
(1927) 07 PAT CK 0021
In the Patna High Court

Shivaram Sand and Others

APPELLANT

Vs

Manu Lal Khemka and Others

RESPONDENT

Date of Decision : 15-07-1927

Acts Referred:

Contract Act, 1872 — Section 63

Citation : AIR 1928 Patna 40

Hon'ble Judges : James, J; Das, J

Bench : Full Bench

Judgement

James, J.—On the 6th October 1920 a suit on a mortgage bond was decreed in favour of the plaintiffs a joint Mitakshara family consisting of Manu Lal and Kanhai Lal with their minor sons. Defendants to the suit were Mt. Lalbati of the first party, her daughter and her minor sons of the second party, and Madho Ram Sand and others, subsequent mortgagees of part of the mortgaged property of the third party. The decree had been satisfied in part by the sale of a portion of the mortgaged property in earlier execution proceedings; and in the proceedings with which we are here concerned, instituted on the 30th April 1924, the mortgaged property in mauza Piprahi was brought to sale for realization of the balance due under the decree amounting to Rs. 12,192-4-6. The sale took place on the 7th February 1925, when the property was purchased by the decree-holders for Rs. 8,000.

2. In the meantime, on the 27th January 1925, Rai Saheb Madho Ram Sand, the subsequent mortgagee, had purchased from the proprietress Mt. Lalbati her shares in Piprahi and Barahri, with some land in a third village, for Rs. 41,000, out of which the sum of Rs. 12,000 was retained for payment to the decree-holders to release Piprahi from attachment. On the 2nd February 1925, which was the date originally fixed for sale, he paid Rs. 450 and procured an adjournment of the sale until the 7th February but he then suffered the property to be sold. It is stated by Madho Ram Sand, but denied by the decree-holders, that, at the end of February 1925, he arranged with Kanhai Lal and Manu Lal, in

the presence of their vakil Maulayi Allaiddin Ahmad, that if he paid Rs. 11,000 in cash the sale should be set aside. Whether the parties entered into such an agreement or not is a question which has to be decided in this appeal; but there is no dispute regarding the events which immediately followed. On 7th March 1925 Madho Ram Sand paid the sum of Rs. 11,000 to Maulavi Allaiddin Ahmad, who instead of making it over to his clients retained it in satisfaction of certain claims of his own against their estate. It appears that the civil Court was closed between the 8th March and the 13th, which was the date fixed for confirmation of sale, and if the amount due under the decree had been deposited in Court on the 13th the judgment-debtors could have had the sale set aside under the provisions of Order 21, Rule 89. On the 13th March Maulavi Allaiddin filed a petition on behalf of the decree-holder purchaser stating that, at the request of the judgment-debtors, the balance of their dues over Rs. 11,000 had been remitted, and that Rs. 11,000 had been paid, and praying that the property sold might be exempted from sale. Three other petitions were filed on the same day on behalf of the decree-holders. One prayed that the sale should be allowed to stand unless the money due under the decree were deposited in Court; the second petition stated that Maulavi Allaiddin Ahmad had realized the money without authorization from his clients; while the third stated that Maulavi Allaiddin Ahmad had recovered the money from the judgment-debtors and had himself appropriated it and prayed that proceedings might be taken against the vakil under the Legal Practitioners Act. Maulavi Najabat Hossain, Subordinate Judge of Bhagalpur, dealing with these petitions, found that Maulavi Allaiddin Ahmad had been duly authorized by his vakalatnama to receive money on account of the decree-holders and that the decree-holders were bound by his action so far as the judgment-debtor Madho Ram Sand was concerned. He accordingly set aside the sale and recorded an order dismissing the execution proceedings on full satisfaction of the decree.

3. The decree-holders appealed to the High Court, where it was held by Ross and Kulwant Sahay, JJ., that the vakalatnama of Maulavi Allaiddin Ahmad, while it authorized him to withdraw money paid into Court, did not authorize him either to compromise or to receive payment out of Court. The order of the Subordinate Judge was accordingly set aside with directions that the matter should be reheard in the lower Court, and that enquiry should be held into the circumstances of the alleged payment. If the agreement and the payment in pursuance thereof were proved, the sale was to be set aside; if no such agreement was proved, the sale was to be confirmed. The enquiry was held by Rai Bahadur Amrita Nath Mitter, Additional District Judge of Bhagalpur who found that the decree-holders had not been parties to the agreement to accept Rs. 11,000 in full satisfaction of the decree; that the order of the Court setting aside the sale which was based on the alleged adjustment must be regarded as invalid for want of express permission to compromise on behalf of the minor decree-holders, and that the Court could not in any case have found that the compromise was for the benefit of the minors. He, therefore, confirmed the sale.

Rai Sahib Madho Ram Sand and his partners appeal from that decision.

4. I take first the question of fact, which is the most important question in this appeal, of whether the decree-holders Kanhai Lal and Manu Lal actually entered into a compromise with Rai Sahib Madho Ram Sand (The judgment then discussed the evidence and proceeded.) Against the evidence tendered on behalf of the appellants we have nothing but the evidence of Kanhai Lal; and it is significant to note that Manu Lal did not enter the witness-box to deny the truth of the story told by the witnesses who gave evidence for the present appellants. We, therefore, consider that the evidence of the appellant-judgment-debtors' witnesses ought to be believed; and we set aside the finding of the learned Additional District Judge, and find that Kanhai Lal and Manu Lal did enter into an agreement with Rai Sahib Madho Ram Sand by the terms of which the sale would be set aside on payment to Maulavi Allauddin Ahmad of the sum of Rs. 11,000.

5. The trouble in this case has evidently arisen from the fact that Maulavi Allauddin Ahmad, instead of making over this money to his clients, retained it in satisfaction of certain claims of his own. This conduct was, on the face of it, unprofessional; but we are not immediately concerned here with that aspect of the case. On 14th August 1923 Kanhai Lal and Manu Lal executed a deed which purported to convey their whole property to three trustees, of whom Allauddin Ahmad was one, for the purpose of settlement of debts. It is not clear to what extent effect has been given to this deed, or what is the real purpose of it. It was suggested before the learned Additional District Judge that the question of whether Kanhai Lal and Manu Lal entered into an adjustment was comparatively unimportant, because Allauddin Ahmad, as trustees of their estate, would be the proper person to, receive the money, but no argument based on his position as trustee under the deed has been addressed to this Court. As the learned Additional District Judge has remarked, although the deed purported to give powers of management to the three trustees, the funds and the accounts continued to be with Kanhai Lal. If the whole estate had vested in trustees, they ought to have been added as parties in the execution proceedings. We may suspect that the deed will be utilized when it is convenient and repudiated when it is not; but as no arguments on matters with which we are here concerned have been based on the position of Maulavi Allauddin Ahmad as a trustee, it is not necessary to introduce additional complications by discussing the effect of the deed.

6. In accordance with the agreement which had been arrived at, Maulavi Allauddin Ahmad, on behalf of the decree-holders and purchasers, filed a petition of satisfaction mentioning that their claim under the decree, so far as it exceeded Rs. 11,000. had been remitted by the decree-holders. So far as the adult members of the family were concerned, there had been a valid accord and satisfaction, of the kind for which provision is made by Section 63, Indian Contract Act. But the agreement was in effect a compromise in the execution proceedings; and, as the minor sons of Kanhai Lal and Manu Lal were parties to

the decree, it was necessary that the leave of the Court should be obtained before effect could be given to it. This was not done; and the learned Additional District Judge has considered the question of whether the agreement could be regarded as for the benefit of the minors. He came to the conclusion that it could not be so regarded, and that the learned Subordinate Judge could not, if his attention had been drawn to the fact that minors were concerned, have given permission to the decree-holders to enter into the agreement on behalf of their minor sons.

7. Before discussing the questions of law, which arise in this connexion, it will be convenient to dispose of the question of whether the agreement was for the benefit of the minors, which is largely a question of fact. Mr. Murari Prasad argues that the agreement ought to be regarded as having been for the minors' benefit, because under it the family obtained, by the direct payment of the money to Maulavi Allauddin Ahmad, the disposal of the sum of Rs. 11,000 which if it had been paid into Court would have been liable to be attached by other creditors. We need not doubt that Kanhai Lal and Manu Lal considered it to be for their own benefit that this money should not be placed within the reach of other creditors of the estate; but whether this should be regarded as for the real benefit of the estate, and of the minor members of it in particular, is another question. The family property consisted of certain assets, against which were to be balanced certain liabilities; and even if the creditors had been able to attach the money paid by Madho Ram Sand, the family property as a whole would not have suffered from that fact. It must be considered that the estate would ordinarily be benefited as much by the reduction of liabilities as by the increase of liquid assets; and if a minor member of the family ever could be held to benefit by the temporary evasion of payment of debts, it could only be in some quite exceptional circumstances, and it certainly could not be so held here. Therefore since the minors cannot be held to have been really benefited by the fact that the money was not deposited in Court, it cannot have been for their benefit that their fathers, in their capacity of decree-holders, had remitted Rs. 750 out of the amount decreed; while as purchasers they had remitted their claim to five per cent of the purchase money (Rs. 8,000). If the attention of the learned Subordinate Judge had been drawn to the fact that this remission of Rs. 1,150 had been made without consideration, he could not have found that the agreement was for the benefit of the minors; and Rai Sahib Madho Ram Sand would then have been faced with the alternative of paying into Court the balance of the amount payable under Order 21, Rule 89 or of allowing the sale to be confirmed. If he had adopted the first course the decree-holders' family would have benefited to the extent of Rs. 1,150. If he had adopted the second course they would have been confirmed in possession of property which is admitted to be worth considerably more than Rs. 12,000. In any case the agreement as it stood could not be considered to be for the benefit of the minor members of the family; and the finding to that effect of the learned Additional District Judge must be accepted.

8. Mr. Sushil Madhab Mullick argues that the Court could not have given effect to a compromise in these proceedings, because the matter of giving effect to a compromise is governed by the provisions of Rule 3, Order 23; and Rule 4 of that Order provides that nothing in the order shall apply to any proceedings in execution of a decree. But if the proceedings are not governed by Order 23, Rule 3, they are governed by Order 21, Rule 2, under which it is the duty of the Court to record adjustments between the parties. It is argued that adjustments between the parties cannot be recorded after a sale has been held; and that Rules 89 and 92, Order 21, would not permit the Court to set aside a sale unless a petition to that effect had been presented by Madho Ram Sand, on the authority of the decision in the case of Sham Narayan Singh Vs. Basdeo Prasad Singh, . In that case it was held by Mullick and Ross, JJ. that

the only ground upon which a decree-holder can set aside his own sale is that the judgment-debtor has no saleable interest in the property. There is no provision in the Code for allowing adjustment between the parties after the sale has been held. The sale is a solemn act and the Court is not competent to review it merely at the request of the parties.

9. In the judgment of the 26th March 1926 of Ross and Kulwant Sahay, JJ., in the present case, whereby the original order of the learned Subordinate Judge was set aside and the case was remanded for further enquiry, Mr. justice Ross himself remarked regarding the decision in Sham Narain Singh v. Basdeo Prasad Singh:

The facts in that case were very different from the facts of the present case. There an application to set aside a sale purporting to be filed on behalf of the decree-holder himself had been put in and immediately afterwards the decree-holder had put in an application saying that his thumb impression had been taken forcibly on a blank piece of paper. Criminal proceedings had been taken in the matter, and it was alleged that the earlier application was a forgery. The sale was upheld. There may be some expressions in the judgment which are too broadly stated: but the decision must not be taken to be intended to limit the powers of the Court in a proper case such as for example that referred to by Sir Lawrence Jenkins, C.J. in Ram Prasad v. Ram Charan Singh [1915] 27 I.C. 601, where the learned Chief Justice thought that it would certainly be open to the Court not to confirm the sale and to treat the sale as being of no effect where that was the concurrent wish of the parties and the obvious requirement of the case. There may be circumstances in which the Court is bound to exercise its inherent power in order that justice may be done.

10. It would certainly appear to be unreasonable to hold that where, after a sale has taken place, the purchasers and the decree-holders, being the same persons, certify that the decree has been settled out of Court and pray that the sale may be set aside, the Court must nevertheless confirm the sale unless the owner of the property goes through the form of filing an application under Order 21, Rule 89 and depositing the money due under the decree in Court. In the matter of setting aside a sale the only persons interested besides the owner of the

property are the decree-holder and the purchaser; and if these two persons agree that the sale shall not be confirmed, it does not appear to be reasonable to hold that the Court must confirm the sale whether the purchaser and the decree-holder like it or not. We, therefore, consider that when Maulavi Allauddin Ahmad, representing the decree-holders and purchasers, filed the petition stating that the decree-holders' claim had been satisfied out of Court and that the sale might be set aside, it would have been proper (apart from the complications introduced by the fact that some of the decree-holders were infants) for the Subordinate Judge to have set aside the sale, as he actually did.

11. Under Order 32, Rule 7, the leave of the Court must be expressly recorded in the proceedings if effect is to be given to an agreement or compromise into which a guardian may enter on behalf of a minor with reference to a suit. If the full amount due under the decree had been paid to the agent or the managing member of the family by Rai Sahib Madho Ram Sand, there would have been no difficulty in the matter; but the reduction of the claim of the decree-holders and purchasers introduced an element of compromise, so that the leave of the Court was required. The attention of the learned Subordinate Judge was not drawn to the fact that there were minors among the decree-holders. The learned Additional District Judge thinks that Maulavi Allauddin Ahmad refrained from drawing the attention of the Court to this fact because he was doubtful whether permission to compromise would have been accorded. Maulavi Allauddin Ahmad was the pleader and agent of the decree-holders and purchasers; but, in the matter of filing the petition of satisfaction, in which it was requested that the sale might be set aside, he was acting under the agreement as agent for Rai Sahib Madho Ram Sand also, and unless there were evidence, direct or circumstantial, to indicate that it was with the knowledge of Rai Sahib Madho Ram Sand that he omitted to apply for permission to compromise on behalf of the minors, Rai Sahib Madho Ram Sand ought not to be allowed to suffer for this omission. If the attention of the Court had been drawn to the fact that there were minors among the decree-holders and purchasers, it is possible that the learned Subordinate Judge might have given the necessary permission for the adjustment, though he ought not to have done so.

12. We propose to deal with this case on the assumption that if the learned Subordinate Judge had been asked to give permission to the decree-holders and purchasers to enter into this adjustment on behalf of the minors he would have refused to do so; and that he would have required the whole of the amount which had been remitted by way of adjustment together with 5 per cent of the purchase-money, to be deposited in Court on that day as a condition of setting aside the sale. If he had done this, it may be presumed that Rai Sahib Madho Ram Sand would at once have deposited the sum of Rs. 1,150 in order to set aside the sale, since otherwise the whole of the purchase-money paid for Piprahi would have been sacrificed.

13. It is not proper that the decree-holder-purchasers should be allowed to insist

upon confirmation at the sale as a result of this technical objection, because, though in form they are now expressing compunction for the adjustment in the interest of their minor sons, it is manifest that the adult members of the family would profit by the confirmation of the sale or the setting aside of that part of the agreement by which a portion of the sum payable to them was remitted. We, therefore, propose to place the parties in the position in which they would have stood if the learned Subordinate Judge had declined to sanction the adjustment. Rai Sahib Madho Ram Sand would have had to deposit Rs. 1,150 on that very day as a condition precedent to the setting aside of the sale; and if to-day the same amount is deposited in Court the sale may be set aside.

14. We accordingly direct that if the sum of Rs. 1,150 be deposited in Court to-day by the appellant, the order of the learned Additional District Judge will be reversed and the sale will be set aside. If the deposit is not made, the order of the learned Additional District Judge confirming the sale will stand confirmed. Each party may bear his own costs.

Das, J.

15. I agree.