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Court : Mumbai

Decided On : Feb-19-1924

Reported in : AIR1924Bom467; (1924)26BOMLR418

Judge : Norman Macleod, Kt., C.J. and ;Shah, J.

Appeal No. : Civil Suit No. 28 of 1920 and Second Appeal No. 49 of 1923

Appellant : Bhaskar Mahadev Parsekar

Respondent : Shankar Vithal Pednekar

Disposition : Appeal dismissed

Judgement :

Norman Macleod, Kt., C.J. and Shah, J.

1. The plaintiff sued to recover from the defendant possession of the plaint property by removing his obstruction, and if necessary by setting aside the order in Miscellaneous Application No. 2 of 1918, with costs and future profits. The defendant is the purchaser of the land in suit from one Khatkhate. The original owner of the property was one Narayan. Khatkhate sued Narayan in Suit No. 124 of 1916 for specific performance of a contract of sale of the suit land, for execution to him of a duly registered sale-deed, and for possession of the land in suit. A decree was passed in that suit for specific performance on December 15, 1917. As Narayan failed to execute a sale-deed an order was passed, under Order XXI,

Rule 34, Sub-rule (5), of the Code, for the execution of a sale-deed in favour of Khatkhate, and this was executed on February 26, 1918.

2. Meanwhile one Ankush got a money decree against Narayan on September 15, 1916, and on July 27, 1917, the property now in suit was attached in execution of that decree. By a Court sale the plaint property was sold to the plaintiff on January 23, 1918. It was confirmed on February 26, 1918, the same day on which the sale-deed was executed under the decree in Suit No. 124 of 1916 in favour of Khatkhate. The plaintiff obtained a sale-certificate on February 27, 1918.

3. The question, therefore, in this suit is whether the plaintiff's title should prevail over the defendant's who claims through Khatkhate, the plaintiff in Suit No. 124 of 1916. The plaintiff's suit has been dismissed in both Courts.

4. It is argued before us that those decisions are wrong, because the doctrine of dispendens does not apply to a sale effected by the Court in execution of a decree. Reliance was placed on the decision of this Court in *Lalu Mulji Thakar v. Kashihai* I.L.R. (1886) 10 Bom. 400. The facts in that case were entirely different, as the purchaser at a Court-sale, who eventually succeeded, purchased the property when it had been freed from the attachment in favour of the original plaintiff. But that case and other cases on the same point have been considered in *Byramji v. Chunilal* I.L.R. (1902) 27 Bom. 266 : 5 Bom. L.R. 21. The learned Judges after referring to the decisions of the Privy Council in *Radhamadhub Holdar v. Monohur Mukarji* (1883) L.R. 15 IndAp 97 and *Moti Lal v. Karrabuldin* I.L.R. (1897) Cal. 179. and also the provisions of Section 52 of the Transfer of Property Act came to the conclusion that it might be taken as settled law that the rule of dispensations was applicable to Court-sales.

5. There is no doubt that Narayan in this case could not have disposed of the property pending the suit filed against him by Khatkhate, but it is suggested that what Narayan the owner could not do, the Court could do by selling his interest in the property in execution of a decree in favour of a third party. Apart from that an explanation would seem necessary how it came to pass that the Court confirmed the sale of the same property to the present plaintiff, and directed a sale-deed to be executed in favour of Khatkhate practically on the same date.

6. We think that, on the authority of *Byramji v. Chunilal*, it must be taken to be perfectly clear that while the dispute was pending between Narayan and his purchaser Khatkhate, Narayan's interest in the property could not be sold to a third party so as to deprive Khatkhate of the fruits of his decree. It is not a question of a purchaser without notice of a prior contract of sale by his vendor. It seems to be a matter of no importance whether the plaintiff knew or whether he did not know of the proceedings which were pending between his vendor and Khatkhate. What the vendor Narayan could not do in order to give a title to a third party not claiming in the suit, could not be done by the Court by selling the property which was the subject-matter of the litigation then before it. We think, therefore, that the Court below was right and the appeal must be dismissed with costs.

Shah, J.

7. I agree.

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