

Radha Devi Vs. Jorawar Singh

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Court : Rajasthan

Decided On : Nov-28-1978

Reported in : 1978WLN(UC)441

Judge : Kanta Bhatnagar, J.

Appeal No. : S.B. Civil Misc. Appeal No. 61/1978

Appellant : Radha Devi

Respondent : Jorawar Singh

Disposition : Appeal dismissed

Judgement :

Kanta Bhatnagar, J.

1. This appeal has been preferred against the judgment passed by the learned Additional District Judge, Bhilwara dated 17-5-1978. Briefly stated the facts of the case giving rise to this appeal are that in a decree passed in favour of respondent Jorawar Singh against Smt. Radhadevi, the decree-holder filed an execution petition under Section 47 read with Order XXI Rule 90 CPC Smt. Radha Devi in that execution proceedings filed objection petition to the effect that the land being beyond urban area is not liable to be attached That petition was dismissed by the Executing Court & being aggrieved by that order Radha Devi filed an appeal in the

Court and that appeal having been accepted the case was remanded to the District Court with the directions that the nine issues framed by this Court may be decided after giving opportunity to the parties to adduce evidence for the same. The Additional District Judge, Bhilwara examined the witnesses produced by the parties and deciding various issues rejected the objection petitions of Smt. Radha Devi and passed the judgment under appeal.

2. The learned Counsel for the appellant has assailed the findings of the learned Additional District Judge on three grounds. The first ground raised is, that while deciding issue No. 4 the learned Additional District Judge has arrived at a conclusion that the auction bid was adjourned for more than 4 days, still he in contravention of the settled position of law, that an adjournment of the auction for more than seven days cannot be done without a fresh proclamation unless waived by the judgment-debtor, held the auction valid.

3. The learned Counsel for the respondent controverting this argument submitted that despite the fact that adjournment was for more than seven days sale is not liable to be set aside because Rule 90 of Order XXI specifically provides that no sale shall be set aside on the ground of irregularity if substantial injury has not been caused to the judgment-debtor.

4. The perusal of the record shows that while deciding issue No. 2 the learned Additional District Judge has stated all the dates on which the auction took place and calculating the time arrived at a conclusion that the adjournment was of course for more than 7 days but he in lieu of the provision of Rule 90 of Order XXI decided that no substantial injury has been caused to the judgment-debtor by this adjournment and therefore, he on this ground alone and in my opinion correctly, did not consider it a fit case in which the sale may be set aside. I am strengthened in my opinion by the principle enunciated in the case of *Maliram Nemichund Jain v. Rajasthan Financial Corpn.* 1974 RLW 94. In that case reliance has been placed on the observations of their Lordships of the Supreme Court in the case of *Radhey Shyam Singh v. Shram Bhari Singh* : [1971]1SCR783. In the Supreme Court case it has been observed as under:

Mere proof of a material irregularity such as the one under Rule 69 and inadequacy of price realised in such a sale, in other words, injury, is, therefore not sufficient. What has to be established is that there was not only inadequacy of the price but that inadequacy was caused by reason of the material irregularity of fraud. A connection has thus to be established between the inadequacy of the price and the material irregularity.

In view of this position of law the finding of the learned Additional District Judge on that point that this irregularity in adjourning the auction for more than seven days will not make the sale liable to be set aside is not to be interfered with.

5. The second ground of attack by the learned Counsel for the appellant on the judgment under appeal is that the decision regarding issue No. 7 dealing with the point of the bidder not being allowed to bid at the auction unless he deposited 25% of the bid amount. According to the learned Counsel there is on record an application by one Banshilal filed before the learned Additional District Judge that the sale Amin did not allow Banshilal to bid at the auction. According to the learned counsel it was the duty of the decree-holder to prove that proper opportunity was given to the bidders and in the absence of such evidence on this point also the sale deserves to be set aside. Meeting out this argument the learned Counsel on the other side contended that Banshilal did not at all reach the site where the auction was being conducted and therefore, no question of his not being allowed to bid arise.

6. The perusal of the record shows that application of course was filed by Banshilal in the court but there is a specific report of the sale Amin on the point that there was the court order for allowing Banshilal to bid at the auction but Banshilal has not reached the place of auction. Thus there is nothing to show that anybody wanted to bid but was not allowed by the Sale Amin to do so. Hence I am of the opinion that the finding of the learned Additional District Judge on this count also stands justified.

7. The learned Counsel for the appellant while advancing his argument on the third ground of attack vehemently urged that the land in question has been held to be a holding by the Additional District Judge and, therefore, his finding that the land is

still attachable is erroneous. According to the learned Counsel Section 37 of the Rajasthan Tenancy Act (hereinafter referred to as the Act) comes to the help of the judgment-debtor because it saves the right of a tenant and the right of a tenant includes the right to enjoy the property peacefully as well as the Khatedari rights. According to the learned Counsel the appellant has from the very beginning come with a specific case that the property in question is situated outside Urban area and, therefore, the learned Additional District Judge was left with no alternative but to allow the appellant to have the benefit Under Section 37 of the Act.

8. Learned Counsel for the respondent submitted that what Section 37 saves is the right of a tenant and in this case there are two points against the appellant, one is that she is not a tenant and the other that the property is not a land as defined in Section 5(24) of the Act According to learned Counsel Section 5(43) of the Act defines a tenant and excludes a trespasser from its definition and, therefore, in view of Exs. 3, 4 and 5 produced by the appellant-objector herself she if at all in possession of the property in dispute falls within the category of a trespasser and Section 37 does not save the rights of a trespasser.

9. The learned Additional District Judge has held that the property in question is a holding. Now the question to be answered is whether the property being a holding is liable to be attached or not despite the fact that it is not used for the purpose of cultivation. The term holding as defined in Section 5(7) means a parcel or parcels of land, held under one lease, engagement to grant, or, in the absence of such lease, engagement or grant, under one tenure, and shall include, in the case of an ijardar or thekedar, the ijara or the ka area To understand this term properly the definition of the term land appearing in Section 52 is to be seen 'Land' as defined means land which is let or held for agricultural purposes or for purposes subservient thereto or as grove land or for pasturage, including land occupied by house or enclosures situated on a holding,.... 'The contention of the learned Counsel for the appellant is that land includes the land occupied by houses and enclosures situated on a holding and, therefore, the property in question being situated on a holding should be considered to be a land as defined in Section 5(24) of the Act and, therefore; any occupier of the property should be extended the benefit under Section 37 of the Act. In order to bring the houses and

enclosures situated on a holding within the ambit of the term land the term 'purposes subservient thereto' carries importance. The argument of the learned Counsel for the respondent that in the present case there is no proof that this house was in any way subservient to the agriculture purpose and, therefore, it cannot be considered to be a house on the holding is full of force. He has substantiated his arguments by the provisions of Sections 90 and 90A of the Rajasthan Land Revenue Act. Those two sections respectively deal with the liability of all lands to payment of revenue or rent and use of agricultural land for non agricultural purposes. In the instant case this is clear that the land around the property in question is not used for the agricultural purpose. This version comes from the statement of Smt. Radha Devi herself who has deposed that there is no agricultural land where her land is and houses have been constructed. This fact is also evident from the statement of Nahar Singh from whom Smt. Radha Devi is said to have purchased the land in question vide sale deeds Ex 1 and 2. Nahar Singh has stated that by these two sale deeds Ex. 1 and 2 two bishwas of land was sold to Smt. Radha Devi. Ex. A.1 is the sale proclamation in which the neighborhood of the property in question is given and on two sides there are residential houses of other persons. There is a residential colony in the surrounding vicinity. Ex 3, 4 & 5 are the notices issued to Smt. Radha Devi and others about their illegal construction and Smt. Radha Devi has admitted that in the Tehsil. the proceedings for Rs. 3500/- being deposited for this land is pending. This is thus clear that the property in question is not on a land which is used for agricultural purpose. The argument of the learned Counsel for the appellant is that even if this fact is taken for granted still what the court has to see is whether the property is on a holding or not and it is not expected of the court to go into the details as to for what purpose the property is used. I do agree with the contention, but at the same time this factor cannot be overlooked that Section 37 was enacted in order to give help to the bonafide agriculturist at the hands of the decree-holders and not to the persons who are not tenants in the true sense of the term. Besides this, the question which carries importance in this matter is whether Radha Devi is a tenant or not because what Section 37 of the Act saves is the right of a tenant. This is evident that no land revenue has ever been paid by Radha Devi. From her side Jamabandi of 10 years back has been produced and the Patwari has simply

stated that Nahar Singh has formerly deposited the land revenue. The definition of the word tenant given in Section 5(43) of the Act is 'a person by whom rent is, or, but for a contract, express or implied, would be, payable and.... It further provides' but shall not include a grantee at a favourable rate of rent or an ijardar or a the kedar or a trespasser. The term trespasser according to Section 5(44) means a person who takes or retains possession of land without authority or who prevents another person from occupying land duly let out to him. In view of these definitions I now turn to the present case & I find it necessary to refer to the provisions of Section 42 of the Act which makes a sale, gift or bequest by a Khatedar tenant of his interest in the whole or part of his holding void if the same is transferred in a fragment. According to the learned Counsel for the respondent at the relevant time in Bhilwara District in which this property is situated the transferable minimum area as per the rules was 12 acres. In the case in hand Nahar Singh has specifically deposed that he has sold only two biswas of land to Radha Devi. The learned Counsel for the appellant has tried to meet out the arguments by submitting that if any illegality is committed in the sale of the land and fragmentation has been made then it is only the landlord who can file an application to get the sale declared void. Whatever be the position in the present case in view of all the circumstances, Smt. Radha Devi cannot be said to have proved herself to be a tenant, it may also refer to her two objection petitions, one dated 13.10.1973 and the other dated 15.11.1973. In both those applications what she has stated is that the land in question is not an upland and therefore, is not liable to be attached. She has not come with a case that she is a tenant. Hence now her criming with a case that she should be given benefit under Section 37 of the Act is not tenable. The result of the proceedings regarding the property in question is not a matter to be considered by this Court but this is quite clear that as Smt. Radha Devi is not falling in the definition of a tenant she cannot have the advantage of Section 37 of the Act and the property in question cannot be said to be not liable for sale in satisfaction of the decree passed in favour of the respondent.

10. The appeal having no force stands dismissed with costs.