Sheodhyan Singh and Others

Vs

Musammat Sanichara Kuer and Others

Civil Appeal No. 497 of 57

(P. B. Gajendragadkar, K. N. Wanchoo JJ)

04.05.1961

JUDGMENT

WANCHOO, J. -

This is an appeal on a certificate granted by the Patna High Court. The respondents brought a suit with respect to ten plots of land and claimed a declaration that the property belonged to them and prayed for possession of the plots by ejectment of the defendants-appellants and for mesne profits. Besides the appellants, there was another set of defendants to the suit from whom the respondents purchased the property. The respondents' case was that the appellants had taken a loan from the other defendants on a mortgage bond on the basis of which those defendants instituted a suit in 1932. This suit was decreed against the appellants and thereafter the other defendants got the mortgaged property sold by auction in execution and purchased it themselves in 1936. Thereafter the other defendants entered into possession of the property, delivery of which was made to them by court. The other defendants remained in possession of the property till they sold it to the respondents in 1943. Thereafter the respondents came into possession of the property. The appellants however began to create trouble from 1942. After the sale to the respondents, the appellants created further trouble which led to proceedings in a criminal court under s. 144 of the Code of Criminal Procedure and the appellants were forbidden from going to the property in dispute. Later on, the appellants were bound down under s. 107 of the Code of Criminal Procedure to keep the peace. In 1945 there was a murder in connection with this property on account of which some of the appellants were tried by the court of session but were acquitted. There were further troubles over the crop of these plots in 1945. Eventually after their acquittal by the court of session, the appellants took possession of the property by forcibly dispossessing the respondents. Consequently the respondents filed the suit out of which this appeal has arisen in July 1946.

The suit was resisted by the defendants on a large number of grounds with which we are however not concerned now. The only points urged before us by learned counsel for the appellants is with respect ot three plots out of the ten which were the subject matter of the suit. The trial court accepted the case put forward on behalf of the respondents and decreed the suit for possession and ordered that mesne profits would be determined subsequently. There was then an appeal by the present appellants to the High Court. The High Court dismissed the appeal except as to one plot with respect to which the suit of respondents was dismissed. As the decree was on variance the High Court granted a certificate; and that is how the present appeal has come up before us.

We have already pointed out that the learned counsel for the appellants has confined his arguments before us with respect only to three plots, namely, 1060, 427 and 1128, out of the ten plots which were in dispute in the courts below. His contention is that in any case the courts below were wrong

in granting possession to the respondents with respect to these three plots. We propose therefore to deal with the contentions raised in respect of these three plots only.

Re. Plot. No. 1060.

The contention on behalf of the appellants with respect to this plot is that it was neither included in the final decree for sale in favour of the respondents' predecessors-in-interest nor in the sale certificate. Therefore, it was not open to the courts below to grant a decree in favour of the respondents with respect to this plot. The final decree contains ten plots. It gives the Tauzi Number the Khasra Number, the Thana Number, the Survey Number, the area and the boundaries of each plot. Among the ten plots mentioned in the final decree, there is a plot No. 160, but no plot bearing No. 1060. In the sale certificate also the same ten plots are mentioned. The sale certificate contains the khata number, the plot number, the area and the boundaries of each plot. There also we find No. 160 but no No. 1060. The High Court has held that No. 160 in the final decree and in the sale certificate is a mistake for 1060. It has further held that this is a case of misdescription and not a case of disputed identity, for in this case the identity of the plot included in the final decree and sold through the sale certificate is not uncertain. It has pointed out that the khata number, the area and the boundaries that are given in the final decree and in the sale certificate correspond with the khata number, the area and the boundaries of plot No. 1060. It has also pointed out that in the writ of delivery of possession to the respondents' predecessors as well as in the sale deed in favour of the respondents the correct plot (namely, 1060) has been mentioned. Further the High Court has also pointed out that there is no plot bearing No. 160 in khata No. 97. Therefore, as the khata number, the area and the boundaries given in the final decree and in the sale certificate tally with No. 1060, the identity is clearly established and there has only been a misdescription of the plot in the final decree as well as in the sale certificate by the omission of one zero from the plot number.

In this connection, learned counsel for the appellants relies on Rambhadra Naidu v. Kadiriyasami Naicker [(1921) L.R. 48 I.A. 155.]. In that case it was held that "certificates of sale are documents of title which ought not to be lightly regarded or loosely construed." It was further held that "where upon a sale under a mortgage decree the purchaser has been given a sale certificate which plainly includes certain property and has been put into possession, it is not open to the Court in a subsequent suit by the mortgagor's representative to hold by reference back to the mortgage deed that the property in question was not sold under the decree." The facts in that case were very different from the facts in the present case. There what had happened was that the mortgage included the pannai lands which belonged to the mortgagor and which were in his enjoyment. But at the date of the mortgage certain pannai lands were not in the enjoyment of the mortgagor. When however the sale proceedings were taken in execution the person who was in possession at the date of the mortgage of some of the pannai lands was dead and in the final decree as well as in the execution proceedings all pannai lands belonging to the mortgagor and in his enjoyment were ordered to be sold. The mortgagor objected that some of the pannai lands were outside the mortgage and were not liable to sale. This objection was disallowed and all the pannai lands were sold and were included in the sale certificate and possession thereof was delivered to the purchasers. In these circumstances the Privy Council held that it was not possible to go back to the mortgage deed to find out what had been sold. It was also held that no suit could lie in the circumstances in view of s. 47 of the Code of Civil Procedure.

In the present appeal, the learned counsel for the respondents does not ask us to go beyond the sale certificate and the final decree for sale; his contention is that there is a mere misdescription of the plot number in the two documents and that the identity of the plot sold is clear from the

circumstances which we have already set out above. He relies on Thakur Barmha v. Jiban Ram Marwari [(1913) L.R. 41 I.A. 38.]. In that case what had happened was that the judgment-debtor owned a mahal in which ten annas share was mortgaged while the remainder was free from encumbrances. A creditor of his attached and put up for sale six annas share out of the mortgaged share. The property attached was sold. When the auction purchasers applied for the sale certificate they alleged that a mistake had been made in the schedule of the property to be sold in that the word "not" had been omitted from the description of the six annas share and that the property should have been described as being six annas not mortgaged. This prayer of theirs was allowed by the executing court and the appeal to the High Court failed. On appeal to the Privy Council, it was held that in a judicial sale only the property attached can be sold and that property is conclusively described in and by the schedule to which the attachment refers, namely, the six annas share subject to an existing-mortgage. The Privy Council therefore allowed the appeal and observed that a case of misdescription could be treated as a mere irregularity, but the case before them was a case of identity and not of misdescription. It was pointed out that a property fully identified in the schedule may be in some respects misdescribed, which would be a different case. Thus the effect of this decision is that where there is no doubt as to the identity and there is only misdescription that could be treated as a mere irregularity. Another case on which reliance has been placed on behalf of the respondents is Gossain Das Kundu v. Mrittunjoy Agnan Sardar [(1913) 18 C.L.J. 541.]. In that case the land sold was described by boundaries and area; but the area seems to have been incorrect. It was held to be a case of misdescription of the area and the boundaries were held to prevail.

We are of opinion that the present case is analogous to a case of misdescription. As already pointed out the area, the khata number and the boundaries all refer to plot No. 1060 and what has happened is that in writing the plot number, one zero has been missed and 1060 has become 160. It is also important to remember that there is no plot bearing No. 160, in khata No. 97. In these circumstances we are of opinion that the High Court was right in holding that this is a case of misdescription only and that the identity of the property sold is well established namely, that it is plot No. 1060. The matter may have been different if no boundaries had been given in the final decree for sale as well as in the sale certificate and only the plot number was mentioned. But where we have both the boundaries and the plot number and the circumstances are as in this case, the mistake in the plot number must be treated as a mere misdescription which does not affect the identity of the property sold. The contention of the appellants therefore with respect to this plot must fail.

Re. Plot No. 427

This plot was originally mortgaged with two other plots in 1920 with the other defendants for Rs. 400/. Later, the mortgagor usufructuarily mortgaged this plot with a number of others with Ramzan Mian and another in 1927 for Rs. 2,500/-. This mortgage deed does not show that any money was left with the mortgagees to redeem the plots mortgaged with the other defendants. But it appears that soon after the mortgage in favour of Ramzan Mian, the mortgage in favour of the other defendants was redeemed by payment of the mortgage amount due to them through Nizam-ud-din and Shams-ud-din. It is said that this payment was made on behalf of Ramzan Mian and therefore Ramzan Mian and another were subrogated in place of the other defendants so far as this plot was concerned. Further it is urged that Ramzan Mian and another were not made parties to the suit of 1932 and that there is nothing to show that when the suit was brought for sale of the ten plots in 1932 the mortgage made in favour of Ramzan Mian and another in 1927 had been redeemed and therefore the purchasers in the execution proceedings in that suit could only get the property subject to the mortgage of Ramzan Mian and another and could not dispossess the appellants, if they were in possession through mortgagees Ramzan Mian and another. In reply, the learned counsel for the

respondents contends that so far as the appellants are concerned, their right and title in this plot have completely gone and it is not for the appellants to claim any right of subrogation in respect of the mortgage which was redeemed by Ramzan Mian and another. Further it is urged that there is nothing to show on this record that in 1932 when the suit was brought the mortgage of Ramzan Mian and another was subsisting and that the appellants were in possession on behalf of Ramzan Mian and another. Therefore the appellants could not put forward any claim for possession of plot No. 427 and if Ramzan Mian and another had any claim they can look after their own interest, even if they were not made parties to the suit of 1932. The result would be that their rights in their mortgage would be subsisting and they can enforce them, if they can under the law, against the respondents; but the appellants cannot put forward their claim to defeat the respondents' case.

We are of opinion that there is no force in these contentions raised on behalf of the appellants. In the first place, it is difficult to understand how the appellants can raise the question of subrogation on behalf of Ramzan Mian and another. In the second place, Ramzan Mian and another could only be subrogated to the rights of the mortgagees of 1920 whose mortgage they had redeemed if there was an agreement in their mortgage that they would be so subrogated. We might have inferred such agreement if any money had been left with Ramzan Mian and another to redeem the earlier mortgage; but the mortgage deed of 1927 in their favour says nothing about the earlier mortgage at all. In these circumstances there can be no question of subrogation even if it was open to the appellants to raise that point before us on behalf of Ramzan Mian and another.

As to the contention that Ramzan Mian and another were not made parties to the mortgage suit and therefore their rights are not affected and if the appellants held the land from Ramzan Mian and another they would still be entitled to possession and could not be dispossessed, it is enough to say that this argument could be raised if it were established that the mortgage of 1927 was still subsisting when the suit was brought in 1932. On that point however there is no evidence and we do not know whether the mortgage of Ramzan Mian and another was subsisting in 1932. Further the finding of the High Court is that whatever evidence is on the record shows that at any rate in 1935 the appellants were in possession of plot No. 427. In these circumstances we cannot hold positively that the mortgage of Ramzan Mian and another was subsisting in 1932 when the suit was brought and that the appellants were in possession of this plot on behalf of Ramzan Mian and another. The appellants therefore cannot resist the claim of the respondents for possession on the ground that they are holding this plot on behalf of Ramzan Mian and another without any proof of this on the record. The appellants contention therefore with respect to plot No. 427 must also fail.

Re. Plot No. 1128

The case of the appellants with respect to this plot is similar to the case with reference to plot 427. In the circumstances the appellants' contention with respect to this plot must also fail. As no other point was urged before us, the whole appeal fails.

We therefore dismiss the appeal with costs.

Appeal dismissed.

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