

(1934) 07 PAT CK 0020

In the Patna High Court

Jagarnath Prasad Bhagat and Others

APPELLANT

Vs

Jamuna Prasad Singh and Others

RESPONDENT

Date of Decision : 10-07-1934

Acts Referred:

Citation : AIR 1934 Patna 493 : 151 Ind. Cas. 959

Hon'ble Judges : Courtney-Terrell, C.J;Agarwala, J

Bench : Division Bench

Judgement

Agarwala, J.—The facts out of which these applications have arisen are as follows ; One Thakur Baijnath Singh executed a mortgage of a certain property and the descendants of the mortgagees obtained a decree on the basis of that bond. An appeal was preferred to the High Court which was dismissed and the mortgaged property was put up for sale in execution of the decree and purchased by the decree-holders for Rs. 52,000 odd. In the bond the property was described as 3 annas 4 gandas pokhta share out of 16 annas asli mal dakhli of Taluka Mangrar. This patti was included in khewat No. 2 but in the bond the khewat number was given as 3 and this mistake was repeated in the plaint, the preliminary, decree the final decree, the petition for execution, the sale proclamation and the sale certificate. The auction purchaser applied for amendment of the sale certificate but the application was rejected by the Court below. He has now applied for amendment of the High Court decree and of the consequential execution papers and has also filed a petition in revision against the order of the Court below dismissing his application for amendment.

2. In support of the application Sir Sultan Ahmad relies on a decision of a Division Bench of the Allahabad High Court in Aziz Ullah Khan and Others Vs. Court of Wards, , where in exactly similar circumstances, the Division Bench of the Allahabad High Court held that where a property has been accidentally misdescribed in the mortgage bond and the mistake has been repeated throughout the proceedings to enforce the mortgage but, where there is no doubt as to the identity of the property mortgaged and the property sold at

auction, the Court has ample power to amend the decree and that such a case is eminently one in which the powers of amendment should be exercised. Mr Sushil Madhav Mallick on behalf of the opposite party contends that in the present case it is not merely a misdescription of the property that has occurred but that the identity of the property is not the same. The real test in cases of this description is that which was pointed out by Lord Watson in *Pattachi Chettiar v. Sangilli Veera Pendia Chinnathambiar* 10 M 241 : 14 I A 84 : 5 Sar. 38 (P C), where his Lordship said:

The questions are what did the Court intend to sell and what did the purchaser understand that he bought.

3. In the sale proclamation in the present case the property advertised for sale was described as 3 annas 4 gandas pokhta share of the judgment-debtor in village Mangrar, and there followed the further description that it was in khewat No. 2. There can be no doubt whatsoever that neither the Court nor any person who had any interest in the sale was under any misapprehension that what was being sold was the property of the judgment-debtor in village Mangrar and not the proprietary interest comprised in khewat No. 3. The mistake that has occurred is, therefore, not one of identity of the property that was being dealt with but mistake of description which, I am of opinion, this Court has ample power to deal with. I would, therefore, adopt the reasoning of the Division Bench of the Allahabad High Court and allow the amendment in the decree of this Court in the application for execution, the sale proclamation and the sale certificate.

4. Mr. Sushil Madhav Mullick referred to a decision of their Lordships³ of the Privy Council in *Thakur Brahma v. Jiban Ram Marwari* 21 Ind. Cas. 936 : 41 C 590 : 41 I A 38 : 18 C W N 313 : 15 M L T 137 : 12 A L J 156 : 26 M L J 89 : 6 Bom. L R 156 : 26 M L J 118 (P C), in support of his contention that the amendment sought to be made could not be allowed. That was a case of an entirely different nature. There what was advertised for sale was an encumbered six annas share in a certain property belonging to the judgment-debtor. The property that was sought to be sold in execution of a money decree, was subject to a mortgage and what was attached was the property that was proclaimed for sale. After the sale the auction purchaser endeavoured to persuade the Court to amend the sale certificate so as to describe the property sold as the 6 annas unencumbered share in the judgment-debtor's property. This their Lordships held could not be allowed. At p. 599 Page of 41 C.---[Ed], of the report Lord Moulton said:

An attempt was made to treat the matter as a case of misdescription, which could be treated as a mere irregularity. But in this case we have to deal with identity and not description. A property fully identified in the schedule may be in some respects misdescribed, but that is not the present case. Here we find an existing property accurately described in the schedule, and the order of the Subordinate Judge grants a sale certificate which states that another and a different property has been purchased at the judicial sale.

5. As I have already indicated, the facts in the present case show quite conclusively that what was being offered for sale and what was being sold was the share of the judgment-debtor in village Mangrar and not some other person's property. There is no question of the auction-purchasers attempting to obtain a property which was not put up for sale. I would, therefore, allow the applications with costs. We assess the hearing fee at two gold mohurs.

Courtney Terrell, C.J.

6. I agree.