

(1958) 08 PAT CK 0003
In the Patna High Court
Case No : Civil Revision No. 587 of 1955

Baldeo Jha and Others

APPELLANT

Vs

Ganga Prasad Jha and Others

RESPONDENT

Date of Decision : 14-08-1958

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 23 Rule 3, 11, 9
Contract Act, 1872 — Section 23
Evidence Act, 1872 — Section 115
Pensions Act, 1871 — Section 12, 4, 5, 6

Citation : AIR 1959 Patna 17

Hon'ble Judges : V. Ramaswami, C.J; R.K. Choudhary, J

Bench : Division Bench

Advocate : Amarnath Jha and Brajeshwar Chandra Verma, for the Appellant;
Lalnarain Sinha, K.K. Sinha, Madhusudan Singh, Ashwini Kumar Roy and Ram
Narain Tewari, for the Respondent

Final Decision : Allowed

Judgement

R.K. Choudhary, J.—This application in revision has been presented by the defendants first party against the decree passed by the Munsif,

first court at Begusarai, exercising small cause court powers, in small cause court suit No. 54 of 1954. The plaintiffs opposite party instituted a suit

for recovery of a sum of Rs. 69-4-0 as their share of the Government pension received by the petitioners with interest thereon, The case of the

plaintiffs is that they and the defendants first and second parties descended from a common ancestor and are the Pandas of a temple at

Jaimanagala Garh. This temple receives an annual pension of Rs. 40 from the Government. The plaintiffs claimed to have eight annas interest

therein and, according to them, the defendants first and second parties each have four annas interest. There was a dispute between the parties with

respect to their right in regard to the above pension and this gave rise to two title suits, being title suits Nos. (113/73 of 1944/46 & 230/94 of

1944-46 filed in the court of the Munsif at Begusarai. Both the suits were made analogous and were compromised. The compromise was

recorded and a decree based on that compromise was passed. According to the terms of the compromise the plaintiffs were held entitled to

receive eight annas share and the defendants first party and the defendants second party to receive four annas share in each in the above pension.

Subsequent to the compromise decree, defendant No. 1 one of the petitioners, withdrew Rs. 80/- on 20-2-1953, and Rs. 40 on 4-3-1953, as

pension from the Government, but did not pay to the plaintiffs their eight annas share therein. Hence, they filed a suit for recovery of their share of

the amount recovered by defendant No. 1, as stated above, with interest thereon.

2. The case of the petitioners is that the plaintiffs are their distant gotias and that they did not descend from a common ancestor from whom they

claimed the pension. It has also been pleaded that the pension could not be the subject of division between the parties and the compromise entered

into between them in the suits referred to above were illegal and void. The defendants second party later on were transposed to the category of the

plaintiffs.

3. Apart from the compromise decree, the plaintiffs supported their claim also on the basis of a Taksimnama, exhibit 3, executed by the parties on

16-2-1948, according to which the parties were to receive shares in the pension as alleged by the plaintiffs in their suit. The learned Small Cause

Court Judge held that the plaintiffs were entitled to the shares as claimed by them in the above pension, but they could not get any interest thereon.

He, therefore, decreed the suit with respect to the share of the plaintiffs in the pension. Against this decree, the defendants first party have

presented this application.

4. Mr. Jha, appearing for the petitioners, has contended that the suit is not entertainable by a civil court and is barred u/s 4 of the Pensions Act,

1871 (Act No. XXIII of 1871). That section reads as follows:

Except as hereinafter provided, no civil court shall entertain any suit relating to any pension or grant of money or land-revenue conferred or made

by the British or any former Government, whatever may have been the

consideration for any such pension or grant, and whatever may have been the nature of the payment, claim or right for which such pension or grant may have been substituted.

Section 5 of that Act provides the mode in which claims to such pensions can be made and lays down that any person having a claim relating to

any such pension or grant may prefer such claim to the Collector of the District or Deputy Commissioner or other officer authorised in this behalf

by the appropriate Government; and such Collector, Deputy Commissioner or other officer shall dispose of such claim in accordance with such

rules as the Chief Revenue-authority may, subject to the general control of the appropriate Government, from time to time prescribe in this behalf.

Section 6 of that Act states that a civil court, otherwise competent to try the same, shall take cognizance of any such claim upon receiving a

certificate from such Collector, Deputy Commissioner or other officer authorised in that behalf that the case may be so tried, but shall not make

any order or decree in any suit whatever by which the liability of Government to pay any such pension or grant as aforesaid is affected directly or

indirectly. The above sections make it perfectly clear that if a person has to make any claim with regard to a pension, he has to prefer such claim to

the prescribed authority as laid down in Section 5 of the Act, and cognizance of the suit can be taken by a civil court only if such officer gives a

certificate that the case may be so tried.

On the other hand, if no claim has been made before the authority referred to above and no certificate has been obtained for the trial of the case

from such authority, the suit is not maintainable in a civil court. It has, however, been contended by Mr. Sinha appearing for the plaintiffs-opposite

party that the suit which is contemplated under those sections must be a suit against the Government so that no one can claim against the

Government without an enquiry having been made with regard to the claim of the claimant by the prescribed authority. His submission is that where

a suit has to be instituted for establishing the claims of the parties inter se who claim to have interest in receiving the pension and in which the

Government is not at all interested is not barred u/s 4 of the Act.

The argument put forward is that the Government has to pay pension to one who is entitled to receive the same, and the question who is so entitled

can very well be gone into by the civil court without any claim having been preferred before the authority prescribed in Section 5 of the Act. I am unable to agree with this contention. The object of the above sections is that the Government should not be made ordinarily to pay the pension to a person who may not really be entitled to receive the same, but gets a decree with regard to the same from the civil court without his claim having been examined by the prescribed authority.

Before the Government can be bound by a decree of the civil court in this matter, its officers as prescribed in Section 5 of the Act must have an opportunity to examine the claim of the parties in the suit. It is only for this object that provisions have been made for preferring the claim before such officers and for a certificate to be obtained from those officers for the trial of the case by the civil court. The words "any suit relating to any pension" used in Section 4 of the Act are quite indicative of the position that all suits relating to such pension are barred under that section, and it is immaterial whether the Government is or is not a party to such suits.

A pure grammatical construction of the above sections cannot but lead to the above conclusion. This view is fully supported by a Bench decision of the Bombay High Court in Babaji Hari v. Rajaram Ballal ILR 1 Bom 75 (A). In that case the plaintiff sued the defendant to have his right declared to a certain share in the Kulkarni, Jyotishi and Deshpande Watan of certain villages in the Collectorate of Satara and also claimed 11 years' arrears of this Watan which consisted partly of Inam lands and partly of allowances paid from the Government Treasury. It was contended on behalf of the defendants that the cognizance of the suit was barred by the provisions of the Pensions Act.

In reply to that contention it was submitted on behalf of the plaintiff that the bar of the entertainability of the suit in the civil court by the said Act related only to suits in which the Government was at party and not to suits between private parties. It was held by the High Court that Section 4 of the Pensions Act of 1871 debars the civil court from taking cognizance of any suit whether the Government is a party to it or not which relates to any pension or grant of money or land revenue conferred or made by the British or any former Government without a certificate from the Collector or other authorised officer. It was further held that Section 5 prescribes a remedy

for the claimant of such pension or grant and Section 6 enables the revenue officer to refer the parties to the civil court for the determination of their, respective interests in the income or other benefit which the executive will, however, still as against either or both of the litigants, be at liberty to allow or to withhold. In AIR 1928 189 (Nagpur) the plaintiff brought a suit as Wahiwatdar of the Shri Jagriteshwar Deosthan at Nagpur which claims the amount from trust fund which had been set apart by the Government and placed under the indenture dated 24-10-1866, for three instalments due to him in respect of his services as Wahiwatdar of the temple against trustees who formed a committee of the temple.

It was held that the suit was not maintainable without a certificate from the Collector. Findlay, T. C., pointed out that the Pensions Act which is one which tends to restrict the ordinary legal rights of the subject to have recourse to the court for remedy of grievances is one to be strictly construed.

5. In Rafiuddin and Others Vs. Mohd. Amin and Others, a claim was made for a share of certain property including a share in the grant of land

revenue in a civil court without a certificate required u/s 6 of the Pensions Act. It was pleaded in defence that the suit was barred, so far as the

grant of land revenue is concerned, u/s 4 of the above Act, the same having been filed without a certificate referred to above. Thereafter, the

plaintiffs obtained a certificate from the Collector after the period of limitation for instituting the suit had expired. It was contended on behalf of the

plaintiffs that the want of a certificate was only a technical irregularity and that it could be obtained later.

On behalf of the defendants, however, it was submitted that the civil court had no jurisdiction to entertain a suit unless the required certificate had

been obtained previous to the institution of the suit. The suit was decreed by the trial court which rejected the plea of the defendants, but was

dismissed on appeal by the High Court. The leading judgment in that case was given by Desai, J. who held, on the facts of the case, that the

absence of a certificate u/s 6 of the Pensions Act goes to the root of the jurisdiction of the civil court & cannot be treated as a defect of a technical

character. P. L. Bhargava, J., who agreed with the conclusion recorded by him and with the order proposed by him, held that the receipt of a

certificate u/s 6 need not precede the institution of the suit and that where the

certificate is received after the institution of the suit, the court is bound to take cognizance of the claim relating to the grant of land revenue irrespective of the fact that the claim is barred by time on the date of receipt of the certificate. He, however, further held that after taking cognizance the court might reject the claim as barred by time. As I have already said, Desai, J., held in favour of want of jurisdiction on the facts of that case on the ground that on the date on which the certificate was obtained, the suit was barred by time.

He, however observed that he was not called upon to decide the effect of a sanction obtained during the pendency of a suit but before the expiry of the limitation for the suit and that he reserved his judgment on that question. In the present case, however, no certificate has been filed as required u/s 6 of the Act and the question, therefore, does not arise as to what would happen if the certificate is filed during the pendency of a suit.

6. It has, however, been contended on behalf of the plaintiffs that the present suit is a suit for money had and received by the defendants first party

for the use of the plaintiffs and, therefore, Section 4 of the Pensions Act is not a bar to it. In supports of this contention reliance has been placed on

Harshadlal Ambalal Desai Vs. Bai Ichha, . In that case the plaintiff sued to recover her share of the Desaigiri money received by the defendant for

certain years. The right of the plaintiff to receive her share in the pension was not disputed. Nor did the plaintiff allege in that suit that the defendant

wrongfully received the pension from the Government.

The case of the plaintiff was that the defendant having rightfully received the pension wrongfully retained her share of the same. Chagla, J.,

therefore, held that the nature of the suit was a suit for money had and received and not in respect of any pension payable by Government. The

case of ILR 1 Bom 75 (A) referred to above was distinguished by him on the ground that in that case the right to receive the pension was in

dispute. In the present case also, the right of the plaintiffs to a share in the pension has been challenged by the petitioners and the case made out by

plaintiffs in the plaint is that the defendants withdrew the amounts of the pension even with regard to their share without any right.

Thus, it appears that on the pleadings of the parties, the petitioners are said to have wrongfully withdrawn the pension from the Government and

the right of the plaintiffs to a share in the same is disputed. In that view of the matter, the decision in Harshadlal Ambalal Desai Vs. Bai Ichha, can have no application to the present case.

7. In my opinion, the suit in question relates to a pension and, on the strict and grammatical construction of Sections 4, 5 and 6 of the Pensions

Act, the jurisdiction of the civil court is Barred to entertain it.

8. It has then been contended on behalf of the plaintiffs that the present suit is based on the rights created by the compromise decree referred to

above, and is not, therefore, a suit for recovery of pension. In reply to this contention Counsel for the petitioners has put forward an argument that

the compromise decree itself was void u/s 12 of the Pensions Act and no cause of action, therefore, could be based on it. Section 11 of that Act

mentions pension granted or continued by Government on political considerations, or on account of past services or present infirmities or as a

compassionate allowance.

Section 12 states that all assignments, agreements, orders, sales, and securities of every kind made by the person entitled to any pension, pay or

allowance mentioned in Section 11, in respect of any money not payable at or before the making thereof, on account of any such pension, pay or

allowance, or for giving or assigning any future interest therein are null and void.

It is not suggested on behalf of the plaintiff that the pension concerned in the present case is not a pension coming within the meaning of the pension

mentioned in Section 11 of the Act. Mr. Jha has therefore, contended that in pursuance of Section 12 of the Act any agreement relating to such a

pension is null and void, be that agreement by a private document or as incorporated in a decree of the court. The contention put forward is that a

consent decree is nothing more than an agreement superadded with the command of the court and it has, therefore, been submitted that such a

decree suffers from all the infirmities of an agreement. The argument is well founded and must prevail.

9. It is settled principle of law that a contract is not less a contract and subject to the incident of a contract because there is superadded the

command of the Judge. If any authority is needed in support of this proposition reference may be made to Wentworth v. Bullen 109 ER 313 (E).

The compromise is recorded under the provisions of Order 23, Rule 3 of the CPC

which states that where it is proved to the satisfaction of the court that a suit has been adjusted wholly or in part by any lawful agreement or compromise, or where the defendant satisfies the plaintiff in respect of the whole or any part of the subject-matter of the suit, the court shall order such agreement compromise or satisfaction to be recorded, and shall pass a decree in accordance therewith so far as it relates to the suit.

In order, therefore, that the compromise should be recorded under this rule, the agreement or compromise must be lawful. As pointed out by a

Bench decision of this Court in *Sabitri Thakurain v. Mrs. F. A. Savi* AIR 1933 Pat 306(F) the word "lawful" used in Order 23 Rule 3 means lawful

within the meaning of the Contract Act. In *The Western Electric Company, Limited Vs. Kailas Chand, Kania, J.* (as he then was) held that the

term "lawful agreement" excludes not only unlawful agreements, i.e., the object or consideration for which is unlawful as defined in the Contract

Act, but all agreements which on the face of them are void and, therefore, will not be enforced by the court. Section 23 of the Indian Contract Act

states that the consideration or object of an agreement is lawful unless it is forbidden by law or is of such a nature that, if permitted it would defeat

the provisions of any law or is fraudulent or involves or implies injury to the person or property of another or the court regards it as immoral or

opposed to public policy, and in each of these cases, the consideration or object of an agreement is said to be unlawful.

It further provides that every agreement of which the object or consideration is unlawful is void. If, therefore, the object or consideration of the

compromise on which the decree is based comes within any of the matters enumerated in that section as making an agreement unlawful, the

compromise "decree itself is unlawful and is thus void.

10. The object of Section 12 of the Pensions Act is to prevent traffic in the pension as it is opposed to public policy. If, therefore, by a

compromise decree a division has been made between the parties with respect to the amount of the pension, it would amount to traffic in the

pension and will come within the mischief of Section 23 of the Contract Act. Again, by allowing a decree to be passed on consent in a suit, which

is not entertainable by a civil court, the parties are, doing what is forbidden by law, or, if permitted it would defeat the provision of law.

In the instant case the effect of the compromise decree in the previous suits is to divide the amount of pension between different parties to those suits and is thus against the public policy. The compromise decree also is against the provision of law inasmuch as it has been obtained in suits the entertainability of which was forbidden by Section 4 of the Pensions Act. In my opinion, therefore, the compromise decree is unlawful and u/s 12 of the Pensions Act is null and void.

11. Lastly, Counsel for the plaintiffs opposite party has put forward an argument that the plea of the petitioners is barred by res judicata. In support of this contention reliance has been placed on the case of Basangouda Giryepagouda Patil Vs. Basalingappa Mallangouda Patil, . The facts of that case are a bit complicated, but, stated shortly, they come to this: In a previously instituted suit there was a compromise between the parties and a consent decree was passed under which two fields were assigned to I and the rest of the land was divided roughly half and half between G and R.

These two were also held entitled to the right of service in equal shares in the patilki watan in question and the correctness of the pedigree of the parties was accepted. The plaintiff claiming through G prayed in the suit for (a) a declaration that defendant 2 was not the patilki watandar of Masuti, (b) a declaration that plaintiff is entitled to have his name entered in the watan register for the sixteen annas right of patilki service, and (c) possession of the lands in the possession of the defendants. The argument put forward on behalf of the plaintiff against the compromise decree was that it amounted to alienations contrary to Section 5 of the Watan Act.

Their Lordships doubted whether the particular compromise could be said to amount to an alienation within the meaning of Section 5. But even assuming it to be so, they held that the decree could not be a nullity and it could only be a good ground for setting it aside in an appropriate proceeding. In course of that judgment, reference was made to the case of Chhaganlal Kishoredas v. Bai Harkha ILR 33 Bom 479 in which it was held that the plea of estoppel by res judicata can prevail even where the result of giving effect to it will be to sanction what is illegal in the sense of being prohibited by statute. The terms of Section 5 of the Watan Act are not to be found in the report and we are not in possession of the same to

examine their effect.

It is not, therefore, possible to hold on the authority of this decision that the plea of the petitioners in the present case that the compromise decree

was a nullity is barred by *res judicata*. Stress, however, has been laid by Counsel for the plaintiffs opposite party on the passage quoted above

from the decision in the case of ILR 33 Bom 478. In that case certain lands were given in usufructuary mortgage by the defendant to the plaintiff

and then the plaintiff gave lease back of the same to the defendant.

On non-payment of the lease rent, a suit was brought by the plaintiff against the defendant in which an *ex parte* decree was passed. Subsequently,

another suit for the lease rent was instituted for subsequent periods in which a plea was taken that the transaction of the mortgage and the lease

back were void inasmuch as the mortgage was unlawful and void u/s 3 of the Bhagdari Act (Bombay Act V of 1862). This plea was held to be

barred by *res judicata* on the ground that the plaintiff's right to recover had been established by an *ex parte* decree in the previous suit.

The argument raised on behalf of the defendant that the plea of estoppel by *res judicata* could not be raised as the result of giving effect to it will be

to sanction what is illegal, was rejected by their Lordships. The reason for rejecting the same is obvious. There was a previous decree of the court

and the plea in the subsequent suit was barred by constructive *res judicata*.

The above principle may not, however, be applicable to a case where there is no decision of the court"" for the decree has been passed on an

agreement between the parties which agreement is always subject to the law of contract. Their Lordships, however, quoted a passage from the

case of *Great North-West Central Rly. Co. v. Charlebois* (1899) 114 AC 124 (T) that if the legality of an act is a point substantially in dispute, it

may be a fair subject of compromise in court like any other disputed matter and thus become *res judicata*.

That observation, on which stress has been laid by Counsel for the plaintiffs, does not solve the problem before us. The question of there being any

substantial dispute with respect to an application of the Pensions Act does not appear to have been in dispute in the previous suits. Nor was there

any compromise with regard to its applicability to the case.

12. Reference has also been made on behalf of the plaintiffs opposite party to a

Privy Council decision in AIR 1936 46 (Privy Council) . In that case, the question involved was as regards the validity of a certain grant in view of Section 12-A, Chota Nagpur Encumbered Estates Act, and the very same question was directly and substantially in issue in a previous suit decided in the year 1917.

It was contended that the decision of the year 1917 barred the plea by principle of res judicata. Sub-section (3) of Section 12-A declares that an alienation or charge made without the previous sanction of the Commissioner is void. The High Court therefore, held that the decision as to the validity of the transaction in the year 1917 was not res judicata.

This decision was upset by the Privy Council inasmuch as in their Lordships' opinion the decision of the court in that suit determined rightly or

wrongly that the section never applied to the transaction in question. Thus, it appears that the question whether the transaction was void in face of

Sub-section (3) of Section 12-A was a question directly and substantially in issue in the previous suit and was decided in favour of the validity of the transaction on the terms of the section.

Therefore the same plea in the subsequent suit was held to be barred by the principle of res judicata. This case has no application to the facts of

the present case where the question as regards the bar of the suit as well as of the illegality of the compromise under the provisions of the Pensions

Act was not decided in the previous suit which ended in a compromise.

13. Reliance has also been placed on Supreme Court decision in Shankar Sitaram Sontakke and Another Vs. Balkrishna Sitaram Sontakke and

Others, and Raja Sri Sailendra Narayan Bhanja Deo Vs. The State of Orissa, . In the first case, there was a finding that the compromise closed

once for all the controversy about taking any account of the joint family business and it was held that the obvious effect of this finding is that the

plaintiff is barred by the principle of res judicata from reagitating the question in the present suit, and it is well settled that a consent decree is as

binding upon the parties thereto as to decree passed by invitum.

Their Lordships, however made a further observation that a compromise having been found not to be vitiated by fraud, misrepresentation

misunderstanding or mistake, the decree passed thereon had a binding force of res judicata. The above observation, therefore, makes it perfectly

clear that if the compromise is vitiated under the provisions of the Indian Contract Act, that may not be binding on the parties as *res judicata*. In the

latter case also it was held that a judgment by consent or default is as effective an estoppel between the parties as a judgment whereby the court

exercises its mind on a contested case. But the question as to what will be the effect of the compromise if under the Contract Act, the agreement

arrived at was for an unlawful object of unlawful consideration, was not gone into.

14. As already observed, Section 4 of the Pensions Act takes away the jurisdiction of a civil court to entertain any suit relating to a pension unless

the claim has been made before the prescribed authorities and a certificate for the trial of the case has been obtained from such authorities. Section

12 of that Act makes an agreement with regard to such a pension absolutely null and void. The compromise is a contract between the parties

superadded with the command of the court, but is subject to all the infirmities of a contract. Under the Indian Contract Act any agreement against

the public policy or having its object to prevent the provision of law or to do something which is forbidden by law is null and void, and a decree

based on such an agreement being unlawful, is equally void.

On the facts of the present case it is manifest that by the compromise there was a traffic in pension which is against the public policy and a decree

was obtained from a court which had been forbidden by law from entertaining the suit. In my opinion, therefore, such a compromise decree can be

ignored as being void *ab initio* in any proceeding either in the same suit or in a subsequent suit.

In the case of *Lakshmanaswami Naidu v. Rangamma* ILR 26 Mad 31 (N), the holder of an office attached to a temple, involving services of a

personal nature and entitling him to receive emoluments, was sued by a person to whom he had mortgaged his right to the office, together with

other property, and a compromise was arrived at, by the terms of which the office-holder agreed that his right to the office and to its emoluments

should be sold in satisfaction of the mortgage debt.

A decree was passed in terms of the compromise and the decree-holder sought to have the right to the office sold in execution of that decree and

contended that inasmuch as a decree had been passed directing the sale of the office, the court executing the decree was not at liberty to consider

its validity but must execute it according to its terms. It was held that the sale of such an office was against public policy and would not be

recognized or enforced by the courts, and that the decree was based on an agreement of compromise, and the court had merely adopted the

contract, the court must be taken to have adopted it with all its incidents. It was further held that by Section 375 of the CPC (which is equivalent to

Order 23, Rule 3 of the present Code) the court had no jurisdiction to pass a decree on a compromise unless it was a lawful compromise and the

terms of the compromise in question being opposed to public policy were invalid and would not be enforced by the courts and so far as a decree

embodied unlawful terms of a compromise it is inoperative and would not be enforced. In *Ramachandra Sum v. Venkatalakshminarayana* AIR

1919 Mad 429 the question involved was with respect to the Madras Impartible Estates Act, 1904, which intended to prevent transfers of

impartible property, founded on public policy.

A consent decree was passed in that case which infringed the provisions of that Act and it was held that a consent decree could not override the

express provisions of that Act and that the defendants were not estopped from questioning the character of the debt by reason of the compromise.

15. For the reasons given above, I hold that the suit out of which the present application arises was not entertainable and ought to have been

dismissed. The decree passed in favour of the plaintiffs by the trial Court is, therefore, bad in law and must be set aside.

16. The result, therefore, is that the application is allowed, the judgment and the decree of the court below are set aside and the plaintiff's suit is

dismissed with costs throughout. Hearing fee of this application is assessed at Rs. 100/-.

V. Ramaswami, C.J.

17. I agree.