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Court : Allahabad

Decided On : May-23-1928

Reported in : AIR1928All704; 110Ind.Cas.876

Appellant : Piare Lal

Respondent : Kishan Lal

Judgement :

Dalal, J.

1. On 6th July 1917, the appellant, Piare Lal, obtained a decree for sale against certain persons including one Ganga Sahai. Ganga Sahai was made a party as transferee of part of the mortgaged property. After his death Kishan Lal was a party to the proceedings. This decree was absolute. A certain property was put up to sale on 26th September 1922, and purchased by Piare Lal decree-holder himself. The sale was confirmed, and Piare Lal was put in possession on 4th February 1923. Subsequently Kishan Lal objected under Section 47, Civil P.C., in the execution department on the ground that the property sold contained his own property of which he was purchaser and which was not included in the absolute decree for sale passed on 6th July 1917. This application was dismissed and an appeal from the order of dismissal was rejected by this Court. While the appeal from the decree in the execution department was pending here, Kishan Lal filed the present suit on 12th December 1923, for a declaration that the property

specified at the foot of the plaint was not included in the decree absolute for sale, that it was not liable to sale in execution of that decree, and for cancellation of that sale and possession of the property. An ancillary relief for mesne profits was also desired. The appeal in the execution department was dismissed by this Court on 16th May 1924. The Subordinate Judge of Bulandshahr dismissed the present suit on 14th January 1925, as being barred by the provisions of Section 47, Civil P.C. As has already been noticed action under Section 47 had been taken prior to the institution of the present suit, so no question arises of the plaint being turned into an application, in the execution department, of objection to the sale. The question at issue before the Subordinate Judge and before the lower appellate Court was, as it is here, whether a separate suit would lie under the circumstances of the case.

2. If the plaint is read the main basis of the claim will be found to be the allegation that property not included in the mortgage was sold at auction in execution of the decree. In the decree property entered in the mortgage-deed was ordered to be sold. This allegation is made in para. 7 of the plaint and again repeated in para. 11. In only one place in the plaint any mention is made of fraud, that is in para. 9, where the plaintiff stated:

The plaintiff's father (meaning Ganga Sahai) came to know of the fraudulent and dishonest proceeding of defendant 1 at the time of sale.

3. No specification of fraud is given, and the proceeding of selling property not included in the sale is alleged fraudulent and dishonest simply for the reason that property not included in the decree was wrongly sold at auction by order of the Court. The remarks of the trial Court on this portion of the plaint allegation are just. He said:

No fraud on the part of the decree-holder was specifically alleged and described in the plaint, and nothing of that sort against him was proved, and the plaintiff himself, though present, was not even produced to prove any fraud having beep practised upon him by the decree-holder in the execution proceedings.

4. The proceedings were public proceedings within the notice of the plaintiff and his father, and there is no allegation anywhere that through some act of the decree-holder the plaintiff was kept ignorant of the proceedings or misled into believing that the proceedings were other than what they were. In the mortgage-deed the property was described in shares (sihams) and naturally this description had to be turned into a description of the actual land by mahal, patti and area, for the purposes of sale. All this was done to the knowledge of the plaintiff Kishan Lal's father and after him of Kishan Lal.

5. The learned Judge of the lower appellate Court decided in favour of fraud by the same train of thought adopted by the plaintiff in his plaint. First of all that Court proceeded to inquire whether the property of the present suit was included in the mortgage or not, and after arriving at a decision that the property was not so mortgaged he presumed fraud on the part of Piare Lal, defendant. Such a presumption in the absence of evidence, or even of allegation was wholly wrong. 'Fraud' is defined in the Contract Act and the definition may be generally applied. It means and includes certain acts committed by a party with intent to deceive another party such as the suggestion, as to a fact, of that which is not true by one who does not believe it to be true the active concealment of a fact by one having knowledge or belief of the fact; a promise made without any intention of performing it; or any other act fitted to deceive. The act which would probably apply to the circumstances of the present case would be an active concealment of the fact by one having knowledge or belief of the fact. In the plaint it is not alleged that Piare Lal knew he was putting up to sale property other than the one ordered to be sold, nor is concealment of such knowledge from Kishan Lal or his father alleged.

5. The question of fraud may be considered more particularly later. Taking the case as it stands, where no fraud is proved, there can be little doubt that a suit is barred by the provisions of Order 21, Rule 92 (3), Civil P.C. At Rule 82 provisions for the sale of immovable property commence. At Rule 89 commence provisions as to what is to happen after sale. Under Rule 89 directions are given as to how a sale is to be set aside on deposit of money. Rule 90 deals with application to set aside a sale on the ground of irregularity or fraud. Finally the conditions are given in Rule 92 as to when a sale is to become absolute, or is to be finally set aside. In

the present case order was passed making the sale absolute on 13th December 1922. This is the order referred to in Clause (3), Rule 92, to set aside which no suit is permitted. This direction is definite and must be obeyed.

6. We have seen that disobedience to this rule on the ground of fraud cannot be permitted as no fraud is proved. Another argument was that the plaintiff was party to the execution proceedings as a transferee, and not as one owning any property, and the allegation being that property owned by the plaintiff himself, and not one of which be was a prior or subsequent mortgagee, was sold, the finality of the order will not bind him. This matter was set at rest by a Bench ruling of this Court in Dulla.v. Shib Lal [1917] 39 All. 47. The Bench held that an objection taken by a person who has become the representative of the judgment-debtor in the course of the execution of a decree to the effect that the property attached in satisfaction thereof is his own property, and not held by him as such representative, is a matter cognizable only under Section 244 (now Section 47), Civil P.C., and not the subject-matter of a separate suit. This principle was recognized by this Court as far back as 1885 in Seth Chand Mal v. Durga Dei [1890] 12 All. 313:(1890) A.W.N. 137. Their Lordships of the Privy Council desired to give the provisions of Section 244 of the previous Civil P.C., the widest application in Prosunno Kumar Sanyal v. Kali Das Sanyal [1892] 19 Cal. 683:

It is of the utmost importance that all objections to execution sales should be disposed of as cheaply and as speedily as possible. Their Lordships are glad to find that the Courts in India have not placed any narrow construction on the language of Section 244.

7. In that case the sale was sought to be set aside on the ground of fraud. According to their Lordships the case of the plaintiff was that the judgment-creditor broke his alleged agreement with the plaintiff and that the other persons alleged to have been implicated being aware of the circumstances took some part in the transaction. Even so, it was held that the question which the plaint sought to raise in that suit could only have been determined by the order of the Court which executed the decree, and that a separate suit for the purpose of setting aside an execution sale is expressly forbidden by Section 244, Civil P.C.

8. The fraud alleged, if any, is one in publishing and conducting the sale. It is alleged that property not included in the decree was published for sale. Such a case is provided for in Rule 90. According to that rule, any person whose interests are affected by the sale of immovable property in execution of a decree may apply to the Court executing the decree to set aside the sale on the ground of material irregularity or fraud in publishing or conducting the sale. It was, therefore, open to the plaintiff to take proceedings even on the allegation of fraud in the execution department.

9. In the result I set aside the decree of the lower appellate Court and dismiss the plaintiffs' suit with costs of all the Courts.