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Court : Rajasthan

Decided On : Aug-06-1984

Reported in : 1984WLN626

Judge : S.S. Byas, J.

Appeal No. : S.B. Civil Regular Second Appeal No. 484 of 1972

Appellant : Firm Jethmal

Respondent : Ram Nath

Advocate for Def. : Mr. Moondra

Advocate for Pet/Ap. : Mr. Jain

Disposition : Appeal allowed

Judgement :

S.S. Byas, J.

1. This is a plaintiff's appeal who won its money suit in the trial court but lost it in the first appellate court of District Judge, Bikaner.

2. The case set up by the plaintiff, though simple, is of unusual nature and gives an interesting reading. As per averments disclosed in the plaint, defendant Ramnath (who passed away during the pendency of this appeal and whose legal

representatives have been substituted in his place) obtained a money decree being No. 2 of 1956 against Ram Niwas on June 6, 1957. In execution of that decree, Ram Niwas get attached and sold a shop described in para 9 of the plaint situate is the city of Bikaner. In the auction conducted by the Executing Court it was purchased by the plaintiff firm on July 15, (sic) 59 for a sum of Rs. 3601/- The sale was confirmed and sale certificate was issued to the plaintiff on September 9, 1959. The possession of the shop was also delivered to the plaintiff on October 22, 1959 and since then he continued to be in possession of it. On December 20, 1961, the Assistant Custodian cum Managing officer, Ganganagar taking the said shop as forming part of the property of the compensation pool under the Displaced Persons (compensation & Rehabilitation) Act, 1954 (hereinafter referred to as `the Act') sold it by auction and it was purchased for a sum of Rs. 7700/- by Diwan Chand (PW 4). The sale certificate was issued by the said Officer in favour of Diwan Chand as September 7, 1963. The plaintiff raised objections against the said auction but his objections were over ruled on the ground that Ram Niwas (against whom the defendant Ramnath had obtained a money decree) had no saleable interest in it. The Assistant Custodian cum Managing Officer held that the aforesaid shop was an evacuee property bearing Number 386 EP. As Ram Niwas had no saleable interest in the shop, it was not available for attachment and sale in execution of decree which the defendant had obtained against him. It was, therefore god wrongly attached and sold by the defendant. The plaintiff had purchased it in the Court auction under the bonafide belief that it really belonged to Ram Niwas. Since Ram Niwas had no saleable interest in it, the sale made in favour of the plaintiff was null and void on account of the failure of consideration. The plaintiff was, therefore, entitled to get the refund of his amount of Rs. 3601/- which the defendant had withdrawn from the executing court. It was also alleged that the auction of the shop through the court in execution of the decree took place due to the mutual mistake of fact which was that the judgment debtor Ram Niwas was taken as the owner of it. The plaintiff moved an application in the Executing Court for the refund of his purchase money of Rs. 360/- but that application was dismissed on July 17, 1963 by the District Judge, Bikaner. The plaintiff came to this Court in revision against that order of the District Judge, which was decided by a Division Bench on April 20, 1968. Since the sale of the shop in favour of the

plaintiff was confirmed, his application was held not maintainable and the revision was dismissed. The learned Judges of the Division Bench were, however, of the view that justice and equity speak in favour of the plaintiff and as such his application for refund of money may be treated as a suit. He was allowed to introduce necessary amendments in his application and to pay court fee thereon so that it may be treated as a plaint. The plaintiff thereupon, after introducing the necessary amendments in his application, presented it as a plaint with requisite court fee. It was registered as a suit. The relief claimed by the plaintiff was the recovery of a sum of Rs. 3,601/- as principal and Rs. 72/- as interest there as, that is for a sum of Rs. 3,673/- in total from the defendant.

3. The suit was resisted by defendant Ramnath. It was admitted by him that he had obtained a money decree against Ram Niwas and the shop in dispute was attached and sold is execution of it. Hs further admitted that it was purchased by the plaintiff and that possession of it was delivered to him. It was categorically denied that the judgment debtor Ram Niwas had no saleable interest in it. All other allegations relating to the re-sale of the shop by the Assistant Custodian cum Managing Officer in favour of Diwan Chand etc. were denied. It was further averred that the plaintiff was in continuous possession of the shop is dispute since October 22, 1959. He was never deprived of its possession and his possession continued even during the pendency of the suit. Since the plaintiff had purchased the shop under the bonafide belief that it belonged to the judgment-debtor Ram Niwas, he cannot term round and say that Ram Niwas had no saleable interest in it. The suit for the refund of the sale price was not maintainable in law. The sale made by the Court through auction in favour of the plaintiff was set null and void and there was no failure of consideration nor was there any mutual mistake of fact which induced the plaintiff to purchase the shop. Certain other objections relating to the non-joinder of necessary party, estoppel, liability to pay interest and like others were raised. The learned Civil Judge, Bikaner, who tried the suit, raised the necessary issues. During trial, the plaintiff produced oral as well as documentary evidence, as whereas the defendant chose not to adduce any evidence so much so that he even did not examine himself. On the conclusion of trial, the learned Civil Judge decided all the issues is favour of the plaintiff. The suit was consequently decreed in terms prayed for by him. The defendant took the matter

in appeal before the District Judge, Bikaner. The learned District Judge allowed the appeal, set aside the judgment and decree of Civil Judge and dismissed the plaintiff's suit. Aggrieved against the said judgment and decree, the plaintiff has come up in second appeal.

4. The narration of the facts would not be complete without mentioning a few other facts. It so happened that the shop in dispute was evacuee property bearing No. 386-EP. The judgment debtor Ram Niwas was a displaced person. The shop in dispute was first sold by the Assistant Custodian cum Managing Officer to judgment debtor Ram Niwas on September 9, 1956 for a sum of Rs. 6,100/-. The shop was in actual possession of one Modaram as a tenant of the Custodian Department. The symbolic possession of the shop was delivered to Ram Niwas against his executing an indemnity bond for a sum of Rs. 6,100/- on January 16, 1958. The sale pries of the shop was to be adjusted against the compensation which Ram Niwas was to get as a displaced person. Later on, it was found by the Assistant Custodian cum Managing Officer that there was no balance left in the net compensation admissible to Ram Niwas against his verified claims. Therefore, the sale price of Rs. 6,100/- of the shop in dispute remained unpaid on behalf of judgment debtor Ram Niwas. On account of this non-payment of the sale price, the sale made in favour of Ram Niwas was set aside by the aforesaid officer. It was put to re-sale by auction and was purchased by Diwan Chand (PW 4) for a sum of Rs. 7,700/-. The sale in his favour was confirmed Since the shop at the time of re-sale was in possession of the plaintiff, the plaintiff thought it proper to purchase it from Diwan Chand. Diwan Chand sold it by a registered sale deed to the plaintiff for a sum of Rs. 6,100/-. It was, thus, that the shop in dispute remained in possession of the plaintiff and continues to be so even now It may be clarified to avoid any confusion that the possession of the plaintiff over the shop in dispute is not in pursuance to the pale made by the executing court but it is on account of his purchasing it from Diwan Chand who, in his turn, had purchased it from the Assistant Custodian cum Managing Office.

5. It would be useful to briefly notice the reasons which prevailed over the learned District Judge in dismissing the plaintiff's suit. His judgment is a long one. The reasons which prevailed over him are:

(1) Sale certificate issued by the Assistant Custodian cum Managing Officer in favour of Diwan Chand (PW 4) was not produced;

(2) Sale deed of shop executed by Diwan Chand in favour of the plaintiff was not produced and

(3) the plaintiff purchased the shop knowing it to be of Ram Niwas and as such he cannot turn round and say that he was not owner of it or had no saleable interest in it.

6. Mr. Jain appearing for the plaintiff made a bitter criticism of the approach of the lower appellate court and contended that it was bad and unsustainable in law. It was argued that there was direct evidence of the Assistant Custodian cum Managing Officer Banwari Lal (PW 1) and Diwan Chand (PW 4) which conclusively proves (1) the sale of the shop to Ram Niwas was set aside, (2) it was re-sold. (3) in the re-sale, Diwan Chand purchased it and (4) Diwan Chand sold it to the plaintiff. It was urged that she evidence of these two witnesses along with plaintiff's partner Jai Narain (PW 3) is form dable and sufficient to prove the setting aside of the sale made is favour of Ram Niwas, the re-sale in favour of Diwan Chand and its purchase by the plaintiff from Diwan Chand. The evidence of these witnesses has not been shaken or punctured or shattered in any way by the defendant. As such, the reasons advanced by the learned Judge have no foundation and consequently his whole approach is erroneous.

7. It was on the other hand contended by Mr. Moondra appearing for the respondent that the findings on the above matters are sound one and should not be lightly disturbed.

8. PW 1 Banwari Lal is the Assistant Custodian cum Managing Officer, He deposed that shop No. 386 E.P. was evacuee property and Ram Niwas was displaced person. The shop was sold to him by the Custodian Department on September 9, 1956 for a sum of Rs. 6,100/-. But the sale was subsequently set aside as Ram Niwas did not pay the purchase money und had no compensation - against his verified claims from which the sale price of Rs. 6,100/- could be recovered or adjusted. Where the purchaser of property fails to comply with the

condition imposed by rule 90(1(sic))(12) & (13) and fails to deposit the full price in any of the recognised manner, the purchase becomes a nullity and the purchaser has no claim to the property under Rule 90(14) of the Rules, 1955. In such a case, even no order cancelling the auction sale is necessary. Ram Niwas did not pay the purchase money and had no compensation claim against which it could be adjusted. The sale in favour of Ram Niwas was consequently set aside and the shop was re-sold It was purchased by Diwan Chand (PW 4) for a sum of Rs. 7,700/- on December 7, 1963. He was cross-examined at some length. He gave the statement on the basis of the record kept in the Custodian Department. His testimony could not be shattered or impeached in any way. It is difficult to agree with the learned District Judge that the cancellation or setting aside of sale made in favour of Ram Niwas or the re-sale of the shop to Diwan Chand should be taken as not proved and the testimony any of this witness should be disbelieved simply because the sale certificate issued in favour of Diwan Chand has not been produced. In my opinion, the testimony of Banwari Lal (PW 1), who holds the responsible office of the Assistant Custodian cum Managing Officer, should not be belittled or brushed aside only on the ground of the non-production of sale certificate.

9. So also, the approach of the learned District Judge pertaining to the non-production of the sale deed executed by Diwan Chand in favour of she plaintiff is not correct and justified. Diwan Chand (PW4) stated that after when be had purchased the shop in auction from the Assistant Custodian cum Managing Officer, he sold it to the plaintiff by executing a registered sale deed in his favour. The plaintiff's partner Jainarain (PW3) stated that he had purchased the shop from Diwan Chand after it was purchased by him (Diwan Chand) in auction from the Custodian Department. I again find no good and cogent reasons to disbelieve the direct and positive evidence of PW 3 Jai Narain and PW4 Diwan Chard. It may be pointed out that the defendant bad adduced no evidence of whatsoever nature in rebuttal. It may be pointed out that the title of the shop sold by auction to Diwan Chand by the Assistant Custodian cum Managing Officer passed to him (Diwan Chand) as auction purchaser on the date of confirmation of sale and not from the date on whice the sale certificate was issued to him. Reference in this connection may be made to rules 90 and 92 of the Displaced Persons (Compensation and

Rehabilitation) Rules 1955 thereinafter referred to as 'the Rules') framed under the Displaced Persons (Compensation and Rehabilitation) Act, 1954. These rules came for judicial review before their lordships of the Supreme Court in Vishan Pal v. Moturam : AIR 1965 SC1994 . It was held by their lordships that the title to the property of the Compensation Pool passes to the auction purchaser on the date of confirmation of sale and is not in abeyance till the issue of the sale certificate to him As such the title of the shop in dispute came to vest in Diwan Chand on the confirmation of sale. It was thereafter that he sold this shop to the plaintiff. The sale of the shop by Diwan Chand is, therefore, valid. In view of the statements of PW 1 Banwari Lal and PW4 Diwan Chand, the non-production of the sale deed executed by Diwan Chand in favour of the plaintiff has no material consequence. The fact stands that Diwan Chand did sell the shop in dispute to the plaintiff The finding of the learned District Judge that due to the non-production of the sale deed the sale should not be taken as proved, is clearly erroneous and must be set aside.

10. It was next argued by Mr. Jain that the approach of the lower appellate court that the plaintiff purchased the shop knowing it to be of Ram Niwas and as such the plaintiff cannot turn round and say that Ram Niwas has not the owner of it or had no saleable interest in it, was also erroneous and unsustainable. It was also argued that the learned District Judge was impressed by the fact that the shop in dispute was in continuous possession of the plaintiff There is again considerable force in the contention. The evidence, an discussed above, clearly shows that the auction of the shop in dispute made by the Assistant Custodian cum Managing Officer in favour of Ram Niwas was later on set aside as he could not pay the purchase money. The plaintiff is the auction purchaser in a court sale. The auction purchaser in a court sale purchases the property with the bonafide belief tint whatever has been stated by the decree holder about the property sold is prima facie correct. The plaintiff, therefore, purchased the shop in dispute with the belief that it really belonged to Ram Niwas whereas it did not, in fact, belong to him Since the auction of the shop made in favour of Ram Niwas was set aside by the Assistant Custodian cum Managing Officer, Ram Niwas cannot be said to have any saleable interest in it. It is always open to an auction-purchaser to contend that the judgment debtor had no saleable interest in it if subsequently it is found

that really the judgment debtor had no saleable interest in the property in dispute which was put to auction. This right is granted to him before the confirmation of sale and also after the confirmation of sale. The approach of learned District Judge was, thus, clearly erroneous The appeal of the plaintiff should, therefore, be allowed.

11. However, Mr. Moondra appearing for the defendant raised certain other contentions to show that the sale by re-auction of the shop in dispute in favour of Diwan Chand by the Assistant Custodian cum Managing Officer was not valid. Two contentions were raised by Mr. Moondra in this regard, viz. (i) the 1/4 of the sale price was not deposited by Diwan Chand then and there when the auction was knocked down and (2) sales by re-auction is not permitted under the Rules, 1955.

12. There is no force in the contention that 1/4th of the sale price was not deposited by Diwan Chand when the auction was knocked down. No such objection was raised by the defendant in his written statement. As such ho cannot be now heard on a fact never pleaded by him.

13. Coming to, the second contention, Mr. Moondra struggled hard to impress that the re-sale by auction of the property is dispute is not contemplated by the Rules. The contention is not tenable. Rule 90(14) vests a power in the officer conducting sale of evacuee property to set aside the auction and forfeit the initial deposit, if any, made by the auction purchaser. The powers thus to set aside the sale re-sale are there.

14. Apart from that, Section 27 of the Act under which Rules, 1955 have been framed, gives a complete finality to the orders passed under the Act and the Rules and put a restriction on any court to call in question the act performed under the aforesaid Act and Rules. As such the auction made in favour of Diwan Chand by the Assistant Custodian cum Managing Officer cannot be assailed in a civil court A sale of property forming part of the compensation pool cannot be, thus, challenged is a civil court on any ground.

15. As stated earlier, the defendant did not raise any defence in his written statement to show that the re-sale of the shop in dispute by the Assistant Custodian cum Managing Officer was illegal. He simply denied the re sale of the shop in favour of Diwan Chand by the Assistant Custodian cum Managing Officer. If the sale stands proved in favour of Diwan Chand, the defendant cannot be allowed to challenge its validity firstly because the civil court has no jurisdiction to entertain such a plea and secondly, the defendant did not raise any such defence in his written statement. It is well established that a party cannot be heard on fact which was never alleged by him on the principle of 'Secundum allegata at probata'.

16. The last question which survives for decision is whether the auction purchaser who has purchased the property is a court sale is entitled to maintain a suit for the recovery of his purchase money in a case where it is subsequently discovered that the judgment debtor had no saleable interest in the property purchased by him. Mr. Moondra contends that no such suit is maintainable.

17. There is a sharp divergence of judicial opinion on the point whether an auction purchaser can recover the purchase money from the decree-holder after the confirmation of sale and subsequently if it is found that the property purchased by him did not belong to the judgment debtor or that the judgment debtor had no saleable interest in it. Some of the High Courts have taken the view that the auction purchaser is not entitled in law or in equitty to file a suit for the recovery of his purchase money. The reasons which have prevailed over these courts are two (i) in a court auction the court does not guarantee a warranty of title to the auction purchaser and (ii) the provisions which were there in the Civil Procedure Code of 1877 and 1882 giving a right to the auction purchaser to maintain a suit for the recovery of purchase money, have been deleted and there is no such corresponding provision in the Civil Procedure Code, 1908. The High Courts which took this view are those of Allahabad, Bombay, Patna and Calcutta.

18. The other High Courts are of the view that an auction purchaser is entitled to file a suit for the recovery of his purchase money. The reasoning adopted by these courts is that when subsequently it is discovered that the judgment-debtor had no saleable interest in the property purchased by the auction purchaser id a court

sale, there is nothing which he has purchased. The property has been sold by the court under the belief (sic) it belongs to the judgment debtor. If it is subsequently discovered that the judgment debtor had no saleable interest in it, it amou(sic)nus to a mistake of fact between the decree holder and the auction purchaser. The further reasoning adopted by them is that it is a case of fall of consideration. The auction purchaser gets nothing in return against the price he pays. In other words, where the judgment debtor has no saleable interest at all, nothing has been sold and if nothing is sold, there is no sale. Thus, it is a case where there is simply a payment of money in return for nothing the courts which tock this view are those of Lahore, Madras, Andhra Pradesh, the Chief Court of Ou(sic)oh, Rangoon and (sic)avancore Cochin.

19. This conflict and cleavage in judicial opinions was noticed by a D.B. of this Court in Thakarlal v. Nathulal . Their Lordships adopted the view taken by Lahore and other High Courts. The view taken is that an auction purchaser is entitled to recover back the purchase money from the decree-holder after the confirmation of a sale in his favour if it is subsequently discovered that the judgment debtor had no saleable interest in the property purchased by the auction purchaser. When the judgment debtor has no saleable interest in the property sold, the position is as if there was no sale and if there was no sale of the property, the decree holder cannot lay claim to the money realised from the sale and it would be a case of absolute failure of consideration for the auction purchaser. The right to recover money that has been paid for a certain consideration which has absolutely failed is a right of civil nature and may be founded on principle underlying Section 65 of the Contract Act. The money may be recovered also on the principle of paid and received.

20. Thus, so far this Court is concerned, the auction purchaser is entitled to maintain the suit and recover the purchase money if subsequently it is discovered that the judgment debtor had no saleable interest in the property purchased by him. The suit of the plaintiff is, therefore, maintainable and be, both in law and equity is entitled to have a return of his money from the decree holder.

21. No other contention was raised.

22. In the result, the plaintiff's appeal is allowed and the judgment and decree of the learned District Judge, Bikaner dated May 16, 1972 are set-aside and that of the trial court are restored. The plaintiff's suit for the recovery of a sum of Rs. 3601/- as principal and Rs. 72/- as interest thereon i.e. for a sum of Rs. 3673/- is decreed against the defendant with pendente lite and future interest at the rate of Rs. 6% per annum in the principal amount of Rs 3601/-. The defendant will bear costs through out.

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