

**(1970) 10 PAT CK 0005**

**In the Patna High Court**

**Case No :** Letters Patent Appeal No. 22 of 1965

Md. Israfil

APPELLANT

Vs

Md. Israil and Others

RESPONDENT

**Date of Decision :** 20-10-1970

**Acts Referred:**

Trusts Act, 1882 — Section 90

**Citation :** AIR 1971 Patna 350

**Hon'ble Judges :** U.N. Sinha, C.J; K.B.N. Singh, J

**Bench :** Division Bench

**Advocate :** L.M. Sharma, for the Appellant; S.M. Hussain and Harendra Prasad, for the Respondent

**Final Decision :** Dismissed

## Judgement

U.N. Sinha, C.J.

1. This appeal has been filed by an intervenor defendant and it arises out of a suit instituted by the plaintiffs for declaration of title to and for confirmation of their possession over 12 kathas and 2 dhurs of land and in the alternative for recovery of possession over the land. The relevant facts are as follows. One Hasan Ali had a holding of 2 bighas 17 kathas and 8 dhurs of land and he died leaving his widow and three sons. Some of the landlords had instituted a suit for realisation of arrears of rent against Hasan Ali's heirs and the suit had been decreed. The decree was put in execution and the holding was sold in auction on the 1st February, 1937. The decree-holders purchased the land and took delivery of possession on the 2nd July, 1937. On 24th January, 1938. one of the sons of Hasan Ali, named Siddique, took settlement of 2 bighas 4 kathas and 8 dhurs of land out of the original holding of Hasan Ali from the auction-purchasers by a registered document. Siddique also claimed to have taken oral settlement of 6 kathas and 12 dhurs of homestead land from the same auction-purchasers. Subsequently on 7th June, 1952 Siddique sold the disputed land to the plaintiffs by a registered document. Apparently there was some mistake made in

mentioning the boundaries and therefore a second sale-deed was executed by Siddique in favour of the plaintiffs on 23rd October, 1957. The plaintiffs contended that the landlord auction-purchasers had come into possession of Hasan Ali's holding and Siddique had come into possession of the land settled with him and so the plaintiffs had also got possession from 7th June, 1952. It was alleged that another son of Hasan Ali, named Imdad, had gone away to Pakistan and on his return he started interfering with plaintiffs' possession over the disputed land. Ultimately a proceeding u/s 144 of the Code of Criminal Procedure was drawn up and it was decided against the plaintiffs. Hence, this suit had to be instituted. Originally Imdad, defendant No. 1, had contested the suit until the present appellant came in picture by purchase from him on 12th September, 1959, during the pendency of the suit in the trial Court. The intervenor defendant appellant supported Imdad's case. The suit was decreed by the trial Court and on appeal the decree was affirmed. Thereafter, the intervenor defendant filed Second Appeal No, 1094 of 1963 in this Court and by judgment passed by this Court on 9th August, 1965, the appeal was dismissed. The main point which had been argued on behalf of the intervenor defendant in the second appeal in question was on Section 90 of the Indian Trusts Act and the only point that has been raised in this appeal is based on that section alone. Before I deal with the contention raised by the learned counsel for the appellant based on Section 90, I may mention the findings which have been arrived at by the learned single Judge of this Court. The learned Judge has held that nothing had been shown to him from which an inference can be drawn that Siddique was in collusion with the landlords who were the auction-purchasers. The learned Judge has held that there was nothing in the case to show that Siddique had managed to take settlement of the disputed land from the landlords auction-purchasers by availing himself of his position as a co-sharer. It has also been mentioned that there was no material on record to indicate any collusion between Siddique and the landlords in bringing about the auction sale in question. - In those circumstances it has been held that the principle of Section 90 had no application. Section 90 of the Indian Trusts Act may be quoted: "Where a tenant for life, co-owner, mortgagee or other qualified owner of any property, by availing himself of his position as such, gains an advantage in derogation of the rights of the other persons interested in the property, or where any such owner, as representing all persons interested in such property, gains any advantage, he must hold, for the benefit of all persons so interested, the advantage so gained, but subject to repayment by such persons of their due share of the expenses properly incurred, and to an Indemnity by the same persons against liabilities properly contracted, in gaining such advantage." Prima facie, before advantage of Section 90 can be taken by the appellant in this case, he must prove that a co-owner, by availing himself of his position as such, had gained an advantage in derogation of the rights of other persons interested in the property, or that co-owner, as representing all persons interested in such property, had gained any advantage. All the findings based on the materials on record are clearly against such conclusions, as indicated above. But, the learned counsel for the appellant

has relied upon a decision of their Lordships of the Supreme Court in the case of Basmati Devi Vs. Chamroo Sao and Others, and has contended that on the principles laid down by the Supreme Court, the instant case must be decided in favour of the appellant. Sri-mati Basmati Dcvi's case was a case of mortgage and the placitum of the decision states as follows: "Where both the mortgagor and mortgagee are liable to pay rent and rent decree and sale in execution of it are brought about because of the default of both of them and the mortgagee purchases the mortgaged land in execution sale, the fact that the mortgagor had made a default, does not alter the position that the mortgagee had also defaulted in paying the rent he was liable to pay, By his default he has contributed to the position that a suit had to be brought for arrears of rent and ultimately to the position that the property was put to sale in execution of the decree obtained in the suit. This contribution to the bringing about of the sale was a direct result of his position as a mortgagee. When, therefore, he purchased the property himself at the sale in execution of the rent decree he clearly gained an advantage by avail-Ing himself of his position as a mortgagee. Section 90 Is applicable to such a case and the mortgagor is entitled to redeem the mortgaged property. This is the position in law even if the mortgagee's liability was to pay less than the major portion of the rent of the holdings." What had happened in that case was that under the terms of mortgage bonds the mortgagees had undertaken to pay a substantial portion of the rent of the land. They had not. with the result that a suit for arrears of rent had been brought by the landlord and a decree obtained. In. execution of the decree the lands were sold and were purchased by the benamidars of the mortgagees. The plaintiff had contended that this purchase had enured for the benefit of the mortgagor and so the right of redemption had not been affected. The trial Court had dismissed the suit, holding that the plaintiff had failed to show that the auction-purchasers were benamidars of the mortgagees. The first court of appeal had come to a contrary conclusion. It was held that the purchase in auction sale was really on behalf of two contesting defendants. The trial Court's decree was set aside and a preliminary decree for redemption was passed, on the finding that under the mortgage bonds the mortgagees were liable to pay rent and the rent sale having been brought about due to the default of the mortgagor and the mortgagees the mortgagees could not take advantage of the same. On appeal, this Court had restored the decree of the trial Court, holding that Section 90 of the Trusts Act did not apply to the facts of the case. In such circumstances, Srimati Basmati Devi's case had gone to the Supreme Court for decision. The relevant portion of the judgment of their Lordships is as follows: "The question for consideration is whether in circumstances like the present where the decree and the sale in execution of it are brought about by the default of both the mortgagor and the mortgagee, the mortgagee can be said to have taken advantage of his position by purchasing the property at the sale. The High Court appears to think that unless the sale was brought about by the default of the mortgagee alone the mortgagee cannot be said to have taken advantage of his position in making the purchases. What seems to have weighed with the learned Judges is that even if

the mortgagee had done his duty by paying the rent he was liable to pay, the sale would still have taken place as the mortgagor did not pay that portion of the rent which he was liable to pay. So, they thought that the mortgagees, though they took advantage of the fact that the property had been brought to sale, could not be said to have taken advantage of their position as mortgagees. With this view we are unable to agree. In our opinion, the fact that the mortgagor, had made a default does not alter the position that the mortgagee had also defaulted in paying the rent he was liable to pay. By his default he has contributed to the position that a suit had to be brought for arrears of rent and ultimately- to the position that the property was put to sale in execution of the decree obtained in the suit. This contribution to the bringing about of the sale was a direct result of his position as a mortgagee. When therefore he purchased the property himself at the sale in execution of the rent decree he clearly gained an advantage by availing himself of his position as a mortgagee." Thereafter, their Lordships stated that the findings being that the liability of defendants 1 and 2 was to pay a substantial portion of the rent it would have been entirely unrealistic to hold that they had not taken advantage of their position as mortgagees, although they had not discharged their obligation under the mortgage bond. According to the learned counsel for the appellant, this decision of the Supreme Court will apply in the present, case, where Siddique was a co-owner of Hasan Ali's holding and even on the conclusions arrived at by the learned single Judge of this Court, it must be held that Section 90 of the Trusts Act is attracted, merely because Siddique had not paid the rent due on the holding which had devolved upon Hasan Ali's heirs. It is difficult to uphold this contention on the facts of the present case. The primary reason for the decision of their Lordships of the Supreme Court appears to be that the mortgagees in that case had by their default contributed to the position that a suit had to be brought for arrears of rent, with the result that when the property was put to sale the defendants in that case had purchased the property in the name of benamidars. Their Lordships had stated that contribution to the bringing about the sale was a direct result of the position as a mortgagee, based on the obligation arising out of the mortgage bonds. It is difficult to conclude that these principles can be applied to a co-owner, without anything more, merely because the co-owner had a liability to pay rent of certain lands. It may also be mentioned at this stage that Hasan Ali's family was governed by the Muslim Law of Inheritance and after his death, his son Siddique was a tenant in common and not a joint tenant with the other heir or heirs. Learned counsel for the contesting respondent has referred to a decision of the Privy Council in the case of AIR 1939 86 (Privy Council) and has argued that in the case of co-sharers, certain ingredients had to be proved before Section 90 can be brought in aid. On the decision of the Privy Council it is argued that some bad faith, on the part of Siddique had to be proved before Imdad or his transferee can contend that the sale in execution of the decree for arrears of rent and the delivery of possession to the decree-holders and the subsequent settlement to Siddique can be made null and void. In my opinion, that contention raised on behalf of the learned counsel for the plaintiffs

respondents is sound and it may be noticed that the decision of the Privy Council has been dealt with by a Division Bench of Orissa High Court in the case of Balabhadra Misra v. Srimati Nirmala Sundari Devi reported in AIR 1954 Orissa 23, in the light in which the learned counsel for the respondents has put his case. The Bench of the Orissa High Court, dealing with Anath Nath's case stated as follows: "The present case is very similar to a later decision of the Privy Council reported in AIR 1939 86 (Privy Council) (in which the judgment was delivered by Sri G. Rankin himself) where their Lordships refused to apply the principles of Section 90, Trusts Act, to a case where a co-sharer who subsequently purchased the property in the revenue sale was not guilty of any act of bad faith towards his co-sharers, had not lulled them into a sense of security, had not abused their confidence and had not done anything to prevent his co-sharers from becoming possible bidders." With respect to the learned Judges of Orissa High Court I am of the view that the approach in Balabhadra's case was in conformity with Section 90 of the Trusts Act in the case of co-owners in the broadest sense. There is no material in the instant case to show that Siddique had any obligation to pay rent on behalf of the co-owners and, therefore, it is difficult to appreciate how Section 90 can be called in aid of the appellant merely because Siddique was one of the heirs of Hasan Ali with respect to the father's holding. In Balabhadra's case of the Orissa High Court, reference has been made to a Bench decision of the Calcutta High Court in the case of Kurshed Ali and Others Vs. Dinanath Surma and Others, . where it was held that the mere fact that the purchaser of an estate in a revenue sale was one of the co-sharers was not sufficient to attract the equitable principles of Section 90, Trusts Act, and that there must be something unfair, something amounting at least to sharp practice, in the conduct of the purchaser. I may state at this point, that, in the instant case Siddique was not even the purchaser in the auction sale held on the 2nd July, 1937. He had merely taken settlement of a portion of the original holding from the auction purchasers in January, 1938. Therefore, no principle enunciated by the learned counsel for the appellant is of any avail to him. based on Section 90 of the Trusts Act. It is not possible to hold that their Lordships of the Supreme Court in Srimati Basmati Devi's case meant to decide that the judgment of the Privy Council in the case of AIR 1939 86 (Privy Council) , and the judgment of the Calcutta High Court in the case of Kurshed Ali and Others Vs. Dinanath Surma and Others, had been wrongly decided on principles. Their Lordships of the Supreme Court were dealing with the case of mortgagor and mortgagee and the mortgagee's liability to pay rent as contracted in the mortgage bonds. Learned counsel for the appellant has not been able to cite any decision involving the case of co-sharers where it has been held that a co-owner of any property can be affected by the principles enunciated in Section 90 of the Trusts Act only because he was a co-owner, although he had not availed himself of his position as such and had not gained any advantage in derogation of the rights of other persons interested in the property. For these reasons, I am of opinion that the judgment of the learned single Judge of this Court is a correct one and must be upheld. The appeal, therefore, fails and is dismissed with costs.