

Hadibandhu Behra Vs. Smt. Kaushalya Devi and ors.

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Court : Orissa

Decided On : Sep-11-1974

Reported in : AIR1976Ori119

Judge : R.N. Misra, J.

Acts : [Code of Civil Procedure \(CPC\) , 1908](#) - Order 21, Rules 58 and 63

Appeal No. : Second Appeal No. 163 of 1971

Appellant : Hadibandhu Behra

Respondent : Smt. Kaushalya Devi and ors.

Advocate for Def. : A. Mukherjee, ;A.K. Misra, ;R.N. Sinha, ;S.N. Sinha and ;B. Mahanta, Advs.

Advocate for Pet/Ap. : A.K. Padhi, Adv.

Disposition : Appeal allowed

Judgement :

R.N. Misra, J.

1. Defendant No. 5 obtained a money decree against the heirs of Banchanidhi Ota in S. C. C. Suit No. 15/55 of 1955 in the court of the S. C. C. Judge, Baripada and levied execution of the money decree in execution case No. 19 of 1960. On 20th

of June, 1961, the plaintiff purchased the property put to sale in that execution case as auction purchaser. On 16-9-1961, a sale certificate was issued in favour of the plaintiff (Ext. 1) on confirmation of the sale. On 9th of March, 1962, the plaintiff claims to have taken delivery of possession through court under Exts. 3 and 3/a and he was put into joint possession along with defendant No. 2. The third defendant on the basis of purchase of half share of Banchanidhi Ota of the disputed property under a registered sale deed of May, 1959, laid claim under Order 21, Rule 58 of the Code of Civil Procedure. The claim was dismissed on 8-4-1961 (Ext. C). A suit under Order 21, Rule 63 of the Code of Civil Procedure was filed impleading the judgment-debtor Banchanidhi and the plaintiff-auction-purchaser was not impleaded. The suit was decreed on 5-9-1962. The defendant No. 5 (decree-holder) filed an appeal which was eventually dismissed.

2. The plaintiff instituted a suit for partition claiming half share on the basis of the sale certificate (Ext. 1). The defence raised was that there was a previous partition between Banchanidhi and Udayanath (defendant No. 2) amicably in 1941. Banchanidhi sold away the disputed property to the third defendant by a registered sale deed and had put her in possession. The third defendant filed a claim under Order 21, Rule 58 of the Code of Civil Procedure in the execution case. The petition was dismissed for default and the suit under Order 21, Rule 63 filed by her was eventually decreed. Therefore, the plaintiff acquired no title to the disputed property on the basis of the purchase. The suit, therefore, was not maintainable.

3. The trial court found that the auction-purchaser was not a necessary party and the third party claimant was not obliged to implead the auction-purchaser in the suit under Order 21, Rule 63 of the Code of Civil Procedure. The sale to defendant No. 3 by Banchanidhi being prior to the auction sale the latter sale conveyed no title to the auction-purchaser as the judgment-debtor had no saleable interest for being conveyed by auction sale. He took the view that Section 144 of the Code of Civil Procedure was not applicable. He placed reliance on two Bench decisions of the Patna High Court in the case of Rameswar Lal v. Mt. Subdi, AIR 1938 Pat 468 and the case of of Mt. Bibi Umatul Rasul v. Mt. Lakho Kuer, AIR 1941 Pat 405. The learned, Appellate Judge also took the same view. Accordingly the courts below on a finding that the auction sale conveyed no title to the auction-purchaser

negated relief to the plaintiff. This second appeal is directed against the affirming decision of the learned Additional Subordinate Judge of Baripada.

4. Mrs. Padhi for the appellant contends that the plaintiff-auction-purchaser is not bound by the decree in the suit under Order 21, Rule 63 of the Code to which he was not a party and the title under the sale certificate has to be given effect to. Therefore, the plaintiff who became a co-owner with the defendant No. 2 is entitled to partition.

5. The courts below have placed reliance on a series of Patna decisions for clarifying the legal position. In the case of Rameshwar Lal v. Mt. Subdi, AIR 1938 Pat 468, Mohamad Noor, J., referred to some earlier decisions of the court and stated:--

'We are not concerned in adjusting the rights of the decree-holder, vis-a-vis the judgment-debtor and the auction-purchaser. We are concerned with the rights of a third party. Suit under Order 21, Rule 63 is a continuation of a claim preferred under Order 21, Rule 58. If the claim is disallowed and the property is sold it must be held that it was sold subject to the result of the decision in the suit which may be instituted under Order 21, Rule 63 which in essence is an appeal against the summary decision of the executing court. For instance, if a claim is disallowed and the property is sold and afterwards the claimant successfully obtains a reversal of the summary order and gets a declaration in his favour that the property which was attached and afterwards sold belonged to him, it will be travesty of justice to hold that the sale which was held subject to the result of the suit, subsists after the decree in the suit in which the claim of the third party is established.'

A Bench of the Patna Court in Mt. Naurzi v. Najaf Ali Shah, AIR 1939 Pat 321, held that an auction purchaser during the pendency of the suit under Order 21, Rule 63 was not required to be impleaded and was bound by the decree passed in the suit. Though the decision was not based on the principle of lis pendens action, it could be supported by it.

In Bibi Umatul Rasul v. Lakho Kuer, AIR 1941 Pat 405, it was held by another Division Bench that no formal order for setting aside the sale was required and the

. execution proceeding would be relegated to the position before the sale and the decree-holder could proceed to execute his decree.

In the case of *Mandreshwar Prasad v. Motilal*, AIR 1968 Pat 232, a Division Bench doubted the correctness of the principle indicated in the last of these cases (AIR 1941 Pat 405} on the footing of a decision of the Supreme Court in the case of *Janak Raj v. Gurdial Singh*, AIR 1967 SC 608. Mrs. Padhi also attacks the very foundation of the logic in AIR 1938 Pat 468, namely the suit under Order 21, Rule 63 is a continuation of the claim, proceeding upon the extension of which the auction purchaser is said to be bound by the ultimate decision in the claim suit. Counsel placed reliance on the ratio of *Sawai Singhai v. Union of India*. AIR 1966 SC 1068.

It is appropriate, therefore, that the two Supreme Court decisions be referred to. In AIR 1966 SC 1068, the court was examining whether a notice under Section 80 of the Code was a condition precedent to a suit under Order 21, Rule 63 of the Code so that the period of notice could be tagged on to the period of limitation prescribed under the Limitation Act, for filing of that suit. The learned Chief Justice spoke for the court thus:--

'It is, however, said that the suit under Order 21 Rule 63 is a continuation of attachment proceedings and as such, cannot be regarded as a suit proper which is included within the purview of Section 80.'

After discussing the position in law, the court summed up by saying:--

'..... It would, we think, be unreasonable to extend the said observations to the present case and treat them as enunciating a proposition of law that for all purposes, a suit brought under Order 21, Rule 63 is either a continuation of the objection proceedings, or is a form of an appeal against the order passed in them.'

The reasoning for the conclusion was further indicated thus:--

'.....We ought to bear in mind that the scope of the enquiry under Order 21, Rule 58 is very limited and is confined to question of possession as therein indicated

while suit brought under Order 21, Rule 63 would be concerned not only with the question of possession, but also with the question of title. Thus the scope of the suit is very different from and wider than that of the investigation under Order 21, Rule 58.'

This reasoning runs counter to the rationale, behind the Patna decisions and I am not in a position to agree with the current of judicial opinion which these Patna decisions (Except AIR 1968 Pat 232) represent.

Now let me deal with the other decision of the Supreme Court, AIR 1967 SC 608. Auction sale had taken place for the satisfaction of an ex parte decree put to execution. In the meantime an application had been filed for recalling the ex parte decree. In consideration of the pendency of such an application, the executing court stayed further proceedings in the execution case. The application for setting aside the ex parte decree succeeded. Thereafter the auction purchaser applied for revival of the execution proceeding and prayed for confirmation of the sale in his favour. The application was opposed on the ground that the ex parte decree had been cancelled. The Court referred to various provisions of Order 21 relating to execution and observed:--

'.....Section 65 of the Code of Civil Procedure lays down that where immovable property is sold in execution of a decree and such sale has become absolute, the property shall be deemed to have vested in the purchaser from the time when the sale becomes absolute. The result is that the purchaser's title relates back to the date of sale. There is no provision in the Code of Civil Procedure of 1908, either under Order XXI or elsewhere which provides that the sale is not to be confirmed if it be found that the decree under which the sale was ordered has been reversed before the confirmation of sale. It does not seem ever to have been doubted that once the sale is confirmed the judgment-debtor is not entitled to get back the property even if he succeeds thereafter in having the decree against him reversed. The question is, whether the same result ought to follow when the reversal of the decree takes place before the confirmation of sale.

There does not seem to be any valid reason for making a distinction between the two cases. It is certainly hard on the defendant-judgment-debtor to have to lose his

property on the basis of a sale held in execution of a decree which is not ultimately upheld. Once, however, it is held that he cannot complain after confirmation of sale, there seems to be no reason why he should be allowed to do so because the decree was reversed before such confirmation. The Code of Civil Procedure of 1908 contains elaborate provisions which have to be followed in cases of sales of property in execution of a decree. It also lays down how and in what manner such sales may be set aside. Ordinarily, if no application for setting aside a sale is made under any of the provisions of Rules 88 to 91 of Order XXI, or when any application under any of these rules is made and disallowed, the court has no choice in the matter of confirming the sale and the sale must be made absolute. If it was the intention of the Legislature that the sale was not to be made absolute because the decree had ceased to exist, we should have expected a provision to that effect either in Order XXI or in Part II of the Code of Civil Procedure of 1908 which contains Sections 36 to 74 (inclusive).

XX XX Xx Nothing has been urged before us which would lead us to take a contrary view. Under the present Code of Civil Procedure, the court is bound to confirm the sale and direct the grant of a certificate vesting the title in the purchaser as from the date of sale when no application as is referred to in Rule 92 is made or when such application is made and disallowed.'

Ext. 1 is the sale certificate after confirmation of the sale. The decision of the Supreme Court was in a case where confirmation had not been granted. Relying on the principles indicated by the Supreme Court in the aforesaid case, it is contended on behalf of the appellant that the courts below have gone wrong in holding that there has been an automatic nullification of the same upon the claim suit having succeeded. The decree in the title suit under Order 21, Rule 63 does not bind the plaintiff because he was not impleaded in the litigation. The declaration obtained in the claim case does not have the effect of setting aside the sale or taking away the title of the plaintiff which he had acquired under the sale certificate issued by the court. Mrs. Padhi's contention appears to be fully supported by the decision of the Supreme Court. It would, therefore, follow that the plaintiff is a joint owner with defendant No. 2 and is entitled to partition as claimed.

6. I allow the appeal, set aside the judgments of the courts below and decree the plaintiff's suit for partition. The plaintiff shall be entitled to partition, to a moiety share of the property. Unless parties amicably effect partition and take possession, the plaintiff or even the defendant No. 2 shall be free to apply to the trial court for appointment of a com-missioner for effecting the partition. The parties shall bear their own costs up to this stage and further costs shall abide by such directions as are given in the final decree proceedings. In effecting partition, the Commissioner shall follow the usual rules of equity applicable to a case of partition of immovable property.

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