

Harendra Kumar Roy Vs. ImamuddIn Saha and ors.

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Court : Kolkata

Decided On : Mar-18-1942

Reported in : AIR1943Cal56

Appellant : Harendra Kumar Roy

Respondent : imamuddIn Saha and ors.

Judgement :

Biswas, J.

1. This is an appeal on behalf of defendant 1 and is directed against the decision of the Subordinate Judge of Dinajpur, reversing that of the Munsif of Balurghat, by which he gave the plaintiffs a decree declaring their title to the disputed lands and confirming their possession thereof. The facts were as follows : Defendant 2 first executed a simple mortgage in favour of the plaintiffs in respect of 20 bighas of land. Thereafter, he executed a usufructuary mortgage in their favour in respect of another 12 bighas for the period 1923 to 1934. Nine years later, on 24th February 1932, defendant 2 executed another usufructuary mortgage in favour of defendant 1. This mortgage comprised the lands which were the subject-matter of the two prior mortgages in favour of the plaintiffs and some additional lands, making a total of 62 bighas in all. The period for which this mortgage was granted was from 1932 to 1946. Some time thereafter the plaintiffs sued to enforce the first mortgage in their favour in respect of 20 bighas, and : in that suit they impleaded defendant 1

as a party as a subsequent incumbrancer. The suit was decreed in due course, and in execution of, the decree the plaintiffs themselves purchased¹ the mortgaged properties in part satisfaction of their dues. They then applied for and obtained a personal decree against defendant 2 under Order 34, Rule 6, Civil P.C., for the unsatisfied balance, and put this decree in execution against the 12 bighas of land which they held under the second mortgage in their favour and in respect of which, as already stated, defendant 1 was a later usufructuary / mortgagee. Defendant 1 thereupon filed an objection, which purported to be one under Section 47, Civil P. C, to the attachment and sale of these lands on the ground that he had an interest in the same. This objection was allowed, and by an order dated 10th June 1935, the learned Munsif, before whom the execution proceeding was pending, directed! that the attachment would continue subject, to the mortgage in favour of defendant 1. The sale was then held on 19th September 1935, when the properties were purchased by the plaintiffs themselves. The plaintiffs then applied for delivery of possession and this led to a further application from defendant 1 under the provision of Order 21, Rule 100 of the Code. The application was allowed on 30th. November 1936. Thereafter, it appears that defendant 1 obtained decrees for adipaddy against the plaintiffs and the aditenants in respect of these lands. The plaintiffs then instituted the present suit on 31st May 1937 by which they sought a declaration that by virtue of their purchase at the auction sale. in execution of their mortgage decree they had acquired a title to the 12 bighas of land free from the interest of defendant 1. As already stated the learned Munsif dismissed the suit, but on appeal the learned Subordinate Judge gave the plaintiffs a decree. Hence this present appeal.

2. It seems to me that the question which the plaintiffs seek to raise in the present suit is really concluded by the order which was made in their presence on 10th June 1935, on the application of defendant 1 under Section 47, Civil P. C. It was definitely held by that order that defendant 1 had the interest of a usufructuary mortgagee in the lands and that the plaintiffs' attachment of these lands should be subject to such interest. If the plaintiffs themselves purchased the properties at the sale which followed, they must be deemed therefore to have acquired the same subject to the said interest of defendant 1. The learned Subordinate Judge was, however, of opinion that that order was without jurisdiction, and would not,

therefore, operate as *res judicata* or be otherwise binding on the plaintiffs, and that view has been pressed before me with some insistence on behalf of the respondents. It need not be disputed that if the order can be said to be without jurisdiction, it will not be binding. The whole question is whether it could be so regarded. The only reason which the learned Judge gives in support of his view is that defendant 1 was not a necessary party in the proceeding for recovery of a personal decree under Order 34, Rule 6, Civil P.C. He apparently meant to hold that as defendant 1 was not a party to that decree, any objection which he might raise in the subsequent execution proceeding would not be an objection by the judgment-debtor or a representative of the judgment-debtor. The matter could not accordingly fall within the scope of Section 47. In so far, therefore, as the learned Munsiff had purported to deal with the application under that section, the order made by him must be deemed to have been without jurisdiction. The reason seems to be plausible enough, but on the facts of the case, it seems to me that to give effect to it would be to attach undue importance to form rather than to substance. In order to determine whether the Munsiff had jurisdiction to entertain the application which was made to him, and to make the order he did on it, the test should be, not how the application was described by the petitioner before him, but what it contained. It may be, as the learned Judge holds, that the application could not strictly come within the scope of Section 47, but that need not *ipso facto* deprive the Court of jurisdiction to deal with it, if there was some other section of the Code under which it could be dealt with.

3. In my opinion, it cannot be for a moment disputed that the objection which was actually raised by defendant 1 by his petition was one which the executing Court was competent to go into. Such an objection might have been made by a stranger to the decree under Order 21, Rule 58. The learned advocate for respondents in fact conceded that if the application had been headed as one under Order 21, Rule 58, he could not have anything to say against it. That being so, I think it will be quite proper and legitimate to treat the application as one under this particular provision of the Code rather than under Section 47. In my opinion, the Court should not be so astute as to throw out an application on the technical ground of mere misdescription, if on the merits it would have jurisdiction to entertain it. It follows accordingly in the present case that the application could not fail merely

because it could not be brought within the scope of Section 47, so long as it was possible to deal with it under the provision of Order 21, Rule 58.

4. My attention was drawn to a number of cases, but they hardly touch the point now in dispute. The nearest case was that in A.I.R. 1926 Cal. 991 (26) 13 A.I.R. 1926 Cal. 991 : 92 I.C. 845 Sashi Bhushan v. Sadananda. But I do not think it is of any assistance to the respondents. What happened there was that after an application for delivery of possession but before delivery of possession could be given, the auction purchaser, who was a limited owner, died. Thereafter certain persons claiming to be the nearest reversioners of the last male owner applied that possession might be delivered to them.

5. The learned Munsiff made an order in their favour. Certain other persons then' came forward setting up a better title and claiming possession of the properties. The learned Munsiff heard the objection and ultimately decided in favour of the objectors. As a result, he recalled his previous order and directed possession to be given to the objectors. There was an appeal against this order to the District Judge, and the District Judge held that the Munsiff had no jurisdiction to revise his first order. There was thereafter a suit between the parties, and the question was whether the order for delivery of possession was res judicata. This Court held that that order was without jurisdiction and could not accordingly have that effect. In taking the view that the previous order was without jurisdiction, the learned Judges; of this Court were careful enough to point out not only that the matter was not one coming under Section 47, Civil P.C., but that the order could not be justified by any other provision of the Code. That is quite a different state of things from what arises in the present case. It cannot be said here that because the order did not come under Section 47, it could not be justified by some other provision of the Code. There is therefore nothing in this judgment which lends support to the respondents' contention. The other eases relied on by the learned advocate are much farther away from the point under consideration. The result is that, in my opinion, the judgment of the learned Subordinate Judge must be reversed and that of the learned Munsif restored. The appellant is entitled to his costs in all Courts.