courtkutchehry.com

Company: Sol Infotech Pvt. Ltd.

Website: www.courtkutchehry.com

Printed For:

Date: 26/10/2025

Ram Ganu Ghadge Vs Hari Sambhu Ghadge

Second Appeal No. 634 of 1947

Court: Bombay High Court

Date of Decision: Jan. 20, 1950

Acts Referred:
Civil Procedure Code, 1908 (CPC) â€" Order 21 Rule 90, Order 21 Rule 92, Order 21 Rule 92(3), 47#Limitation Act, 1908 â€" Article 12, 142

Citation: AIR 1950 Bom 346 : (1950) 52 BOMLR 358

Hon'ble Judges: Dixit, J

Bench: Single Bench

Advocate: V.H. Gumaste, for the Appellant; G.A. Desai, for the Respondent

Final Decision: Dismissed

Judgement

Dixit, J.
This second appeal arises out of a suit filed by the plaintiff to recover from the defendants possession of a piece of land

admeasuring 8 gunthas out of Survey No. 187/2 situate at Mhavashi in the Patan taluka of the Satara District.

2. Prior to the Falni survey, Survey No. 187/ 2 corresponded to Survey No. 187/3. The area of the land was 16 gunthas and was of the

ownership of the plaintiff''s grandfather Dulbaji. Dulbaji had two sons, namely, Sambhu and Dhondi. Each of the two sons had 8 gunthas for his

share. The western portion of Survey No. 187/3-1 belonged to Dhondi, while the eastern portion of Survey No. 187/3-2 belonged to the plaintiff.

3. In 1917, the plaintiff mortgaged the eastern 8 gunthas along with some other properties to defendant 2. Defendant 2 brought Suit No. 231 of

1928 to enforce the mortgage and obtained a decree. In 1931 defendant 2 filed darkhast No. 136 of 1931 to execute the decree. The execution

proceedings were sent to the Collector, and the Collector sold Survey No. 187/2, and it was purchased by defendant 1. The auction sale took

place on 31st August 1932 and a sale certificate was issued on 28th November 1932.

4. On 24th March 1945, the plaintiff filed the present suit against the defendants claiming possession of 8 gunthas on the basis that he was the

owner thereof.

5. Defendant 1 filed a written statement, contending that he had purchased the suit property in the auction sale for Rs. 75; that the sale was

confirmed by the Collector on 25th October 1932; that he obtained possession of the suit property through the Mamlatdar; that the plaintiff"s suit

was barred u/s 47, Civil P. C.; that the suit was not in time; and that the suit was barred by the principle of estoppel.

6. The trial Court dismissed the plaintiff"s suit; but upon appeal by the plaintiff in the District Court of Satara, the learned Assistant Judge set aside

the decree of the trial Court and decreed the plaintiff"s suit. From the appellate decree defendant 1. has come up in second appeal.

7. Upon this appeal Mr. Gumaste for the appellant has raised a number of contentions; and before I deal with those contentions, it is necessary to

be clear as regards the facts in order to properly appreciate those contentions. Dhondi, who was the owner of the 8 gunthas, out of the 16 gunthas,

died about the year 1927 leaving no widow nor issue, and it is not in dispute that the plaintiff, after the death of Dhondi, became entitled to his 8

gunthas as the next heir. The result was that the plaintiff became the owner of 16 gunthas out of which he had previously given a mortgage of 8

gunthas to defendant 2. In the suit brought by defendant 2 to enforce the mortgage, the mortgaged property was described as survey No. 187, pot

No. 3/2, measuring 8 gunthas. In the mortgage decree that followed the Court directed that this mortgaged property should be sold. The decree is

Ex. 40 in the case. Defendant 2 applied to execute the decree and in the execution application the mortgaged property which was directed to be

sold was mentioned as survey No. 187, pot No. 3/2, measuring 8 gunthas. In the execution application, however, it was recited that the

description of the aforesaid property was after the Phalni Revision Survey No. 187, pot No. 2, measuring 16 gunthas. In the execution application

it was recited that the latter property should be sold. The darkhast is Ex. 37 in the case. Defendant 1 obtained a sale certificate and the property

shown as having been sold to defendant 1 is survey No. 187/2 measuring 16 gunthas. The sale certificate is EX. 39 in the case.

8. The first contention taken on behalf of the applicant is that the plaintiff"s suit is barred u/s 47, Civil P. C. Now, this suit is brought by the plaintiff

upon the basis of his title in which the plaintiff claims possession of 8 gunthas as owner. The suit is brought against defendant 1 who is the auction

purchaser and against defendant 2 who is the decree, holder in the mortgage suit. It seems to me that Section 47, Civil P. C., has no application.

Section 47(1) provides that all questions arising between the parties to the suit in which the decree was passed, or their representatives, and

relating to the execution discharge or satisfaction of the decree, shall be determined by the Court executing the decree and not by a separate suit.

The present is a suit between the plaintiff and defendant 2 who were respectively the judgment-debtor and the decree-holder in the mortgage

decree. The suit is also against the auction-purchaser. It seems to me that it is difficult to hold that the auction purchaser is either a party to the suit

in which the decree was passed or is a representative of the decree-holder. That being so, it is clear that Section 47 has no application.

9. It is next contended that the suit is barred under Order 21, Rule 92, of the Code. The point is based upon Sub-rule (3) of Order 21, Rule 92,

which provides that no suit to set aside an order should be brought by any person against whom such order is made. To understand Rule 92, it is

necessary to refer to Rule 89, Rule 90 and Rule 91. It is not in dispute that Rule 89 and 91 have no application. Rule 90 refers to an application to

set aside a sale on ground of irregularity or fraud; and Mr. Gumaste"s contention is that since no application is made to set aside the sale, the

present suit is barred under Order 21, Rule 92. But I am unable to accept this contention. The Court, which was executing the mortgage decree,

ordered sale of the property, that is, sale of survey No. 187/2. Now, this property was not the property which had been mortgaged, and this is not

disputed. The mortgaged property was survey No. 187/3-2. In the execution application this property was mentioned; but the decree-holder

asked survey No. 187/2 to be sold. The question, therefore, is whether the sale held in the execution proceedings is a good sale or a void sale.

Mr. Gumaste for the appellant has relied upon a decision of the Allahabad High Court reported in Rahim Baksh v. Kishen Lal I. L. R. (1939) ALL

385: A. I. R 1939 ALL 363. This authority is undoubtedly in favour of the contention urged in support of the appeal. There is, however, a contrary

authority which is to be found in the case reported in Bulaki Das and Others Vs. Kesri and Others, . It is to be noted that the earlier Allahabad

case has not been followed in the later Allahabad decision, and it would seem that there is a good deal of conflict of judicial opinion on the point in

the Allahabad High Court. However that may be, the question which I have to determine is whether the sale is void, and upon the facts which have

been proved in this case, the sale is void. The executing Court derived its authority to direct the sale of the mortgaged property from the mortgage

decree. The mortgage decree directed survey No. 187/3-2 to be sold. The executing Court, however, directed survey No. 187/2 to be sold. The

mortgaged property measured 8 gunthas and the executing Court directed 16 gunthas to be sold. If the mortgage decree did not authorise the sale

of 16 gunthas, it seems to me that the executing Court had no jurisdiction to sell 16 gunthas of survey No. 187/2. After all, an executing Court is to

execute the decree; and if the executing Court assumes to itself power which it does not possess to direct sale of the property which is not ordered

by the decree to be sold, it seems to me that the executing Court assumes jurisdiction which it does not possess. If, therefore, the executing Court

had no jurisdiction to direct the sale of the 8 gunthas other than the mortgaged property, the sale must, in my opinion be held to be a nullity. The

view that the sale is a nullity receives support from the case reported in Thakur Barmha v. Jiban Ram 41 Cal. 590: 41 I. a. 38 If the sale is a nullity,

then it mast follow, in my opinion, that there is no bar afforded by the provisions of Order 21, Rule 92, Civil P. C. Rule 92 contemplates the

application of Rule 90; and according to Rule 90, a sale can be set aside on the ground of irregularity or fraud in publishing or conducting the sale.

In this case, there is no evidence to show that fraud or irregularity was committed in publishing or conducting the sale. The executing Court by its

order dated 24th September 1931, directed the sale of the property by the Collector. This the executing Court had clearly no authority to do save

with respect to the 8 gunthas which was the subject-matter of the mortgage, decree. It seems to me, therefore, that Rule 90 of Order 21 of the

Code has no application; and if Rule 90 has no application, then Rule 92 will have no application. The result is that the suit is not barred under

Order 21, Rule 92, Civil P. C.

10. The next contention taken on behalf of the appellant is that the suit is barred under Article 12, Limitation Act. Article 12 contemplates a suit to

set aside a sale and the period of limitation is one year from when the sale is confirmed, or when the sale would otherwise have become final and

conclusive if no such suit is brought. Now, in the view which I have taken of the sale which I hold to be a nullity, it seems to me that Article 12,

Limitation Act, has no application. If the sale is a nullity, then that which is a nullity need not be set aside. That is the view taken by Broomfield in J.

the case reported in Karashiddayya Shiddayya Bennur Vs. Shree Gajanan Urban Co-operative Bank, Ltd., A contrary ruling has been cited by

Mr. Gumaste which is to be found in the case reported in Mahadeo v. Sadashiv 22 Bom. L. R. 1082: A. I. R 1921 Bom. 257. With respect, I

prefer to follow the later ruling and hold that the suit is not barred under Article 12, Limitation Act.

11. The last point taken on behalf of the appellant is that the suit is barred under Article 142, Limitation Act. In this connection the facts are these.

The sale was confirmed on 28th November 1932. The plaintiff alleged in the plaint that defendant 1 took wrongful possession of the suit property

in about 1936. In the written statement filed by defendant 1, defendant 1 stated that he had obtained possession of the suit property. In support of

the rival contentions, the plaintiff and defendant I gave evidence. The plaintiff stated that defendant 1 began to make vahivat of his portion about

three or four years after the auction sale and this suggests that defendant 1 got possession in 1935 or in 1936. Defendant 1 in his evidence stated

that he took possession of the land in the month of March. It is difficult to extract any meaning out of this statement because the statement does not

make mention of March of any particular year; but it is obvious that it must be March of 1933. It is important to note that defendant 1 had not

mentioned the date on which he got possession. Both the plaintiff and defendant 1 were cross-examined. In the cross-examination the plaintiff

stated that he was in vahivat of the whole land, that his portion of the land was sold, and that whatever land was sold in auction was in possession

of defendant 1. Defendant 1 in his cross examination stated that he had not given an application to the Mamlatdar for giving possession; that Hari

(i.e., the plaintiff) was in possession of 16 gunthas before the sale; that he had not got kabje pavati; that the Mamlatdar had not come for giving

possession; and that the Talathi gave him the sale certificate and asked him orally to make vahivat of the land Mr. Gumaste for the appellant says

that the present suit is a suit for possession on the allegation of previous possession followed by subsequent dispossession; and if it is a suit of that

nature, in that event the plaintiff must fail. The trial Court held that although the plaintiff''s suit was barred under Article 12, the same was not barred

under Article 142, Limitation Act. It is apparent, from the judgment of the trial Court, that the trial Court took the view that defendant 1 got

possession on or after 17th April 1933, so that the suit which was brought on 24th March 1945, was within twelve years. The lower appellate

Court considered that the suit was in time because defendant 1''s statement was vague and that the plaintiff''s title having been proved, doubtful

facts will have to be construed for the purpose of upholding the plaintiff''s title. With respect, I do not quite understand this statement. If the

plaintiff''s suit is one for possession upon the basis of prior possession followed by subsequent dispossession, then in that case the suit will fall

under Article 142, Limitation Act; and in that case the plaintiff has not merely to prove his title but his possession and dispossession within twelve

years. If any authority is needed for this proposition, it is to be found in the case reported in Naru v. Krishna 40 Bom. L. R. 166 : A. I. R 1938

Bom. 210.

12. Mr. Gumaste for the appellant concedes that he has produced no documentary evidence in order to show that he obtained possession on any

particular date, but it is urged that the onus is not on defendant 1 to prove that he got possession on any particular date. But in view of defendant

1''s evidence, I am not prepared to accept this contention. Defendant 1 stated in the written statement that he got possession in the same year as

the year of the auction sale. In the course of his evidence defendant 1 stated that he got possession in March without stating any particular year to

which ""March"" relates. The statement may mean it was March of 1933 or it may be that it was with reference to March of 1934 or 1935 or even

1936. But there is some evidence in connection with the question of possession. That is to be found in a vardi which is Ex. 42 in the case. That

vardi says that Rama Ganu (i.e., defendant l) produced the sale certificate and consequently a bond was made of his vahivat. There is an

endorsement in Col. 12 which recites that the sale certificate was shown on 13th April 1933. The suit was brought on 24th March 1945.

Therefore, counting backwards, twelve years would commence to run from 24th March 1933, and it seems to me that this vardi can reasonably be

interpreted as meaning that defendant 1 got possession in April 1933. Defendant l in the course of his evidence stated that he got possession in

March. But the reason for this statement is obvious because if defendant 1 obtained possession on or before 23rd March 1933, the plaintiff"s suit

would be out of time. It seems to me, therefore, that in the state of the evidence recorded in the case, and particularly in the view taken of that

evidence in the trial Court, I hold that the plaintiff"s suit is not barred under Article 142, Limitation Act. The question of onus is immaterial in appeal

and, therefore, upon the facts proved in the case, I am satisfied that the plaintiff has been in possession within twelve years before the suit. The last

point also must be rejected.

13. The result is that the appeal fails, and the same will be dismissed with costs.