(1937) 11 PAT CK 0064

In the Patna High Court

Joti Lal Sah APPELLANT

Vs

Mt. Rameswari Kuer and Others RESPONDENT

Date of Decision : 24-11-1937

Acts Referred:
Bengal Land Revenue Sales Act, 1859 — Section 18

Citation : AIR 1938 Patna 281

Hon'ble Judges : Wort, J;Manohar Lal, J

Bench : Full Bench

Judgement

Wort, J.—In my opinion this appeal must be allowed. It arises out of an action by the respondent-plaintiff claiming a declaration that a sale deed of 15th January 1927 purporting to be for a consideration of Rs. 2500 which was executed by Mt. Gharbharan Kuer, the widow of Bechu Sah, was in fact without consideration and legal necessity and that the transaction was not binding on the reversioners of the plaintiff. The relief claimed included a declaration that a revenue sale, to which I shall presently refer in greater detail, was also collusive and fraudulent and not binding on the plaintiff.

2. The facts are as follows: The lady who executed the sale deed was defendant 3 in the action. She was the junior wife of one Bechu Sah whose senior wife was one Jasoda Kuer of whom the plaintiff was the daughter. Defendant 4 in the suit is the daughter of Mt. Gharbharan. The principal defendants are defendant 1 who is the appellant, and defendant 2. Defendants 1 and 2 are uncle and nephew and it was a part of the plaintiff''s case in this Court that the business of these two persons was joint--an allegation which became necessary on the pleadings as establishing the second part of the relief claimed, already referred, I refer to the claim for a declaration that the revenue sale was fraudulent and collusive. It is to be noticed in this connexion that this particular claim was made by amendment which was allowed to the plaintiff by an order dated 1st May 1934. The amendment was made after the filing of the written statement and indeed on the day the hearing of the suit commenced.

3. I propose to state one or two facts from which the points in issue will appear. The sale deed was executed on 15th January 1927 and the purchaser was defendants. At the time of the sale deed, as I think will appear, the estate was in arrear for revenue, and on 6th June 1927, a revenue sale was held in which defendant 1 who is the appellant before this Court became the purchaser. There was some dispute in the Court below and indeed in this Court as to whether the arrears for which this sale was held were arrears of revenue due for the January kist or the March kist of the year 1927; but for reasons which I shall state, it seems to me that we are bound to come to the conclusion in the circumstances of the case, that revenue was in arrear for earlier kists and during the possession of the vendor under the sale deed of 15th January 1927, that is to say, Mt. Gharbharan Kuer. Now it was the plaintiff''s case that the transaction of, January 1927 was without consideration and that it was without legal necessity. The necessity alleged by the defendants, and attempted to be proved by one of their witnesses Ramsarup Sah (witness 6) was money required for the repairs of the house and for the Gaya sradh.

4. In the alternative, the defendants in support of the transaction alleged that there had been bona fide enquiries by the purchaser as to the existence of the necessity. The learned Judga in the Court below has declined to accept the defendants'' evidence as regards the legal necessity, and I find it impossible to hold in the state of the evidence that the ?conclusion arrived at in the Court below is wrong.

5. The evidence in support of the allegation is of the vaguest possible kind. The witnesses which the defendants called for that purpose were Sheo Shankar Sah (witness 2), Jagan Sah (witness 4), Ramsarup Sah (witness 6) and Bamasray Sah ''(witness 7). The first of these witnesses Sheo Shankar Sah states that Mt. Gharbharan Kuer went to Gaya in Chait seven years ago; that he met her at Gaya and that there were 8 or 9 persons with her including Gulal Prasad; that after she returned she fed Brahmins and agnates. This witness stated that she might have spent; Rs. 400. Witness 4 Jagan Sah improved on the evidence of the previous witness by stating that the lady spent Rs. 400 in feeding people and that he learnt from other sources that she spent Rs. 1200 for going to Gaya. It was this witness who also stated that Rs. 500 was spent in repairing the house. The other witnesses Ramsarup Sah and Ramasray Sah stated vaguely that the money was taken for the Gaya sradh and for the repairs of the house. The last named Ramasray says that Mt. Gharbharan "was in need of money for going to Gaya". It would be impossible in my judgment on evidence of that character to hold that the allegation that the money was required for the purposes alleged had in fact been proved. Of the two witnesses to whom I have referred, namely Sheo Shankar and Jagan, the evidence of one is vague and that of the other who went into a greater detail, was hearsay. It is therefore of no value whatever.

6. So far as regards the question whether the purchaser made a bona fide enquiry, Ramsarup Sah, witness 6 for the defendant, ?was called to establish

that fact and says that he made enquiry on behalf of Sheonarain (defendant 2) from Jagan Sab, Ramasray Sah, Ramprit Sah, Gulal Sah and daughter of Gharbharan. The learned Judge has declined to accept their evidence. He has pointed out that when Jagan Sah who was witness 4 for the defendant went into the witness-box, no question was put to him to support the statement made by Ramsarup and that Ramprit who was one of the persons from whom enquiry was made, although present in Court was not called and examined by defendant. The learned Judge also discredits the evidence of Ramasray Sah for the reason that he was called without summons and deposed at the request of defendant 1. I am not prepared to say that the fact that a witness has not been summoned was justification of itself for saying that his evidence was not to be accepted, but at the same time I do not forget that the learned Judge had the witness before him, and that the circumstances to which he referred undoubtedly led him to reject the evidence, nor have we had any argument addressed to us which would lead us to the conclusion that the Judge was in error in this regard. As to the actual passing of the consideration (Rs. 2500) it is impossible to hold that that sum was not paid. There was an allegation in the plaint that it was not paid and the relief claimed was for a declaration that there was no consideration. But apart from those allegations there is no evidence on the part of the plaintiff but there is evidence by the defendants of unimpeachable character establishing the fact of payment. There is in this connexion a fact recorded in the deed itself that the money was paid in the presence of the Registrar. I leave that part of the case by referring to the decision of their Lordships of the Judicial Committee of the Privy Council in Ali Khan Bahadur v. Inder Parshad .

7. The more seriou(1896) 23 Cal. 950s part of the case however relates to the question of the revenue sale. It is the contention of Dr. Sen on behalf of the respondents that the plaintiff here has established a case of fraud against defendants 1 and 2. In considering this case the allegations of the plaintiff must, in my judgment, be analysed with some care. In the first place the conspiracy and fraud alleged by the plaintiff is not simply a conspiracy and fraud of defendants 2 and 1, but it sufficiently and clearly appears from paras. 5 to 9 of the plaint that according to the plaintiff not only defendants 1 and 2 but defendants 3 and 4 were involved in this. Shortly stated the plaintiff''s case is that owing to bad feeling between the senior and the junior widows, Mt. Gharbharan Kuer the junior widow in conspiracy with the other defendants in the case brought this transaction about in order to defeat the claims of the plaintiff.

8. As I understand the case now argued, I apprehend that Dr. Sen does not now seriously contend that Mt. Gharbharan Kuer was a party to this fraud, although I must in this connexion refer to one of the arguments addressed to us on this point.

9. On the ground that it has been found that there was no legal necessity to support the sale Dr. Sen asks us to presume fraud against Mt. Gharbharan. I think it would be a rather drastic conclusion to arrive at, to hold that the mere

fact that a widow entered into an imprudent transaction was evidence of fraud. Apart from that fact I think it is admitted there is none other. We are therefore left with the case of the alleged fraud against defendants 1 and 2. The first point to clear up with regard to this matter is whether the revenue sale was held with respect to the January or March kist.

10. It is clear that as the case depends upon the contention that defendant 2''s fraud consisted in his allowing the estate to fall into arrear in conspiracy with defendant 1, this point is of importance. If the arrear was for any kist earlier than that of 15th January it is obvious that the default was not of defendant 2 but of Mt. Gharbharan. Dr. Sen also argues that allowing the estate to remain in arrear is evidence upon which we are entitled to hold that the act of defendant 2 was fraudulent, or to put it perhaps more accurately, was guilty of a conspiracy to bring about this revenue sale. It seems to me, however, that the fact that defendant 2 allowed the estate to remain in arrear is no evidence of fraud or of a conspiracy which would support the allegation of fraud. He was under no obligation to anyone to pay excepting to Government and to himself.

11. On the facts the position is as follows: We know the revenue sale took place on 6th June 1927, and if the document which is Ex. E in the case is not evidence, we should be left without any evidence whatever as to what the kist was for which the estate was sold. Dr. Sen asks us to say that on the reading of this order the kist was for 28th March 1927. The order states: "Khalispur, pargana Gaya, etc. having an annual sadar jama of Rupees 12-4-1 was sold for arrears of demand up to 28th March 1927". If we take this document, then the evidence is not clear what is meant by the statement made therein "demand up to 28th March 1927". If we hold, as we are bound to hold, I think that this document is no evidence, then we must fall back on the presumption which arises in the case, the sale certificate which is evidence being silent on the point. The, sale took place I repeat on 6th June 1927. By a decision of their Lordships of the Judicial Committee of the Privy Council in Buksh Ilahi v. Durlav Chandra Kar (1912) 39 Cal. 981 a sale in June of 1927 would be justified only if the sale was for the arrears of one of the kists for the year 1926. In the absence of evidence to the contrary, we are bound to assume that the revenue sale was a regular sale, that is to say, a sale in accordance with law. In the absence of proof in the circumstances of this case we are bound to hold that the kist for which this sale was held was one of the kists of the year 1926--a kist during the possession of Mt. Gharbharan Kuer. It is therefore necessary to hold that the'' arrear was not an arrear caused by defendant 2.

12. Now, the other facts upon which the respondents rely for proof of fraud against defendant 2 are that defendants 1 and 2 were joint; that the purchase was by defendant 1 and the sale was by reason of the arrear which it is said defendant allowed to be caused; and from those circumstances we are asked to hold that defendants 1 and 2 had been guilty of this fraud by which defendants 1 and 2 hoped to feed their imperfect title derived from Mt. Gharbharan by the

subterfuge of this irregular revenue sale.

13. The allegation in the plaint as regards the jointness of defendants 1 and 2 is consistent, in my opinion, not with the existence of a joint family of which defendants 2 and 1 were members but with jointness as regards business as stated in para. 9; the plea reads "whose business is all joint". Although the learned Judge does not accept the evidence that separation took place more than ten years before the purchase of January 1927, on pleadings and the evidence it seems to me that the most that could be said is that their business was joint. Upon the question that their business was joint, Ex. 3, which was a petition for the refund of the surplus sale proceeds in the revenue sale, was written out (according to the evidence) by one of the plaintiff''s witnesses on the instructions of both defendants 1 and 2. Ex. 3(a) was a mutation petition on behalf of defendant 1 which was written by ones and signed by the other. The same may be said as regards the land registration petition (Ex. 3-b) and also as regards Ex. 3(c) the application for the correction of an entry in the Land Register. These facts are relied upon by the plaintiff and by the learned Judge in the Court below for holding that the business of these two persons was joint. The learned Judge expresses himself in this way:

Even assuming for a moment for the sake of argument that defendants 1 and 2 are not joint in mess, there is sufficient evidence in the record that would go to prove that all their affairs are joint and it is defendant 1 who looks after the same.

14. On the finding at which I have arrived thearrear was not by the default of defendant 2; that is the only assumption in law we can arrive at in this case. It may be and for the momerlt I accept the contention that it is proved that the business of defendants 1 and 2 is joint. On those facts alone we are asked to infer a case of conspiracy and fraud against these two defendants. In coming to a conclusion on this question, I cannot disregard the fact that the allegation made in the plaint was an allegation of conspiracy not only against these two defendants but also against the other two defendants in the suit. Had the finding of fact arrived at by the Court below been a question of appreciation of oral evidence and the demeanour of witnesses, it would have been perhaps difficult, if not impossible, for this Court to come to a conclusion different from that at which the learned Judge in the Court below has arrived. But in this case the finding of fraud against defendants 1 and 2 is a finding arrived at by inferences from facts admitted or proved. Those facts do not in my judgment admit of such conclusions. The facts do not point unmistakingly to fraud and are susceptible of inferences consistent with innocence as regards this charge. Without fraud the revenue sale must stand and as the plaintiff''s case in this suit depended upon her success in establishing her right to a declaration that the revenue sale was not binding upon her, the suit must fail.

15. For these reasons I would allow the appeal and dismiss the plaintiff''s action with costs throughout.

Manohar Lal, J.

16. I agree; but as we are reversing the decision of the learned Subordinate Judge it is right that I should shortly give my reasons why I have arrived at the same opinion as my learned brother. I am satisfied on reading and considering the evidence, both oral and documentary that the decision of the learned Subordinate Judge is correct when he holds that the sale of 15th January 1927, was not for legal necessity nor was the money advanced to defendant 3 after due and bona fide enquiry.

17. On the other hand I am also satisfied that the consideration, as stated in the sale deed, did pass from defendant 2 to defendant 3. The evidence was practically one sided. Witness 6 for the defendant stated definitely that a sum of Rs. 2240 was paid before the Sub-Registrar and there is also an endorsement to this effect upon the sale deed. This statement was not challenged in cross-examination. Neither the widow nor the son-in-law came forward to deny the receipt of consideration. I therefore hold that the plaintiff would be entitled to the first declaration as mentioned in the relief portion of the plaint, were it not for the fact that it is impossible to grant this relief because the property covered by the sale deed was sold on 6th June 1927, in arrears of Government revenue. I now proceed to consider whether the plaintiff is entitled to the real declaration claimed by him, namely

that the revenue sale in favour of defendant 1 is collusive and fraudulent and the same is not binding upon the next reversioners of the said Bechu Sah.

18. This relief was not contained in the plaint as it was originally filed on 23rd March 1933. Defendant 1, who is the appellant before us, filed a written statement on 29th June 1933. The case was opened for trial on 1st May 1934. On that date I find on reading order No. 21 that the plaintiff applied for an amendment of the plaint by asking for this new relief to be added. This was objected to by the defendant but the objection was overruled. In order to succeed the plaintiff is required to prove that the sale of 6th June 1927 was brought about by the fraud of defendants 1 and 2 upon the allegations as mentioned in the plaint. These allegations, if analysed, amount to this that the stepmother of the plaintiff and defendant 4 were in collusion with each other to waste the properties of Bechu Sah in order to put the plaintiff to loss; secondly that the sale deed of 15th January 1927 was for no legal necessity and without consideration; and thirdly that defendants 1 and 2, uncle and nephew, had joint business and were on the look-out to lay hands on this property and accordingly they brought defendant 3 to their side and brought about the execution of the sale deed; and lastly, which is very important, that

to strengthen their title defendants 1 and 2 resorted to the fraud in that they intentionally allowed the revenue of the villages to fall in arrears, got them sold at the Collectorate revenue sale and themselves purchased them in the name of defendant 1.

19. No evidence was given at the trial to show that defendants 3 and 4 or defendant 3 was in collusion with defendants 1 and 2 in order to get the property sold in arrears of revenue. Some attempt was made to show that defendants 1 and 2 were members of the joint Hindu family governed by the Mitakshara school of Hindu law and that they were joint in mess and business and therefore it was argued that when the property was allowed to be sold in arrears of revenue and purchased by defendant 1, the purchase really enured to the benefit of the joint family or to that of defendant 2 as before. The short answer to this contention is that no such case is made out in the pleadings and indeed para. 9 of the plaint suggests that defendants 1 and 2 were separate but only had joint business. The oral evidence in the case also points to the same conclusion, namely that defendants 1 and 2 separated from each other long ago. I am particularly impressed by the evidence of Joti Lal Sah, defendant 1, who is aged 72. He says definitely on oath that defendant 2 separated from him for over 50 years. This assertion is supported by the documentary evidence in the case namely among, others, the judgment, Ex. B(1) of 1903, and entries in the survey record of rights Exs. P series, which show that the two branches were separately recorded in possession and that defendant 2 was recorded in possession under the guardianship of his mother Mt. Somaro Kuar.

20. In view of the pleadings this evidence is quite sufficient in my mind to negative the suggestion, now made in argument that defendants 1 and 2 were members of a joint Hindu family. The oral evidence adduced on behalf of the plaintiff is meagre and insignificant upon this point and is not fit to be relied upon. The only allegation made in the evidence of two witnesses for the plaintiff is that defendant 1 and defendant 2 "lived jointly". The cross-examination of witness 3 for the plaintiff discloses that he knows nothing about this family and I am not impressed with the evidence of this witness at all. In my opinion the plaintiff has failed to prove that defendants 1 and 2 were members of a joint Hindu family. On the other hand it is established that they were separate. Even the evidence on the question that their business was joint is not of a very convincing character. But I am prepared to assume in favour of the plaintiff that defendants 1 and 2 had joint business.

21. The critical question of fact in this case is whether the property was allowed to be sold because the defendants intentionally allowed the revenue of the village to fall into arrears. Strange as it may seem, although this was the crucial point in the case, the plaintiff has miserably failed to prove that this property was brought to sale on account of arrears during the time that defendant 2 was the owner. Defendant 2 purchased this property on 15th January 1927, as stated already, and the document was registered on 20th January 1927. It is well known that the January kist in this province for paying arrears of the Government revenue ends on 12tb January and after that date no payment is permissible unless the Collector exercises his special powers u/s 18, Revenue Sale Law, which he does only in cases of extreme urgency or hardship.

22. In the present case the plaintiff has not taken the trouble to produce a copy of the touzi ledger which would show the state of account of this estate with the Government. It is that paper which would have shown easily the arrears for which this estate was actually sold on 6th June 1927. Reliance was however placed by Dr. Sen on the order sheet at p. 33 to show that the Government dues of this estate on the date of sale was Rs. 27-3-1. I do not see how the statement in the order-sheet is evidence of the fact but in any case it does not show the period for which this estate was in. arrears.

23. Reliance was next placed upon the statement in Ex. E at p. 35 which is an order of the Deputy Collector to the Nazirto give possession to the purchaser. It states that the estate was sold for arrears of demand up to 28th March 1927. It also states that the sadarjamu payable annually is Rs. 12-4-1. In the first place this statement in the order for delivery of possession is no evidence at all and is no guarantee as to the truth of the facts stated'' therein. Assuming that this statement is admissible and true it does not show that the estate was not in arrears before 12tri January 1927. In my experience when the estates bear a small annual revenue-payable to Government such amounts are payable only in one kist, that is in January of each year.

25. In this case I find that the annual sadar-jama is Rs. 12-4-1 and I would be inclined to think that this was the amount payable annually in the January kist; but, whatever may be the real position, the evidence on the record is wholly insufficient to establish that this estate fell into arrears after 15th January 1927, that is to say, in the March kist of 1927. This being so, the plaintiff has failed to prove that the defendant allowed the estate to fall into arrears. It is also obvious that when the property was sold by the widow the estate was already in arrears and therefore the arrears were due from this estate while defendant, 3 was the owner. If it is permissible to guess, I think what happened was that owing to the negotiations for purchase being caused or for sometime each party was under the impression that the other party had paid or would pay the Government demand and in this view the Government demand was not paid by the vendor and by the time the sale deed came to be executed and registered the last date of payment of January kist was over.

26. It was then argued by Dr. Sen that when defendant 2 came to know that the property was on sale he allowed the property to be sold for arrears of Government revenue and did not pay the demand which was justly payable by him and he got it purchased in the name of defendant 1. Now assuming that each one of these allegations is established, I do not see how these can prove that defendant 2 is guilty of any fraudulent conduct. Defendant 2 was a bona fide purchaser of this property and the sale to him upon my finding, was good till the lifetime of the vendor. When he found the estate in arrears it was open to him to pay up the arrears or not to pay up the arrears. There was no duty imposed upon him to pay up the arrears. He was not required to look after the interest of the reversioners in that situation. It may be he did not have the money ready on that

date to pay up the arrears or as is more probable he acted like petty zamindars who are very careless in paying up the Government arrears in time. They wait till the very last moment and then they begin to arrange for the amount which is to be deposited and proceed to the treasury on the last date of the kist and are unable to reach there in time. Such cases are not of uncommon occurrence in this province. But in any case I do not see any evidence on the record from which I can draw an inference of fraud against defendant 2 or against defendant 1; the acts attributed to them are all of equivocal character and in the absence of clear evidence the Court is not entitled to presume fraud but should presume innocence.

27. The learned Subordinate Judge has fallen into the error which was condemned by the Privy Council in Moonushee Buzloor Ruheem v. Shumsoonnissa Begum (1867) 11 M.I.A. 551, where they observed that "Judges in India are perhaps somewhat too apt to see fraud everywhere". The learned Subordinate Judge was no doubt super induced into this belief by the manifold cases of fraud with which he has to deal in the course of his official duties.

28. Upon a careful consideration of the evidence I am of opinion that the finding of the learned Subordinate Judge that the sale was brought about by the fraud of defendants 1 and 2 is incorrect and I am unable to accept it. I therefore agree that the appeal should be allowed and the suit of the plaintiff dismissed with costs throughout.