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Court : Rajasthan

Decided On : Dec-05-1969

Reported in : AIR1970Raj167; 1969()WLN611

Judge : D.M. Bhandari, C.J.,; C.B. Bhargava and; S.N. Modi, JJ.

Acts : [Code of Civil Procedure \(CPC\) , 1908](#) - Sections 115 - Order 1, Rule 10

Appeal No. : Civil Revn. No. 106 of 1965

Appellant : Hardeva

Respondent : ismail and ors.

Advocate for Def. : Makhtoormal, Adv.

Advocate for Pet/Ap. : P.N. Dutta, Adv.

Disposition : Revision dismissed

Judgement :

Bhandari, C.J.

1. This revision application arises out of a suit filed by Ismail and three others against Noora and Hardeva, defendants Nos. 1 and 2 respectively alleging that in field Khasra No. 204 measuring 19 Bighas 7 Biswas in village Nuhand, Tahsil Rajgarh, the plaintiffs had 1/2 share and the other half belonged to Noora

defendant No. 1. The field had not been partitioned and the plaintiffs and defendant No. 1 were in joint possession thereof. Defendant No. 1 sold the entire field to defendant No. 2 on 17th October, 1962, under a sale-deed showing a fictitious amount of Rs. 2000 as consideration and got it registered on 26th October 1962. The plaintiffs further alleged that they were prepared to purchase share of defendant No. 1 and that they had asked defendant No. 1 to sell the field to them after taking Rs. 1000 but the said defendant refused to do so. The plaintiffs claimed for a declaration that they were owners of half share in the said field and also a decree for pre-emption of half share of Noora. This suit was contested by defendant No. 2 who denied the case set up by the plaintiffs that they had half share in the field or that they had a right of pre-emption. During the pendency of the suit, Noora died on 11th April, 1963, and the plaintiffs filed an application on 19th July, 1963, praying that his legal representatives be brought on record. Defendant No. 2 contested the application on the ground that it was barred and that the suit had abated. The trial Court held that the application for bringing the legal representatives of Noora was barred by limitation but held that the suit had not abated in its entirety and proceeded to try the suit after striking down the name of Noora.

2. Defendant No. 2 filed a revision application under Section 115 of the Code of Civil Procedure in this Court praying that as the suit had abated in its entirety, the Court had no jurisdiction to proceed with the trial of the suit. The learned single Judge referred the case to a Division Bench as in his opinion, the ruling of this Court in *Poonamchand v. Motilal*, ILR (1955) 5 Raj 77. = (AJR 1954 Raj 287), required reconsideration. The case was argued before the Division Bench. The following three questions were argued before the Division Bench :-

(1) Whether a revision application lies against the order of the trial Court holding that defendant No. 1 who died during the pendency of the suit and whose legal representatives were not brought on the record in time were not necessary parties to the suit and the suit would proceed without the legal representatives being impleaded?

(2) Whether the transferor of an immovable property is a necessary party to a suit filed by a third person claiming property as his own?

(3) Whether a vendor is a necessary party to the suit for pre-emption?

The Division Bench in view of the importance of the points raised considered it proper to refer the case to a Full Bench. In this way the case has come before the Full Bench.

3. We first take up the second point for consideration. On this point, Poonamchand's case, TLR (1955) 5 Raj 77 = (AIR 1954 Raj 287), is against the plaintiffs. The facts in that case were that Motilal had sold certain immovable property to the father and grandfather of one Gulabdas. There was a decree against Gulabdas in which the property was put to sale and purchased by Daudas and one another. Poonamchand plaintiff claimed in the suit filed by him that the property belonged to him as it had fallen to his share on a partition between plaintiff and Motilal. The question arose whether Motilal was a pro forma defendant. It was held that Motilal was not a pro forma defendant but was a necessary party to the suit as the plaintiff was attacking the sale by Motilal and another in favour of Gulab-das's father and grandfather of the plaintiff. This authority was cited before Bapna J. in Bhairon Bux v. Hazarimal, ILR (1960) 10 Raj 305, but he refused to follow this authority and held that the vendor is not a necessary party where a third person claims both against the vendor and the vendee and institutes a suit to safeguard his rights against the vendee.

4. With great respect, we are of the view that the law laid down by the Division Bench in Poonamchand's case, ILR (1955) 5 Raj 77 = (AIR 1954 Raj 287), is not sound. When the vendor has sold his property and has delivered the possession of the property to the vendee, the vendee becomes the sole owner of the property and it is upto the vendee to defend his title against any person who claims any right in the property. The vendor may be a proper party, but he is not a necessary party inasmuch as an effectual decree can be passed in favour of third person against the vendee. It cannot be said that the constitution of the suit is bad and no relief can be granted to the plaintiff against the vendee in the absence of vendor. Order 1, Rule 9 lays down that no suit shall be defeated by reason of the

misjoinder or non-joinder of parties, and the Court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it. The injunction of the law is not to dismiss a suit as incompetent if it is possible for a Court of law to proceed with the trial of the suit and determine the rights and interests of the parties actually before it. In a case in which a vendor has lost his right or interest in the property by reason of transfer and all rights, title and interest in the property have vested in the vendee, it cannot be said that the suit cannot proceed against the vendee.

Two tests have been laid down by the Full Bench decision of the Allahabad High Court in the Benares Bank Ltd. v. Bhagwan Das, AIR 1947 All 18 (FB) for determining the question who is a necessary party to a proceeding and these two tests are firstly there must be a right to some relief against such party in respect of the matter involved in the proceedings in question and secondly it should not be possible to pass an effective decree in the absence of such a party. Their Lordships of the Supreme Court in Deputy Commissioner, Hardoi, in charge Court of Wards, Bherawan Estate v. Rama Krishna Narain, AIR 1953 SC 521, approved of the law laid down by the Full Bench of the Allahabad High Court in this respect. This principle is enunciated in Rule 9 (10?) of Order 1 Civil P. C. and in the instant case it cannot be said that no effective decree can be passed in favour of the plaintiffs in the absence of Noora. Poonamchand's case, ILR (1955) 5 Raj 77 = (AIR 1954 Raj 287) supra, was referred by Dwivedi J. in Ramgopal v. Jhau Lal, AIR 1963 All 126 and was dissented from by the learned Judge in view of the Full Bench authority of the Allahabad High Court and the law laid down by the Supreme Court.

5. We may however point out that a case in which a plaintiff files a suit against a defendant who is not the full owner of the property but claims limited right in the property from the owner stands on a different footing. In such a case, it may be successfully urged that the owner is a necessary party as no effectual decree could be passed against the defendant as he claims under some other person who is the owner of the property and without the owner being brought on the record, the Court should not have decided the case. Such cases are Subbaraya Sastri v. Seetha Rama-swami, AIR 1933 Mad 664; Rahima Bi v. Vellore Municipal Council,

AIR 1954 Mad 495, Brojanath Bose v. Durga Prosad Singh. (1907) ILR 34 Cal 753, Narahari Mohanti v. Ghanshyam Bel, AIR 1963 Orissa 186, Chenthiperumal Pillai v. D. M. Devasa-hayam, AIR 1956 Trav-Co. 181 (FB), and Chandra Nath Sarma v. Guna Ram Kalita, AIR 1949 Assam 21. Such cases must be distinguished from a case in which the allegations of the plaintiffs are that the vendor has sold all his rights in the property to the vendee and that he had delivered possession of the property to him and has not kept anything with him.

6. Learned counsel for defendant No. 2 has relied on Umed Mal v. Chand Mal, AIR 1926 PC 142. In that case the plaintiffs claimed certain land under a mortgage from one Mst. Fatima and asked for a declaration of title and for possession. In the suit Mst. Fatima was not made a defendant. The main question was whether Mst. Fatima had included that land in the mortgage-deed, it was held that Mst. Fatima was a necessary party. It was further observed that there were suits of a class in which a decree for possession might be passed in the absence of mortgagor for what it is worth, but the suit before the Privy Council was not of such a class as the very question to be tried was whether Mst. Fatima ever conveyed the land to the alleged mortgagee and it was held that it was material irregularity to decide it in the absence of Mst. Fatima. This case is clearly distinguishable on facts.

7. It may be urged that the sale of a property by a vendor ordinarily involves a warranty of title and if the vendee loses in a case filed by a third party, he has a right to recover back the sale-price paid by him to the vendor and in this way the vendor is interested in the result of the suit. This is true. But this does not mean that a person who claims title in the property cannot file a suit for recovery of the property or for declaration of his right therein against the vendee. In spite of the fact that the vendor is interested in the result of the suit to the extent that he may be liable to refund the amount of consideration received by him, it cannot be said that the person claiming the property as his own cannot recover it from the vendee on proving that the vendor had no right, title or interest in the property. The vendor may or may not be bound by the decree passed in such a suit, but the person who has filed the suit can recover back the property from the vendee. In America the proper procedure which may be adopted by the vendee in order that the vendor may be bound is that he may give notice of the suit to the vendor. In this

connection we may refer to the following passage in 'Freeman on Judgments Vol. I page 970' :--

'But, in accordance with the general rule governing the proceedings and judgment against an indemnitee or covenantor, the purchaser, or any subsequent vendee, upon being sued for the property, in trover or replevin, or in any action involving the title, may give notice of the pendency and nature of the suit, to the original vendor, or require him to defend or to assist in defending the same, and after such notice the vendor, whether he defends or not, cannot, in subsequent litigation with the vendee, question the finding of title involved in the judgment. This rule is based upon the existence of an express or implied warranty of title.'

8. In India, the proper procedure is for the vendee to make an application that vendor is also a proper party to a suit and he may be made a party to it and the Court may unless it comes to the conclusion that such application, was made to delay the proceedings or for causing harassment to the plaintiff may make vendor a party to the suit. But if he is not a necessary party, he is a proper party.

9. Thus from all aspects of the matter, Noora was not a necessary party to the suit for declaration, that half of the share in the field belonged to the plaintiff.

10. The second part of the relief claimed by the plaintiff was for a decree for preemption and the question to be determined is whether the vendor was a necessary party to the suit. In our humble opinion, the vendor is not a necessary party in a suit for decree for pre-emption precisely for the same reasons as mentioned above for a suit for declaration. This is the view taken in a number of cases. Reference may be made in this connection to *Ram Sarup v. Sital Prasad*, (1904) ILR 26 All 549, *Harbans Tewari v. Tota Sahu*, (1910) ILR 32 All 14, *B. Brij Narain v. B. H. K. Dhaon*, AIR 1942 Oudh 366.

11. We are, therefore, of opinion that Noora was not a necessary party either for granting declaration or for granting a decree for preemption.

12. We may, however, point out that a revision application would be maintainable against an order of a subordinate Court holding that a suit would proceed for trial

even in the absence of a necessary party because in trying a suit in the absence of necessary party, the Court will be committing an illegality in the exercise of its jurisdiction.

13. The revision application fails and is dismissed with costs.

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