

(1962) 07 PAT CK 0009

In the Patna High Court

Case No : A.F.O.D. No"s. 76, 77 and 112 of 1957

Jagarnath Ram and Another

APPELLANT

Vs

Thakur Prasad and Others

RESPONDENT

Date of Decision : 30-07-1962

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 105

Citation : AIR 1963 Patna 165

Hon'ble Judges : Ramratna Singh, J;Kanhaiya Singh, J

Bench : Division Bench

Advocate : M.K. Varma and G.C. Ghosh, in S.A. Nos 76 and 77 and Kanhaiyaji and Rameshwar Prasad II, in S.A. No. 112, for the Appellant; Kanhaiyaji, Rameshwar Prasad II and R.P. Srivastava, in S.A. Nos. 76 and 77 and S.C. Ghosh and M.K. Verma, in S.A. No. 112, for the Respondent

Judgement

Kanhaiya Singh, J.—On the 20th July, 1929 Thakur Prasad obtained from Doma Ram two houses on a monthly rental of Rs. 6 and executed a registered kerayanama.

2. On the 30th July, 1929 Doma Ram executed an unregistered deed of agreement in favour of Thakur Prasad aforesaid, Jiut Ram and other members of their family fn respect of two houses and two goals situated in the town of Sasaram. Jiut Ram Is the brother of Thakur Prasad. The stipulation was that on payment of Rupees 1500 Doma Ram would execute a registered sale deed in favour of Thakur Prasad and others. The date fixed for execution of the sale deed was twelve years after the execution of the deed of agreement and before the expiration of the 18th year from that date. There was a further stipulation that Doma Ram would erect some shops on the sahan land of the value of Rs. 600; and Thakur Prasad and others would pay Rs. 600 to Doma at the time of execution of the sale deed. In other words, Thakur Prasad and others had to pay Rs. 2100 to Doma as a consideration for execution of the sale deed. Doma Ram died In 1936 leaving him surviving his son Jagarnath, his widow and other heirs.

On the 30th July 1947 Thakur Prasad and others instituted Title Suit No. 218 of 1947 against the heirs of Doma, namely, Jagarnath and others, for specific performance of contract and for recovery of the property covered by the agreement. They alleged in the plaint that they were liable to pay to the heirs of Doma Rs. 600, being the value of the shops constructed by Doma on a portion of the disputed property and that they had in their possession Rs. 2100 and were ever ready to pay this amount to Jagarnath and others for execution of the sale deed in their favour. Accordingly, they prayed for specific performance of contract and also for recovery of possession of the disputed property.

3. Jagarnath and others also instituted Title Suit No. 59 of 1948 for recovery of rent and damages from Thakur Prasad, Jiut Ram and others on the strength of a registered deed of kerayanama dated the 20th July, 1949.

4. The aforesaid two suits were tried analogously; and the learned Munsif, by his order dated the 20th September, 1949 dismissed Title Suit No. 218 of 1947 and decreed Title Suit No. 59 of 1948 in part. His main finding was that the Mahadanama was not genuine and valid. Thakur Prasad and others preferred two appeals from the decrees to the District Judge. The first appellate Court by its judgment dated the 21st August, 1951, affirmed the decree of the learned Munsif passed in Title Suit No. 218 of 1947 and modified the decree in Title Suit No. 59 of 1948.

5. Thakur Prasad and others preferred Second Appeal No. 1736 of 1951 from the decree of the lower Appellate Court in Title Suit No. 218 of 1947. They also filed another Second Appeal No. 1737 of 1951 from the decree passed in Title Suit No. 59 of 1948. Both these second appeals were heard together and were decreed on the 2nd April, 1956. The learned Single Judge of this Court, who disposed of these two appeals, found that the Mahadanama was a genuine document. According to him, the question of genuineness of the Mahadanama had been agitated in a previous suit and decided against Jagarnath; and, in the opinion of the learned single Judge, that decision constituted *res Judicata* and the question of the genuineness of the Mahadanama could not be re-agitated in the present litigation. With this definite finding about the genuineness of the Mahadanama, the appeals were remanded to the lower appellate court for decision on other points involved in accordance with law. The result was that the judgments and decrees of the lower appellate court were set aside.

On remand the two appeals were heard and disposed of by Mr. H. P. Srivastava, Additional Subordinate Judge. By his judgment dated the 24th September 1956, he decreed Title Suit No. 218 of 1947 for specific performance of contract. He, however, did not allow the plaintiffs a decree for possession of the shops and houses in respect of which the plaintiffs were ready to pay Rs. 600. In his opinion, no such relief had been asked for by them in the plaint. The result was that the suit was decreed in part. He, however, dismissed the other suit for recovery of rent substantially on the ground that the kerayanama was a farzi document and Jiut and others were occupying the house free of rent. Now,

Jagarnath has preferred S. A. 77 of 1957 against the decree of the lower appellate court passed in Title Suit No. 218 of 1947. He has also filed S. A. 76 of 1957 against the decree passed in Title Suit No. 59 of 1948. Thakur Prasad and others have also preferred another appeal, being S. A. 112 of 1957, against that part of the decree by which they were not given possession of the shop houses constructed by Doma on a portion of the disputed property. Since all these three appeals are connected and involve a common question of law and fact, they were heard together. They were first, placed before a single Judge of this court, who, by his order dated the 11th December, 1959 referred these appeals to a Division Bench for disposal. This is how these appeals have come before us for decision.

6. It will be recalled that initially, the court of first instance and the appellate court had dismissed the suit for specific performance of contract and decreed the suit for rent. In second appeals the suits were remanded and the judgment and the decree of the first appellate court were set aside. In remanding the case it was held by the learned single Judge of this Court that the genuineness of the Mahadanama was not open to challenge as the decision in a previous suit constituted *res judicata*. Mr. S. C. Ghosh appearing for the appellants contended that this observation of the learned single Judge has no binding force and the order of remand was not proper; and, therefore, these appeals are concluded by findings of fact since initially the court of first instance and the first appellate court had decided in favour of Jagarnath and others.

This contention is devoid of merit. The question whether or not the decision of the learned single Judge, who remanded the appeals, about the genuineness of the Mahadanama was conclusive and liable to be challenged in appeal from the decree of the first appellate court depends upon the decision whether the order of remand was appealable or not. Section 105 of the CPC provides as follows:

"(1) Save as otherwise expressly provided, no appeal shall lie from any order made by a court in the exercise of its original or appellate jurisdiction; but, where a decree is appealed from, any error, defect or irregularity in any order, affecting the decision of the case, may, be set forth as ground of objection in the memorandum of appeal.

(2) Notwithstanding anything contained in Sub-section (1), where any party aggrieved by an order of remand made after the commencement of this Code from which an appeal lies does not appeal therefrom, he shall thereafter be precluded from disputing its correctness."

It will appear that under Sub-section (2) the order of remand is conclusive and its correctness cannot be challenged if the order of remand was appealable and no appeal was preferred therefrom. If an appeal lies from the order of remand and no appeal is preferred, then the correctness of the order of remand cannot be challenged in this Court. Where, however, no appeal is provided in the CPC from the order of remand, then the correctness of the order of remand could be re-agitated in appeal from the decree of the first appellate court.

A similar observation has been made by their Lordships of the Supreme Court in *Satyadhyan Ghosal and Others Vs. Sm. Deorajin Debi and Another*, . Their Lordships observed as follows:

"It is clear, therefore, that an interlocutory order which had not been appealed from either because no appeal lay or even though an appeal lay an appeal was not taken could be challenged in an appeal from the final decree or order, A special provision was made as regards orders of remand and that was to the effect that if an appeal lay and still the appeal was not taken the correctness of the order of remand could not later be challenged in an appeal from the final decision, it, however, an appeal did not lie from the order of remand the correctness thereof could be challenged by an appeal from the final decision as in the cases of other interlocutory orders."

Therefore, Jagarnath and others are precluded from disputing the correctness of the order of remand provided that order was appealable. Mr. Ghosh contended that an appeal did not lie from the order of remand.

On the other hand, Mr. Kanhaiyaji contended that the order of remand was appealable under Clause 10 of the Patna High Court Letters Patent. In support of his contention, learned counsel for the respondents referred to a Bench decision of this Court in *Tapesar Raut and Others Vs. Ram Jatan and Others*, which supports his contention. It has been laid down in that case that, where a learned single Judge has in second appeal set aside the decision of the lower appellate court granting a decree to the plaintiffs and remanded the case for a fresh hearing to the lower appellate court in accordance with the principle laid down in the judgment, the judgment allowing the second appeal and remanding the case for rehearing is a judgment within the meaning of Clause 10 of the Letters Patent and, therefore, an appeal from such an order under Clause 10 of the Letters Patent was competent and maintainable. No ruling to the contrary has been cited by Mr. Ghosh. It is plain, therefore, that order of the learned single

Judge of this Court remanding the appeals was an order from which an appeal lay and, therefore, the correctness of the decision of the Court that the Mahadanama was genuine could not be re-agitated in this appeal. It is not, therefore, open to Jagarnath and others to re-agitate the question of the genuineness of the Mahadanama; and it must be held, in agreement with the lower appellate Court, that the Mahadanama was a genuine document.

Next, it was urged by Mr. Ghosh that the Mahadanama was not admissible for want of registration. His contention is that by this deed of agreement certain interest was created in favour of Thakur Prasad and others in the two houses which had been let out on rent and, therefore, this is a document by which certain rights were created and hence it required registration. This contention is based upon a misconception of the provisions of the Mahadanama. It will appear from the above that the houses were let out on rent to Thakur Prasad before the Mahadanama was executed and that the Mahadanama recited the fact of

possession of the houses having been delivered to Thakur Prasad and others much earlier. It will be wrong therefore, to say that Thakur and others acquired some interest in the houses by virtue of this Mahadanama. At any rate, even on the assumption that the houses were given to Thakur and others by virtue of this Mahadanama, there was apparently no creation of any interest. The houses were let out on rent to them and there was no transfer of title in favour of Thakur and others. Therefore, this document did not require registration and was admissible in evidence.

7. He next contended that the suit was barred by limitation. The Mahadanama was executed on the 30th July, 1929. The present suit was brought on the 30th July 1947, that is, just a day before the expiration of 18 years from the date of the execution of the Mahadanama. By virtue of this agreement a sale deed was to be executed after twelve years of the execution of the Mahadanama and before the expiration of 18 years therefrom. Therefore, the date for execution of the sale deed, according to the agreement, was any date falling between the twelfth year and the eighteenth year computed from the date of the Mahadanama. There is no dispute that this case is governed by Article 113 of the Limitation Act which provides a period of three years for a suit for specific performance of contract. Under this article time from which the period of limitation begins to run is the date fixed for the performance of the contract or if no such date is fixed when the plaintiff has notice that performance is refused. As observed above, the Mahadanama did fix a date for the performance of the contract.

It is true that there was no precise date assigned for the performance of the contract. But it cannot be said that no date had been fixed therein. In fact, the date was, as observed above, any date after the expiry of twelve years and before the expiry of 18 years from the date of the Mahadanama. From this point of view, the suit having been Instituted a day before the expiration of 18 years was prima facie within time. Mr. Ghosh, however, pointed out that in a mortgage suit brought in 1942 the heirs of Doma had repudiated the Mahadanama and, therefore, according to him, the suit should have been brought within three years from the date of repudiation, that is, some time in 1949; and since the suit was instituted more than three years after the date, it is time-barred. That contention is obviously wrong. The suit had to be instituted within three years from the date fixed for the performance of the contract; and in the absence of any such date, within three years of the notice to the plaintiff of refusal of performance. Even assuming that there was repudiation of the Mahadanama in 1942, still Thakur and others had a right to institute a suit within three years of the date fixed for the performance of the contract. In my opinion, the suit is not barred by time.

8. Mr. Ghosh next contended that there was no legal necessity for the agreement of sale and, therefore, the son and other heirs of Doma were not bound by this agreement. According to the finding of the lower appellate court, the property in suit did not form part of the joint property of the family of Doma; it was acquired

by Doma for and on behalf of Thakur and others virtually as their agent and, therefore, when the property was acquired on behalf of Thakur and others, the question of legal necessity did not arise. Mr. Ghosh then contended that on that finding the suit must be dismissed in limine, because if the property in dispute belonged to Thakur and others, there was no question of specific performance of contract and the proper remedy for them was to bring a suit for possession since Doma and his heirs were nothing but benamidars. This argument also overlooks the provisions of the Mahadanama. It will appear that for the purchase of this property, Thakur and others had contributed Rs. 600 and Doma had spent Rs. 1500, the total consideration thus being Rs. 2100. Therefore though this property was acquired by Doma on behalf of Thakur and others, they could not immediately claim this property without payment to Doma Rs. 1500 spent by him; and this liability in reality necessitated a deed of agreement of sale. The deed provides that a deed of sale would be executed, by Doma on payment by Thakur & others of Rs. 1500. From this point of view, there was a consideration for the deed of agreement of sale and consequently the suit for specific performance is maintainable and is not liable to be dismissed in limine.

9. Lastly, Mr. Ghosh urged that the finding of the lower appellate court was vitiated, because other documents considered by the Court of first instance were not considered by it. This grievance also has no basis. As a matter of fact, the consideration of the various documents was not necessary in view of the findings in the previous second appeals that the genuineness of the Mahadanama was beyond challenge. Apart from this, those documents, even if considered, will not affect the correctness of the finding of the appellate court below.

10. The genuineness of the Mahadanama incontrovertibly leads to another conclusion and it is this that the registered deed of keryanama was, as recited in the Mahadanama, farzi, and the houses were let tree rent, Jagarnath and others were thus not entitled to rent. The result is that the two appeals filed by Jagarnath and others, namely, S. As. 76 and 77, both of 1957, must be dismissed.

11. Coming to S. A. 112 of 1957, the contention of Mr. Kanhaiyaji on behalf of the appellants is that they are entitled to a decree also for possession of the shops constructed by Doma on a portion of the disputed land. That relief was disallowed by the lower appellate court on the ground that no such claim had been made in the plaint. This is entirely erroneous. There is no dispute, and it has been specifically averred in the plaint, that

The plaintiffs are entitled to recover possession of the shops also on payment of Rs. 600 to Jagarnath and others. On the strength of the Mahadanama also the plaintiffs are entitled to recover possession of those shops on payment of Rs. 600 to Jagarnath and others. It is true that there is no specific relief sought for possession of the said shops. With respect to the said shops all the facts have been averred in the plaint and the plaintiffs were also ready to pay to Jagarnath and others Rs. 1500 plus Rs. 600. The suit has been valued at Rs. 2100 and

court-fee has also been paid thereon. The plaintiffs claimed possession of the disputed property and this was the main relief sought by them. Possession of the disputed property obviously included possession of the shops standing thereon; and, in my opinion, in view of the fact weired in the plaint it was not necessary to seek specifically possession of the shops also, independently of the relief for possession of the disputed property. Therefore, the lower appellate court was wrong in allowing to Thakur and others a decree for possession of the shops also, the result is that the plaintiffs in Title Suit No. 218 of 1947 are entitled to a full decree and accordingly the decree of the appellate court below must be modified and the plaintiffs are given possession of the disputed houses including the shops constructed by Doma, of course, on payment by the plaintiffs of Rs. 600 on that account.

12. In the result, S. As. 76 and 77, both of 1957, are dismissed with costs and S. A. 112 of 1957 is allowed with costs.

Ramratna Singh, J.

13. I agree.