taken by Jamnadas under Order 21 Rule 58 and Rule 63 of the Code would not constitute *re judicata*. But, where no objection was raised to the auction sale when such objections ought to have been raised, would disentitle the appellants to raise the same. Thus, on questions of law, as determined by the court of appeal and confirmed by the High Court, we see no reason to interfere. However, we think equitable considerations will have to prevail in this case, for the following reasons:

1. Admittedly, Jamnadas was the owner of 1/2 share, he being the joint purchaser along with Balkishan and Laxminarayan.

2. 1/2 share of the suit house came to be decreed in favour of Jamnadas in Civil Suit No. 554 of 1964. That was appealed against by Balkishan in Civil Appeal No. 67 of 1970 before the District Judge, Amarawati unsuccessfully. Thereafter Balkishan preferred Second Appeal No. 240 of 1969 which was dismissed. Ultimately, a compromise was entered into and the partition decree was modified accordingly. Inter alia the compromise memo provided that the southern portion will go to the share of Jamnadas while northern portion will fall to the share of Balkishan.

3. Pursuant to this, possession was taken by the appellants.

4. In law, no doubt, the title of Gian Chand had become indefeasible as pointed out above but the 1/2 share belonging to Jamnadas could not have been sold in execution of a decree to which he was not a party. In this regard, we merely note the plea that the decree in Civil Suit No. 133 of 1964 itself was collusive. However, we make it clear that we are not going into that plea nor can we do so.

12. In view of the above, we think the ends of justice would be met by directing payment of a sum of Rs. 50,000/- (Rupees fifty thousand) by the appellants to the respondents in lieu of recovery of possession of the southern 1/2 share. This is in addition to the damages which have come to be awarded in favour of the respondents. Thus, the decree for recovery of possession will stand modified in the above terms.

13. The appeal will stand disposed of accordingly. However, there will be no orders as to cost.