(1945) 03 PAT CK 0013

In the Patna High Court

Salahuddin Hyder Khan and Others APPELLANT

Vs

Dhanoo Lal Choudhary and Others RESPONDENT

Date of Decision : 19-03-1945

Acts Referred:
Court Fees Act, 1870 — Section 7(iv)(c), 7(v)

Citation : AIR 1945 Patna 421

Hon'ble Judges : Manohar Lall, J;Das, J

Bench : Full Bench

Judgement

Das, J.—This is an application in revision relating to a court-fee matter. The petitioners are sons of one Raja Muhammad Yakub Khan, deceased, proprietor of what is commonly known as the Persouni Raj Estate. The allegation is that the ancestors of the petitioners were originally Hindus, but were converted to Islam; they, however, continued to be governed by the Mitakshara law of coparcenary. It is not necessary at this stage to consider how far this allegation is correct. The petitioners further alleged that their father was a man of immoral habits and was addicted to drinking wine, taking bhang, opium, etc. He borrowed money to satisfy his immoral and vicious habit3, and executed several mortgage bonds and two sale-deeds for the purpose, all relating to the joint family properties mentioned in Schs. A, B, C and D of the plaint. On the basis of the mortgage bonds, decrees were obtained, and in execution of the decrees the properties were sold. The petitioners therefore brought the suit out of which this application has arisen, and asked for the following reliefs:

(a) That it may be adjudged by Court that the mortgage bonds dated 10th September 1915, 9th March 1918, (in favour of defendants 1 to 8) and 10th September 1915, 5th August 1919 and 14th April 1921 (in favour of defendants 9 to 14) and mortgage bond dated 13th January 1928 and kebala dated 13th January 1928, (in favour of defendants 15 to 24) and 23rd March 1911, (in favour of defendants 15 to 37) executed by Raja Mohammad Yakub Khan, deceased, father of the plaintiffs were for illegal and immoral purposes and are not binding on the plaintiffs and the decrees and the sales thereunder as also the sales under the kebalas dated 23rd Maroh 1911 and 13th, January 1928, are null and void and not binding on the plaintiffs who are consequently entitled to recover possession of those properties.

(b) The possession of the properties given in the schedules below may be awarded to the plaintiffs by ousting defendants first party therefrom.

c) That the cost of the suit be awarded to the plaintiffs.

d) Any other relief to which the plaintiffs may be deemed entitled be awarded to them.

2. The petitioners paid court-fees on twenty times the Government revenue payable for the properties in suit, as on a suit for possession u/s 7 (v), Court-fees Act. The Court below has held that the suit properly comes u/s 7(iv)(e), Court-fees Act, and has demanded court-fees on the market value of the properties in suit. It is against this order of the learned Subordinate Judge that the present application is directed. It has firstly been contended before us that the learned Subordinate Judge is wrong in holding that the suit comes u/s 7(iv)(c), Court-fees Act. It is urged that the petitioners are entitled to treat all the alienations as null and void, and can merely ask for possession without the necessity of having a declaration at all. Reliance has been placed for this contention on the Full Bench case in Ramkhelawan Sahu v. Surendra Sahi A. I. R. 1938 Pat. 22. Reference has also been made to the decision of their Lordships of the Judicial Committee in Bijoy Gopal Mukherji v. Krishna Mahishi Debi 34 Cal. 329, where the following observations occur:

...A Hindu widow is not a tenant for life, but is owner of her husband''s property subject to certain restrictions on alienation and subject to its devolving upon her husband''s heirs upon her death. But she may alienate it subject to certain conditions being complied with. Her alienation is not therefore absolutely void, but it is prima facie voidable at the election of the reversionary heir. He may think fit to affirm it, or he may at his pleasure treat it as a nullity without the intervention of any Court, and he shows his election, to do the latter by commencing an action to recover possession of the property. There is, in fact, nothing for the Court either to set aside or cancel as a condition precedent to the right of action of the reversionary heir.

3. In my opinion, the aforesaid contention, raised on behalf of the petitioners, is not correct so far as the properties which have been sold in execution of mortgage decrees are concerned. The true test in such cases has been laid down in the Full Bench decision in Ram Sumran Prasad v. Gobind Das A. I. R. 1922 Pat. 615 in which the plaintiffs as reversionary heirs instituted a suit to recover possession of certain properties which had been the subject-matter of a gift by a widow. It was observed in that case that the real question for determination was whether or not the plaintiff could obtain in the suit a decree for possession without first seeking a declaration that the gift to the defendant by the widow

was not binding on him. It was stated therein that if the gift was binding against the reversioner until it was set aside by a decree of the Court, then it was essential that the plaintiff should first ask for a declaration setting it aside. The case in Ramsumran Prasad and Others Vs. Gobind Das, has not been overruled by the later Full Bench decision in Ramkhelawan Sahu Vs. Bir Surendra Sahi and Others, . This later decision related to two cases in both of which it was found that no declaration was sought for or required. The facts show that in one of the cases the plaintiff claimed as the nearest agnate and heir of the last male owner, and treated the gift by the widow as null and void. In the other case, the plaintiff claimed as heir of one Rani Rajbansi Kuer certain properties set forth in the schedule, which were stated to be the absolute stridhan properties of Rani Rajbansi Kuer. In none of the two cases was it necessary for the plaintiff to ask for a declaration before he could get possession. The position is different in a case 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.

4. The case in Shama Pershad v. Sheopersan Singh A. I. R. 1920 Pat. 290 is exactly similar to the present case. In that case, two Mitak-shara sons filed two suits to set aside decrees made upon mortgages executed by their father, and sales held under such decrees, and to ob-tain possession of their individual shares in the joint family property. It was held that in effect the suits were not merely for recovery of possession but for declarations with consequential relief, and that, therefore, the court-fee payable in each case was not a sum equal to ten times the Government revenue but an ad valorem fee calculated on the value of the plaintiff''s share in the joint family property. It is contended before us that this decision must be considered to have been overruled, by implication by the decision in Ramkhelawan Sahu Vs. Bir Surendra Sahi and Others, . In my opinion, this contention is not correct, and loses sight of the essential distinction between alienations made by a widow or other limited heir without legal necessity and without the consent of the next reversioners, and alienations made by a Hindu father as such. The power of the manager of a joint Hindu family to alienate joint family property is analogous to that of a manager for an infant heir as defined by their Lordships of the Judicial Committee in Hunoomanpershaud Pandey v. Mt. Babooee Munraj Koonweree (1854) 6 M.I.A. 393. A Hindu father as such, however, has special powers to alienate coparcenary properties which no other coparcener has. In the exercise of these powers he may sell or mortgage ancestral properties including the interest of his sons, grandsons, and great-grandsons therein for the payment of his own debt, provided the debt was antecedent debt, and was not incurred for immoral or illegal purposes. It is for the alienee to prove that the antecedent debt existed or that after due enquiries he, in good faith, believed that it existed; the burden is then shifted upon the sons to prove that the debt was contracted by the father for an immoral or illegal purpose. As regards the properties which were sold in execution of mortgage decrees, it is clear that the petitioners as sons cannot treat the sales as null and void in the way in which a reversioner can treat alienations by a limited owner as

null and void. The sons are bound by the sales, unless they prove that the debts were contracted by the father for an immoral or illegal purpose. With regard to the properties which have been sold in execution of mortgage decrees and have passed out of the possession of the family, the petitioners cannot ask for possession without first getting a declaration that the debts were incurred for an illegal or immoral purpose. That being the position, the learned Subordinate Judge is clearly right in his finding that the suit in effect comes u/s 7(iv)(c), Court-fees Act, so far as the properties which have been sold in execution of mortgage decrees are concerned.

5. As to the properties which have been sold by private sale deeds, the position is to some extent different. The father could sell the joint family properties including the sons'' interest therein to discharge a debt contracted by him for his personal benefit, provided the debt was antecedent to the alienation. As stated above, it would be for the alienee to prove initially that such antecedent debt existed. In the plaint, it is stated that there was no justifying necessity for any of the alienations, and they were made to satisfy the vicious and immoral habits of the father. The petitioners as sons and coparceners can treat such sales as not binding on them, leaving it to the defendants to prove that they were for antecedent debts. Learned Counsel has made a distinction between the two kinds of alienations, and I think that there is such a distinction in the present case: the alienations by private sale by one coparcener without justifying necessity can be treated by the petitioners as null and void and not binding on them, whereas the sales held in execution of mortgage decrees are binding on the petitioners till they are set aside on the ground that the debts were contracted for an illegal or immoral purpose. Therefore, with regard to the properties sold in execution of mortgage decrees, the plaintiff must state the value of the properties, that is, the amount at which the relief sought is valued. With regard to other properties, the value shall be deemed to be twenty times the revenue payable for them. Section 17, Court-fees Act, would not apply, and court-fees would be payable on the total value of the two kinds of properties, calculated as stated above. As observed in Nauratan Lal v. Wilford Joseph Stephenson A. I. R. 1922 Pat. 359, the word ''subject'' used in Section 17 means ''cause of action'' and is not to be interpreted with reference to the different subjects mentioned in Section 7.

6. It has next been contended on behalf of the petitioners that the learned Subordinate Judge is wrong in asking them to pay court-fees on the market value of the properties sold in execution of mortgage decrees. It is pointed out that u/s 7(iv)(c), Court-fees Act, the plaintiff is entitled to state the amount at which he values the relief sought, and he can put any value he likes. Learned Counsel has relied on the decision of their Lordships of the Judicial Committee in Sunderbai v. Collector of Belgaum AIR 1918 P.C. 135 , and also on the following Calcutta decisions: In Re: Court-fee Act and Kalipada Mukharjee, , Official Trustee of Bengal v. Gobardhan Guchait 118 I. C. 357 and Pannalal v. Abdul Gani AIR 1930 Cal. 473. As far as this Court is concerned, there is a long line of decisions which have laid down that the plaintiff cannot be allowed to put an

arbitrary valuation on the relief he seeks; if he does so, it is open to the Court to determine the value and ask the plaintiff to pay court-fee on the value so determined. I need refer only to some of the decisions of this Court on the subject: Brij Krishna Das v. Murli Rai AIR 1920 Pat. 656, Shama Pershad v. Sheopersan Singh A. I. R. 1920 Pat. 290, Ram Sekhar Prasad Singh v. Sheo-nandan Dubay A.I.R . 1923 Pat. 137 and Ramcharitar Panday v. Basgit Rai AIR 1932 Pat. 9. I may further state that in the case in Ram Sekhar Prasad Singh v. Sheo-nandan Dubay A.I.R . 1923 Pat. 137 the case in Sunderbai v. Collector of Belgaum AIR 1918 P.C. 135 was considered and distinguished. Several previous decisions taking a contrary view were considered in that case, and it was observed as follows:

It will be observed that none of those cases relate to possession. They would all seem to relate to claims in which the Court had no option but to accept the plaintiffs'' valuation. No case has been shown to us where there was a claim for possession and where the plaintiff was allowed to put a valuation upon it which the Court knew to be false.

7. The Calcutta High Court cases taking a different view, particularly the case in Pannalal Lala Vs. Abdul Gani and Others, , were noticed and not followed in Ramcharitar Panday and Others Vs. Basgit Rai and Others, . This last case has been approved in the latest Full Bench decision in Mt. Rupia Vs. Bhatu Mahton and Others, , where also it has been held that the Court is empowered under the law to revise the valuation put by the plaintiff, and if on such a revision, in its opinion, the valuation is insufficient or arbitrary, it has jurisdiction to fix a right valuation. The distinction between cases in which the plaintiff is in possession and cases in which the plaintiff is out of possession has been clearly ex. plained in Mt. Deokali Kuari Vs. Mahadeo Prasad Bhagat, . The following observations made therein are relevant for our present purpose:

We have no doubt that the proper method of valuing the suit is according to the injury or loss from which the plaintiff seeks to be protected, and that loss cannot be valued as the Subordinate Judge has valued it at the total value of the properties in-suit ; such a value would be proper if the plaintiff as out of possession of the properties.

8. Even in the Calcutta High Court, the case in In Re: Court-fee Act and Kalipada Mukharjee, came to be reconsidered in Narayangunj Central Co-operative Sale and Supply Society Ltd. Vs. Mafizuddin Ahmed and Another, . This is a Full Bench decision of the Calcutta High Court, and it is stated there that the decision of their Lordships of the Judicial Committee in Sunderbai v. Collector of Belgaum AIR 1918 P.C. 135 is not really a decision on the question at issue, and Mukherji J. has made the following observations in his leading judgment:

On a careful perusal of their Lordships'' judgment, however, I have come to the conclusion that the point was not before their Lordships and no decision on it was, in fact, passed; what appears in the report is only a recital of the facts in that case.

9. Whether these observations be correct or not, it is clear that the decision of their Lordships in Sunderbai v. Collector of Belgaum AIR 1918 P.C. 135 was in relation to reliefs claimed in a suit in which the plaintiff was still in possession. In the Full Bench decision referred to above the Calcutta High Court has held that the case in Umatul Batul v. Nanji Kuar 6 C.L.J. 427 was correctly decided so far as it laid down that it is within the power of the Court to revise the plaintiff''s valuation. The case in Umatul Batul v. Nanji Kuar 6 C.L.J. 427 has been consistently followed in this Court. It is, therefore, clear that there is a long line of decisions of this Court to the effect that in suits coming u/s 7(iv) (c), Court-fees Act, the plaintiff shall initially value the relief which he claims. If the valuation is arbitrary and unreasonable, the Court can revise it. If the plaintiff is out of possession, as in the present case, the proper value should be the value of the property. In stating that value, it will no doubt be open to the plaintiff to bring to the notice of the Court any exceptional circumstances which may exist at the present time and which may only temporarily affect the value of the properties. For these reasons, I am of the view that the learned Subordinate Judge has rightly asked the petitioners to state the value of the properties which have been sold in execution of mortgage decrees. For other properties, the value shall be twenty times the Government revenue payable for them, as in a suit for possession. Court-fees will be paid on the total value of the two kinds of properties, calculated as stated above. The result, therefore, is that the application is allowed in part, and the order of the learned Subordinate Judge is varied as indicated above. In view of the limited success of the petitioners, I would award no costs of hearing of the application.

Manohar Lall, J.

10. My learned brother has reviewed the case law exhaustively and I entirely agree with his reasonings and conclusions. In the well-known case in Mt. Naomi Babuasin v. Modhun Mohun 13 Cal. 21 Lord Hobhouse in delivering the judgment of their Lordships made these observations at page 17:

It appears to their Lordships that sufficient eare has not always been taken to distinguish between the question how far the entirety of the joint estate is liable to answer the father''s debt, and the question how far the sons can be precluded by proceedings taken by or against the father alone from disputing that liability. Destructive as it may be of the principle of independent coparcenary rights in the sons, the decisions have for some time established the principle that the sons cannot set up their rights against their father''s alienation for an antecedent debt, or against his creditors'' remedies for their debts, if not tainted with immorality. On this important question of the liability of the joint estate their Lordships think that there is now no conflict of authority ... If his debt (that is to say, the father''s debt) was of a nature to support a sale of the entirety, he might legally have sold it without suit, or the creditor might legally procure a sale of it by suit. All the sons can claim is that, not being parties to the sale or execution proceedings, they ought not to be barred from trying the fact or the nature of the debt in a suit of their own. Assuming they have such a right, it will avail them nothing '' unless they can prove that the debt was not such as to justify the sale.

11. In another well-known case, Brijnarain Rai. v. Mangla Prasad A. I. R. 1924 P. C. 50, Lord Dunedin in delivering the judgment of their Lordships laid down five propositions out of which the second and the third propositions are relevant: Proposition 2 -- If the managing member is the father and the other members are his sons, he may, by incurring debt so long as it is not for an immoral purpose, lay the estate open to be taken in execution proceedings upon a decree for payment of that debt. Proposition 3--If he purports to burden the estate by a mortgage, then unless that mortgage is to discharge an antecedent debt, it would not bind the estate.

12. It seems to me, therefore, that the true position is that where Mitakshara son seeks to set aside a decree upon a mortgage executed by his father and the sale held thereunder and then to obtain possession of the joint family estate, the suit cannot be held to be merely a suit for recovery of possession but for a declaration with consequential relief (see the case in Shama Pershad v. Sheopersan Singh A. I. R. 1920 Pat. 290 but where a son seeks to recover the property which has been sold by the father by a private sale, the son can ignore the sale and simply seek to recover possession of the property covered thereby. In such a case he need not ask for a declaration and the suit cannot be treated to be a declaratory suit with a consequential relief but it must be treated simply as a possessory suit. This view has been consistently taken in a number of decisions of this Court as has been pointed out by my learned brother.

13. Is this view affected in the least by the decision of their Lordships of the Judicial Committee in Sunderbai v. Collector of Belgaum AIR 1918 P.C. 135, upon which strong reliance was placed by Mr. P. R. Das ? If the facts of that case are examined, it will be found that the plaintiff asked for a declaration that he was the adopted son of the deceased Dongappa Jayappa and for a perpetual injunction restraining the defendant from recovering the properties in suit from the plaintiff. It was not a case where the plaintiff wanted to recover possession of the properties from the defendant. In these circumstances the value of the relief sought for was the value of the injunction. It is always difficult to put a proper value upon an injunction in these circumstances and, therefore, all that the Court can insist on is that the plaintiff should not make an arbitrary valuation. If these facts are kept in view the observations of Sir John Edge, who delivered the judgment of their Lordships at page 21, are fully understandable. Says his Lordship:

Where the plaintiff sues for a declaratory decree and asks for consequential relief and puts his own valuation upon that consequential relief, then for the purpose of the court-fee and also for purposes of jurisdiction it is the value that the plaintiff puts upon the plaint that determines both.

14. These observations of their Lordships are binding upon all Courts in India, but, in my opinion, these observations do not apply to the situation which arises in the present case where the plaintiff is asking for recovery of possession and is bound to ask for a declaration with regard to those properties which passed out of the family due to the mortgage and the execution sale held thereunder. In my opinion, therefore, the decision of the Privy Council is of no assistance to Mr. Das. It is unnecessary for me to examine the Calcutta cases because we are bound by a long series of the cases in our Court which, in my opinion, correctly lay down the principles which should be followed in such cases.

15. On behalf of the respondent it was argued that the plaintiff has in effect asked for a declaration that the sale-deeds which were executed by the father were not binding upon him because they were executed for immoral or illegal consideration, and it is, therefore, suggested that the plaintiff should pay ad valorem court-fee and not merely on twenty times the Government revenue. But the short answer to this contention is that these allegations in the plaint merely anticipated the defence which may be set up on behalf of the defendant and cannot be construed as asking for any declaration. Even assuming, however, that the plaintiff has asked for a declaration it was unnecessary for him to do so because the Court is bound to adjudicate the matter in controversy between the parties, and for the purposes of court-fee the Court will regard this declaration as unnecessary : see Ramsumran Prasad and Others Vs. Gobind Das, . For those reasons I agree that the court-fee should be levied on the plaintiff in the manner indicated by my learned brother. I would add that it will be open to the plaintiff to show that in the special circumstances of this case the properties should not be valued at the market rate either on account of the rise in the price due to temporary cause or on account of any special circumstance which may affect this particular plaintiff regarding those properties. But in the absence of any special circumstance as the plaintiff is bound to put a reasonable value upon the reliefs sought by him, he must value them according to the market value. I also agree that there should be no order for the costs of this application.

