
(1953) 02 PAT CK 0010
In the Patna High Court
Case No : Civil Revision No. 657 of 1951

Mt. Anantia

APPELLANT

Vs

Ramlagan Singh and Others

RESPONDENT

Date of Decision : 10-02-1953

Acts Referred:

Citation : AIR 1953 Patna 306 : (1953) 1 BLJR 267

Hon'ble Judges : Ahmad, J

Bench : Single Bench

Advocate : Krishna Das De, for the Appellant; N. Bagchi, L.M. Sharma, R.K. Bagchi and Lakshman Saran Sinha for Govt. Pleader, for the Respondent

Final Decision : Allowed

Judgement

Ahmad, J.—This is an application in revision by the plaintiff against the preliminary order dated 14-8-1951 passed by Mr. Ajitnath Sarkar, Munsif, 2nd Court, Patna holding that court-fee paid is insufficient and that it should have been paid as provided u/s 7(iv)(c) of the Court-fees Act and not on the bond amount as claimed by the plaintiff.

2. The suit instituted by the plaintiff is one for the redemption of the mortgage created by him in favour of defendant 1 by a registered document. It bears title suit No. 134 of 1949/51 and is at present pending for disposal in the Court of the learned Munsif. The plaint discloses that there are five sets of defendants in this case of whom defendants 1 to 10 are defendants first party, who are either original mortgagees or their successors. The plaintiff is the widow of one Ramgobind Singh. The ancestor of Ramgobind was one Dularchand Singh. The family of Dular Chand is at present represented by two branches which are separate. One branch is represented by the family of Ramgobind Singh and the other by the family of Sheogobind Singh, defendant 26 and Mt. Bhagwati Kuer, defendant 25. The lands owned by the family were recorded in the survey record of rights under khata Nos. 114 and 115 of tauzi No. 220. As a result of partition in the family half of the land in each of the khatas came to Ramgobind and after

him to his widow and the remaining half went to the share of Sheonarayan Singh and Mt. Ehagwati Kuer.

By a document dated 19-2-1924, the plaintiff gave her half share in plots Nos. 920, 929 and 970 of khata No. 114 in usufructuary mortgage, in lieu of Rs. 1000/- to one Ramdhani Singh, the father of the defendants 3 to 7 and Ramlagan Singh defendant 1. The period of mortgage was from 1331 to 1338 Fs. Under the terms of the mortgage the mortgagee was to pay rent of the mortgaged land. By another registered deed dated 9-7-1926, the plaintiff gave her 2 bighas 10 kathas of land under plot No. 852 of khata No. 114 to the family of defendant first party in lieu of Rs. 900/-. The period for the mortgage was from 1334 to 1338 Ps. and under this mortgage too the mortgagee was to pay the rent of the mortgaged land. By a third document dated 9-7-1926, the plaintiff gave another 2 bighas of land in plot No. 980 of khata No. 114 again to the defendants first party. The period of this mortgage was from 1334 to 1338 Ps. and as in the case of other mortgages the mortgagees were to pay rent of the mortgaged land. By a fourth registered document dated 9-7-1926, another 2 bighas of land in plot No. 980 khata No. 114 was given in a usufructuary mortgage by the plaintiff to the defendant first party in lieu of Rs. 600/-. The period of the mortgage was from 1334 to 1338 Ps. and under this document as well the rent was to be paid by the mortgagees. The remaining land of the plaintiff, which was still left without burden, was given in rehan to the families of the defendants 1st to 4th parties by the plaintiff and under the terms of that rehan also the mortgagee were to pay the rent of the lands in rehan. By a separate document the defendant 25 and the mother of defendant 26 also gave their entire land under khata 114 in usufructuary mortgages to the defendants 1st to 4th parties. Under that document as well the rent was to be paid by the mortgagees. The defendants 25 and 26, the executants of the last mortgage, have been impleaded as the defendants 5th party in this suit.

3. On the 30th of Jaith 1356 Fs. corresponding to 10-6-1949 the plaintiff went to the defendants first party in order to redeem the rehan deed dated 19-2-1924 and offered to pay the rehan money to them. The defendant 1st party at first tried to put them off but ultimately they disclosed to the plaintiff on. 5-8-1949 that the entire rehan land covered by the rehan deeds executed by the plaintiff and also the one executed by defendant 25 the mother of defendant 26 were sold in execution of a decree for rent and were purchased by the defendant 1st party in farzi name of their relation and by the defendants 2nd, 3rd and 4th parties. It is also alleged in the plaint that after the purchase of the land in the execution sale the auction purchasers divided it amongst themselves and the defendants refused to redeem the rehan deed dated 19-2-1924. On enquiry, as is stated in the plaint, the plaintiff came to know that as a matter of fact the defendants 1st to 4th parties dishonestly and fraudulently in collusion and conspiracy with each other did not pay the rent to the landlords as stipulated in the mortgage bonds and fraudulently, dishonestly and malafidely in collusion with the landlords and in conspiracy with one another got a rent suit filed by the

landlords in respect of the entire holding in which summonses were surreptitiously and fraudulently served and ultimately a fraudulent and collusive decree was obtained and the entire land was got sold "bala bala" without any service of notices on the parties.

4. On the allegations stated above, the plaintiffs have instituted the present suit to redeem the rehan deed 19-2-1924, and paid a court-fee of Rs. 134/1/- on a sum of Rs. 1000/- which was the original consideration of the mortgage bond.

5. Under these circumstances the Stamp Reporter raised the objection that the court-fee paid was insufficient and the Court on hearing the parties held that an ad valorem court-fee u/s 7(iv)(c) of the Court-fees Act should have been paid and not on the bond amount as paid by the plaintiffs. In support of the order passed by the learned Munsif, reliance was placed on the cases of -- "Brij Krishna Das v. Murli Rai AIR 1920 Pat 656 (A); -- Hasan Mirza and Another Vs. Syed Bakar Hasan, , and the Full Bench case of -- Mt. Rupia Vs. Bhatu Mahton and Others, .

6. I am afraid, none of the cases referred to above are applicable to the facts of the present case. The point involved is no doubt a bit ticklish but is one which has been frequently discussed by the Courts and has been already the subject-matter of many decisions by the different High Courts in India and by this Court as well. In spite of all these decisions, however, it appears that it still retains its complicated character.

7. In the case of AIR 1920 Pat 656 (A)", the suit was for a declaration that a decree obtained against the plaintiffs and others and the sale held thereunder, were void on the ground of fraud. The plaintiff had himself paid ad valorem court-fee u/s 7(iv)(c) of the Court-fees Act but had fixed the valuation on the basis of a decree which the plaintiff wanted to avoid and not on the basis of the value of the property which had been sold in the execution of that decree. In the light of those facts the point in controversy was whether the loss incurred to the plaintiff was the amount of the decree passed or the value of the property sold in execution of that decree. The Court, held that the property had already been sold and the sale having been attacked only on the ground of fraud, the loss involved to the plaintiff was the value of their interest in the property and not the value of the decree which the plaintiff wanted to avoid..... I think the facts of that case are not applicable to the facts of the present case.

The reliance was placed on this case for the simple reason that there was a prayer for redemption as well in the plaint and in the light of that prayer it was argued by the plaintiff of that case that the other prayers were only ancillary to the prayer of redemption. In answer to that it was observed therein:

"In my opinion this cannot be so; for till the sale is reversed, the plaintiffs cannot redeem. It would not have been sufficient for them to bring a suit for redemption without making any mention of the decree and the sale leaving it to the defendants to set up the decree as a bar to the suit. They could not in a suit so

framed have been permitted to adduce evidence of fraud and got a declaration that the decree and the sale were inoperative. It might have been otherwise if the decree had been without jurisdiction or if they had been defendants but here it was of vital importance to them to set aside the decree and the sale by means of a declaratory decree."

8. This observation is clearly based on the footing that the decree passed against the plaintiff was voidable and not void and therefore it had to be avoided before the claim of the plaintiff could be decreed on the basis of any title held by him. Had, therefore, the Court held that the decree was void the decision would have been entirely otherwise.

9. The judgment in the case of -- Hasan Mirza and Another Vs. Syed Bakar Hasan, , is that of Dhavle J. sitting singly. Therein he observed:

"There was no dispute below about the category in which the suit fell: even before the addition of the prayer for a permanent injunction, which was held in -- "Deokali Koer v. Kedarnath 39 Cal 704 (C1), to be a form of consequential relief, the suit was one within Section 7(iv)(c), Court-fees Act, as several of the declarations prayed for in the plaint after the first declaration (regarding the alleged wakf) formed consequential relief -- compare -- Ram Oraon Vs. Doman Kalal and others ; --"Surendra Narain Singh v. Sham Bihari AIR 1922 Pat 404 (E) and -- "Muhammad Fahiman Haq v. Jugat Ballav Ghose AIR 1923 Pat 475 (F)."

He thereafter referred to the following observation made by the Full Bench in the case of -- Ramsumran Prasad and Others Vs. Gobind Das, ;

"Where the plaintiff claims relief to which he is not entitled until some decree or alienation of property which stands in his way has been avoided, or until his legal character or title, which has been called in question, has been declared by a decree of the Court, it has generally been held that such a suit comes under Clause (iv) (c) of the section (Section 7) even though a declaration which it is necessary for him to obtain before further relief can be granted has not been in terms asked for in the plaint,"

and relying on it held:

"We may take it that this still continues to be the law, and that the Pull Bench in -- Ramkhelawan Sahu Vs. Bir Surendra Sahi and Others, , did not intend to overrule the Patna decisions, as regards the valuation in such cases, which I have already cited and to which no reference was made by the learned Judges doubtless because they were not dealing with this point."

The question, therefore, even in the light of the observations made in this case, that arises for consideration, is whether it was necessary for the plaintiff to seek declaration in the present case to the effect that the decree passed in the rent suit and the sale held thereunder was not binding on them. If it was necessary for the plaintiff to seek a declaration like that then the Court-fee was to be paid u/s 7(iv)(c) of the Court-fees Act. In my opinion, as I shall presently show, it was

not at all necessary for the plaintiff in the circumstances of the present case to seek a declaration on that line.

In the Full Bench case -- Mt. Rupia Vs. Bhatu Mahton and Others,

"the suit was for a declaration that two sale-deeds, dated 5-2-1940, executed by the plaintiff and defendants 7 to 10 in favour of defendants 1, 3 and 5 were fraudulent and did not confer any title on the latter. The plaint was filed with a court-fee of Rs. 15/- for a declaration only in respect of each of the two documents. On these allegations the Stamp Reporter was of the opinion that the suit was governed by Section 7(iv)(c) of the Court-fees Act and that ad valorem court-fee was payable".

The Full Bench held:

"(1) A suit though cast in the form of a declaratory relief only, but in substance aiming at setting aside a deed formerly executed and registered in accordance with law, is not liable to the fixed fee under Article 17, Schedule II, Court-fees Act.

(2) that the plaint in such a suit is liable to ad valorem court-fees either u/s 7(iv)(c) or Article 1 of Schedule I of the Court-fees Act; and

(3) that the weight of the judicial authority of the different High Courts, and, particularly, of this Court, is in favour of the view that such a suit is governed by the provisions of Section 7(iv)(e) of the Court-fees Act."

The facts of this case reported in -- Mt. Rupia Vs. Bhatu Mahton and Others, , are covered by the terms of Section 39 of the Specific Relief Act and the decision has, therefore, to be given in such cases in the light of the provisions of Section 39 of the Specific Relief Act.

The position is different where a decree is attacked on the ground of its being nullity. That aspect of the case is dealt with fully in the Full Bench case of -- Sri Krishna Chandra Vs. Mahabir Prasad and Others . In that case, the plaintiff had prayed for declaration that a certain decree was not binding upon him and was altogether void and ineffectual. What was, therefore, held was that inasmuch the plaintiff merely asked for a declaration that the previous decree was not binding on him and was altogether void and ineffectual, the suit was one for obtaining a declaratory decree only, and fell under Article 17 (iii) of Schedule II of the Court-fees Act. I, therefore, think that the principle laid down in the Pull Bench case reported in -- Mt. Rupia Vs. Bhatu Mahton and Others, , is not applicable to the facts of the present case.

10. The present case is entirely different in its scope. Here it has been alleged firstly that the sale had been brought about as a result of collusion between the mortgagee and the landlord in order to defraud the mortgagor and therefore the decree and sale was a nullity in the eye of law and secondly that even if there was any sale in law, the mortgagee on getting back the settlement of the land

from the landlord could not change the character of the possession as against the plaintiff for the reason that the sale and the decree had been brought about as a result of default on the part of the mortgagee in complying with the terms stipulated in the contract regarding the payment of rent to the landlord. The allegation of fraud, if found to be true, makes a decree and sale void and nullity in the eye of law and the allegation that the decree and sale was the result of the wrong perpetrated by the mortgagee in not paying the rent as stipulated in the mortgage bond debars him from taking advantage of that sale and telling the mortgagor that his right of redemption had been wiped out by that decree and sale.

In support of the contention that as a result of fraud alleged in the plaint against the mortgagee the decree and sale is a nullity in the eye of law and no declaration is needed for avoiding such a decree and sale, reliance was placed by learned counsel appearing for the plaintiff-petitioner on the case of -- Ramautar Sao Vs. Ram Gobind Sao and Others, . Therein their Lordships observed:

"It can never be said that a plaint carries by necessary implication a prayer for a relief which is in fact unnecessary, and a clear distinction must be drawn between cases where it is necessary for the plaintiff to get the document declared void and cancelled before he can obtain relief, and cases where the plaintiff can obtain his relief without any such declaration and cancellation, upon a mere finding that the document does not affect him, that is to say, we must distinguish between voidable documents and wholly void documents and between declarations in the true sense and declarations so called, which are merely the findings of fact necessary to give the plaintiff relief. Both these distinctions have been clearly drawn many times in Judicial decisions. The Privy Council in --"Petherpermal v. R. Muniandi 35 Ind App 98 (K), has held that an inoperative instrument does not bar the plaintiff's right to recover possession of his land, and that it is unnecessary for him to have it set aside as a preliminary to his obtaining the relief he claims. This distinction has been clearly pointed out in --"Banku Behari v. Krishto Gobindo 30 Cal 433 (L). A document which is nullity does not require to be set aside, or cancelled. A suit for declaration that a transaction embodied in a particular deed was from its very inception a sham transaction is to be distinguished from a suit for cancellation of the deed; -- "Jagardeo Singh v. Phuljhari 30 All 375 (M). A plaintiff may rely upon the invalidity of a void instrument as against himself without suing for its cancellation, and a suit for declaring the invalidity of such an instrument will not be governed by Section 7(iv)(c), though it will of course be otherwise when a party cannot impeach the document without having it cancelled; see -- "C.V. Sankaran Nair v. C.V. Gopala Menon", 30 Mad 18 (N). In a similar strain are observations in -- Arunachalam Chetty, Nagalingam Chetty by his mother and next friend Parvathammal Vs. Rangasamy Pillai, , to the effect that the substance, and not the language, of the plaint must be looked to, and a suit for declaration that the document is not binding is to be taken to be for consequential relief, where it is incumbent on the plaintiff to get the document set aside before he can question it. In short, the

prayer for cancellation can only be deemed to be present by necessary implication where upon its true construction the plaint in asking for avoidance of the document asks for reliefs which necessarily involve its cancellation, that is to say, in the case of a document which is voidable as opposed to void."

In the present case the allegation is that the decree and sale brought about as a result of collusion by the mortgagee is void and nullity in the eye of law. In that view of the allegation the plaintiff need not seek any declaration to the effect that it should be avoided. The case of --"Ram Rup Singh v. Jang Bahadur Singh AIR 1951 Pat 566 (P), is on all fours applicable to the facts of the present case. In that case the learned Chief Justice has dealt with the point very elaborately. There also the property under the usufructuary mortgage had been sold in execution of a decree for rent which under the terms of mortgage was to be paid by some of the mortgagees. On the sale of the property it had been got back by the mortgagees again. The allegation was that the sale had been brought about as a result of fraud on the part of the mortgagees and also as a result of non-payment of rent by some of them. In the light of those facts the learned Chief Justice held:

"Thus on the evidence it is clear that the defendants took possession as mortgagees; and it was their clear duty to save the property from the Court sale which took place on 20-8-1937, in execution of the rent decree. Admittedly the landlords became the auction-purchasers and the defendants took settlement from them and are in possession of the disputed land. In my opinion, the defendants by taking the settlement from the landlords, could not change the character of their possession is against the plaintiffs. The defendants were clearly in the wrong in allowing the property to be sold and, therefore if the holding has come back into their hands they cannot, take advantage of their own wrong and deprive the plaintiffs of their right of redemption. It is a well-known legal maxim that convenience cannot accrue to a party from his own wrong (*commodum ex injuria sua nemo habere debet*). The principle of this maxim was applied by their Lordships of the Judicial Committee in -- "*Hunoomanpersaud v. Mt. Babooee Munraj* 6 Moo Ind App 393 at p. 423 (PC) (Q), where their Lordships have said:

"But of course, if that danger arises or has arisen from any misconduct to which the lender is or has been a party, he cannot take advantage of his own favour against the heir, grounded on a necessity which his wrong has helped to cause". Further on the learned Chief Justice observed: "The matter, however, does not rest only with the breach of a duty on the part of the defendants. The evidence discloses not only a case of misconduct but also warrants an inference of collusion between them and the landlords" amlas, (After discussion of the evidence the judgment, proceeds:) Therefore, on a careful consideration of all the facts and circumstances, I am clearly of the opinion, that the defendants took the settlement in fulfilment of their design and as such the plaintiffs are entitled to treat the Court sale as a private sale and claim redemption, because the mortgage must be treated in the eye of law as still subsisting. If any

authority be needed for this proposition, I would refer to -- "Nawab Sidh Nazir Ali v. Ojoodhyaram", 10 Moo Ind App 540 (R); -- "Deonandan v. Janki Singh AIR 1910 PC 227 (S); -- "Gauri Shanker v. Sheotahal AIR 1936 Pat 434 (T); -- "Fekua Mahto v. Lal Sahu", AIR 1939 Pat 332 (U) and an unreported decision of this Court in -- "Ramdas Singh v. Manki Singh", Second Appeal No. 907 of 1948, D/- 4-5-1949 (Pat) (V)."

A similar case again came for decision recently in this Court before Ramaswami and Sarjoo Prosad JJ. That was in -- "Second Appeal No. 2132 of 1948, D/- 19-2-1952 (W)". There also their Lordships have relied on the decision of AIR 1951 Pat 566 (P)", and observed: "I respectfully endorse the decision, and it would be unnecessary for me to encumber this judgment by repetition of those reasons."

11. I, therefore, think that the controversy in the present case stands concluded by the decisions of this Court referred to above. I have no doubt that in face of the allegations made by the plaintiff in the plaint there is no good reason to suggest that there is in the plaint even by implication any attempt to seek declaration for avoiding the sale and the decree and I think no such relief is at all needed in order to get his relief for redemption in the circumstances of the case. The suit as framed is one purely for redemption and the court-fee paid on that footing is sufficient. In the face of the allegations made by the plaintiff, no further relief can be said to have been included in the plaint. The order passed by the learned Munsif, I think, is not correct.

12. The application is accordingly allowed and the suit is restored to the file to be taken up in the regular course for hearing. Hearing fee two gold mohurs.