
(1963) 10 PAT CK 0008
In the Patna High Court
Case No : A.F.A.D. No. 930 of 1962

Sk. Khadimul Haque and Others

APPELLANT

Vs

Marai Dubey and Another

RESPONDENT

Date of Decision : 10-10-1963

Acts Referred:

Evidence Act, 1872 — Section 17
Specific Relief Act, 1877 — Section 23, 393

Citation : AIR 1965 Patna 262

Hon'ble Judges : K. Ahmad, J

Bench : Single Bench

Advocate : S. Anwar Ahmad, for the Appellant; Thakur Prasad and Vishwanath Pd., for the Respondent

Final Decision : Allowed

Judgement

K. Ahmad, J.—This appeal arises out of a suit for specific performance of an oral contract dated the 7th August, 1954 said to have been arrived at between the plaintiff on one side and defendant No. 1 on the other for the sale of an immovable property, namely, the land having an area of 1 bigha 8 kathas 12 dhurs which admittedly then belonged to defendant No. 1.

It appears that long before the 7th August, 1954 that property had already been given in Ijara to the plaintiff and one Bhikhari Dubey under a registered document for a sum of "Rs. 2,000/- by defendant No. 1. Thereafter, on the 9th August, 1954, defendant No. 1 executed two deeds of sale (Exts. A and A/1), the former in favour of defendants 5 to 7 and the latter in favour of defendants 2 to 4, each for a sum of Rs. 2,000/- in respect of practically half and half of the property in dispute. The case of the plff. is that these two sale deeds are not binding on him and that under the oral contract dated the 7th August, 1954, defendant No. 1 was bound to execute the deed of sale in respect of the property in favour of the plaintiff for a sum of Rs. 3,600/- as agreed upon thereunder. According to the plaintiff, the stipulation under the contract was that out of Rs.

3,600/-, Rs. 2,000/- was to be paid towards the ijara money under the ijara deed executed in his favour by defendant No. 1 and that Rs. 1,500/- was to be paid in cash on the date of the contract for sale and the balance of Rs. 100/- was to be paid on the day of the execution of the document which was undertaken to be executed by Aswin 1362 Fasli and hence the suit for the specific performance of the contract dated the 7th August, 1954 and in the alternative for recovery of Rs. 1500/- paid by the plaintiff to defendant Xo. 1 as claimed by him on the 7th August, 1954.

2. In defence, the contract for sale was challenged by all the contesting defendants, namely, defendants 2 to 7; but defendants 2 to 4 admitted in their written statements that there was a debt payable by defendant No. 1 to the plaintiff under bahi khata, and that was to the tune of Rs. 1500/-. Further, they also admitted that in the deed of sale dated the 9th August, 1954 which is Ext. A/1 on the record a sum of Rs. 1500/-, out of its total consideration of Rs. 2,000/- was left with them for the payment of that amount towards the satisfaction of the debt of the plaintiff in respect of the aforesaid sum of Rs. 1500/-. The main defence however of all the contesting defendants, namely, defendants 2 to 7, in respect of the claim about it consisted of the fact that the sum of Rs. 1500/- left with defendants 2 to 4 under the deed of sale (Ext. A/1) was already paid by them to the plaintiff. Therefore, the common plea raised on behalf of all the defendants was that the plaintiff was not entitled either to the specific performance of the contract or to the recovery of Rs. 1500/- as claimed by him.

3. Both the courts below have concurrently found that the story about the contract for sale, as claimed by the plaintiff, is not true, and this finding has not been challenged before me. But they have further found that the plea of payment in regard to Rs. 1500/-, as set up by defendants 2 to 7, has not been established. Accordingly, a decree for a sum of Rs. 1500/- along with certain interest by way of damages has been decreed by both the courts below. Defendants 2 to 7, therefore, have now come up in second appeal to this Court.

4. Mr. Anwar Ahmad, appearing for the defendants appellants, has supported the appeal on three main grounds:

(1) that on the basis of the contract made between defendant No. 1 on one side and defendants 2 to 4 on the other and under the deed of sale dated the 9th August 1954 which is Ext. A/1 on the record no decree should have been passed for the sum of Rs. 1500/- in favour of the plaintiff as the latter was not a privy to either of the two contracts made thereunder; (2) that the court below should have either accepted the whole of the admission made in the written statements in regard to the claim of Rs. 1500/- or should not have split it up and accepted a part of it and rejected the other part; and (3) that even if it is held that the plaintiff is entitled to the recovery of Rs. 1500/-, the decree in respect thereof should have been passed only against defendant No. 1 and the vendees under the deed of sale (Ext. A/1), namely, defendants 2 to 4 and not against

defendants 5 to 7, who are the vendees under the other sale deed (Ext. A).

In support of his first contention, Mr. Anwar Ahmad has laid reliance on the decisions in *Jamna Das v. Ram Autar* ILR 34 All 63 *Nanku Prasad Singh v. Kamta Pd.* 3 Pat LT 637: AIR 1923 PC 54 *Achuta Ram and Others Vs. Jainandan Tewary and Others*, *Jagat Narain Singh Vs. Sripati Nath Roy and Another*, *Suraj Prasad Oja Vs. Ram Lal Singh and Others*, and the *State of Bihar v. Charanjit Lal Chadha* AIR 1900 Pat 139. In my opinion, none of these cases has got any bearing on the facts of the present case, and all of them are clearly distinguishable. So far as the first three cases are concerned, namely, those of ILR 34 All 63 ; 3 Pat LT 637: (AIR 1923 PC 54(1)) and ILR 5 Pat 468: (*Achuta Ram and Others Vs. Jainandan Tewary and Others*,), they relate to the personal liability of a mortgagor under Order Section 34, Rule 4 of the CPC equivalent to old Section 90 of the Transfer of Property Act. In all these three cases, the property given in mortgage was subsequently sold by the mortgagor to a third party before the suit on the basis of the mortgage was brought by the mortgagee. Subsequently, in the course of execution of the mortgage decree which the mortgagee obtained the sale money fetched by the sale of the property given in mortgage was not found sufficient to satisfy the mortgage money, and therefore an application was tiled under Order 34, Rule 6 of the CPC for realisation of the balance personally from the mortgagor as also from the transferees. In that connection, a point arose for consideration whether the transferee from the mortgagor had any personal liability for a debt against the mortgagor. In answer thereto, their Lordships of the Privy Council in ILR 34 All 63 observed :

"This is a perfectly plain case. The action is brought by a mortgagee to enforce against a purchaser of the mortgaged property an under-taking that he entered into with his vendor. The mortgagee has no right to avail himself of that. He was no party to the sale. The purchaser entered into no contract with him, and the purchaser is not personally bound to pay this mortgage debt. Therefore, he is not a person from whom, in the words of the 90th section of the Transfer of Property Act, the balance is legally recoverable".

This has been followed in the other two cases on that point in 3 Pat LT 637 : AIR 1923 PC 54 and ILR 5 Pat 468: (*Achuta Ram and Others Vs. Jainandan Tewary and Others*,). In my opinion there was no liability created in any of those cases between the mortgagor and his vendee for the benefit of the mortgagee nor there was any acceptance of the same by the vendee. Therefore, there could be no question of enforcing any liability under Order 34, Rule 4 of the CPC against the transferee on the mere ground that the sale made in his favour was subject to the mortgage.

In the case of 13 Pat LT 68: AIR 1030 Pat 390) and A, whose estate was heavily indebted, conveyed It to his brother B in consideration of the latter agreeing to give him a maintenance allowance, and B brought a suit to enforce the deed in the course of which the deed was affirmed and B was appointed Receiver of the estate, and then C who had instituted a suit for money against A after the date

of the conveyance, sought to execute the decree against the estate, and an order for execution was made after notice to B who was made a party to the execution proceedings, and B subsequently objected to the sale of the estate in execution. That objection was upheld and it was held that as there was no covenant to his personal debts and even if there was such a covenant there was no privity of contract between B and C, C had no right to execute the decree against the estate in B's hands; in other words, the decision in this case was based on the principle that there was no trust created in favour of C for the satisfaction of his debt, and, therefore, in those circumstances, C being not a party to the document between A and B could not sue for the claim which he had against A. Similar was the position in other two cases, namely, *Suraj Prasad Oja Vs. Ram Lal Singh and Others*, and *The State of Bihar and Another Vs. Charanjitlal Chadha and Another*, . In *Suraj Prasad Oja Vs. Ram Lal Singh and Others*, , one A executed a handnote in favour of B and another handnote in favour of C. B and C assigned the notes to D. Thereafter A, the executant of the notes, sold all his properties to X and Y. The sale deed contained a recital that X and C undertook to pay the amount due on hand-notes. This undertaking was not communicated to D. D brought a suit against X and Y for recovery of the amount due on the hand-notes. On those facts, the question raised was whether D was entitled to recover this amount from X and Y, he not being a party to the contract between them and A by which they undertook to discharge the debt. The reply in this case was given in the negative, and it was again based upon the same principle that no trust was created in favour of D.

In *The State of Bihar and Another Vs. Charanjitlal Chadha and Another*, the position was also the same. In fact the submission made by Mr. Anwar Ahmad is based upon the principle of common Law as laid down in *Tweddle v. Atkinson*, (1861) 1 B and Section 393, namely that a stranger to the consideration cannot sustain an action on the promise made between two persons unless he has in some way intervened in the agreement. But even in England that rule of law has been made subject to the rule of equity, as given in *Gandy v. Gandy*, (1885) 30 Ch. D. 57. Therein, a right of action is given to the third person, when the person with whom the contract is made is a trustee express or implied for the third person for whom the benefit is intended. In the light of these two principles, questions have often arisen in Indian Courts also as to how far the principle of law as laid down in (1861) 1 B & S 393 is applicable in India. That question has been exhaustively dealt with in *A.R. Iswaram Pillai Vs. S. Taregan and Others*, and finally it has been held therein that the principle as laid down in the aforesaid English case in (1861) 1 B & S 393 has certain exceptions, like (a) the creation of a trust in favour of the plaintiff in respect of the amount sued for; (b) the creation of a charge on immovable property by the promisor or allocation by the promisor of the specific money in suit in favour of the plaintiff; (c) the creation of a settlement on marriage in which the plaintiff may be beneficially entitled as provided by Section 23, Specific Relief Act, and (d) estoppel as against the promisor owing to transactions between the plaintiff and;

the promisor.

In the present case, the materials on the record are sufficient to establish that there was a trust created in favour of the plaintiff in respect of the amount sued for. In fact, even the defendants in the written statements did not challenge that the plaintiff was not entitled to the claim made for the recovery of Rs. 1500/- on the ground that he was not a party to the deed of sale (Ext. A/1); on the contrary, if not expressly at least by implication, they conceded that there was a liability against them for the payment of the amount sued for to the plaintiff, but the plea taken by defendants 2 to 4 was that the amount had already been paid. As already stated, this plea of payment has not been accepted by the courts below. Therefore, I find no reason to accept the contention of Mr. Anwar Ahmad that there was no trust created in favour of the plaintiff for the payment of Rs. 1500/- by defendants 2 to 4.

In this connection, while I was dictating the Judgment my attention has also been drawn to a Full Bench case in Thirumulu Subbu Chetti Vs. Arunachalam Chettiar, , but that case was decided on the footing that there was no trust created and defendant No. 3 there was not the plaintiff's agent and there was no novation or obligation undertaken by defendant 3 to the plaintiff. In the present case, as already stated above, the obligation created against defendants 2 to 4 under the sale deed (Ext. A/1) does not seem to have been denied at any stage by these defendants; on the contrary the same has been admitted, if not expressly, at least by Implication. Therefore, that authority also has got no application to the facts of the present case. I, therefore, feel no hesitation to hold that on the facts of the present case the plaintiff is entitled to get the decree, at least for the recovery of Rs. 1500/- as stipulated in the deed of sale (Ext. A/1). It is true that this liability under the deed of sale was accepted only by defendants 2 to 4 and not by defendants 5 to 7. Therefore, the decree on the basis of that liability can be passed only against defendants 1 to 4 and not against defendants 5 to 7.

Mr. Thakur Prasad, appearing for the defendants, has also conceded to this extent. Thus, point No. 1, as raised by Mr. Anwar Ahmad, is decided against the appellants, but point No. 3 in their favour to the extent that the decree for the recovery of Rs. 1500/- as claimed by the plaintiff will be only against defendants 1 to 4 and not against defendants 5 to 7.

That, therefore, leaves us with the second contention raised by Mr. Anwar Ahmad. In law, it is well established that any admission made in a pleading has to be accepted or rejected as a whole but that principle of law, I think, has no relevancy to the facts of the present case. It is true that in the course of discussion made In the judgment under appeal, some reference has been made to the admission made in the written statement and a part of it on discussion has been ultimately rejected by that court, namely the one relating to the payment of the amount to the plaintiff. Therefore, viewing from that point of view there could have been something to be said in favour of the appellants, had the decree

for the amount rested on the ground of that admission alone; but, in my opinion, on the facts of this case the main consideration which has weighed with the Court below in giving a decree to the plaintiff in regard to Rs. 1500/- is not the admission made by the defendants 2 to 4 but the term of the contract that was entered into between defendant 1 and defendants 2 to 4 in the deed of sale which is Ext. A/1 on the record and the factum of denial by defendants 2 to 4 that there was no obligation created against them under that deed of sale for any payment of Rs. 1500/- to the plaintiff. In that view of the matter, the third contention advanced by Mr. Anwar Ahmad also fails.

5. For these reasons, I think the appeal has to be allowed so far as defendants 5 to 7 are concerned, but it has to be dismissed as against defendants 1 to 4; in other words the suit for recovery of Rs. 1500/- along with the damages will stand decreed only against defendants 1 to 4 and not against defendants 5 to 7; but in the circumstances of the case there will be no order for cost.