

Sukhdeo Vs. Donger and ors.

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Court : Allahabad

Decided On : Dec-18-1933

Reported in : AIR1935All152

Appellant : Sukhdeo

Respondent : Donger and ors.

Judgement :

Kendall, J.

1. The plaintiff-appellant in the suit from which this appeal arises had bought a well from one Bhopal, who had purchased it at an auction-sale in execution proceedings in which Donger and Narain Lal, respondents 1 and 2, were the judgment-debtors. They had made an objection to the sale of the well in those proceedings, but the matter was decided against them, and they failed to bring a suit for establishing their alleged right.

2. They afterwards continued to use the well for irrigation purposes and consequently the plaintiff-appellant brought the present suit for damages and an injunction. The Courts below have decided that the well was not transferable by sale in execution of a decree-in spite of the decision of the executing Court, and they have therefore held that the plaintiff-appellant had no right to sue.

3. No one has appeared in this Court on behalf of the respondents, and it appears from the judgment of the trial Court that they did not appear there and the suit was heard *ex parte*. As I have already said they did not take any steps to reverse the finding of the execution Court against them, it is clear that they have not been at all diligent in their own defence.

4. The lower appellate Court held that the sale of the well by auction in execution of a decree was contrary to the provisions of the Agra Tenancy-Act, but it has not referred to any particular provisions of the Act, and the reasoning appears to be that as air occupancy holding cannot be transferred in execution of a decree, and as this well had been held by the trial Court to be appurtenant to the occupancy holding, the well also could not be transferred by sale in this way. I have referred to the judgment of the trial Court and its finding is that, the well stood in an occupancy holding; which was being irrigated by it, and it was therefore part and parcel of the holding and could not be sold. The plaintiff was well aware of the fact that the well in dispute appertained to the occupancy holding of the defendants and therefore its sale was prohibited by the Tenancy Act. Mr. Girdhari Lal Agarwala, has contended on behalf of the appellant that the well is not really appurtenant to the holding, and that the tenants are still in a position to irrigate their fields from it provided that they do so with his consent and on payment. He also contends that the tenants are bound by the decision of the Court in, the execution proceedings. It appears to me that if the sale of the well was invalid because it was contrary to the provisions of the Tenancy Act, the fact that there is a decision of the execution Court to the contrary will be of no avail. It further appears to be clear that the finding to the effect that the well was appurtenant to the holding that is to say, that it was a part of the holding, leads inevitably to the conclusion that it was no more transferable by auction-sale than the rest of the holding. Lastly, it is contended that even if the sale of the well was legally invalid the plaintiff-appellant has at any rate the right in virtue of his purchase to remove the bricks and other materials of the well. To my mind this would amount to a violation of the spirit of the Tenancy Act, if not of the latter. If a transfer by a sale is illegal, the total destruction of the well as such must *a fortiori* be illegal. I can find no authority on this particular point, but in spite of the negligence of the respondents in pressing their pleas both in the Courts below and in this Court, I

am of opinion that the decision of the lower appellate Court is correct, and the result is that I dismiss the appeal with costs. Mr. Girdhari Lal Agarwala has applied for leave to appeal under the Letters Patent and as the question before the Court is a novel one, I consider that permission ought to be given and it is given accordingly.

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