

(1946) 08 PAT CK 0013
In the Patna High Court

Sm. Ramkali Kuer and Others

APPELLANT

Vs

Kali Prasad and Others

RESPONDENT

Date of Decision : 21-08-1946

Acts Referred:

Transfer of Property Act, 1882 — Section 53

Citation : AIR 1947 Patna 257

Hon'ble Judges : Manohar Lall, Acting C.J.; Ray, J

Bench : Full Bench

Judgement

Manohar Lall Ag. C.J.

1. This appeal arises out of a decision of the learned Subordinate Judge of Gaya, dated 11-11-1942 by which he has decreed the suit instituted by the respondents for a declaration that the properties in suit are liable to be attached in execution of their decrees. The appellants before us are the daughters of one Raghunath Sahay, defendants 1(a) to 1(c), and a deity, defendant 1(d).

2. It is necessary to give the dates of certain transactions and events in order to appreciate why we are forced to set aside the decree of the learned Subordinate Judge on a preliminary point only without going into the merits of the case.

3. On 3-S-1935, Kali Prasad, plaintiff 1 in the action, obtained a decree for about Rs. 5900 against Raghunath Sahay, who was made defendant 1. The decree was put into execution in 1935 and an attachment was effected amongst other properties of the property apparently standing in the name of Ramlachhan Kuer, the wife of the judgment-debtor. She put forward a claim in the execution Court based upon the ground that her husband executed a deed of gift on 9-5-1932 in her favour of some of the properties sought to be sold and that on 16.6-1933, a registered sale deed had been executed in her favour by her husband of some other properties which the decree-holder was seeking to sell. The claim of the lady was allowed on 30-11-1935. Accordingly on 8-10-1936, a suit giving rise to this appeal was instituted by the defeated decree-holder Kali Prasad under the

provisions of Order 21, Rule 63, Civil P.C. In the plaint he alleged that he was one of the creditors of defendant 1 and there were several other creditors so that defendant 1 had become heavily indebted and that it was only in order to avoid payment of the dues to the plaintiff and to other creditors that defendant 1 had executed a farzi and got up deed of gift on 9-5-1932 and a sale deed on 16-6-1933. The plaintiff gave details of the debts due to the various creditors and urged that the property valued at Rs. 84,000, has been stated in the deed of gift to be valued only at Rs. 15,000, and that both the documents were executed out of mala fide intention and that they were not intended to be acted upon and were not acted upon; but on the other hand the properties covered by the deeds were all along in possession of defendant 1 and defendant 2 had never been in possession thereof. Accordingly the relief sought for was that the Court may set aside the order dated 30-11-1935, and hold that the deed of gift and the sale deed were fraudulent, null and void and inoperative against the plaintiff and other creditors of defendant 1, so that the plaintiff and the other creditors may get the properties covered by those deeds sold. He also stated in the plaint that should any of the other creditors of defendant 1 desire to join in the suit, they may be made co-plaintiffs. Four other persons were impleaded as coplaintiffs 2 to 5 after the publication of a notice under order 1, Rule 8, Civil P.C., but after the expiry of one year from the date of the order allowing the claim case. Plaintiff 1, however, was rightly treated as having instituted the suit in a representative capacity so that the mere fact that the other co-plaintiffs came on the record after the period of limitation has become immaterial.

4. On 1-7-1937 Ramlachhan Kuer filed her written statement in which she claimed that he had acquired title and possession under the deeds which were wrongly stated to be mala fide and inoperative.

5. On 21st October 1937 she executed a, will in favour of Sri Thakur Sita Ram Ji by which she bequeathed some of the properties in favour of the deity in these terms:

After my death the said Shri Thakur Sita Ramji shall be and shall remain-for ever in possession and occupation as the proprietor of all the properties constituting my proprietary interest which I have acquired under the deed of gift dated 7-5-1932 and sale deed dated 16-6-1933 executed by my husband Babu Raghunath Sahay.... My husband Babu Raghunath Sahay shall, so long as he is alive, continue to be the shibait (sic) of the said Shri Thakur Sita Ramji.... I have appointed my husband Babu Raghunath Sahay as executor of this will of mine.

On 27-10-1937, she died.

6. On 9-12-1937 Babu Raghunath Sahay as the shebait of Sri Thakur Sita Ramji filed an application in this suit that Sri Thakur Sita Ramji may be substituted as the legal representative of his deceased wife on the foot of the will dated 21-10-1937. The plaintiff objected to this substitution on the ground that there was no necessity to make any substitution as Babu Raghunath Sahay was the

real owner in possession of the properties and the sale-deed and the deed of gift in favour of defendant 2 did not convey any title to defendant 2. On 16-5-1938, as the plaintiff contested the petition for substitution, the pleader appearing on behalf of Thakurji did not object to the refusal of his application because it was the duty of the plaintiff to bring all the persons concerned on the record and he also urged that the plaintiff took the risk of proceeding with the suit without the applicant being brought on the record. The Court very rightly observed that he saw no reason why the plaintiff should be compelled to add Sri Thakur Ramji as a party and he accordingly ordered that the application of Thakurji to be added as a party should be rejected, but observed that the idol will be, in no way, bound by the decree if any that will be passed in that suit. This order is to be found at p. 63 of the record (Part I). The name of defendant 2, who was admittedly dead, was expunged from the record.

7. On 4-6-1938, defendant 1 filed a petition in which he prayed that the whole suit should be held to have abated. The matter was taken up on 15-9-1938, when the plaintiff contended that no substitution of anybody was necessary as defendant 2 was a mere benamidar of defendant 1 who has all along been in possession of the properties in suit. But the Court observed that in his opinion Sri Thakurji ought to have been made a party, but as his application was already rejected and no further steps had been taken by the plaintiff it was unnecessary for him to say anything on the matter. He then considered whether the right to sue survived against defendant 1 alone and observed that this will depend upon the decision as to whether defendant 1 alone is the owner of the properties and defendant 2 was his mere benamidar, and as this was the main point of dispute in this case, the Court could not decide it properly at that stage and accordingly rejected the application of defendant 1 that the suit should be ordered to have abated.

8. Against this order defendant 1 moved this Court in civil Revn. No. 686 of 1938, but the application was withdrawn on it being distinctly understood that defendant 1 will not be prevented from raising the point which he had raised in the trial Court at the time of the hearing.

9. On 3-11-1940, defendant 1 died, and the plaintiff filed a petition on 7-11-1940, to be allowed to bring the legal heirs of Raghunath Sahay on the record. The daughters of Raghunath Sahay were brought on the record on 2-12-1940.

10. In the meantime on 30-9-1940, the will executed by Ramlachhan Kuer in favour of the deity was admitted to probate and, therefore, one of the objections which the plaintiff had to the substitution of the deity disappeared. Accordingly, on 10-3-1940, the plaintiff filed a petition in which he prayed that Sri Thakurji may be added as a party through the shebait, the daughters of Raghunath Sahay. This application was opposed on behalf of the daughters on the ground that the plaintiff had formerly objected to the addition of Sri Thakurji when the deity wanted to be made a party and the application was rejected on the

application of the plaintiff himself and the plaintiff cannot now be allowed to go back on his former attitude. The learned Subordinate Judge on 20-3-1941, held that as according to the defendant this deity was a necessary party to the suit, he should be made a party and the mere fact that the plaintiff objected to its being made a party at the previous stage of the suit, cannot operate as estoppel against him. He then considered the question of abatement and observed that the question will be gone into at the time of the hearing of the suit, and the defendants will not be prejudiced if the deity was made a party. Similarly regarding the question of limitation, the Court observed that the matter will be considered at the time of the hearing of the suit and he made it clear that the addition of the deity as a party will not prejudice the plaintiff or the other defendants in any way. Accordingly he directed that the deity be added as a party in the suit and the plaint be amended.

11. Against this decision the deity moved this Court in civil Revn. No. 332 of 1941 which was disposed of by Harries C.J., and myself on 6-11-1941. While dismissing the application we observed that we expressed no opinion whatsoever on the question whether the suit was or was not barred against the deity and that the question was left open for decision by the Court below at the appropriate time. We also declined to express any opinion as to whether the plaintiff was estopped from contending that the deity had no title.

12. On 25-8-1942, the other plaintiffs were added as co-plaintiffs.

13. At the request of the defendants, the learned Subordinate Judge heard arguments on issue No. 14 "Has the suit abated? If so, can the abatement be set aside?" The learned Subordinate Judge passed an elaborate order on 27-5-1941 in which he held that defendant 1, Raghunath Sahay, had become the legal representative of defendant 2 from the date of her death on 27-10-1937 and further that it was difficult for him to resist the contention on behalf of the plaintiff that the case fell under Order 22, E. 2, Civil P.C., and no application for substitution was necessary as defendant 1 was the legal representative of defendant 2 and was already on the record even though it appeared to him at first sight that a different principle should have guided him in this case in view of the attitude taken up by the plaintiff. In the result he held that defendant 1 remained the legal representative of the estate of defendant 2 till he died and, on his death, the plaintiff applied in time to bring on the record his daughters who are the next legal representatives under the terms of the will and who are also the heiresses at law of both defendants 1 and 2 and concluded that the suit had not abated.

14. The successor of the learned Subordinate Judge completed the trial of the suit and has given a decision on 11-11-1942 in which he has held that the gifted property and the property covered by the sale deed were intentionally made the subject of these apparent dispositions in order to screen them off from the creditors. He further held that no title had passed to the donee and the vendee and accordingly he decreed the suit of the plaintiff.

15. In appeal, it is contended by Mr. B.N. Rai that the learned Subordinate Judge was wrong in holding that the suit had not abated and that in the events that have happened the suit should have been dismissed against the deity,

16. In my opinion the contention of the appellants is well founded. The plaintiff as already stated made a clear allegation in the plaint that the title in the properties in suit never passed from defendant 1 to defendant 2 as the deed of gift and the sale deed were inoperative. He persisted in this position when the deity appellant applied to be made a party and on the objection of the plaintiff an order was passed that the deity should not be added as a party and that "the idol would in no way be bound by the decree if any passed in this suit."

17. The plaintiff's alternative argument does not help him either. Let it be assumed that the title of the properties in suit was with defendant 2, but she transferred that title in favour of the deity by the will, and the title vested in the deity. It is a mistake to think that the title vested in the deity only from the date of the probate of the will which was pronounced on 30-9-1940. That being the position, when defendant 2 died, the title of the properties in suit vested in the deity. This is not a case where defendant 1 as a shebait of the deity was already on the record because the plaintiff refused to recognise defendant 1 as the shebait of the deity and insisted that he was on the record in his personal capacity only as the owner of the properties in suit and not as a legal representative of defendant 2. This position is so clear that it is impossible to accede to the argument advanced on behalf of the respondents.

18. Mr. B.N. Rai has drawn attention to the case in *Haweli Shah v. Sheikh Painda Khan* AIR 1926 PC 88. In that case some persons were made defendants as the sons and legal representatives of a deceased tortfeasor, but their names were struck out from the record and some other persons were substituted as the administrators of the estate of the deceased Sunder Das and after a lapse of one year the discharged defendants were again reinstated as defendants. Their Lordships of the Judicial Committee observed at p. 91:

The suit was thereby brought to an end as against the sons. On 21-6-1924 the Judicial Commissioner reviewed this order and altered it. He held that as no formal letters of administration had been taken out, the previous order was wrong and he directed, but only after the lapse of a year, the names of the sons to be restored as defendants through their mother and guardian. The original plaint of November 1922, against the sons had been superseded by a plaint of 10-7-1923, amended in accordance with the Commissioner's earlier order so as to be directed against the estate alone.

This amended plaint is again to be superseded by one in which the suit is to be one against the sons alone. The latter now come before the King in Council, and not unnaturally ask that the plaint thus amended should be treated as instituting a new suit, and they claim that this suit is out of time and barred by limitation....

To this contention their Lordships do not see any answer.

19. These observations apply to the facts of this case as the deity was sought to be added on 21-3-1941, and the suit has to be treated as a new suit against the deity instituted on that date. But on that date six years had elapsed from the date of the transactions sought to be impugned--this is on the assumption that the suit was a proper suit instituted under the provisions of Section 53, T.P. Act.

20. A somewhat similar situation arose in AIR 1939 110 (Privy Council) . In the plaint in that suit four trustees of a certain Pagoda were sued in that capacity and the plaintiff had also asked for relief against each of the defendants personally. Shortly after the suit began, the four trustees were removed from their position as trustees of the Pagoda and eight others were appointed in their place. Upon that the plaintiff made an interlocutory application asking originally to add the eight new trustees as defendants and subsequently to substitute the new trustees in place of the old. This application was granted and thereupon the names of the four original trustees were struck off and those of the new trustees were substituted. When the case came up for trial and before the hearing began on the merits, the trial Judge suggested that the liability of the original trustees was a personal one and that no liability attached to the new trustees. Upon this the plaintiff about a year after the date of the first order made an application to replace the names of three out of four original trustees (the other having died) as defendants, but this application was refused by the trial Judge. Before their Lordships the plaintiff argued that he had not proceeded under Order 23, Rule 1 in applying for the substitution of the new trustees in place of the old, but that his application was made under Order 1, Rule 10 alone. But this argument did not appeal to their Lordships in these words at p. 205:

The last named rule no doubt authorizes the Court to order the name of a party improperly joined to be struck out and that the names of any person who ought to have been joined be added. But such an order is expressly directed to be made on such terms as may appear to the Court to be just.

If no terms are inserted in the order, then, in their Lordships' view, the effect of withdrawing the suit against some of the defendants is to be ascertained from Order 23, Rule 1. That order is not very happily worded, but its meaning is reasonably clear. Under its provisions the Court may give liberty to the applicant to institute a fresh suit after a withdrawal, but if it does not do so, the plaintiff is precluded from instituting a fresh suit in respect of the same subject-matter.

21. In my opinion, therefore, in whatever way the question is looked at, the result must be unfavourable to the plaintiff respondent and for this he alone is to blame because he vehemently opposed the addition of the deity as a defendant at the earlier stage of the suit.

22. Mr. Rajkishore Prasad relied upon a number of cases in support of his contention, but none of them takes a view contrary to that which I have expressed above.

23. For these reasons I came to the conclusion that the learned Subordinate

Judge was wrong in holding that the suit had not abated by reason of the events stated already. The suit was also barred by limitation against the deity appellant.

24. The case of the daughters appellants, on the other hand, is different because they have been substituted as the legal representatives of defendant 1. But it is unnecessary to consider their appeal separately because, in our opinion, the suit of the plaintiff should have been dismissed against the deity appellant. To that extent the appeal of the daughters as the shebait of the deity must succeed. The appellants had no objection if the plaintiffs proceeded to execute the decree against properties in possession of the daughters as heirs of defendant 1 provided it was not barred by limitation.

25. The result is that the appeal is allowed, the decision of the learned Subordinate Judge is set aside and the suit of the plaintiffs is dismissed, but in the circumstances each party will bear his own costs of this litigation in this Court and in the Court below.

26. Miscellaneous Appeal No. 367 of 1943.--This appeal has become infructuous in view of our decision just pronounced in First Appeal No. 13 of 1943. It was admitted on behalf of the respondent that if the decision in the first appeal was adverse to the respondent this appeal must also be allowed.

27. The short facts are that an application for execution was filed by the decree-holder Kali Prasad in 1985. An objection under Order 21, Rule 58, Civil P.C., was filed on behalf of the wife of Raghunath Sahay claiming the attached properties by virtue of a deed of gift dated 9-5-1932 and a deed of sale dated 16-6-1933. That objection was allowed on 30-11-1935, and the execution case was struck off. The decree-holder then instituted a suit in 1936 for a declaration that the deed of gift and the sale deed were farzi and inoperative. This was decided in favour of the decree-holder on 11-11-1942, but that decision has been reversed by us while disposing of First Appeal No. 13 of 1943. In the meantime, during the pendency of the title suit, the decree-holder started another execution case on 5-4-1987 registered as No. 81 of that year and he realised a certain sum by sale of the other properties of Raghunath Sahay not covered by this suit. That execution was struck off on 26-6-1938. After the decision in favour of the decree-holder on 11-11-1912 the decree-holder filed another execution on 28-1-1943 against the properties covered by that suit. The objection of the judgment-debtor to the execution of this decree on the ground that the application was barred by limitation was rejected by the learned Subordinate Judge on 25-8-1943. Hence the miscellaneous appeal to this Court.

28. The learned Subordinate Judge was correct in holding that the application was not barred by limitation, but as we have held that those properties which are covered by the suit of 1986 did not belong to the judgment-debtor on the relevant date, the application for execution so far as it seeks to attach and sell the said properties must be disallowed.

29. In the result this appeal is also allowed and the order of the learned

Subordinate Judge of Gaya, dated 25-8-1948 is set aside but for reasons different from those which were in existence at the time when that order was passed by the learned Subordinate Judge. Each party will bear his own costs of these proceedings in this Court and in the Court below.

Ray, J.

30. I entirely agree and have nothing to add.