(1941) 04 PAT CK 0013

In the Patna High Court

Nisar Mohammad Khan and Others — APPELLANT

Vs

Tauquir Ahmad and Others — RESPONDENT

Date of Decision : 23-04-1941

Acts Referred:

Citation : AIR 1941 Patna 529

Hon'ble Judges : Manohar Lall, J

Bench : Division Bench

Judgement

Manohar Lall, J.—These two appeals are by the plaintiffs and arise out of one suit instituted by them for a declaration, that a certain sale held on 16th April 1934, for recovery of arrears of cess did not affect their interest in village Ekamba, and for Recovery of possession of that share.

2. The facts necessary for understanding the questions raised may be shortly stated. The plaintiffs'' case is that they have title to the extent of 6 annas 10 dams and odd in village Ekamba, tauzi Ho. 6918, and in order to safeguard their interest, due to the deliberate default: of the other cosharers, they applied to the Collector on 26th June 1933, to open a separate account for them. On 16th September 1933, the office reported to the Deputy Collector that there was an arrear of Rs. 11-8-6 on account of cess and asked the applicants to pay their share; and on 17th October 1933, the applicants did not pay the entire arrears but only the amount due on account of cess for their shares. That being done on 7th November 1933, the Deputy Collector ordered that a separate account should be opened in the name of the applicants. These separate accounts were to take effect from January 1934.

3. In the meantime the estate was in arrears on account of cess due for the kist of January and March 1933. Thereupon a certificate proceeding was started on 24th August 1933; in order to recover the arrears from all, the cosharers including the plaintiffs with-out serving notices in a proper manner as required by the Public Demands Recovery Act and without complying with some of its provisions the sale was; held in April, 1934. The plaintiffs having come to know

of the sale instituted the present suit on 14th April 1936 challenging the entire sale as fraudulent.

4. They further assailed the validity of the sale on the ground that Gulf am and Qoraisa Bibi having died before the service of the notice u/s 7 of the Act their shares remained unaffected by the sale, and lastly, that the share of Zinoor Ahmad Khan, plaintiff 4, was wholly unaffected by the sale.

5. The trial Court came to the conclusion that the plaintiffs have been unable to establish their allegations of fraud, bat he held that Gulf am died on 4th July 1928, and Qoraisa Bibi died on 24th September11933, and that their shares remained wholly unaffected by the sale. He also granted relief to plaintiff & on the ground that he was no party to the certificate proceedings and fixed his share at 18 dams 12 krants and odd. In the result he held that the shares of Gulfam, Qoraisa Bibi and plaintiff 4, that is to say, 5 dams 8 krants and odd as recorded in serial No. 8, 1 anna 2 dams and odd as recorded in serial No. 11 and 18 dams 12 krants and odd as recorded in serial No. 12 of Register D, amounting in all to 2 annas 6 dams and odd, were not, affected by the sale He accordingly ordered that, the plaintiffs were entitled to take possession of these shares the amount of mesne profits to be deter, mined in subsequent proceedings. Against this decision passed on 12th April 1938, both the parties preferred an appeal to the learned District Judge.

6. Those appeals were disposed of by Maulavi Mohammad Ibrahim on 29th May 1939. He affirmed the, findings of the learned Munsif on the question of fraud and as to the non-validity of the sale with regard to the shares of Bibi Qoraisa and Gulfam, but he reversed the decision of the learned Munsif as to the non-validity of the sale with regard to the share of plaintiff 4 and held that Zinoor Ahmad Khan had no interest in the shares but that Jaunser Mohammad Khan who was so described in Register D and also in the certificate proceedings was cosharer of this 5 annas and 2 dams share. Against this decree the two appeals have been preferred by the plaintiffs.

7. The learned advocate for the appellants could not seriously challenge the concurrent findings of the Courts below that the sale in the certificate proceedings was not vitiated: by fraud. That finding is a finding of fact and binds this Court. But he strenuously, argued that after the separate accounts had been opened on 7th November 1933, on realizing from the plaintiffs their quota of the arrears of cess due from this estate for the kist of January and March 1933, the certificate proceedings which were started/ on 24th August 1933, must be held to be without jurisdiction so far as the shares of the plaintiffs were concerned. But the fallacy in the argument is that the certificate proceedings had been started to realize the dues from all the cosharers who were then alive not only for their quota but also on account of the quota of'' the otber cosharers who were in default.

8. It is true that the plaintiffs paid their own quota but that did not do away with

the liability of the entire estate to pay the arrears which were due from the whole, estate.; In the order bearing No. 16 dated 19th February 1935, in the certificate proceeding in question I find that this question was raised before the certificate officer when he was asked to set aside the sale on account of the shares of some of the cosharers, but the certificate officer correctly rejected the application on the ground that as a separate account was ppened on 7th November 1933, and the demand was for the'' cess for January and March kist of 1933, the applicants were liable for these kists even though they had paid their quota. For these reasons I overrule the first contention.

9. It was next argued that the lower appellate Court was wrong in holding that the share of plaintiff 4 was affected by the sale. The trial Court found as a fact that this plaintiff has got a share entered in serial No. 12 of Register D and that in the original certificate, in the notices u/s 7 and Rule 25. and in the sale proclamation Zinoor Ahmad Khan is not shown as a party; on the other hand Jaunsar Ahmad Khan is shown as a party. No evidence was adduced before the learned Munsif to show that Jaunsar and Zinoor was one and the same person. He therefore held that the share of plaintiff 4 was not affected by the sale certificate and then, as I have already stated, he found his share to be 18 dams 12 krants and odd and not 5 annas and 2 dams. The learned appellate Court however observes that:

Plaintiffs 1 to 6 are Nisar Mohammad Khan, Siraz Mohammad Khan, Anwar Ahmad Kha|n, Zinoor Ahmad Khan and Zainul-ab-din Khan as sons and Mt. Biban Bibi as daughter of Yiar Mohammad Khan. They are holders of 5 annas 2 dams and odd share. In the certificate (Ex. 19) the holders of those 5 annas 2 dams and odd share have been mentioned. They are the same as in the plaint except that instead of Zinoor Ahmad Khan, Jaunsar Mohammad Khan was written. It is urged by the side of the plaintiffs that Jaunsar Mohammad Khan is not a cosharer of 5 annas 2 dams share; the contesting defendants on the other hand urge that Jaunsar Mohammad Khan. is the real cosharer and not Zinoor Ahmad Khan. In the Register D I do not find the name of Zinoor Ahmad Khan, but in that register Jaunsar Mohammad Khan is written as cosharer of this 5 annas 2 dams share. Certificate is thus in accordance with the Register D.

10 He accordingly held that the holders of this 5 annas and 2 dams share were all parties to the certificate proceeding and therefore the sale in respect of this share was ordered to stand. The learned Subordinate Judge appears to have made a mistake. I have examined the certified copy of Register D regarding this share. Item 8 distinctly mentions the name of the proprietor as Babu Gulfam Ahmad Khan, minor, and in col. 3 his father''s name is put down as Zinoor Ahmad Khan. Again in Item 12 the entry in col. 2 is Nisar Mohammad Khan, Siraz Mohammad Khan, Anwar Ahmad Khan, Zinoor Ahmad Khan, Zainul-ab-din Khan and Mt. Biban Bibi. I do not find any name as Jaunsar Ahmad Khan. It is true that the first ''o'' after Zinn may be read as ''s'' but it appears that the copyist was trying to write Zannur Ahmad Khan. Whatever doubts there may be

on this point are removed by the entry in col. 3 where the parentage of Gulfam is shown as Zinoor Ahmad Khan.

11. For these reasons I set aside the decision of the: learned Subordinate Judge on this point and restore the decision, of the learned Munsif and hold that the share of plaintiff 4 was also unaffected by the certificate sale of April, 1934. This disposes of the two appeals so far as the plain, tiffs are concerned.

12. But the defendants have also filed a cross-appeal or cross-objecton and Mr. Jafar Imam appearing on their behalf argues that the Courts below should not have granted any relief regarding the shares, of Gulfam and Quoraisa Bibi also. He also argues generally that, the whole suit was not maintainable by reason of Section 46 of the Act when it, has been found that there was no fraud in, the certificate proceedings or in the conducts of the sale.

13. To take up the case of Gulfam first, Gulfam was a minor who died on 4th July 1928, leaving his father Zinnoor Ahmad Khan, plaintiff 4, and his mother. Hakim Bibi, plaintiff 8, as his heirs. The extent of his share was 5 dams and odd which is not in dispute. It is clear therefore that when the certificate was issued on, 4th August 1933, it was issued against a dead person; It is common ground that no order for substitution of his heirs has ever been passed in this certificate proceeding.

14. It is alleged that as one of the heirs of Gulfam, namely his father, plaintiff 4,; was himself a. party to the proceedings in his own; right the proceedings, however irregular they may be, cannot be held to be not binding upon his estate which has been so represented. By Section 52 it is provided that where a certificate debtor dies before the certificate has been fully satisfied, the certificate officer may, after serving upon the legal representative of the deceased a notice in the prescribed form, proceed to execute the certificate against such legal representative; and the provisions of this Act shall apply as if such legal representative were the certificate-debtor and as if such notice were a notice u/s 7, This section has no application to the present case because the original certificate was issued against a person who was dead, It is not a case where the certificate-debtor died after the issue of the certificate and before the certificate was fully satisfied. It seems to me, therefore, that the entire proceedings based upon the certificate so issued against a dead person are wholly inoperative to affect; the heirs, of Gulf am. It was open to the certificate officer u/s 11 to amend the certificate by addition, omission or substitution of the name of the certificate debtor, but he never did so. The proviso to that section provides that when an amendment is made a fresh notice shall be issued as provided in Section 7.

15. For these reasons I agree with the Courts below that the heirs of Gulfam are wholly unaffected by the certificate sale. It may also be observed here that the father was no party to the certificate proceedings be, cause I have already held, in agreement with the learned Munsif, that Zinnoor Ahmad was not a party to the

certificate proceedings but one Jaunsar Ahmad Khan.

16. With regard to the case of Qoraisa Bibi the facts are that a certificate was properly issued against her. She died on 24th September 1983 leaving her father, her mother, her husband, plaintiff 2, and her daughter, a minor, who is plaintiff 7 as her heirs. By Section 52 the certificate officer was empowered to serve upon these legal representatives of Qoraisa Bibi a notice which would be deemed as a notice u/s 7. No such notice was ever served although the peon had re. ported that Qoraisa Bibi had died on 24th September 1933, in his service report. As already stated, plaintiff 7 was one of the heirs and was a minor on that date. There, fore, the certificate officer ought to have proceeded u/s 50, namely that he should have appointed a proper person to represent the minor daughter, but no such thing was done.

17. The result, therefore, was that three of the heirs of Qoraisa Bibi, namely her father, her mother and her daughter, were never upon the record. But it is argued that as her husband, plaintiff 2, was upon the record in his own capacity the representation of the heirs of Qoraisa Bibi was complete. No notice, however, was issued against plaintiff 2 that he was to be proceeded against as the heir of Qoraisa Bibi. For these reasons I am unable to agree with the learned Counsel for the respondents that the share of Qoraisa Bibi was at all affected by the certificate sale.

18. It was then argued that the proper remedy of the heirs was to proceed u/s 29 by applying to have the sales set aside on the ground of non-service of notice or for any other irregularity. But that section assumes that the certificate was a proper certificate. Here the certificate was never altered and no substitution was made by bringing in the names of the legal representatives upon the record, Moreover under that section the certificate officer has power to set aside the sale on the ground that notice was not served u/s 7 or on the ground of other material irregularities. But here the plaintiffs do not want that the sale should be set aside. All they want is that in the events that have happened the sale should be held not to affect their interest.

19. It was then argued that Section 46 was a complete bar for the trial of this question which was a question that arose between the certificate-holder and the certificate'' debtor or their representatives and relating to the making) execution, discharge or satisfaction of a certificate duly filed under this Act. But the question here is between the auction purchaser and the representatives of the certificate-debtor and not between the certificate-holder and the certificate-debtor or their''representatives.

20 For these reasons I hold that the sale held did not affect the share of Gulfam and of Qoraisa Bibi and that the judgments of the Courts below are correct

21. In the result the appeal of the plaintiffs is allowed to the extent of the share of plaintiff 4; in other respects the appeal is dismissed. The cross-appeal of the respondents is also dismissed. In the cir. cumstances there will be no order for

costs of this Court.

