

(1968) 01 PAT CK 0031
In the Patna High Court
Case No : F.A. No. 87 of 1962

Noor Mohammad and Others

APPELLANT

Vs

Sri Narayan Chandra Deo Dhabal Deb and Others

RESPONDENT

Date of Decision : 11-01-1968

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 22

Citation : (1968) 01 PAT CK 0031

Hon'ble Judges : N.L. Untwalia, J;B.P. Sinha, J

Bench : Division Bench

Advocate : Asghar Hussain and Amin Ahmad, for the Appellant; Jyotirmoy Ghosh for the Respondent No. 1, for the Respondent

Final Decision : Dismissed

Judgement

N.L. Untwalia, J.—This is an appeal by defendants 1 to 3 from the decree of the Court below passed in a mortgage action. Noor Mohammad, defendant no. 1, and his brother Mohammad Ismail had borrowed some money on the basis of hand-notes from Raja Jagdish Chandra Deo Dhabal Deb, the late Raja of Dhalbhum Raj, in the district of Singhbhum. Eventually, in lieu of the debts advanced, they executed a simple mortgage bond on the 15th of December, 1947, for a sum of Rs. 17,624/-, agreeing to pay the said amount with interest at the rate of 9 per cent, per annum, the due date of payment as mentioned in the bond was 30th June, 1948. According to the plaintiff's case, the money was not paid. The Raja died on the 28th January, 1957, leaving behind Sri Narayan Chandra Deo Dhabal Deb, the sole plaintiff in the action, his eldest son, and some more sons and daughters, besides a widow, who were all impleaded as defendants-second party in the suit, because according to the plaintiff's case, there was a custom prevalent in the family in regard to the succession, according to which the eldest son inherited all the properties of the deceased, that is to say, there was a rule of primogeniture governing the succession in the family. In the alternative, it was also pleaded that to avoid all future disputes and

complications, all the brothers and sisters and the mother of the plaintiff gave up all claim to the properties left behind by his deceased father and he was in possession of all the properties left by him as his sole heir. Mohammad Ismail was dead before the institution of the suit, which was filed on the 9th December, 1959. According to the plaintiff's case, as stated in Paragraph 4 of the plaint, Mohammad Ismail died on 20.4.1959 leaving behind defendant no. 1, his brother, defendant no. 2, his minor son, and defendant no. 3, his widow as his heirs, who had inherited the assets of the deceased. It was further stated in Paragraph 10 of the plaint that the plaintiff was not a money-lender by profession and did not carry on money-lending business, nor his father was a money-lender by profession, and the said money was advanced by the plaintiff's father casually as a friendly loan to accommodate Noor Mohammad and late Mohammad Ismail. The money not having been paid, the suit was instituted for recovery of the money due on the mortgage bond by sale of the mortgaged properties. In Schedule B appended to the plaint, an account was given showing that interest on the principal sum of Rs. 17,624/- at 9 per cent, per annum from the 15th December, 1947 to 8th December, 1959 amounted to Rs. 19,033/-, but an amount of Rs. 1,409/- out of interest was forgone, and interest claimed in the suit was Rs. 17,624/-, equal to the principal amount, the total claim in the suit being Rs. 35,248/-.

2. Defendant no. 1 filed his written statement on 7.11.1960. A written statement on behalf of defendant no. 3, the widow of Mohammad Ismail, was filed on 7.12.1960 and on behalf of minor defendant no. 2, a written statement was filed on 18.11.1961 through her mother guardian defendant no. 3. To put it in nutshell, the main pleas taken by way of defence in the suit are the following:

(i) That no amount was due under the mortgage, the entire interest had been paid in cash and the principal amount had been paid off by supply of machineries and articles from the defendants' factory known as Jagdishpur Metal Industries;

(ii) That the plaintiff alone could not maintain the suit and the rule of primogeniture was not applicable and could not be applicable in the family of the plaintiff in order to entitle him to claim the entire amount;

(iii) That Raja Jagdish Chandra Deo Dhabal Deb used to carry on business of money-lending, and in course of the said business with a view to earn heavy interest, he advanced the loan to the defendants and the advancement of loan to them was neither casual nor friendly in order to accommodate them, as alleged by the plaintiff;

(iv) That the suit was bad for mis-joinder and non-joinder of parties and some more heirs left by Mohammad Ismail had not been joined in the action; and,

(v) That the suit could not be decreed in absence of a succession certificate in favour of the plaintiff.

3. All these pleas have been overruled and rejected by the learned Subordinate

Judge who tried and decreed the suit. In regard to the plea of payment, issue no. 8 was framed, and the Court below has held that this plea has not at all been substantiated in the case by reliable and cogent evidence. In regard to plea no. (ii), the learned Subordinate Judge framed issue no. 5, as to whether the law of primogeniture was in vogue at the time of the death of the Raja, and answered it against the plaintiff on the basis of the provision of law contained in the Hindu Succession Act, 1956, but he decided this issue in favour of the plaintiff on the basis of the two deeds of family arrangement (Exts. 1 and 1/a) under which the plaintiff alone was recognized to be the sole owner of all the movable and immovable properties left by the Raja. Under issue no. 7, it has been held by the Court below that the plaintiff's father or the plaintiff was not a professional money-lender and the loan was casually advanced to the defendants to accommodate them. Therefore, the suit was not barred by the provision of the Money Lenders Act. On the point of mis-joinder and non-joinder of parties, the view of the Court below is that the other sons and daughters and widow of the late Raja have been joined as parties to the suit as defendants-second party and it has not been proved satisfactorily that Mohammad Ismail had left any other person other than the minor son and the widow impleaded as defendants in the suit as his heirs. The issue no. 6 framed by the Court below was as to whether it was necessary for the plaintiff to obtain a succession certificate in order to get a decree. The answer has been given in his favour on the footing that for obtaining a mortgage decree, succession certificate was not necessary.

4. Mr. Asghar Hussain, learned Advocate for the appellants, has attacked the decision of the Court below on almost all the points stated above. I shall take them up one by one.

5. On the plea of payment, it is to be noticed first that the mortgage bond is coming from the custody of the plaintiff. The explanation given by the defendants as to why it was not taken back in spite of the satisfaction of the dues has rightly been rejected by the Court below. It does not stand to reason that Noor Mohammad and his brother would have paid the entire interest amount in cash as also the principal amount by supply of machineries and articles from their factory, and yet they would have left the mortgage bond without any endorsement of satisfaction in the custody of Raja or the plaintiff. No receipt of payment of any cash amount towards the satisfaction of the mortgage due, either on account of interest or principal, has been produced. No receipt has been produced to show supply of any machineries to the Raja, much less to show supply of such machineries towards the satisfaction of the principal amount due under the mortgage. The explanation given by the defendants is that the receipts were seized in a criminal case started against them by the police, in which finally they were acquitted. This explanation was obviously not plausible and could not be and has not been rightly accepted by the Court below. According to the evidence adduced on behalf of the defendants, no attempt was made to take back the receipts from the Criminal Court after their acquittal. No explanation is there as to why such an attempt was not made. Noor Mohammad has not been

examined in the case. There is no explanation as to why he has not been examined. His son Ghulam Nabi (D.W. 13) has been examined, and in the cross-examination he says that he did not remember in whose Court the iron and steel control case (the criminal case) was pending. He has further stated that the defendants had a list of articles seized by the police, but they had lost that list. The net result is that all this plea of payment was endeavoured to be substantiated merely by oral evidence, which as I shall show by a brief discussion, was too worthless to find favour with any Court of law. I see no justification to give any weight to it at the appellate stage.

6. D.W. 1 stated that he worked in Jagdishpur Metal Industries as a helper. Saw-Machine and Oil-Engine were taken from the premises of the said Industries 10 or 11 years ago to Chilkigarh and on the instruction of Raja Bahadur, they were taken to Palasbani, and were fitted there. In cross-examination he stated that he did not know as to whether any receipt had been taken for the delivery of the articles or whether any challan had been taken. Firstly, on such a piece of evidence supply of the machineries is not proved. Even assuming that some machineries were supplied, the evidence of D.W. 1, cannot indicate that they were so supplied towards the satisfaction of the mortgage dues. More or less to the same effect is the evidence of D. Ws. 2 and 3. Their evidence does not require any specific reference. D.W. 12, Ram Narain Singh, is the Manager of the defendants working at their factory. He stated in his examination-in-chief that in satisfaction of the mortgage dues, the defendants had given machineries of the factory to Raja Saheb. He had personally delivered some of them. But in regard to his further evidence as to whether the machineries had been supplied in satisfaction of the mortgage dues, he stated even in his examination-in-chief "Noor Mohammad had told me that there had been agreement between him and Raja Saheb for deliveries of machineries etc. in satisfaction of the mortgage dues." In absence of the evidence of Noor Mohammad, this hearsay evidence is not admissible. Then remains nothing on the record to show that the machineries were supplied in satisfaction of the mortgage dues. In cross examination D.W. 12 stated that a receipt had been taken for the machine rice supplied to Raja Saheb in satisfaction of the mortgage dues. In absence of the receipt, it is not possible to hold that the machineries were supplied or that they were so supplied in satisfaction of the mortgage dues.

7. Learned counsel for the appellants vehemently argued that a pleader commissioner, Sri Santosh Kumar Basu (D.W. 5), was appointed to go to Ghatsila to find out the machineries installed in the factory of the company known as Dhalbhum Trades and Industries Ltd. but he was not allowed to execute the commission. Learned counsel submitted that this indicates the guilty mind of the plaintiff that if the commission would have been allowed to be executed, the machineries supplied by the defendants would have been detected. This argument has got to be rejected, firstly, because supply of machineries to Dhalbhum Trades and Industries Ltd., which as is the evidence of P.W. 4, is a public limited concern, was not a supply to the Raja. Even if he was a director or

managing director of the company, the company had a separate and distinct entity from the Raja. The defendants, if they had supplied machineries to the company on credit, could have proceeded to realise their dues from the company. There is nothing to indicate that as against the supply of machineries to the company, the Raja had agreed to adjust the price towards his dues from the defendants under the mortgage. Moreover, Dhalbhum Trades and Industries Limited was not a party to the suit, nor any direction or order was made against the company to allow the pleader commissioner to execute the commission, and if in absence of the Managing Director or the manager, the commission was not allowed to be executed, it cannot be said on the facts and in the circumstances of this case that it was so with a bad motive of suppressing the alleged facts of supply of machineries by the defendants to the Raja or to the Company.

8. Mr. Asghar Hussain advanced one more argument in this Court in support of the plea of payment with reference to the deeds of family arrangement (Exts. 1 and 1/a). He submitted that almost all the properties have been enumerated in those deeds of family arrangement, but the debts under the mortgage has not been so mentioned. I am not impressed by this argument at all. Ext. 1 is a deed of family settlement executed on 13.5.1957 by some of the parties. Some others executed an identical deed on the same date, which is Ext. 1 (a). In these deeds some details of those properties only have been given which were immovable properties in possession of the Raja at the time of his death, or if they were not in his possession suits were pending at some place or the other for their recovery or for realization of compensation amount from the State of Bihar in respect of the properties which had vested in the State of Bihar under the Bihar Land Reforms Act. In one of the Paragraphs in Ext. 1, it was mentioned that "the only properties which the late Sri Jagdish Chandra Deo Dhabal Deb dispossessed of consisted mainly of.....", and thereafter seven items of properties have been enumerated. Learned counsel has submitted that the term "dispossessed of" is a mistake for the expression "died possessed of". The argument was attractive and in the first catch we were inclined to accept it, but on examining the original of the two deeds, we find, "dispossessed of" used in both the deeds and then on careful examination we find that the words "dispossessed of" were used in the sense that the only properties, which the Raja was not in possession of, consisted of seven items enumerated in the Paragraph where the word "dispossessed" was used. There is a clear recital in both the deeds "That the aforesaid Sri Narayan Chandra Deo Dhabal Deb, the party of the Tenth Part, shall be the absolute owner of all the properties movable left by the said deceased Sri Jagdish Chandra Deo Dhabal Deb". No details of any debt or movable was mentioned in either of the two deeds of family settlement. It is, therefore, difficult to accept the arguments that non-mention of the mortgage bond or the dues under the mortgage bond in question should lead to the inference that the mortgage had been satisfied.

9. I, therefore, hold, in agreement with the finding of the Court below, that the defendants have miserably failed to substantiate their plea of payment, either of

interest or of the principal amount due under the mortgage bond or any part thereof.

10. With reference to the point of family settlement, learned counsel for the appellants submitted that on behalf of one of the sons of the Raja, who was in England, the deed was executed by his Attorney, holding a power of Attorney (Ext. 7) from him, but the power of Attorney did not authorise him to execute such a deed. Such an argument was repelled by the Court below stating clearly in its judgment that Ext. 7 conferred such powers on the Attorney to execute a deed of family settlement, as he did on behalf of Kamalesh Chandra Deo Dhabal Deb, son of the Raja, who was in England. He is a party in Ext. 1. The original document (Ext. 7) is in Bangla, and it was not included in the paper book by giving any official translation of it, nor in course of argument any translation was supplied to us to show that the inference of the Court below is wrong in this regard. Moreover, the said son is one of the defendants put in the category of defendants second party. Summons had been served on him through his Attorney, and yet he has not appeared to contest the claim of the plaintiff in the suit. I, therefore, concur in the view of the Court below that the suit has been rightly instituted by the sole plaintiff, and since the other heirs of the Raja have been impleaded as defendants second party, it is not at all bed for non-joinder of any of them as plaintiff to the suit.

11. The evidence on point no. (iii) as to whether the suit is not maintainable in view of the provision of law contained in Section 4 of the Bihar Money Lenders Act, 1939, the relevant evidence is of P. Ws. 1, 3, 4, 5 and 8, who have all stated that the Raja had no money-lending business. As against that, the defendants examined D. Ws. 4, 7, 8, 9, 10 and 11 to say that he had such a business. On a consideration of the evidence with reference to the documentary evidence, it is clear that the finding of the Court below even on this point is correct and could not be assailed with success in this appeal.

12. Ext. G is a hand-note dated 14.5.1939 for a sum of Rs. 200/- executed by Noor Mohammad and Mohammad Ismail in favour of the Raja. Ext. G (1) is another hand-note dated 10.7.1941 for Rs. 300/- executed by Mohammad Ismail in favour of the Raja. The third hand-note Ext. G (2) dated 17.8.1941 was executed by Mohammad Ismail in favour of the Raja for a sum of Rs. 200/- and the fourth one Ext. G (3) was executed on 28.12.1941 for a sum of Rs. 500/- by Mohammad Ismail. After these four hand-notes for small amounts, there comes in the year 1944 a hand-note Ext. G (4) for a sum of Rs. 2,500/- executed by Noor Mohammad and Mohammad Ismail. Thereafter there are three hand-notes in the year 1946, Ext. G (5) for Rs. 2,500/-, Ext. G (6) for Rs. 2,500/- and Ext. G (7) for Rs. 5,000/- executed by the two brothers in favour of the Raja. In lieu of all these hand-notes, the mortgage bond was executed in the year 1947. Ext. 6 dated 23.1.1944 is a document showing the demise of some land by the Raja to Noor Mohammad and his brother. The land was demised to them as lessees "for the purpose of erecting a factory or factories" thereon. It is significant to note,

therefore, that starting from the year 1939 up to the year 1941, the sums advanced to the two brothers were very small. It was only after the lease of the land for factory purposes that big sums of money were advanced by the Raja to the two brothers in order to accommodate and help them in construction of factory, and that is the case put forward on behalf of the plaintiff in evidence. Although, therefore, there were as many as eight hand-notes from the year 1939 to 1946 executed by one or more of the two brothers in favour of the Raja, but to all intents and purposes they were not in pursuance of any money-lending business carried on by the Raja, but it was on account of special consideration which the Raja had for them, and specially the big advances were to help them in building the factory on the land demised by the Raja.

13. The only other documents in support of the case as to whether the Raja was a professional money-lender are Exts. C, C (1) and C (2). Ext. C (2) is a decree dated 7.8.1946 passed in S.C.C. Suit No. 216 of 1946 against one Bhutu Namata on the basis of a hand-note dated 22.12.1941 for a sum of Rs. 195/-, Ext. C (1) is another decree dated 12.8.1946 in a money suit against Rabindra Nath Maitra (D.W. 10) on the basis of a hand-note dated 24.8.1944 for Rs. 297/8/- and Ext. C is a decree dated 19.3.1947 in another money suit against Mohammad Abdul Gafur on the basis of a hand-note dated 3.7.1944 for Rs. 642/8/-. Reference was also made to Ext. D, which is a show cause notice under Order 21, Rule 22, Code of Civil Procedure, issued to D.W. 11 in some execution in the year 1952. In my view, this is not at all relevant. The net result of Ext. C series is that three hand-notes were taken by the Raja; one in the year 1941 and two in the year 1944 for small sums of money from three different persons. It is in the evidence of P.W. 8 that the annual income of Dhalbhum Raja was 2 lacs 25 thousand rupees and there was a little savings out of it. This shows that the income of the Raj was quite considerable and the expenses were also enormous. In that situation it is difficult to believe that the Raja was carrying on money lending business by advancing Rs. 200/- to Rs. 300/- to some debtors to earn interest. The explanation given by the plaintiff with reference to those transactions that the hand-notes were executed either on account of the Salami due or on account of some money due from the employee of the estate, seems to be plausible and cannot be rejected outright. In any event, three other transactions of the advancement of loans on the basis of hand-notes in the years 1941 and 1944 cannot lead to the conclusion, on the principle of law decided by this Court in (1) Dwarkadas Marwari V. Kalipada Dey and another (1959 B.L.J.R. 145), that the Raja was carrying on a money lending business and that he was a professional money-lender. The oral evidence adduced on behalf of the defendants does not improve the matter any further. D.W. 4 is an advocate's clerk. He was working for the defendants since 1932, and even in his examination-in-chief he stated that he could not say if Jagdish Chandra Deo Dhabal Deb had advanced money to any other person other than Noor Mohammad and Mohammad Ismail. D.W. 7 is another advocate's clerk. He deposed to the facts which are referable to Exts. C/1 and C/2. He admitted that the judgment-debtor of Ext. C/2 Bhutu Namata

was an employee under Dhalbhum estate and he could not say if he had executed hand-notes for defalcating money while in service. The evidence of D.W. 8 is worthless. He spoke about advancement of loan to one Noor Bux and stated in cross-examination that he learnt from him that the Raja had sued him. The evidence is hearsay. The evidence of D.W. 9 who is the son of the judgment-debtor of Ext. C is to the effect that his father had been sued on the basis of a hand-note. The evidence of D.W. 10, who is the judgment-debtor in Ext. C (1), is that he had taken loans from the Raja on four occasions by executing hand-notes. He had been sued on the basis of hand-notes. But except on decree (Ext. C/1), no other decree has been produced in support of his statement. The evidence of D.W. 11 is not reliable to show that Ext. D. was issued to him for realization of any money advanced by the Raja.

14. In (2) Babu Ram Jaop Choudhury V. Badu Pathak and others (1960 B.L.J.R. 497), I had taken the view that Section 4 of the Bihar Money-Lenders Act bars the suit of that person who is a professional money-lender, and if the suit is in respect of a loan advanced by a professional money-lender. It does not bar the suits of those persons who are not professional money-lenders, and if their suits are for realization of money casually advanced. Therefore, the defendant who wants to defeat the suit of a person for realization of money has got to plead and prove that the suit is by the person who is a professional money-lender and who does not hold a money-lender's license. This view was accepted by a Bench of this Court in (3) Lakhi Narayan Sao V. Srimati Beagwati Kuer alias Sohagwati Kuer and others (1963 B.L.J.R. 361). Reliance was placed by me, as also by the Division Bench to the earlier decision of this Court as also to the case of (1) Dwarkadas Marwari (1959 B.L.J.R. 145), where it was held that the business of money lending imports a notion of system, repetition and continuity, and that is the proper legal test to be applied for the purpose of finding out whether the plaintiff is a professional money-lender and whether the suit is barred by virtue of Section 4 of the Bihar Money-Lenders Act. A man does not become a money-lender by reason of occasional loans to relations, friends or acquaintances, nor does he become a money-lender merely because on one or several isolated occasions he may lend money to strangers. There must be more than occasional and disconnected loans to justify a finding that the plaintiff is a professional money-lender and the bar of Section 4 of the Bihar Money-Lenders Act operates. Mr. Asghar Hussain placed reliance upon another decision of the same Bench reported in the same volume, that is, (4) Musamat Dhan Kuer and others V. Bansi Bhagat (1963 B.L.J.R. 351). On evidence, the two courts of fact had found in that case that the plaintiff was a professional money-lender. This finding could not be attacked in the case which was disposed of by the Bench. Moreover, from the facts stated in the judgment, it is clear that there was ample evidence to establish within the scope of the permissible inquiry, as laid down in (1) Dwarkadas Marwari's case (1959 B.L.J.R. 145) that the plaintiff was a professional money-lender. The evidence falls too short of the mark to establish in the present case that the Raja was a professional money-lender. I, therefore,

hold in agreement with the finding of the Court below that the Raja was not a professional money-lender and the suit is not hit by Section 4 of the Bihar Money Lenders Act, 1939.

15. On the question as to whether the suit is bad for non-joinder of some more heirs of Mohammad Ismail, I would first refer to the written statement filed by defendant no. 1, which was earliest one filed in the case. In that written statement he merely stated in Paragraph 3:

That the suit is bad for non-joinder and mis-joinder of parties.

He did not say a word about Mohammad Ismail having left any more heir, besides two already impleaded in the suit.

Another written statement was filed by defendant no. 3, the widow of Mohammad Ismail, a month later, and in that also an incomplete and imperfect statement was made in Paragraph 3 to the following effect:

That the plaintiff's suit is bad for non-joinder of parties in as much as the plaintiff has not made party of all the heirs of deceased Md. Ismail.

To the same effect and in identical words is the plea taken in the third written statement filed on behalf of the minor son of Mohammad Ismail, namely, defendant no. 2. It is to be noticed, therefore, that in the first written statement even the fact is not stated that Mohammad Ismail had left any other heir. In the subsequent written statement it is merely stated that all his heirs have not been joined. It was too vaguely said so without stating as to what other relations or issues Mohammad Ismail had left who were his heirs under the Mahomedan Law and how many of them. In evidence, D.W. 12, the Manager of the factory of the defendants, for the first time stated in Court that Mohammad Ismail had left his wife, one son and three daughters. To the same effect was the evidence of D.W. 13, Ghulam Nabi, son of Noor Mohammad, defendant no. 1. In his cross-examination D.W. 13 stated that he was present with his father at the time the written statement of this case was drafted, and they had told the lawyers about the heirs left by his uncle. Yet it is significant to note that no such statement was made in the written statement of his father. Defendant no. 3 has not examined herself. The names of the daughters or their addresses have not been disclosed, even in the evidence. In such a situation, the learned Sub-ordinate Judge did not feel satisfied as to the truth of the vague fact pleaded that Mohammad Ismail had left some more heirs. I do not think that I will be justified in upsetting that finding in this appeal on such a belated, vague and indefinite pleading, attempted to be supported by the flimsy and unreliable evidence of D. Ws. 12 and 13. I, therefore, hold that the heirs of Mohammad Ismail have been impleaded by the plaintiff as defendants and that it has not been proved that he had left any more heir.

16. Coming to the fifth and the last point urged on behalf of the appellants, it is sufficient to state that this point has been stated merely to be rejected. A large

number of authorities are there of the Calcutta High Court as also of this Court in support of the view that in absence of a succession certificate, a mortgage decree cannot be denied to the plaintiff. The plaintiff obviously is not asking and cannot ask for a personal decree against the defendants. Three cases mentioned in the judgment of the Court below are (5) Natesa Ayyar Vs. Mangalathammal, , (6) Shamanand Das Vs. Baid Nath Das, and (7) Kanchan Modi and Others Vs. Baij Nath Singh and Others, , I may add two Patna cases also, both of which are Division Bench decisions, (8) Kaviraj Basudevanand Vs. Raghubir Saran Rastogi and Others, and (9) Raghubir Narain Singh Vs. Raj Rajeshwari Prasad Singh and Others, . In the result, all the points urged on behalf of the appellants fail. The appeal, accordingly, fails and is dismissed with costs to plaintiff-respondent no. 1.

B.P. Sinha, J.

I agree.