

(1928) 06 PAT CK 0018
In the Patna High Court

Ram Das Singh

APPELLANT

Vs

Tanak Singh and Others

RESPONDENT

Date of Decision : 15-06-1928

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 11
Criminal Procedure Code, 1898 (CrPC) — Section 145

Citation : AIR 1928 Patna 557

Hon'ble Judges : Macpherson, J;Kulwant Sahay, J

Bench : Full Bench

Judgement

Kulwant Sahay, J.—This is an appeal by defendant 1 and it arises out of a suit brought by the plaintiffs for a declaration that a deed of sale dated 27th April 1922, executed by defendant 7, a member of the joint family of the plaintiffs, in favour of defendant 1, in respect of the land in dispute, was illegal, void and inoperative, and for recovery of possession with mesne profits of the land conveyed under the said deed of sale.

2. Plaintiff 1, Tanak Singh and defendant 6, Chaturbhanjan Singh, are full brothers. Plaintiffs 2, 3 and 4 are the sons of plaintiff 1. Plaintiff 5 is the son of plaintiff 3. Defendant 6 is Chaturbhanjan Singh, the brother of plaintiff 1. Plaintiffs 6 and 7 and defendant 7, Ram Nandan Singh, are the sons of Chaturbhanjan Singh. Plaintiffs' case is that all these persons form members of a joint Hindu family.

3. It appears that one Bhikhari Raut had 142 bighas of land in Sitab Diara under the Dumraon Raj. There is a contest between the parties as regards the nature of his interest. The plaintiffs allege that Bhikhari Raut was the occupancy raiyat in respect of this land. The case of defendant 1 is that he was a tenure holder, and defendant 1 and other members of his family were the raiyats in respect of a portion of this 142 bighas of land under Bhikhari Raut. After the death of Bhikhari Raut his widow Jatna Kuar and the widow of his predeceased son Mt. Basmato Kuar sold the interest of Bhikhari Raut of which they were in possession

by two deeds of sale, both dated 24th September 1919, to defendant 1 and to the plaintiffs and certain other persons. The sale to defendant 1 was of a 5 annas share of Bhikhari Raut's interest and by the other deed of sale the remaining 11 annas was sold to the plaintiffs and three other persons, the deed of sale standing in the name of Ram Nandan Singh, defendant 7 as representing the plaintiffs' joint family. The share of the plaintiffs in this purchase was 2 annas 9 pies and the balance out of the 11 annas belonged to the other three purchasers. There was, however, a dispute as regards possession and a proceeding u/s 145, Criminal P.C., took place wherein it was found that defendant 1 and the members of his family were in actual possession as raiyats of the land purchased by the plaintiffs. In 1921 Title Suit No. 178 of that year was instituted in the Court of the Subordinate Judge of Chapra by the four purchaser under the deed of sale of 24th September 1919 for a declaration that the lands purchased by them formed the occupancy holding of Bhikhari Raut and they were entitled to direct possession as purchasers of that holding. Defendants 1--5 in that suit were some of the raiyats who claimed occupancy right along with Ram Das Singh, the present defendant 1, and Ram Das Singh himself was defendant 8 in the suit. Defendant 7 was Chaturbhanjan Singh the present defendant 6 and the vendors Mt. Jatna Kuar and Mt. Basmato Kuar, were also impleaded as defendants. In that suit it was held that the interest of Bhikhar Raut in the 142 bighas was that of a tenure-holder and not of an occupancy raiyat, Since then it appears that civil as well as criminal litigations are going on between the plaintiffs and their joint family and defendant 1 and the members of his family; and in 1922 we find that there was a Small Cause Court suit pending against defendant 1, Ram Das, in which Chaturbhanjan Singh, defendant 6, was the plaintiff; and there was a criminal case of theft pending in which the defendant 6 was the accused and defendant 2, a cousin of defendant 1 was the complainant. It further appears that a number of zarpeshgi deeds had been executed by defendant 1 in the name of defendant 6. One of the zarpeshgi deeds related to the occupancy holding in dispute. All the disputes between the parties appear to have been settled by a compromise, the terms of which were incorporated in a solahnama filed in the Small Cause Court suit on 21st April 1922. Under this compromise defendant 1 was to pay a sum of Rs. 5,000 to the defendant 6 in settlement of the dues of the defendant 6 under the zarpeshgi bonds, the Small Cause Court suit was to be dismissed and the criminal case was not to be prosecuted and defendant 7 had to execute a deed of sale in respect of 2-annas out of the 2 annas 9 pies share purchased under the deed of 24th September 1919. Accordingly a deed of sale was executed by defendant 7 in favour of defendant 1 on 27th April 1922 whereby 17 bighas 15 kathas of land representing a 2-annas share out of the 11-annas purchased by the plaintiffs and others on 24th September 1919 was conveyed to defendant 1. The present suit was instituted by the plaintiffs for a declaration that this deed of sale was illegal, void, and inoperative inasmuch as it was executed by a junior member of the joint family without their knowledge or consent.

4. The defence of defendant 1, who was the sole contesting defendant, was that this deed of sale was a perfectly legal and valid conveyance. He alleged that Tanak Singh's branch of the family was separate from Chaturbhanjan Singh's branch, and that the purchase of the 2 annas 9 pies share out of the 142 bighas under the deed of sale of 24th September 1919 in the name of defendant 7, Ram Nandan Singh, was not a purchase for the benefit of the joint family consisting of the plaintiffs and the defendants 6 and 7. He further contended that the interest of Bhikhari Raut was that of a tenure holder and he was himself the occupancy-raiyat of the land, and what was purchased was the tenure holder's interest, and even if his deed of sale be found to be invalid the plaintiffs were not entitled to direct possession inasmuch as defendant 1 was entitled to remain in actual possession as the occupancy raiyat of the land.

5. The learned Munsif held that the plaintiffs and defendants 6 and 7 formed members of a joint Hindu family and that plaintiff 1, Tanak Singh, was the karta of the family. He further found that the purchase of Bikhari Raut's interest in the name of defendant 7 under the deed of 24th September 1919 was a purchase by the joint family and not the exclusive purchase of defendant 7. He held that it was not proved that the conveyance of 27th April 1922 executed by defendant 7 in favour of defendant 1, was with the consent of the other members of the family or for the benefit of the family and it was not taken after bona fide enquiry and was, therefore, not binding upon the plaintiffs. As regards the petition of compromise filed in the Small Cause Court suit the Munsif found that the compromise was not bona fide and not binding upon the plaintiffs or on defendant 6. He framed no issue and came to no conclusion as regards the nature of the interest of Bhikhari Raut purchased by the plaintiffs; and he made a decree for delivery of possession to the plaintiffs with mesne profits.

6. On appeal by the defendant 1 the learned Subordinate Judge has affirmed the decree passed by the Munsif. The findings of the learned Subordinate Judge are that the plaintiffs and defendants 6 and 7 were the members of a joint Hindu family; that the purchase of the disputed property in the name of defendant 7 was not his self-acquisition but was purchased by the plaintiffs and defendants 6 and 7 jointly as representing the joint family. He next found that the sale-deed, dated 27th April 1922, executed by defendant 7 in favour of defendant 1, was not a valid alienation which was binding on the joint family inasmuch as defendant 7 was a junior member of the family, the karta of the family being the plaintiff 1, Tanak Singh, and as a junior member he had no right to alienate the joint family property. As regards the compromise he found that it was entered into by defendant 6 and it was for his benefit, but that the compromise did not relate to the joint family property and that the plaintiffs had nothing to do with it, and the sale by defendant 7 in pursuance of the compromise was not a sale binding on the joint family of the plaintiffs. He also found that the defendant 1 had no kashtkari right in the disputed property. He, accordingly affirmed the decree of the Munsif awarding direct possession to the plaintiffs.

7. Against this decree defendant 1 has come in second appeal to this Court. The findings of the learned Subordinate Judge, that the plaintiffs and the defendants 6 and 7 formed members of a joint family and that the purchase of 24th September 1919 in the name of defendant 7 was a purchase by the joint family are findings of fact which cannot be interfered with in second appeal. The question for consideration is whether the conveyance under the deed of sale dated 27th April 1922, executed by defendant 7 in favour of defendant 1, is binding on the joint family.

8. The reasons given by the learned Subordinate Judge for holding that the conveyance under the deed of sale, dated 27th April 1932, is not binding on the joint family, are not satisfactory or convincing. The learned Subordinate Judge seems to be under the impression that an alienation by a member of a joint family who is not the karta of the family is under no circumstances binding on the family. He says that in order to bind the family the alienation must be by the managing member of the family and it must be for antecedent debt or for legal necessity of the joint family, and he finds that plaintiff 1 was the managing member of the family and defendant 7 was not the managing member and for this reason the sale was invalid. The broad proposition of law acted upon by the learned Subordinate Judge is not correct. It cannot be said that under not circumstances can an alienation of a joint family property by a junior member of the family be binding on the family. In *Inder Chand v. Bidyadhar Pandey* AIR 1921 Pat. 48 a mortgage bond was executed by Bidyadhar who was one of the members of a joint family. The family consisted of two branches who were members of a joint Hindu family, but each branch was represented by the eldest member of that branch and whenever any transaction had to be entered into, both these two persons representing their respective branches acted jointly. Bidyadhar was the eldest member of his branch and represented that branch; but he executed the mortgage in suit alone. The lower Courts held that the members of the other branch of the family were not bound by this mortgage inasmuch as Bidyadhar acting alone had no authority to bind the interest of the other branch of the family. Das, J., in dealing with this point observed as follows:

It was, however, urged on behalf of the respondents that there is no finding that Bidyadhar was the karta of the joint family and that therefore the family is not liable for the debt incurred by one who was not karta of the joint family. With this contention I do not agree. If the debt was a debt binding on the joint family we must assume that there was an authority vested in Bidyadhar to borrow the money for what must now be considered to be a joint family necessity.

9. This case is therefore an authority for the proposition that an alienation of a joint family property by a member who is not the managing member of the family may be binding on the family if the alienation be for the joint family necessity. The same view was taken by this Court in *Dhanuk Dhari Singh v. Rambrick Singh* AIR 1922 Pat. 553, where it was held that any member of a joint family is entitled to deal with the family property and to incur debts binding upon

it provided the act is done in times of distress and for family necessity. The learned Subordinate Judge, therefore, was not right in holding that the deed of sale executed by defendant 7 was invalid simply on the ground that it was executed by a member of the family who was not the karta of the family.

10. In passing it may be noticed that the learned Subordinate Judge has said that the allegation in the plaint was that plaintiff 1 was the karta of the joint family and that there was no denial of this allegation in the written statement of the defendant. This is clearly an error of record. In para. 5 of the written statement of defendant 1 there is a clear allegation that Tanak Singh was not the karta of the family. Evidence appears to have been given on the aide of the defendant to show that plaintiff 1 was ignorant of certain important transactions relating to the family and that he had ceased to act as the karta of the family. One does not know how far the learned Subordinate Judge was influenced in his finding that plaintiff 1 was the karta of the family on account of his misapprehension that there was no denial of the fact in the written statement.

11. Next, in dealing with the question of the compromise in the Small Cause Court suit instituted by defendant 6 against defendant 1, the learned Subordinate Judge says that although the compromise was for the benefit of defendant 6, it was not for the benefit of the plaintiffs. His view was that the solanama related to the compromise of the Small Cause Court suit and the criminal case, to neither of which the plaintiffs were parties and which did not relate to the family property. He further says that there was nothing to show that the Small Cause Court suit was brought by defendant 6 in his representative capacity. In this connexion it has to be borne in mind that the learned Subordinate Judge had himself come to the finding that purchases made in the name of any one of the members of the family are presumed to be purchases by the joint family. In the case of every transaction relating to joint family the presumption is that although the transaction may be carried on in the name of one or another member of the family it is a family transaction and the member in whose name the transaction is carried on represents the joint family. It was for the plaintiffs to show that the transaction which led to the Small Cause Court suit was not a joint family transaction. The learned advocate for the appellant has referred to certain evidence in the case which goes to show that the Small Cause Court suit was a transaction of the joint family. He refers to the evidence of defendant 6 where he stated that both he and his brother were looking after the Small Cause Court suit and that at the time the compromise was effected plaintiff 1 was at Bhagalpore. One of the members of the family was implicated in a criminal case and if a compromise was effected whereby it was agreed that a portion of joint family property was to be sold in consideration of all the disputes between the family and defendant 1, including the criminal case, being settled, the ordinary presumption would be that the joint family is bound by such compromise and the sale will be a valid sale. The learned Subordinate Judge, however, does not discuss the evidence on this point and he seems to have thrown the onus upon the defendant to prove that the transaction relating to the

Small Cause Court suit was a joint family transaction and that the criminal case also related to the joint family property.

12. Lastly, in dealing with the question of the status of the plaintiffs the learned Subordinate Judge admits that in suit No. 178 of 1921 it was found that defendant 1 had the kastkari of the occupancy right in the land, but did not accept the contention of the defendant that the decision in that suit operated as an estoppel for the reason that the plaintiffs were not parties to that suit and that it was a suit which was not brought by defendant 7 in his representative capacity so as to be binding on the plaintiffs. Here also the reasons given by the learned Subordinate Judge do not appear to be sound. Defendant 7 was one of the plaintiffs in that suit, the other plaintiffs were the persons in whose favour the deed of sale of 24th September 1919 had been executed. Suit No. 178 of 1921 was, therefore, a suit instituted by all the persons in whose name the deed of sale of September 1919 stood. If the purchase in the name of defendant 7 was for the benefit of the joint family and if defendant 7 represented the joint family in the transaction of the purchase, the ordinary presumption is that he represented the joint family in the suit of 1921 also. No reason has been given by the learned Subordinate Judge for holding that the suit by defendant 7 was not in his representative capacity except that the plaintiffs were not parties to the suit. Under the circumstances of the present case it has to be presumed that defendant 7 represented the joint family in all transactions arising out of the purchase which was made in his name and I am of opinion that the decision in suit No. 178 of 1921 operates as res judicata and it is not open to the plaintiffs to assert that the interest purchased by them under the deed of sale of September 1919 was that of an occupancy raiyat and not that of a tenure-bolder. As was pointed out by the Privy Council in the recent case of AIR 1927 56 (Privy Council) in the case of a Hindu family where all have rights it is impossible to allow each member of the family to litigate the same point over and over again and the Court has in each case to look to Expln. (6), Section 11, Civil P.C., to see whether or not the leading member of the family has been acting either on behalf of minors or in their interest or if they are majors with the assent of the majors. It is true that in the present case defendant 7 was not the leading member of the family but he was the member who admittedly represented the family in the transaction of the purchase and it is natural to assume that in subsequent transactions also he represented the entire family.

13. It will thus appear that the decision of the learned Subordinate Judge on the question of the binding nature of the sale by defendant 7 to defendant 1 is not satisfactory. It is, however, a finding of fact which however erroneous, this Court may not be justified in interfering with in second appeal. I must, therefore, accept the finding that the sale-deed of 27th April 1922 is not binding on the joint family of the plaintiffs and defendants 6 and 7. The question, however, of the status of the plaintiffs is concluded by the decision in the previous suit No. 178 of 1921 and it is not open to the plaintiffs to contend that their interest is that of an occupancy raiyat, and it must be held that their interest was that of a

tenure-holder. The decree of the learned Subordinate Judge, therefore, awarding direct possession to the plaintiffs must be set aside. It is contended on behalf of the appellant that if the sale is not binding on the joint family then he is entitled to a refund of the purchase money paid by him. Under the circumstances of the case, I am of opinion that the contention is just and the Court can make an order for refund under Order 41, Rule 33, Civil P.C.

14. Having regard to all the circumstances of the case, the decree of the learned Subordinate Judge is varied. It is declared that deed of sale dated 27th April 1922 executed by defendant 7 in favour of defendant 1 is void and inoperative as against the joint family of the plaintiffs and defendants 6 and 7. The plaintiffs are entitled to recover possession of the property sold, but the possession will be of the interest of a tenure-holder and they will not be entitled to eject defendant 1 from the lands in dispute. They will only be entitled to recover rent from him. The decree awarding mesne profits will stand but the mesne profits will be calculated on the basis of the rent payable by defendant 1. It is declared that defendant 1 is entitled to a refund of the consideration money paid by him under the deed of sale of 27th April 1922 viz., the sum of Rs. 1,082 and a decree will be made in his favour for the recovery of this sum with interest thereon at 9 per cent per annum from the date from which mesne profits is awarded to the plaintiffs up to realization as against defendant 7. Having regard to the fact that defendant 1 has obtained a substantial amount of success in the present appeal each party will bear his own costs throughout. If the plaintiffs have taken direct possession, defendant 1 will be entitled to restitution.

Macpherson, J.

15. I agree.