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Court : Allahabad

Decided On : Feb-04-1935

Reported in : AIR1935All588

Appellant : Sukhdeo

Respondent : Donger and ors.

Judgement :

Sulaiman, C.J.

1. This is a plaintiff's appeal arising out of a suit for damages and for a perpetual injunction restraining the first two defendants from irrigating their fields from the well in dispute. The plaintiff himself is the decree-holder who held a simple money decree against, Dongar and others, but not against defendant 2, Narain Lal. In execution of that decree he attached the well in question and put it up for sale and it west purchased by Bhupal. Objections raised by the judgment-debtors that the well was a part, of their Occupancy, holding had been in a summary way ever ruled by the execution Court. The present plaintiff has not purchased the well from Bhupal. He has brought the suit against the judgment-debtor, Danger, as well as defendant; 2, Narain Lai. making Dhupal a proforma defendant. His case is that his predecessor Bhupal acquired this well under the auction-purchase, and the defendants were wrongly interfering with his possession and using water from it. Defendant 1 pleaded that the well was a part of his occupancy holding and its sale was void under the Agra Tenancy Act. The other defendant Narain Lal does not

appear to have made any appearance at the trial. But both the Courts have dismissed the suit on the ground that the well being a part of the occupancy holding of defendant 1 was not saleable. The lower appellate Court has held that, the well is no doubt a part and parcel of the occupancy holding. This finding is a finding of fact and cannot be challenged in second appeal, unless it is vitiated by some error of law.

2. So far as the effect of this finding upon the plaintiff as against the defendant Narain Lal is concerned, the counsel for the appellant cannot urge that it is binding on him. Narain Lal was not a party to the previous execution proceeding and no order passed in that proceeding can, in any way, stand in his way. He is entitled to say that the property was not saleable and that therefore no interest passed to Bhupal and none has devolved on the present plaintiff. The plaintiff's claim as against Narajin Lal must therefore stand dismissed.

3. A difficulty has been created so far as Dongar's case is concerned by the circumstance that the execution Court, without going into the matter thoroughly, summarily, rejected his objection that the well was a part of the occupancy holding and ordered it to be sold and it was actually sold at auction and the sale was confirmed. Dongar did not choose to appeal from the order passed by the execution Court, nor did he get the auction sale set aside.

4. The question that arises in this case is whether it is now open to Dongar to go behind the execution proceedings and ask the Court to hold that the sale was a nullity and therefore the plaintiff's claim should fail. The question is not free from difficulty and there is certainly much to be said on both sides.

5. Under Section 47, Civil P.C. all questions arising between the parties or their representatives and relating to execution shall be determined by the execution Court and not by a separate suit. It was at one time considered that a defendant in as separate suit was not debarred from re-agitating the question. But the preponderance of authorities is now in favour of the view that a defendant is barred just as much as a plaintiff, and that the execution Court has the exclusive jurisdiction to decide such matters and they cannot be questioned in a separate suit.

6. But the difficulty does not end here. Under Section 23, Agra Tenancy Act, the interest of an occupancy tenant is not transferable either in execution of a decree made by civil or revenue Court or otherwise except in accordance with the provisions of this Act, and there can be no question that a well can foe a part of an occupancy holding, as it comes within the scope of the word 'improvement' as defined in Section 3, Sub-section (2). The execution Court has there-fore no authority or jurisdiction to sell an occupancy holding, and such a sale is void. It is well settled that the principle of res judicata or the principle of estoppel cannot be pleaded against a statute, and therefore if the matter were clear and were a pure question of law, the plaintiff cannot succeed on the mere ground that the defendant is barred by the principle of res judicata or estoppel. But the difficulty arises because the question whether it was an occupancy holding or not was to some extent a mixed question of law and fact, and not a pure question of law. Its decision depended on evidence that might have been produced in the execution Court which apparently the then objectors did not produce. The Court ordered the property to be sold and would certainly not have ordered it to be sold, if it had been satisfied that the property was an occupancy holding.

7. There is authority for the view that where the question is such a mixed question that part of the finding which is a finding of fact must be deemed to have been decided adversely against the judgment-debtor before the auction sale was held, he should not be allowed to raise that question of fact afresh in a separate suit.

8. We may refer to the cases of Ranga Lal v. Kishori Lal 1915 All. 57, Deodatt Singh v. Ramcharrittar Jati 1918 All. 278 and Lala Ram v. Thakur Prasad 1918 All. 305. In two of these cases the judgment-debtor was not allowed to question the validity of an auction sale which had taken place in spite of his objection. The Full Bench in Katwari v. Sita Ram 1921 All. 118 distinguished these cases on the ground that in them the question was whether after a sale in execution of a decree, it was open to the judgment-debtor to dispute the title of the auction purchaser, and did not over-rule them. Under Section 23, Tenancy Act, an occupancy holding is not privately transferable, nor is it saleable in execution of a decree. It is therefore quite clear that even if it has been mortgaged and a decree for sale has been obtained, the objection can still be raised in the execution

department that the property is not saleable in execution of the decree, and the execution Court would be bound to decline to sell it. This aspect of the provision explains the decision of the Full Bench. But where a sale has already taken place, and has been confirmed there is no longer any duty to inquire into the nature of the property. The sale must have taken place after the objections if any raised by the judgment-debtor had been overruled. It must therefore be implied that the Court either expressly or by implication decided that the character of the property was not such as to make it non-saleable. Although the point is certainly doubtful, as it may have the effect of nullifying the provisions of Section 23, we see no reason for differing from the view taken in the previous cases, particularly as there would not necessarily be a great hardship as the zamindars would not ordinarily be bound by such sales. We must therefore hold that so far as Dongar is concerned, the question that the property was not in occupancy holding was barred by the principle of res judicata and the lower appellate Court should not have gone into the question as against him.

9. But there is a difficulty in decreeing the plaintiff's claim. So far as the claim for damages against the two defendants is concerned, the plaintiff has not attempted to show how much damage has been suffered by him on account of the act of defendant 1 and how much on account of the act of defendant 2. The claim as against Dongar also must therefore fail.

10. As regards the injunction, it is a discretionary relief. Both the defendants 'have been, treated in the plaint as forming one party, and Narain Lal is undoubtedly entitled to irrigate the field from this well. We therefore think that it 'would be utterly futile to issue an injunction against the defendant Dongar rest raining him from irrigating the field from this well, when his co-tenant Narain Lai, will not be so prevented. On this last ground the appeal is dismissed.

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