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(1919) 08 CAL CK 0033

Calcutta High Court

Case No: None

Syam Kishore De	APPELLANT
Vs	
Umesh Chandra Bhattacharjee and Others	RESPONDENT

Date of Decision: Aug. 25, 1919

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 41 Rule 23, Order 43 Rule 1(u)

Citation: 55 Ind. Cas. 154

Hon'ble Judges: Panton, J; Asutosh Mookerjee, J

Bench: Division Bench

Judgement

1. This is an appeal under Order XLIII, Rule 1(u), Code of Civil Procedure, against an order of remand made under Order XLI, Rule 23, Code of Civil Procedure, in a suit for recovery of possession of land upon declaration of title by purchase. The disputed property was mortgaged on the 7th April 1892 by Ali Chand Bibi, Sheik Isuf and Sheik Joman to the father of the plaintiffs to secure a loan of Rs. 130. The mortgagee sued to enforce the security and obtained the usual mortgage decree on the 15th December 1897 for a sum of Rs. 344 and costs of the litigation. On the 21st March 1903 the decree-holder purchased the property in execution sale for a sum of Rs. 255. On the 9th June 1906 the auction-purchaser executed a conveyance of the property to one of the mortgagors Ali Chand Bibi for a consideration of Rs. 200. The conveyance was not registered as required by law, but the original owners, whose possession had not been disturbed by the auction-purchasers, continued in occupation. Meanwhile, Sham Kishore Dey, who held a decree for money against Ali Chand Bibi and Sheikh Isuf, had, in execution, purchased the right, title and interest of his judgment-debtors on the 21st December 1894. For some unexplained reason, be did not take possession for many years and symbolical possession was delivered to him only so recently as 30th December 1909. The plaintiffs instituted the present suit on the 29th March 1915 for recovery of possession on the

strength of their title by purchase at the mortgage sale on the 21st March 1903. They joined as defendants the representatives-in-interest of their mortgagors (defendants Nos. 1--9) as also Sham Kishore Dey, purchaser of the right, title and interest of their mortgagors (defendant No. 10). They ignored the cenveyance executed by them on the 9th June 1906. The suit was defended by defendants Nos. 1 and 10. The Court of first instance found that the conveyance was genuine and held that although it was inoperative as a conveyance by reason of non-registration, the plaintiffs were equitably estopped from setting up a title inconsistent with the agreement to sell, which could be specifically enforced against them. In this view, he dismissed the suit with costs. On appeal, the Subordinate Judge has held that the conveyance is inoperative in law and that the plaintiffs are entitled to succeed, subject to the exercise of right of redemption by the tenth defendant. In this view, the Subordinate Judge has set aside the decision of the primary Court and remanded the suit. The present appeal has been preferred by the tenth defendant alone.

2. On behalf of the appellant, it has been argued that the plaintiffs are disentitled to possession, as the agreement to sell was specifically enforceable, and placed them in the same position in a Court of Equity as if the requisite legal documents had been duly executed and registered. We are of opinion that this contention must prevail.

3. It is well settled, as the result of a long series of decisions in this Court, that when in pursuance of an agreement to transfer property the intended transferee has taken possession, though the requisite legal documents had not been executed and registered, the position is the same as if the documents had been executed, provided specific performance can be obtained between the parties to the agreement, in the same Court and at the same time as the subsequent legal question falls to be determined; Bibi Jawahir Kumari v. Chatterput Singh 2 C.L.J. 343; Singheeram Poddar v. Bhagbat Chander Nundi 6 Ind. Cas. 632 : 11 C.L.J. 548; Bepin Behari Mitter v. Tinkowri Pathak 9 Ind. Cas. 374 : 13 C.L.J. 271 : 15 C.W.N. 976; Secretary of State v. Forbes 17 Ind. Cas. 180 : 10 C.L.J. 217; Sarat Chahdra Ghose v. Sham Chand Singh Boy 14 Ind. Cas. 701 : 16 C.L.J. 71 : 89 C. 663; Puchha Lal v. Kuni Behary Lal 20 Ind. Cas. 803 : 19 C.L.J. 213 : 18 C.W.N. 445; Khagendra Nath v. Sonatan Ouha 31 Ind. Cas. 987 : 20 C.W.N. 149. These decisions are based on the well-known doctrine of equity enunciated in Walsh v Lonsdale (1882) 21 Ch. D. 9 : 52 L.J. Ch. 2 : 43 L.T 858 : 31 W.R. 109, that under certain circumstances, equity regards that as done which should have been done. The result attained in these oases was reached by the Judicial Committee in the case of Mahomed Muta v. Aghore Kumar Ganguli 28 Ind. Cas. 930 : 42 I.A. 1 : 42 C. 801 : 19 C. W.N. 260 : 17 Bom. L.R. 420 : 21 C.L.J. 231 : 28 M L.J. 548 : 13 A.L. 3. 229 : 17 M.L.T. 143 : 2 L.W 258 : (1915) M.W.N. 621 (P.C) by the application of the doctrine of part performance enunciated in Maddison v. Alder son (1883) 8 App. Cas. 437 : 52 L.J.Q.B. 737 : 49 L.T. 303 : 31 W.R. 820 : 47 J.P. 821. Illustrations of the application of that principle will be found in Khagendra Nath v. Sonatan Guha 31 Ind. Cas. 987 : 20 C.W.N. 149; Jnan Chandra Das v. Rajani Kanta Pal 41 Ind. Cas. 860 : 22 C.W.N. 522 and Mohammad

Skafikul Huq v. Krishna Gobinda Dutta 47 Ind. Cas. 428 : 23 C.W.N. 284 : 28 C.L.J 77. In the case last mentioned, Richardson, J., pointed out that the view adopted in this Court, though not in conformity with that taken elsewhere, Kurri Veerareddi v. Kuni Bapireddi 29 M. 386 : 1 M.L.T. 163 : 16 M.L.J. 395; Chidambara Chettiar v. Vaidilinga Padavachi 80 Ind. Cas. 40 8 : 88 M. 619; Ramanathan Chetty v. Ranganathan Chetty 43 Ind. Cas. 138 : 40 M. 1134 : 6 L.W. 300 : 22 M.L.T. 173 : 38 M.L.J. 252 : (1917) M.W.N. 767; Timangowda v. Benepgowda 28 Ind. Cas. 946 : 39 B. 472 : 17 Bom. L.R. 386 is supported by the observation of Lord Moulton in Loke Yew v. Port Swettenham Rubber Co. (1913) A.C. 491 : 82 L.J.P.c. 89 : 108 L.T. 467: "The present action, from this point of view, is an action by a bare trustee of land to eject the beneficial owner who is and has for years been in possession of the land and has cultivated it." The transferee under the conveyance was never disturbed in her enjoyment of the property; the possession which she was allowed to retain lulled her into security or partial security; she might otherwise have at any time claimed specific performance of the contract of sale, and as the agreement had not been denied by the plaintiffs before the institution of the salt, no question of limitation could be successfully raised in answer to a arose suit if such had been instituted forthwith. In such circumstances, there can be no doubt that the plaintiffs are not entitled to relief in a Court of Equity, whether we apply the rule in Walsh v. Lonsdale (1882) 21 Ch. D. 9 : 52 L.J. Ch. 2 : 43 L.T 858 : 31 W.R. 109 or Maddison v. Alderson (1883) 8 App. Cas. 437 : 52 L.J.Q.B. 737 : 49 L.T. 303 : 31 W.R. 820 : 47 J.P. 821.

4. As a last resort, the plaintiffs have urged that the tenth defendant should not be allowed to take up this defence, as the agreement to sell was not made with him. We are of opinion that there is no force in this contention. In the first place, the question was raised in the written statement of the first defendant, a representative-in-interest of the person in whose favour the infructuous conveyance was executed, and at his instance the fourth issue was specifically framed in the following terms:

Did the plaintiffs sell their interest in the disputed land to Ali Chand Bibi on receipt of consideration? If so, is the suit tenable?

5. This issue was decided against the plaintiffs by the trial Court. They appealed and got the decision reversed on an erroneous ground. The fact that the tenth defendant alone has appealed does not debar the Court from an enquiry into the grounds of the decision of the Subordinate Judge. In the second place, the tenth defendant is not a stranger to the property. He has never lost his right of redemption. If he is called upon by the plaintiffs to redeem their security, he is competent to defeat the claim by proof that their conduct has bean such as to disentitle them to assistance from a Court which is enjoined to decide the rights of parties with reference to rules of justice, equity and good conscience.

6. The result is that this appeal is allowed, the order of the Subordinate Judge set aside and the decree of the Court of first instance restored. This order will carry costs, both here and in the Court of Appeal below.