

S. M. Karim

Vs

Mst. Bibi Sakina

Civil Appeal No. 647 of 1962

(M. Hidayatullah, Raghuvar Dayal JJ)

14.02.1964

JUDGMENT

HIDAYATULLAH, J. –

This is an appeal by special leave against the judgment of the High Court of Patna reversing the concurrent judgments of the two courts below, and ordering the dismissal of the suit of the appellant. The appellant is Syed M. Karim, son of one Syed Aulad Ali and the respondent Mst. Bibi Sakina (defendant No. 11) is transferee of the properties in dispute from Hakim Alam (defendant No. 2), son-in-law of Syed Aulad Ali. The appellant, in his turn, is a transferee of the same properties from his father Syed Aulad Ali.

The suit was brought for declaration of title and confirmation of possession or in the alternative for delivery thereof against several defendants in respect of this and other properties. We are not concerned in this appeal with the other defendants or the other properties. This part of the appellant's suit was based on the allegation that Syed Aulad Ali had purchased the suit properties on May 28, 1914 at a court sale, benami in the name of his son-in-law Hakim Alam. The reason for the benami purchase was that under the rules of the Darbhanga Raj where Syed Aulad Ali was employed, persons serving in certain capacities were prohibited from purchasing at court sales. The sale certificate was issued in the name of Hakim Alam who was then living with Syed Aulad Ali. On January 6, 1950, Syed Aulad Ali sold the property to his son the present appellant and Hakim Alam sold the property in his turn to Bibi Sakina and the present suit was filed for the above reliefs.

In this appeal, it has been stressed by the appellant that the findings clearly establish the benami nature of the transaction of 1914. This is, perhaps, true but the appellant cannot avail himself of it. The appellant's claim based upon the benami nature of the transaction cannot stand because s. 66 of the Code of Civil Procedure bars it. That section provides that no suit shall be maintained against any person claiming title under a purchase certified by the Court on the ground that the purchase was made on behalf of the plaintiff or on behalf of someone through whom the plaintiff claims. Formerly, the opening words were, no suit shall be maintained against a certified purchaser, and the change was made to protect not only the certified purchaser but any person claiming title under a purchase certified by the Court. The protection is thus available not only against the real purchaser but also against anyone claiming through him. In the present case, the appellant as plaintiff was hit by the section and the defendants were protected by it.

It is contended that the case falls within the second subsection under which a suit is possible at the instance of a third person who wishes to proceed against the property, though ostensibly sold to the certified purchaser, on the ground that it is liable to satisfy a claim of such third person against the

real owner. Reliance is placed upon the transfer by Syed Aulad Ali in favour of the appellant which is described as a claim by the transferee against the real owner. The words of the second sub-section refer to the claim of creditors and not to the claims of transferees. The latter are dealt with in first sub-section, and if the meaning sought to be placed on the second sub-section by the appellant were to be accepted, the entire policy of the law would be defeated by the real purchaser making a transfer to another and the first sub-section would become almost a dead letter. In our opinion, such a construction cannot be accepted and the plaintiff's suit must be held to be barred under s. 66 of the Code.

As an alternative, it was contended before us that the title of Hakir Alam was extinguished by long and uninterrupted adverse possession of Syed Aulad Ali and after him of the plaintiff. The High Court did not accept this case. Such a case is, of course, open to a plaintiff to make if his possession is disturbed. If the possession of the real owner ripens into title under the Limitation Act and he is dispossessed, he can sue to obtain possession, for he does not then rely on the benami nature of the transaction. But the alternative claim must be clearly made and proved. The High Court held that the plea of adverse possession was not raised in the suit and reversed the decision of the two courts below. The plea of adverse possession is raised here. Reliance is placed before us on *Sukan v. Krishanand* (I.L.R. 32 Pat. 353) and *Sri Bhagwan Singh and others v. Ram Basi and others* (A.I.R. 1957 Pat. 157) to submit that such a plea is not necessary and alternatively, that if a plea is required, what can be considered a proper plea. But these two cases can hardly help the appellant. No doubt, the plaint sets out the fact that after the purchase by Syed Aulad Ali, benami in the name of his son-in-law Hakir Alam Ali continued in possession of the property but it does not say that this possession was at any time adverse to that of the certified purchaser. Hakir Alam was the son-in-law of Syed Aulad Ali and was living with him. There is no suggestion that Syed Aulad Ali ever asserted any hostile title against him or that a dispute with regard to ownership and possession had ever arisen. Adverse possession must be adequate in continuity, in publicity and extent and a plea is required at the least to show when possession becomes adverse so that the starting point of limitation against the party affected can be found. There is no evidence here when possession became adverse, if it at all did, and a mere suggestion in the relief clause that there was an uninterrupted possession for "several 12 years" or that the plaintiff had acquired "an absolute title" was not enough to raise such a plea. Long possession is not necessarily adverse possession and the prayer clause is not a substitute for a plea. The cited cases need hardly be considered, because each case must be determined upon the allegations in the plaint in that case. It is sufficient to point out that in *Bishun Dayal v. Kesho Prasad and another* (A.I.R. 1940 P.C. 202), the Judicial Committee did not accept an alternative case based on possession after purchase without a proper plea.

Reading the plaint as a whole, we agree with the High Court that a case based on possession after the purchase was not stated in the plaint and the decision of the High Court in the circumstances of this case was therefore proper. The appeal fails and is dismissed with costs.

Appeal dismissed.

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