

(1935) 08 CAL CK 0006

Calcutta High Court

Case No: Appeal from Appellate Decree No. 2151 of 1933

Manir Ahmhad and Another

APPELLANT

Vs

Munshi Obedal Hoque and
Others

RESPONDENT

Date of Decision: Aug. 12, 1935

Final Decision: Dismissed

Judgement

Rau, J.

The only ground pressed in this appeal is that upon the admitted facts of the case and upon the findings arrived at by the Court of Appeal below, that Court should have held that the suit is barred by the provisions of sec. 66 of the present Code of Civil Procedure. The Plaintiffs are the sons of one Ajgar Ali. Defendants Nos. 1 to 3 are the heirs of his elder brother Annar Ali; Defendants Nos. 4 to 16 are tenants of the lands in suit. The suit was for declaration of the Plaintiffs' proprietary right in those lands and for confirmation of their possession through the aforesaid tenants.

2. The plaint avers that Ajgar Ali purchased the lands in suit at an execution sale in the name of Annar Ali; that Ajgar Ali was in possession (through tenants) during his life-time and after him, the Plaintiffs were in possession for more than the period of limitation; that neither Annar Ali nor Defendants Nos. 1 to 3 had at any time any title to or possession in the lands; and that it was only in 1928 that Defendants Nos. 1 to 3 obtained certain rent decrees against the tenants. It may be mentioned that the auction purchase took place on October 9th, 1874.

3. These averments have been found to be true by both the Courts below. The Court of first instance records its finding thus:--

The circumstances and the evidence discussed above therefore lead me to the conclusion that the purchase was really made with the money of Ajgar Ali and that Ajgar Ali alone realised the rent and that Annar Ali his brother was merely a benamdar for Ajgar Ali. There is also no other evidence except the decrees in the

rent suits Nos. 3289 and 8290 of 1928 on behalf of the Defendants to show any realisation of rent from the date of purchase up to this date and this circumstance is wholly against the case of the Defendants.

4. The lower Appellate Court has generally accepted this finding.

5. It is argued on behalf of the Appellants in this Court that even assuming the facts, as averred and found, to be true, the suit is barred by sec. 66 of the Code of Civil Procedure, 1908.

6. There are two serious difficulties in the way of this contention: First, on the merits, it is far from certain that the suit is governed by sec. 66 of the present Code. The auction-purchase in this case took place in 1874, when the Code in force was that of 1859. In the case *Promatha Nath Pal Chowdhuri v. Mohini Mohan Pal Chowdhuri* (1), the auction-purchase and an assignment by the certified purchaser both took place when the Code in force was that of 1882 and it was held that the suit was governed by sec. 317 of that Code and not by sec. 60 of the Code of 1908, although this latter Code was in force when the suit was instituted. Similarly, in a later case of this Court, *Umashashi Debi v. Akner Chandra Mazumdar* ILR 63 Cal. 297: S.C. 30 C.W.N. 160 (1925), which appears to have been instituted about the year 1921, Cuming, J., observed (Page 301 of the report):--

This suit is governed by the old Code,

although in that case the decision did not turn upon any difference of language between sec. 317 of the old Code and sec. 66 to the present Code. If the principle of these two cases is applied to the present case, it would follow that the suit must be governed by the Code of 1859.

7. It is true that on this point there has been a conflict of opinion, the Madras and Allahabad High Courts inclining to the view that suits brought after the present Code came into force are governed by sec. 66 of the Code irrespective of the date of the auction-purchase or the assignment by the certified purchaser. See for example *Chidambaram Chettiar v. Submmania Aiyar* [1916] 1 M. W. N. 220; 32 I. C. 434 (1915) and *Abdul Jalil Khan v. Obaidullah Khan* ILR 43 All. 416 (1921). Their Lordships of the Judicial Committee had an opportunity of setting the controversy at rest, in an appeal from the Allahabad decision cited above, but they refrained from dealing with the question, as the appeal could be disposed of on another ground [*Abdul Jalil Khan v. Obaidullah Khan* L.R. 56 IndAp 330: S.C. 33 C.W.N. 1061 (1929)]. The Calcutta view not having been overruled, even when there was a chance, I follow that view.

8. The present suits must therefore be held to be governed by the Code of 1859 which was in force when the auction-purchase took place. Sec. 260 of that Code provided that

any suit brought against the certified purchaser on the ground that a purchase was made on behalf of any person not the certified purchaser, though by agreement.

the name of the purchaser was used shall be dismissed with costs.

9. The section has to be strictly construed [Mussammat Buhuns Kowur v. Buhooree Lal 14 M. I.A. 406 (1872)]; therefore, the words "certified purchaser" cannot be held to include the heirs of the certified purchaser. Such at least was the view taken by this and the Allahabad High Courts of the corresponding section of the Code of 1882. [Dakhada v. Srimonto ILR 26 Cal. 950: S.C. 3 C.W.N. 657 (1899) and Sibta v. Bhagoli ILR 21 All. 196 (1899)]. The present suit being against the heirs of the certified purchaser and not against the certified purchaser himself would not, therefore, have been barred by sec. 260 of the Code of 1859.

10. That is one answer to the argument of the Appellants, but they have another difficulty to contend with, namely, that the ground now taken v/as not raised in either of the Courts below. No doubt, where a plea goes to the very root of the case, it can be raised for the first time in second appeal. Let us, however, consider the position here. The plaint averred continuous possession by Ajgar Ali and the Plaintiffs for longer than the period of limitation--in fact for over 50 years; and in prayer (ka) of their plaint, the Plaintiffs asked for a declaration of their title not only by virtue of the benami auction-purchase, but also by virtue of adverse possession (tamadi dakhali swattwa). On the findings of the Courts below, which I have stated earlier in this judgment, the claim by virtue of adverse possession appears irresistible. Had the Appellants taken the ground, in the trial Court, that the claim by virtue of the auction-purchase was barred by sec. 66 of the Code of Civil Procedure, 1908, an issue would doubtless have been framed on the alternative claim and would have been found in favour of the Plaintiffs. In the circumstances, it would hardly be fair to allow this ground to be taken now for the first time, while ignoring the Plaintiffs' claim on the basis of adverse possession. The appeal is, therefore, dismissed with costs.