
(1929) 01 PAT CK 0008

In the Patna High Court

Singhasan Misser and Others

APPELLANT

Vs

Jadunandan Misser and Others

RESPONDENT

Date of Decision : 18-01-1929

Acts Referred:

Citation : AIR 1930 Patna 155

Hon'ble Judges : Ross, J;Chatterji, J

Bench : Full Bench

Judgement

Ross, J.—The plaintiffs brought a suit on a mortgage against the defendants. The mortgaged property was two annas and odd share in Tauzi No. 658. The suit was compromised by a petition of 18th March 1922 on the terms:

that the defendants are to make over to the plaintiffs 25 bighas out of the mortgaged lands hearing Tauzi Nos. 1386, 1369 and 1371 in lieu of the entire claim with casts in the Court due to them, amounting to Rs. 7,500. The partiGS shall get a separate patti of 25 bighas comprising proportionate zorait, orchard and raiyati lands carved out according to the share in each of the three tauzis through Babu Bireshwar Mukherji and Burujbal Prasad, pleaders and the plaintiffs shall got into possession and occupation of the said patti. The pattibandi formed shall be filed in the said Court and it will be treated as a part of this compromise petition. Should any party fail to appear on 13th April 1922 to have the pattibandi made, both the pleaders will be competent to form the patti on a reference to the khatian, the recent survey map and the partition papers and to file the same in the Court, which shall be admitted by the parties and the plaintiffs shall, on determination of their shares with regard to 25 bighas of land, got their names registered in the land registration department and shall pay the land revenue and road-cess in all the three tauzis separately, to which no party shall raise any objection. Therefore this petition is filed and it is prayed that a decree may be passed in accordance with the sulehnama.

2. Under this agreement the commissioners proceeded to ascertain the lands. The plaintiffs did not appear before them and they found some difficulty in

making the allotment. Tauzi No. 658 had been partitioned into the three tauzis mentioned in the compromise. So far as Tauzi No. 1368 was concerned the defendants in that suit, who were interested in that tauzi, being defendants 6 to 15, appeared before the commissioners and the commissioners allotted 10 bighas 3 kathas 9 dhurs of land to the plaintiffs as representing the proportion of the 25 bighas that these defendants were liable for.

3. But in the case of the other tauzis, difficulties were raised. In Tauzi No. 1369 defendant 26 of that suit filed a petition on behalf of all the defendants owning that tauzi, from which it appeared that they did not want any allotment in favour of the plaintiff out of the mortgaged land in this tauzi; and in the case of Tauzi No. 1371, defendant 16 who had a share therein appeared before the commissioner; but, as his share was joint with those of other maliks and his lands were not separate, the commissioners were unable to make any allotment in that tauzi. In accordance with the commissioner's report a decree was passed the result of which was that the plaintiffs got only 10 bighas 3 kathas and 9 dhurs instead of 25 bighas. They applied unsuccessfully for amendment of the decree and then instituted the present suit for a declaration that the final decree dated 1st May 1922 on the basis of the commissioners' report was contrary to the terms of the compromise and that a fresh pattibandi might be made. The learned Subordinate Judge has decreed the suit and the defendants appeal and contend in the first place that the suit is not maintainable and, secondly, that even if it was maintainable the Court was incompetent to disturb the entire allotment which as to 10 bighas and odd had become final.

4. It was conceded by the learned advocate for the appellants that a consent decree can be set aside on the same grounds as an agreement and this is well established. But he contended that so far as mistake is concerned these grounds are limited to the cases of mutual mistake or mistake induced by the opposite party and he referred to the decision in *Stewart v. Kennedy* [1890] 15 A.C. 108. That case decided that a party is not entitled to have a contract rescinded because he has misunderstood its terms and it was pointed out by Lord Herschell that the authorities showed that in the case of bilateral obligation it was considered essential that the error which was sought to be taken advantage of by one party to rescind the contract should have been induced by the other party to it. In *Wilding v. Sanderson* [1897] 2 Ch. 534 it was laid down that mistake is one of the grounds for setting aside an agreement. Lindley, L.J., observed:

It was conceded, and in my opinion it is clear, that the order of 23rd November 1894 being a consent order based on and intended to carry out an agreement come to between the parties, ought to be treated as an agreement which could be properly set aside on any ground on which an agreement in the terms of the order could be set aside. Mistake is one of such grounds.

5. Then after referring to *Stewart v. Kennedy* [1890] 15 A.C. 108 his Lordship pointed out that mistake as to the meaning of the words used might be accompanied by another mistake as to the subject matter dealt with by the

contract and, if the parties are not ad idem as to the subject matter about which they were negotiating, there was no real agreement between them. Now the decree in the mortgage suit must be looked at as based on an intention to carry out an agreement between the parties. That agreement was that the plaintiffs should get 25 bighas but by the order as drawn up on the commissioners' report they have not got 25 bighas, but only 10; and this, is a sufficient ground for setting aside the decree because the order in the form in which it was drawn up was never consented to by the plaintiffs and it does not represent their agreement at all. Further it is clear from the commissioner's report that the mistake was induced by the opposite party so far as Touzi No. 1369 was concerned by the defendants going back on the contract and refusing to allow any allotment after agreeing to do so; and, so far as Touzi No. 1371 was concerned, by the failure of defendant 16 to separate his lands from those of the other cosharers, a course which he must be assumed to have undertaken to adopt, if it was necessary in order to give effect to his contract. A large number of cases was cited in the argument, but it is unnecessary to refer to them as the principles governing the decision in this case are free from any doubt and indeed there is no difference between the parties on this point.

6. While, however, I hold that the suit is maintainable, I think the decree passed by the Subordinate Judge goes too far. He has ordered a fresh pattibandi to be made; but so far as the pattibandi in Touzi No. 1368 is concerned, this was effected by the commissioners under the powers given to them by the terms of the compromise and this is not liable to be disturbed.

7. I would, therefore, allow this appeal in part and modify the decree of the Subordinate Judge by declaring that when the new pattibandi is made the allotment already made by the commissioners on 22nd April 1922 of 10 bighas 3 kathas and 9 dhurs in Touzi No. 1368 is not to be disturbed. There will be no costs of the appeal.

Chatterji, J.

I agree.