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Court : Allahabad

Decided On : Jun-07-1929

Reported in : AIR1929All953; 122Ind.Cas.604

Judge : Shah Muhammad Sulaiman and ;Boys, JJ.

Appellant : Anrup Misir

Respondent : Ram Harakh Misir

Judgement :

Sulaiman, J.

1. This is a plaintiff's appeal arising out of a suit for declaration and possession. The parties to the present suit had jointly instituted a suit for pre-emption and a joint decree was passed in their favour by the trial Court. The pre-emption money was deposited in the name of the present defendant Ram Harakh Misir. The present plaintiff Anrup Misir does not appear to have attempted to deposit any money or to apply to the civil Court for execution of the decree or for delivery of the property to him. Ram Harakh Misir, however, applied for execution in his own favour alleging that the amount had been deposited by him alone. Execution was allowed and the possession was delivered to him of the entire pre-emption property. In spite of an objection raised by Anrup Misir in the revenue Court, Ram Harakh Misir succeeded in obtaining mutation of names. Anrup Misir then filed the present suit for a declaration that he had paid half the pre-emption money and

asked for possession of the half share. In his plaint he did not offer to pay half the amount in case it was found that he had not paid it, but later on his vakil made a statement in the trial Court to that effect.

2. Both the Courts below have found that the plaintiff had not paid a pie to the defendant on account of the pre-emption money as was alleged by him. The first Court decreed the suit on payment of half the amount but the appellate Court has dismissed it in toto.

3. The main question raised before us on behalf of the appellant is that when a joint decree for pre-emption had been passed in favour of two plaintiffs, the payment by even one of the plaintiffs would enure for the benefit of both the decree-holders and both would be entitled to equal shares in the property, the defendant at best should recover the half of the amount which the plaintiff did not pay.

4. In order to answer this question it is necessary to consider the true nature of a pre-emption suit. Several persons may be entitled to pre-empt a sale. They may institute separate suits each claiming the whole property and all the suits may be consolidated and their respective rights and priorities be determined, or they may agree to institute a joint suit for pre-emption.

5. Order 20, Rule 14, Civil P.C., provides the form which a pre-emption decree may take. Where the rival claims to preemption have been adjudicated upon, the decree has to specify their respective rights as provided in Sub-clause (2). But where the plaintiffs do not ask the Court to adjudicate upon their respective rights inter se, a joint decree may be passed and if the amount is deposited in compliance with the decree, the defendant has no concern with the way in which the property is to be shared by the plaintiffs.

6. But I am unable to hold that the mere fact that a joint decree has been passed in favour of all has the necessary result of passing title to all the joint decree-holders even if only one of them pays the amount. Any pre-emptor is at liberty to withdraw at any stage and he may withdraw even after the decree and before the date fixed for payment. The remaining pre-emptor would then have a right to

deposit the whole amount and pre-empt the entire property. I cannot see why a co-plaintiff, who has got a joint decree in his favour should, in spite of a refusal to contribute towards the payment of the purchase-money or even an express desire to withdraw, still be entitled to recover a share of the property on an offer to pay the proportionate amount subsequently. The preemption money has got to be paid within the short time fixed for its payment. A co-plaintiff who refuses to pay the amount within that time cannot be allowed to claim the property, say after 11 years, if he then is in a position to contribute. It therefore seems to me that the rights of the joint decree-holders as to the shares which they are entitled to in the property on account of the payment of the purchase-money, will have to be determined in case a dispute arises. The property cannot be divided among them automatically merely because the decree was a joint one.

7. This result in my opinion follows from the following considerations. Rule 14, Sub-Clause (1) under Clause (b), Order 20, Civil P.C. lays down that the title to the property shall be deemed to have accrued from the date of the payment. It is therefore clear that a mere passing of the decree does not confer on the plaintiffs any title to the property. It is the payment of the pre-emption money which gives them such title. A similar provision is to be found in Section 24, Agra Pre-emption Act (Act No. 11 of 1922) which lays down that a person who has obtained a decree for pre-emption in respect of any property shall acquire no title to have the property until he pays the purchase-money into Court in accordance with the pre-emption decree.

8. That in order to get equal shares in the property persons equally entitled to pre-emption must pay an equal share of the consideration is clearly laid down in Section 13, Pre-emption Act. I therefore think that in order to determine in what proportion the joint plaintiffs are to share the property the circumstances under which the payment was made must in each case be enquired into.

9. If any one of the co-plaintiffs has really refused to contribute towards the payment of the purchase-money and in that way impliedly withdrawn his claim and the payment of the whole amount is made by the other co-plaintiff the whole property ought to go to the latter. On the other hand, the mere fact that the whole

amount has been paid by one co-plaintiff would not destroy the right of the other, if there was any understanding between them that the payment would be made on behalf of both and that the accounts would be adjusted afterwards.

10. In the course of the argument it was urged that the deposit of the amount in pursuance of the decree was a proceeding in execution, and Order 21, Rule 15 applied to it and that the joint decree could not be executed in favour of one decree-holder without protecting the interests of the other. It was therefore contended that the necessary result was that the entire property passed to both the decree-holders. I am unable to accept this contention. The deposit of the pre-emption money within the time fixed by the Court is neither a proceeding in execution of the decree nor any step-in-aid of it. In fact a conditional decree has been passed and it does not become a perfect decree in favour of the plaintiffs for pre-emption of the property until that condition has been fulfilled. In case of its non-fulfillment the decree is really one of dismissal of the suit. Dalal, J. in *Narain Dat Tewari v. Ram Baran* (S.A. No. 506 of 1925, decided on 19th October 1927) also held that such deposit was not in execution of the decree. I therefore do not think that Order 21, Rule 15 applied to the deposit of the purchase-money.

11. In the present case the Court which passed the pre-emption decree ordered the delivery of possession in favour of Ram Harakh Misir apparently without any investigation of the matter. That, however, does not, in my opinion, preclude the question from being gone into in the present case.

12. Coming to the facts of the present case the plaintiff alleged that he had actually paid half of the amount of the pre-emption money to the defendant before the deposit was made. On this allegation he cannot possibly say that he had really not paid the amount but there was an understanding between the parties that Earn Harakh should pay the whole and the parties would adjust their accounts afterwards. The defendant in his written statement asserted that the plaintiff had been included for the mere purpose of preventing him from colluding with the vendees and that when the plaintiff was asked at the time of depositing the money he said that he was in debt and could not pay the amount. The lower appellate Court has recorded a distinct finding that the defendant's allegation that the

plaintiff was merely a dummy and was associated in the pre-emption suit to make his collusion with the vendees impossible'. On this finding there could not possibly have been any intention in the minds of the parties that the plaintiff should have a share in half of the property and the accounts would be settled between them afterwards. The deposit of the whole amount, was made by the defendant on his own behalf and in my opinion the plaintiff cannot take advantage of it in order to claim half the property, even though he is now prepared to pay his half share of the pre-emption money.

13. The suit was rightly dismissed by the lower appellate Court.

Boys, J.

14. This is a plaintiff's appeal arising out of a suit for a declaration of his right to one-half of certain property and possession thereof. The present suite arises out of an earlier pre-emption suit. The present plaintiff and the present defendant jointly as co-plaintiffs brought suit No. 82 of 1925 against one Ram Baran for pre-emption on the ground that the so-called deed of gift to him by one Ram baran was in reality a sale, and that they were entitled to pre-empt. The present plaintiff had apparently a superior claim to that of the defendant if he had chosen to enforce it separately. But the two, the present plaintiff and the present defendant, did in fact bring the suit jointly.

15. ON 20th May 1925, a decree was passed in the ordinary form contained in Order 20, Rule 14, para. 1, providing for the payment of Rs. 1,075 and the usual 30 days.

16. On 28th May 1925, the joint decree-holders joined in an application asking for further time as they had appealed in reference to the amount of the consideration money. It is not clear, as we have not the pre-emption record before us, how time was extended, for the only order on the application is 'File.'

17. On 6th July 1925, a deposit was made by the present defendant of the full amount of Rs. 1,075.

18. On 12th December 1925, the present defendant applied for and obtained delivery of possession to him alone, and then applied for mutation. The plaintiff receiving notice of the mutation proceedings objected, but his objection was disallowed on the ground that the defendant was in sole possession, and mutation was effected in favour of the present defendant alone,

19. Hence the present suit which the plaintiff has brought asking for a declaration that he has a half share in the property, and further that a decree for possession of half may be passed if he be found to be out of possession; and he brought this suit on the allegation that he had paid to the defendant half of the consideration money of the property before the money was deposited.

20. The trial Court found against the plaintiff on the allegation of fact, and it further found, but not in very precise terms, that the plaintiff was really a dummy. The words of the trial Court are:

Ha was joined as a party so that he may act bring a collusive suit for the vendees. This is a good ground. A real vendee generally tries to catch hold of some preferentially entitled person to pre-empt and admit the whole sale consideration and sometimes cherishes a hope to get the property through some device or another. An anxious pre-emptor Therefore not only files a suit but labours hard to bring in his file preferentially entitled persons so that there may not be a collusive notion with an adverse effect against the pre-emptor's suit. I, therefore, hold that plaintiff did not pay the amount he alleges and the whole sum was a matter of fact deposited by Ram Harakh (the present defendant).

21. On the issue whether the plaintiff was entitled to any relief, the trial Court notwithstanding the finding which I have quoted, held that the plaintiff was entitled to a decree for possession of half on payment of half the purchase money.

22. Both parties appealed. The lower appellate Court held definitely that the present plaintiff was merely a dummy, and was associated in the pre-emption suit to make his collusion with the vendees impossible. It also found against the plaintiff that he had paid none of the money, and dismissed the plaintiff's appeal, and allowing the defendant's appeal set aside the decree of the trial Court and

dismissed the plaintiff's suit with costs.

23. Plaintiff appeals now to this Court against both the decrees of the lower appellate Court. The present Second Appeal No 1554 of 1927 is against the decree of the lower appellate Court in the defendant's appeal to that Court.

24. The plaintiff-appellant's contention is that the payment of Rs. 1,075 by the defendant respondent in the pre-emption suit was a payment which, even if made by the defendant, as found by both Courts, entirely out of his own pocket, enured equally to the benefit of the plaintiff, and that similarly the application of 12th December 1925, for delivery of possession to the defendant alone must be taken as enduring also to the benefit of the plaintiff.

25. If there were no further facts found than these I should be inclined to hold that the plaintiff's appeal must be decreed and the decree of the trial Court restored. We have been referred to Order 20, Rule 14, which provides for the form of decree in a pre-emption suit. It appears to me to be impossible to hold that the trial Court in a pre-emption suit must, when the money is deposited by one of two or more co-plaintiffs, inquire into the question whether the money is deposited on behalf of all the plaintiffs or only on behalf of one.

26. We have nothing before us to show with what accompanying statements the tender of the money was made. We have got the accompanying application before us, owing to the absence of the pre-emption record, and so we can only assume that it contained no specific allegation that the defendant was depositing the money solely on his own account and claimed to reap the whole benefit of the decree: and in such circumstances I think that the trial Court should and could only assume that the payment is being made for the benefit of all the co-decree holders.

27. I need not enter into the question of what action the Court should take if the application of the person depositing the money did show that he was claiming to deposit solely on his own account and claiming the whole benefit arising from such deposit. It may be that the trial Court's proper course would be to refuse to accept the money or to accept it provisionally and issue notice to the other decree-

holders. I have not to determine that question in this case.

28. It is urged for the defendant that the deposit of money in accordance with a pre-emption decree is not part of execution proceedings so as to make Order 21, Rule 15, applicable. On the other hand it may reasonably be suggested that in preemption proceedings there is one decree and one only, and that they differ from proceedings in a mortgage suit, where there is a preliminary and a final decree, and that any step taken by a decree-holder by virtue of the pre-emption decree to secure his rights is a step in execution. It is difficult to see what it is, if it is not a step in execution. The decree stands complete and the decree-holder desires to obtain his rights under it. It is necessary, before he can demand delivery of the property by an application for such delivery, for him to show that he has paid the money. It is difficult to see how an application to be allowed to deposit the money can be regarded as an application in the suit, and if it is not an application in execution, then it is difficult to see into what category it will fall. I have already held that *prima facie* a deposit must be taken to be made on behalf of all the decree-holders, and I would further hold that the principle of Order 21, Rule 15 is applicable and that this is an additional reason for holding that where there is nothing to show, as in this case, that the person depositing the money was claiming the sole benefit of the rights following upon such deposit to the exclusion of his co-decree-holders the trial Court can and can only treat the deposit as made on behalf of all the decree-holders.

29. Again, if the appellant had secured, as he should have done, the summoning of the pre-emption record, it would almost certainly have been found that the tender of the money had been accompanied by a prayer for the delivery of the property and, if that were so, it would be still more difficult to suggest that it was not a proceeding in execution to which Order 21, Rule 15, would directly apply.

30. So far, then, I would hold that the deposit whether made by the defendant out of his own pocket or not, enured to the benefit of the plaintiff also.

31. Similarly I would hold that the application of 12th December 1925, for delivery of possession to the defendant alone was beyond doubt an application in execution therefore an application to which Order 21, Rule 15 applied. The Court

did not in fact make any order under Sub-rule 2, Rule 15, Order 21, but I do not think that the plaintiff would be debarred from claiming half the property.

32. This is, however, in the present case by no means all. Both Courts have found, the lower appellate Court in the most express terms, that the plaintiff was merely a dummy in the proceedings induced by the present defendant to join as a co-plaintiff merely in order that he might not be put up by the original vendee to bring a collusive suit which would defeat the present defendant. In face of this finding I have no hesitation in holding that the present plaintiff cannot now plead that the deposit made by the defendant enured to his benefit or that the possession obtained by him in what was undoubtedly execution of the decree enured to his benefit, and the suit of the plaintiff was rightly dismissed.

33. I would add that, in my opinion, if neither the appellant nor the respondent secures the presence of a necessary record for the information of the Court hearing an appeal, the one or the other has only himself to blame if the ordinary presumptions are made against him. It is ordinarily too late at the hearing of the appeal to suggest that the hearing should be interrupted and the case adjourned for the record to be sent for.

34. I would dismiss the appeal with costs.

35. The appeal is dismissed with costs including in this Court fees on the higher scale.

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