
(1925) 01 PAT CK 0035
In the Patna High Court

Thakur Prasad Sahu

APPELLANT

Vs

Mohammed Musa and Others

RESPONDENT

Date of Decision : 16-01-1925

Acts Referred:

Citation : AIR 1925 Patna 410

Judgement

1. The dispute in this case is between the plaintiff Thakur Prasad Sahu and the second party defendants, both of whom claim to have purchased the same property from the first party defendants who may be referred to as the vendors. The two kebalas were executed on the same day, namely the 9th September 1919 in one of which the plaintiff purchased from the vendors 7 kathas 4¹/₂ dhurs of homestead land with the buildings thereon, and in the other of which the second party defendants purchased from the same vendors the same property. The case for plaintiff was that on the 8th September he entered into a written agreement in the form of a baibeyana-nama with the vendors for the purchase of the property which he now claims and that on the following day, a kebala was executed in respect of the same property in his favour that the defendant's second party hearing of this induced the vendors, by an offer of a larger sum, to sell the same property to them and they accordingly obtained a kebala of the same. Applications were made to register all three documents. At first the Sub-Registrar merely registered the plaintiff's baibeyana-nama of the 8th September and the defendants' kebala of the 9th but on submitting the matter to the District Registrar he ordered registration of the plaintiff's kebala also. The defendants' case was that they had been in negotiation for the sale of the property for a long time; that in August a kebala had in fact been drafted, but not finally executed, and although it is not clearly stated in the judgment, I assume that they contended that they had no notice of the negotiations with the plaintiff and were not aware afterwards when their kebala was signed, that the document of the 8th September had been executed in favour of the plaintiff.

2. The trial Court came to the conclusion that the plaintiff had made out his case and accordingly passed a decree in his favour for possession of the land claimed.

On appeal the Subordinate Judge of Monghyr took a different view and came to the conclusion that the plaintiff was not entitled to priority by virtue of his kebala and the document of the 8th September which he thinks was not executed prior to the kebala of the defendants second party. From that decision the plaintiff has appealed and he challenges the decision of the Subordinate Judge mainly on the ground that in arriving at his conclusion of fact he has misdirected himself and has allowed his judgment to be influenced by matters which he was not entitled to take in consideration. After reading the judgment, I must confess that this criticism of the learned Judge's judgment is amply justified. He has, I think, allowed himself, in the first place, to misconstrue the baibeyana-nama upon which the plaintiff relies and influenced by that misconstruction he has treated certain action on the part of the plaintiff as very suspicious, whereas had he construed the document rightly there was no reason for attaching any suspicion at all to the plaintiff's action. The document which in the earlier part purports to be a contract for the sale of the property states that the vendors shall execute a kebala in favour of the purchaser in respect of the said land within a week. As a matter of fact the kebala was executed on the following day There is nothing in that document to prevent the execution of the kebala on the following day. A week was provided as the extreme limit within which the vendor was to carry out his undertaking to execute the kebala, and therefore, there is nothing surprising or suspicious in the fact that the kebala was executed within a week and in fact on the following day. Nevertheless the learned Judge has considered that the fact that the kebala was executed on the following day is contrary to the provision in the document itself which, he thought meant that the kebala was not to be executed until after the expiry of a week. This precipitate action, contrary, as he thought, to the terms of the baibeyana, was in his opinion a very suspicious circumstance and showed that the plaintiff was hurrying in order to gain some undue advantage over the defendants second party.

3. Now, the next matter in which the learned Judge misdirected himself was this:--he says "plaintiff No. 1 has deposed that both the kebala and the deed of agreement were executed" in the presence of Muhammad Ismail and that he had told that fact to the Vakil who had drafted the plaint. But we do not find mention of this fact in the plaint." That again he considered a very suspicious circumstance. I regret to say that the learned Judge has fallen into an error which countenances and encourages a practice amongst pleaders in the mofussil Courts which is entirely contrary to the rules of procedure which deal with the preparation of pleadings. The fact that the deed of agreement was executed in the presence of Muhammad Ismail who was a well-known and respected pleader in Monghyr, was perhaps important evidence in support of the plaintiff's case that the transaction entered into was genuine and above all suspicion. But it was evidence only, and it was not only unnecessary to enter that fact in the pleading but it was altogether contrary to the express provisions of Order 6, Rule 3 which provides what a pleading shall contain. The rule states that every pleading shall contain and contain only a statement in a concise form of the material facts on

which the party pleading relies for his claim or defence as the case may be but not the evidence by which they are to be proved. If you find a person in the position of a Subordinate Judge encouraging this unfortunate practice which prevails of entering in one's plaint or written statement not merely a short statement of the facts upon which the parties rely in support of their case but also the evidence by which they propose to prove those acts it is not surprising that one finds so many of these pleadings which come from mofussil Courts extremely prolix, containing a vast quantity of matter which is entirely irrelevant for the purposes of pleading. The learned Judge, however, has fallen into a grave error in supposing that, because some of the evidence upon which the party relied did not find a place in his pleading that is a reason for disbelieving that evidence entirely.

4. Another matter, perhaps not of so much importance, which impressed the learned Judge was that in the baibeyana document upon which the plaintiff relies and which purports to have been executed on the 8th September, the figure 8 is capable of being read as 9. Well, that may or may not be the fact, but the learned Judge considers that this was also a very suspicious circumstance. It is perfectly clear that, although there may be two possible readings of the document, there is nothing suspicious in the fact that the figure 8 might possibly be read as the figure 9, because any alteration of the document could not be an alteration in favour of the plaintiff by whom that document is produced but an alteration which went against his own case. It is also perfectly clear that the figure is 8 as written in the language in which the document is written, but owing to a stroke above the line and above the word immediately to the left of the figure 8 it is possible that the figure 8 may be read as 9.

5. Another matter upon which the learned Judge misdirected himself was this. As I have already indicated one of the points in the case was, whether this document was written on the 8th or 9th. The document itself which purports to have been written on the 8th acknowledges receipt of the sum of Rs. 25. The receipt of this money is proved by the document itself, and the payment of the money, I should mention is not disputed by the vendors. That is a matter which they admit in the written statement. There was therefore no reason whatever why the plaintiff should number up the case by filing with his plaint further evidence of the payment of this money in addition to the document itself, having regard to the fact that there was no dispute with the vendor as to the payment of the money. Nevertheless, the learned Judge considered that it was a suspicious circumstance that the gola bahis of the plaintiff had not been filed to show the exact date upon which this money was paid. The matter arose in cross-examination of one of the plaintiff's witnesses who was asked whether his books would show the payment of the money on the 8th September. He answered that his books were not at that time in Court and they had not been exhibited with the plaint; but as soon as the matter was raised the books were sent for and they were tendered with a petition to the Court as evidence in the case. No further notice appears to have been taken of them; although tendered by the

plaintiff they were not put in evidence by the defendants to support their suggestion. In these circumstances it seems to me that the learned Judge was not entitled to draw any adverse inference against the plaintiff on the ground that these books had not been filed with the plaint, because, in the first instance, there was no necessity to exhibit them at that stage and in the second instance when their importance became manifest they were tendered for inspection.

6. There are other minor matters arising in the judgment but I have said enough to show that the decision of the learned Judge which after all was a decision on the question of which of the two sides should be believed, must have been seriously influenced by the matters which I have already mentioned, How far he was influenced by these matters it is impossible for us to tell, but the decision arrived at in such circumstances seems to me to amount clearly to what would be, if it were the verdict of the jury, a misdirection. The learned Subordinate Judge has misdirected himself.

7. I think the case ought to go back to the lower Appellate Court for re-hearing, bearing in mind the matters which I have already referred to. But before sending the case back there are two further matters which I think must be noticed. One question which undoubtedly arose at the trial, but about which there was no specific issue framed, was whether the defendant, by which I mean the defendant purchaser, had notice of the baibeyana executed in favour of the plaintiff on the 8th September, if in fact it was executed on that date, before he obtained his kebala on the 9th. The baibeyana has been so far taken as a contract to sell and not apparently as a contract of sale. But if the defendant had notice of that then it must necessarily make a difference in considering how far he is entitled under his kebala of the 10th September.

8. In considering the evidence afresh the learned Judge must come to a decision upon that question namely whether the defendant had notice of the contract entered into with the Plaintiff at the time when the kebala in his favour was executed.

9. A further matter was raised before us on behalf of the appellant which I gather has not been the subject of a decision in either of the lower Courts. It was contended that the document of the 8th September was in fact not merely a contract to sell but in itself an absolute sale of the property. The question is one of construction and the matter is, in my opinion, not altogether free from difficulty. It may be that there is some evidence in the case, we cannot say, which may be material in considering the proper construction of that document; and therefore as the case is going back, I do not think that it will be right for us at the present moment to pass any opinion as to what the proper construction is. It is undoubtedly open to the parties to contend upon this document that it is a sale and not merely a contract to sell. It is true that only an eight annas stamp had been placed upon it and to that extent it appears to have been treated as a contract to sell; but that defect can be cured by paying the proper duty. At the same time I think that the plaintiff is not entitled to rely upon it, as a contract of

sale, as distinguished from an executory contract unless the proper duty payable on a contract of that nature is first of all paid.

10. There are two other matters which it will be necessary for the learned Judge to consider for I do not think they have considered in the judgment now on appeal. The first is whether there was an executory contract entered into in August between the defendant first party and the defendants second party. Some suggestion of that was put forward but the allegation may merely be that a draft of a sale was prepared on that occasion. I am not sure that the allegation goes so far as to assert that an actual contract, that is an executory contract, was come to that time. That matter, however will have to be considered upon the evidence. A further point also which may in one event become important is, which of the two documents of the 9th September, that is the two kebalas executed in favour of the rival claimants, was executed first. It may not, of course, be necessary to decide it; but in one event it may become an important matter.

11. The decree of the learned Judge is set aside and the case is remanded for rehearing upon the evidence already on the record.

12. The appellant is entitled to the costs of this appeal. The costs of the hearing before the Subordinate Judge will be dealt with and determined according to the decision come to on the rehearing. The costs of this appeal are to be recoverable from the defendants second party who alone have opposed the appeal. As this is a case of old standing instituted in 1919 it should be expeditiously dealt with by the lower appellate Court.