Ganeshi Lal and Others Vs Jagan Nath and Another

Court: Allahabad High Court

Date of Decision: Dec. 16, 1915

Acts Referred: Civil Procedure Code, 1908 (CPC) â€" Section 66

Citation: AIR 1916 All 100(2) : 32 Ind. Cas. 171

Hon'ble Judges: Henry Richards, C.J; Rafique, J

Bench: Division Bench

Judgement

1. This appeal arises out of a suit in which the plaintiffs claimed a declaration of their title to a 3/5ths share in certain property and joint possession

over the same together with mesne profits. The Court below has granted the plaintiffs a decree subject to the paying of certain costs. The facts so

far as they are material for the purposes of our judgment are practically admitted by both sides. There was a mortgage dated the 10th of April

1885; It was made in favour of five brothers, one of whom was Behari Lal. A suit was instituted upon foot of this mortgage in 1891 and a decree

was obtained for Rs. 19,000 odd. The law as to the liability of heirs not made parties to mortgage suits was at that time not very clear. The result

was that a suit was brought by some of the heirs of the original mortgagors to have 68 shares out of 144 shares exempted from the sale under the

mortgage-decree on the ground that they had not been made parties to the suit. This suit was successful and 68 shares were exempted from sale.

Sometime afterwards in 1904 Behari Lal alone brought a suit, against the heirs who had been successful in exempting the 68 shares, for a

declaration that those shares were liable to be sold for the balance still remaining due on foot of the mortgage and for the sale of those 68 shares.

Behari Lal made the other brothers and their descendants pro forma defendants to this suit, alleging that they had declined to join with him. It is

necessary here to mention that in the year 1889, that is to say, long prior to the suit, Behari and his brothers had separated. Some of the pro forma

defendants made an application to be brought from the array of defendants to the array of plaintiffs; but instead of pressing the application they

failed to put in appearance and the application was refused for default. Behari"s suit was successful. He had remitted portion of the money that was

still due on foot of the mortgage upon the ground that the property was not worth the whole amount. The consequence was that Behari got a

decree in his own name for the sale of the property to realise Rs. 15,000 and costs. Behari then made an application to the Court for leave to bid

which was granted. Some of the pro forma defendants made an application to the sale officer (not to the Judge as they should have done) that

Behari should pay the amount of the purchase-money in cash and not be allowed to set off the decree; or that if he did set off the decree, the sale

should be concluded in the name of Behari Lal and themselves and that Behari Lal and they should be declared the purchasers. This application

was refused on the 15th of May 1905, the sale officer holding that Behari Lal was the sole owner of the decree. The property was put up to sale

and purchased by Behari Lal for Rs. 10,000. He was allowed to set off the decree pro tanto. The sale certificate to Behari is dated the 5th of July

1905. The present suit was instituted on the 11th of October 1912, that is to say more than seven years afterwards and subsequent to the death of

Behari Lal.

2. The Court below seems to have considered that the plaintiffs were entitled to possession of the property sued for in proportion to their shares in

the original mortgage. It is contended on behalf of the appellants that having regard to the provisions of Section 66 of the Code of Civil Procedure,

the present suit is not maintainable. That section provides that ""No suit shall be maintained against any person claiming title under a purchase

certified by the Court-in such manner as may be prescribed on the ground that the purchase was made on behalf of the plaintiff or on behalf of

some one through whom the plaintiff claims"". In our opinion this section has no application to the present case. If the plaintiffs are in a position to

show that they are entitled to this property, they are entitled to recover the same notwithstanding the provisions of Section 66. It is not alleged by

the plaintiffs that Behari Lal was benamidar for them. It seems to us that the plaintiffs" claim, if any, is founded upon equity. It is absolutely clear

that Behari Lal was not purchasing on behalf of the plaintiffs or their representatives. On the contrary he was purchasing the property for himself in

spite of their protests. It must also be carefully borne in mind that Behari Lal was in no sense the managing member of a joint Hindu family. We

have already pointed out that this family had separated in the year 1889. Had the plaintiffs or their representatives pressed their application to be

brought on to the array of parties on the plaintiffs" side they would probably have been successful. The Court would probably have granted their

application, subject to fair conditions as to their responsibility for the costs incurred by Behari Lal. They did not, however, press this application.

Later on when a decree was being made, in all probability had they asked the Court to frame the decree so as to safeguard their interests, it would

have done so on equitable terms. Even afterwards had the application that Behari Lal should be ordered to pay the purchase-money into Court,

been made to the Judge instead of to the sale officer, the plaintiffs'' interests might have been considered.

3. If the plaintiffs'' claim is based, as we think it is, upon equitable ground, we have to see what that equity was. It seems to us that the plaintiffs''

equity (if any) attached to the purchase-money which the purchaser of the properly, whoever he was, would pay. In the events which happened it

was that the Rs. 10,000 for which the property was purchased by Behari should be treated as cash, that out of that Rs. 10,000 the plaintiff who

had borne all the expenses and risk of the litigation should in the first place receive; not only the costs which were allowed him against the other

side, but also such costs as were reasonably and properly expended in carrying on the litigation. In the next place, Behari would have been entitled

to his share of the Rs. 10,000 (after deducting the costs) in proportion to his share in the mortgage and the present plaintiffs would have been

entitled to the balance in like proportion. Assuming that the plaintiffs or the persons they now represent had this equity, the proper time to enforce

and seek it was whilst the suit was pending or possibly even afterwards by an independent suit. It is admitted, however, that all their rights in the

Rs. 1.0,000 which was realised by the sale of the property is now barred by time and unless they can follow the property and get a decree for a

specific share, they have no remedy. If we look on the property purchased as representing the decree and even if we assume that the plaintiffs had

some equitable claim in respect of the decree, Behari''s interest was mush larger than that of the plaintiff. He was entitled to all the costs he had

incurred as well as his share of the mortgage debt.

4. We have, however, already pointed out, that the plaintiffs'' equity (if any) attached to the purchase-money and not to the property purchased.

The fact that the plaintiffs did not enforce their rights at the proper time in a proper manner is no just ground why they should now get possession

of the property.

5. We allow the appeal, set aside the decree of the Court below and dismiss the plaintiffs'' suit with costs in all Courts including in this Court fees

on the higher scale.