

APPELLATE CIVIL.

Before *Jwala Prasad and Kulwant Sahay, J.J.*

MASUDAN LALL

1924.

v.

Feb., 8.

RAMGULAM SAHU.*

Bihar and Orissa Public Demands Recovery Act, 1914 (Bihar and Orissa Act IV of 1914), Schedule II, rule 43—Sale for arrears of cess—purchase by certificate—debtor, effect of—Certification sale—date from which title vests in purchaser—application by person in possession to set aside sale, maintainability of—Code of Civil Procedure, 1908 (Act V of 1908), Order XXI, rule 90—Cosharers—sale of property of, at certificate sale—purchase by one of them, effect of.

A purchase by the certificate-debtor of property sold under the Bihar and Orissa Public Demands Recovery Act, 1914. for arrears of cess, is not invalid.

The title of a purchaser at a certificate sale vests in him from the date of the sale and does not depend upon delivery of possession of the property.

Where a person in possession of property before a certificate sale continues in possession after the sale has vested the title in another, the possession of the former is merely on behalf of the purchaser and is not sufficient to support an application to set aside the sale under Order XXI, rule 90. Civil Procedure Code.

Where a cosharer purchases the property of the cosharers at a certificate sale his purchase does not enure for the benefit of the other cosharers unless the sale was brought about by his own default, laches or fraud.

Jotendro Mohun Tagore v. Debendro Monee(1), *Janki Singh v. Deonandan Prasad*(2), *Deonandan Prasad v. Janki Singh*(3) and *Faizar Rahman v. Maimuna Khatun*(4), distinguished.

* Appeal from Original Order No. 236 of 1922, from an order of Babu Abinash Chandra Nag, Subordinate Judge of Bhagalpur, dated the 25th May, 1922.

(1) (1878) 2 Cal. L. R. 419.

(2) (1916-17) 21 Cal. W. N. 473, P. C.

(3) (1910-11) 15 Cal. W. N. 776.

(4) (1912-13) 17 Cal. W. N. 1923.

Appeal by the petitioner.

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This was an appeal by Masudan Lall and his brother Saligram, against an order of the Subordinate Judge, dated the 25th May, 1922, disallowing his application to set aside an auction sale held in execution of a mortgage decree.

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The mortgage decree was passed on the 14th November, 1914, and the sale of the mortgaged properties took place on the 21st March, 1919. It was confirmed on the 9th December, 1920. One of the properties sold was Gossaingaon *alias* Bishunpur Gopi. Two-annas eight-pies, the share of Mr. Das, son of R. S. Das, one of the judgment-debtors, was purchased by Masudan Lall, on the 17th February, 1915, in execution of his money decree. Masudan Lall obtained possession of the aforesaid 2-annas 8-pies of Gossaingaon on the 6th June, 1915, and in due course obtained mutation of his name in Register D of the Collectorate. On the 13th May, 1919, the entire 16-annas of Gossaingaon was sold in execution of a road-cess certificate under the Public Demands Recovery Act and purchased by one Mahendra Narayan Das. In that certificate Masudan Lall and Saligram, the present appellants, and Shyam Sahay and others, were judgment-debtors. On the 6th August, 1921, Mahendra applied under Order XXI, rule 90, of the Civil Procedure Code, to set aside the sale of the 16-annas of *mauza* Gossaingaon. His application was numbered Miscellaneous Case No. 125 of 1921. While this was pending, on the 11th August, 1921, Masudan Lall and Saligram made a similar application to set aside the sale of 2-annas 8-pies of the said *mauza*, and this was numbered Miscellaneous Case No. 129 of 1921. The applicants in both these cases applied for stay of delivery of possession which the mortgagee sought to obtain under his purchase of the 21st March, 1919, in execution of the mortgage decree of the 14th November, 1914.

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On the 13th August, 1921, the Subordinate Judge held that the decree-holder was not entitled to obtain *dakhaldhani* with respect to the 2-annas 8-pies share purchased by Masudan Lall and Saligram. In spite of this order, the Subordinate Judge apparently stayed delivery of possession with respect to the entire 16-annas.

Then the decree-holders applied in revision to the High Court, and a Division Bench remanded the case to the Court below for giving delivery of possession over 13-annas 4-pies of the property in question.

The record of the case was received back in the Court below on the 30th March, 1922, and the Subordinate Judge then proceeded with the hearing of the applications for setting aside the sale. Evidence was then taken, which consisted of documents marked *Exhibit 1* (sale certificate of Mahendra), *Exhibit 2* (sale certificate of Masudan Lall) and *Exhibit 3* (Register D). The hearing concluded on the 20th May, 1922, and after the arguments of the parties judgment in the case of Masudan Lall and Saligram (Miscellaneous Case No. 129 of 1921) was delivered on the 23rd May, 1922, with the result that the Court held that Masudan Lall had :

“no such interest as can be said to be effected by the sale and he has therefore no right to apply for setting aside the sale.”

It was contended in the present appeal that the view taken by the Subordinate Judge was erroneous and that Masudan Lall and Saligram had an interest in the property which was affected by the sale and that, therefore, they had a right to apply under Order XXI, rule 90, of the Code. The Subordinate Judge held that whatever interest Masudan Lall and Saligram had acquired by their purchase on the 17th February, 1915, in execution of their money decree, was extinguished by the subsequent purchase of the entire *mauza* on the 13th May, 1919, by Mahendra Narayan Das in execution of the cess certificate under the Public Demands Recovery Act.

K. P. Jayaswal (with him *Monmatha Nath Pal* and *S. M. Gupta*), for the appellant.

Susil Madhab Mullick, *Sivanarain Bose* and *Harihar Prasad Sinha*, for the respondents.

The arguments appear sufficiently from the judgment.

JWALA PRASAD, J. (after stating the facts, as set out above, proceeded as follows) :—

Mr. *Jayaswal* contended that the purchase of Mahendra was wholly void, and consequently it did not affect the interest acquired by Masudan Lall and Saligram. It is said that Mahendra is son-in-law of Shyam Sahay, one of the judgment-debtors in the certificate sale, and that the purchase was *benami* by the judgment-debtors themselves. In support of this Mr. *Jayaswal* relies upon the finding of the Court in the objection of Mahendra Das in Miscellaneous Case No. 125 of 1921, wherein the Subordinate Judge held that :

“ the judgment debtor was the real objector in the name of his son-in-law with a bogus purchase.”

Mr. *Jayaswal* says that a judgment-debtor has no right to purchase any property in a sale held under the Public Demands Recovery Act, and refers to rule 43 of Schedule 2 of Bihar and Orissa Public Demands Recovery Act (Act IV of 1914). That rule runs :

“ When a tenure or holding, situated in an area in which Chapter XIV of the Bengal Tenancy Act, 1885, or Chapter XVI of the Orissa Tenancy Act, 1913, is in force, is put up for sale in execution of a certificate for arrears of rent due in respect thereof, the certificate-debtor shall not bid for or purchase the tenure or holding.”

The prohibition contained therein applies only to a sales held on certificates for any other dues, such as, of rent due from the tenure. It does not apply to sales held on certificates for any other dues, such as, cess. The execution with respect to a certificate for cess will, therefore, be governed by the general provisions of the Civil Procedure Code which enjoins no prohibition upon a judgment-debtor making any purchase, though in rule 72, Order XXI, it enjoins

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upon the holder of the decree not to purchase without the express permission of the Court. This aspect of the case was apparently overlooked by Mr. *Jayaswal*, and the plain reading of rule 43 was also missed. It may also be pointed out that the purchase by a judgment-debtor of a tenure or holding with respect to which the prohibition contained in rule 43 applies does not in itself render the sale void but that it can be avoided upon an application made by the decree-holder or any other person interested in the sale. This is obvious from clause (2) of rule 43. In no case, therefore, was the sale in question in which Mahendra appeared as purchaser, dated the 13th May, 1919, a void sale, assuming that Mahendra was only a *benamidar* of Shyam Sahay, one of the judgment-debtors and the latter was the real purchaser. The sale of the property in execution of the certificate for cess, dated the 13th May, 1919, therefore, stands, and the effect of that sale was to extinguish the interest of Masudan Lall and Saligram.

It is then contended that no possession was delivered to the purchaser of the certificate sale, namely, Shyam Sahay or Mahendra, and consequently Masudan Lall continued to be in possession of the property which he had obtained on the 6th June, 1915, and being in such possession he had an interest in the property which was affected by the auction sale in which the respondents purchased the property. But the title of the purchaser in the certificate sale did not depend upon the delivery of possession in order to perfect his title. It vested in him from the date the sale took place. The further proceedings of obtaining sale certificate or *dakhaldehanti* are merely in furtherance of the sale which took place on the 13th May, 1919. The possession of Masudan Lall and Saligram after their right, title and interest passed to the purchaser in the certificate sale was merely on behalf of the purchaser in the latter sale. The possession of Masudan Lall and Saligram could not, therefore, be held to be on their own behalf, which they were entitled

to protect. They have, therefore, no interest by virtue of their purchase. In this view the case relied upon by Mr. *Jayaswal* in Smith's Leading Cases, Vol. II, page 741, *Asher v. Whittock* (1), does not apply. No satisfactory evidence has been given as to the possession of Masudan Lall and Saligram after the 13th of May, 1919. Some *chalans* for payment of the revenue, though not exhibited in the Court below, were shown to us. They showed payments, prior to the certificate sale, of revenue and cesses by Masudan Lall and Saligram. It was also not stated before us that any Government revenue or cess was paid after the certificate sale. Therefore, as a matter of fact, they failed to prove their possession over the property. It would appear from a reference to Register D that the names of Masudan Lall and Saligram do not now stand registered, but have been expunged, and in their place the name of the mortgagee-purchaser has been recorded. The entry in Register D is of no avail to the appellants to show their interest in the property based either upon title or possession. The entry is liable to be corrected, and as a matter of fact has been corrected.

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The next argument of Mr. *Jayaswal* has been that inasmuch as the real purchaser at the certificate sale was one of the judgment-debtors Shyam Sahay, his purchase was that of a cosharer and must be held to enure for the benefit of the other cosharers Masudan Lall and Saligram and others. In support of this Mr. *Jayaswal* has relied upon the following cases: *Jotendro Mohun Tagore v. Debendro Monee* (2), *Janki Singh v. Debinnandan Prasad* (3) which went up to the Privy Council [*Deonandan Prashad v. Janki Singh*(4)], and *Faizal Rahman v. Maimuna Khatun*(5). These cases have no application to the present one. In those cases the sale was brought about by the default, laches, or even fraud of one of the cosharers

(1) (1865) L. R. 1 Q. B. 1.

(2) (1878) 2 Cal. L. R. 419.

(3) (1910-11) 15 Cal. W. N. 776.

(4) (1917) I. L. R. 44 C. 573; L. R. 44 I. A. 30.

(5) (1912-13) 17 Cal. W. N. 1233.

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who purchased the property. Therefore it was held that the cosharer stood in a fiduciary relationship with other cosharers in the property and he could not take advantage of his own laches or fraud so as to deprive the other cosharers of their interest in the property. No such thing has been shown in the present case. We cannot presume that the sale under the certificate of arrears of cess was brought about by Shyam Sahay, one of the judgment-debtors, on account of his own default, laches or fraud. The appellants had ample opportunity to prove that Shyam Sahay was guilty in having caused the sale of the property after the record was received by the Subordinate Judge from the High Court. It appears from the order-sheet, extracts from which I have quoted above, that ample opportunity was given to the appellants, and in fact they had their witnesses also summoned; but no evidence was given at the hearing except the aforesaid documents *Exhibits 1, 2 and 3*, referred to above. We have, therefore, to base our inference upon those documents alone. Mahendra's certificate simply shows that the sale had taken place on account of arrears of cess due from the judgment-debtors among whom Masudan Lall and Saligram's names also appeared. The only possible inference is that they along with other cosharers had equally defaulted. Therefore the certificate sale extinguished their interest in the property which vested in the purchaser at that sale whether he was Mahendra or one of the judgment-debtors, Shyam Sahay. Upon the evidence, therefore, in the case the Court below is right in holding that the purchase by Masudan Lall and Saligram, in 1915, of 2-annas 8-pies of Gaosaingaon *alias* Bishumpur Gopi was of no avail to them and they ceased to have any interest after the 13th May, 1919, when the entire village was sold in certificate sale.

The result is that the appeal is dismissed with costs.

KULWANT SAHAY, J.—I agree.

Appeal dismissed.