

(1918) 02 CAL CK 0037

Calcutta High Court

Case No: Appellate Decree No. 1858 of 1915

Satish Chandra Sarkar and
Others

APPELLANT

Vs

Brojogopal Dutta and Others

RESPONDENT

Date of Decision: Feb. 18, 1918

Final Decision: Dismissed

Judgement

Richardson, J.

The suit out of which this appeal arises was a suit for a half share of a holding comprising twelve big has odd which stood originally in the name of one Jagannath Mitra. The last male holder of the- entirety was Ram Charan Mitra. On his death the holding devolved as to half on his son Bepin Behary and as to half on his son Karunamoy. The sequence of the subsequent events and transactions is as follows :- On the 30th Agrahan 1291 (November 1884), Bepin Behary having died, his widow, Giribala, who succeeded him, sold his or her half share to the father of Defendant No. 1 and his co-sharers, Defendants Nos. 4 and 5. As to this half share there is now no dispute that it is in the possession of those Defendants.

2. As to the other half share which Plaintiff seeks to recover on Karunamoy's death unmarried it went to his mother Bimola (Ram Charan's widow) and on her death wrap inherited by Asutosh Haldar, her grandson by a daughter named Niroda. Asutosh Haldar was then a minor and for some reason Niroda caused the share to be entered in the zemindar's books in the name of Biraj Mohini, her widowed sister. It is common ground that Biraj Mohini was a mere benamdar.

3. On the 4th Ealgun 1301, Niroda on behalf of her son sold the share to Mihir, the brother of Defendant No. 1 and the father of Defendants Nos. 2 and 3.

4. In 1896, Niroda or her son through her brought a suit against Mihir to recover the share. The suit was successful and in execution of the decree, symbolical possession was given to Asutosh Haldar, as against Mihir, on the 14th October 1898.

5. Meanwhile, in 1897 some of the landlords in respect of their fractional share brought a suit for rent against Biraj Mohini, and obtained a decree against her. It is not disputed that this decree was a money-decree and not a decree in execution of which the holding itself could be sold. Nagendra Nath Pal, therefore, the purchaser at the Court sale which followed, purchased only the right, title and interest of the benamdar Biraj Mohini.

6. On the 20th Baisakh 1308 (April 1901), Asutosh Haldar, then apparently of age, executed a release of his rights in favour of Nagendra Nath Pal. This document was registered but it is clear that the registration was void; and accordingly the document is not admissible in evidence.

7. On the 20th Sraban 1308 (5th August 1901), Nagendra obtained symbolical possession (against Biraj Mohini) of the share he had purchased at the execution sale.

8. On the 23rd Joista 1309 (July 1902), the Plaintiff purchased Nagendra's rights and on the 9th August 1910 instituted the present suit under colour of the title so obtained. He was successful in the Courts below and the principal Appellant before us is the Defendant No. 1. The Defendants Nos. 2 and 3, the sons of Mihir and the Defendants Nos. 4 and 5 appear in the record as Respondents, but have taken no active part. The contest is between the Defendant No. 1 and the Plaintiff.

9. The case for the Defendant No. 1 is, firstly, that the Plaintiff's vendor purchased merely the right, title and interest of a benamdar and that the title which he conveyed to the Plaintiff is therefore worthless. Secondly, while admitting that Mihir's purchase of 1301 was made on his behalf as well as on behalf of Mihir himself, the Defendant No. 1 asserts that before the suit against Mihir was instituted, Mihir had sold his rights and left the land, and that he, the Defendant No. 1, has since been in possession of the disputed share adversely to the title claimed by the Plaintiff through Asutosh Haldar and Nagendra. He therefore pleads that the suit is barred by limitation.

10. On the question of title, the learned Pleader for the Plaintiff relied on *Rambehari v. Surendra* ((1913) Cri.L.J. 34). The proposition that the beneficial owner may be bound by the result of a suit against the benamdar whom he has set up to represent him is not in question. It may be that Asutosh Haldar was bound by the result of the rent suit but as the decree made therein was a money-decree, he was not necessarily bound by the sale of his property in execution. In such a case the rule applicable appears to be that stated in *Baburam v. Ram Sahai* ((1905) Cri.L.J. 806). "No doubt, the sale has taken place in execution of a decree for money. Prima facie, all that has passed in execution is the right, title and interest of the judgment-debtor. But, nevertheless, if the beneficial owner subsequently seeks to recover the property on the ground that his interest has not been affected by the execuion sale, he may be met, and under certain circumstances successfully met, by

a defence on the part of the purchaser, based on the doctrine of estoppel." In the present case, there is nothing to show that what was sold at the execution sale was anything more than the benami title. Nor is Ashutosh Haldar or his legal representative a party to the suit. The Plaintiff cannot say that his title is admitted in the suit by the beneficial owner. The Courts below have not found, nor apparently were they asked to find, that the Plaintiff's vendor was a bond fide purchaser for value without notice. There may, therefore, be a jus tertii outstanding and as in a suit for ejectment, the Plaintiff must rely on the strength of his own title and not on the weakness of his adversary's title, there may be at the lowest a doubt whether the Plaintiff's title is established. It is not, however, necessary actually to determine this question because, in my opinion, the suit is barred by limitation.

11. As the Plaintiff alleges in his plaint a previous possession of the disputed share and a subsequent dispossession, the burden is on him to prove possession by himself or his predecessor-in-interest within twelve years of the date of the suit. For this purpose, the Plaintiff relies on the symbolical possession obtained by Ashutosh Haldar on the 14th October 1898. But that possession was obtained as against Mihir. It is said that the decree against Mihir bound the Defendant No. 1. That may be, but symbolical possession is of no avail except against the actual party to the suit or the proceedings in execution [Mir Waziruddin v. Lala Deoki Natulan.(3)]. In a suit for ejectment all the parties in actual possession whom it is desired to eject should be made Defendants. Defendant No. 1 was not made a Defendant and constructive possession as against Mihir is of no avail against him. In my opinion, therefore, the appeal succeeds on the ground of limitation and the suit should be dismissed with costs throughout.

Beachcroft, J.

I agree that the suit is barred by limitation.