

Bindra Pandey Vs. Munna Pandey and ors.

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Court : Allahabad

Decided On : Jul-26-1939

Reported in : AIR1939All721

Appellant : Bindra Pandey

Respondent : Munna Pandey and ors.

Judgement :

Rachhpal Singh, J.

1. This is a plaintiff's second appeal arising out of a suit for redemption. The facts which have given rise to this litigation between the parties can very briefly be stated as follows : One Mt. Shukla Pandain was the proprietor of 20 gandas share in village Sodairampur. She created a usufructuary mortgage in respect of 10 gandas out of 20 gandas in 1898 in favour of Munna Pande and his brother Bhola Pande. When Mt. Shukla died this 20 gandas share was divided between certain claimants. One of them was a collateral of her husband, while the other two, Ram Dawar and Dwarika, were her daughter's sons. Each of them got 10 gandas. So far as the collateral is concerned, he redeemed 5 gandas which had been allotted to him and there is no controversy in respect of 10 gandas which he got. The dispute is as regards the remaining 10 gandas which went to the share of the abovementioned sons of the daughter of Mt. Shukla. The sons of her daughter were minors and in 1910 their father sold the 10 gandas which they had got to

Munna Pande and his brother Bhola Pande. It will thus be seen that by this sale deed the mortgagees became proprietors of the 10 gandas which was sold to them. Their mortgage in respect of 5 gandas out of 10 gandas was put to an end by the sale which was made in their favour.

2. It appears that Munna Pande and his brother Bhola owned certain other share in the village. They made an application for partition that their other share in the village should be formed into a separate patti. Somehow, either by mistake or deliberately, they did not make any prayer that the 10 gandas share which had been gone to them by purchase under the sale deed of 1910, should also be included in their patti. The partition was made and the other share owned by the two applicants was formed into a separate patti. The 10 gandas which they had purchased under the sale deed of 1910 remained as it was, and by mistake or oversight the names of the two original owners, the daughter's sons of Mt. Shukla, continued to be recorded in the revenue papers as mortgagors, though as a matter of fact, having regard to the sale of 1910, they had ceased to be mortgagors in respect of any portion of the 10 gandas share. The plaintiff got a transfer of the 10 gandas share in dispute in 1931 and as transferee of the late mortgagor he instituted a suit for redemption on 6th October 1931. The trial Courts decreed the suit. That decree was reversed by the learned District Judge in appeal. The plaintiff has come up in second appeal. It is clear that under the sale deed of 1910 Munna Pande and Bhola Pande acquired by purchase the 10 gandas share in suit absolutely. They had a mortgage over 5 gandas out of this 10 gandas but that mortgage was put an end to by the execution of the sale deed of 1910 in their favour by the daughter's sons of Mt. Shukla. The result was that the plaintiff's transferors had no right whatsoever in this 10 gandas share, and the plaintiff therefore purchased nothing under the sale deed which he got from the daughter's sons of Mt. Shukla in 1931. It was however contended by the plaintiff that Munna Pande and his brother should have laid a claim in respect of this 10 gandas share at the time of the partition and, as they did not do so, their defence is now barred by the provisions of Section 233, Clause (k), Land Revenue Act. The learned District Judge has repelled this contention and in my opinion the view taken by him is correct. Section 233, among other things, enacts that:

No person shall institute any suit or other proceeding in the Civil Court with respect to...(k) partition or union of mahals except as provided in Sections 111 and 112.

3. It appears to me that this Section prevents a party coming to Court as a plaintiff to agitate a matter which has finally been decided at the time of the partition. The policy underlying this Section is that the Civil Court will not reopen any question which has been decided in partition proceedings. In the present case however the position is totally different. Munna and his brother do not come to Court as plaintiffs. They do not seek to set aside anything which has been decided in the partition suit. It has to be remembered that in the partition proceedings there was absolutely no dispute between the parties as regards the 10 gandas share which is now in suit. It was open to the defendants, if they so wished, to add a prayer in the partition suit praying that this 10 gandas share should also be allotted in their mahal but somehow or other they did not do so. They have however been in possession of the share, and I fail to see why they cannot as defendants be permitted to plead that they are entitled to hold their own property which they have lawfully purchased and to which the transferors of the plaintiff had no right whatsoever at the time when the transfer was made. In *Abadi Begum v. Mohammad Khali Khan* (1930) 17 A.I.R. 17 A.I.R. Oudh 481, a Bench of two learned Judges of the Chief Court of Oudh held that the provisions of Section 233(k) have no application to the rights of persons who do not seek litigation but are merely defending their own possession. The learned Judge of the Court below has rightly pointed out that this case goes against the contention raised on behalf of the plaintiff-appellant. As I have already pointed out, the defendants, respondents are in possession under the terms of the sale deed, and I see neither reason nor justice under which the plaintiff can come and disturb the lawful possession and title of the defendants-respondents. In the partition proceedings referred to above there was no dispute of any kind between the parties as regards the 10 gandas share now in suit. It may be that having regard to the provisions of Section 233(k), Land Revenue Act, a plaintiff may be debarred from instituting a suit in the Civil Court, but I do not agree that the defendants who are in undisputed possession under a legal title can be held to be debarred from setting forth their plea under the provisions of Section 233(k), U.P. Land Revenue Act. Another case on the point is *Bajrang Bahadur Singh v. Beni Madho Baksh Singh* (1932) 19

A.I.R. Oudh 199. In that case Raza J. held that:

Where the parties are on the same side in partition proceedings and no question arises between them as to their respective title or shares, inter se, and a 'mahal' or 'patti' is formed in their name jointly without specification of shares and one of them subsequently brings a suit in the Civil Court for a declaration that he alone is the owner of the entire mahal or patti, the suit cannot be barred by the provisions of Section 233(k).

4. This case went before their Lordships of the Privy Council in appeal and the appellate judgment is printed in *Bajrang Bahadur Singh v. Beni Madho Bakhsh Singh* their Lordships agree with this view. The facts of the case before me are somewhat similar inasmuch as in the partition proceedings, as already pointed out, there was no dispute between the parties in regard to the share in suit. For the reasons given above I hold that the view taken by the learned District Judge is correct and the appeal is accordingly dismissed with costs. Leave to file Letters Patent appeal is granted.

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