

MANU/BH/0108/1958

Equivalent Citation: AIR1958Pat290, 1958(6)BLJR82

IN THE HIGH COURT OF PATNA

A.F.O.D. No. 334 of 1948

Decided On: 17.12.1957

Appellants:**Zainuddin Hussain Mirza and Ors.**
Vs.
Respondent:**Sohan Lal Pachisia and Ors.**

Hon'ble Judges/Coram:

Rai , Khaleel Ahmad and Misra , JJ.

Counsels:

For Appellant/Petitioner/Plaintiff: J.C. Sinha, Adv.

For Respondents/Defendant: A.B.N. Sinha and N.P. Agarwala, Advs.

JUDGMENT

Rai, J.

1. This appeal was heard by a Division Bench of this Court presided over by Mr. Justice Ahmad and Mr. Justice Misra but, as there was difference of opinion between the two learned Judges, the appeal has been placed be-fore me.

2. In order to appreciate the points raised at the bar before me it is necessary to state briefly the relevant events preceding the institution of the suit which gave rise to the present appeal. On 30-11-1867, Raja Enayet Hussain executed a will by which he made provisions for various persons including one Mt. Bibi Phuso who was born of the womb of a kept mistress of the Raja. The salary of Rs. 200/- per month granted to Bibi Phuso under the will was paid to her as long as she was alive. After her death there was some agreement between; Syed Ata Hussain, the legitimate son of Raja Enayet Hussain, and Sk. Salamat Hussain, husband of Bibi Phuso by which the latter was accepted to have inherited half of the monthly grant of Rs. 200/- payable to Mt. Bibi Phuso. On this basis Salamat Hussain was paid Rs. 100/- per month by Ata Hussain who was in possession of the estate of Raja Enayet Hussain as the sole legatee under the will dated 30-11-1867.

In execution of a decree of Syed Ata Hussain the monthly salary payable to Sk. Salamat Hussain which he had inherited from his wife was put to sale in Execution case No. 7 of 1885. Bindraj and Ramchandra purchased at auction the right sold for a sum of Rs. 7,500. The auction sale was confirmed on 18-11-1885. The auction purchasers and their successors-in-interest were regularly receiving Rs. 100/- per month as the salary payable to Sk. Salamat Husain which they had purchased at the auction sale. On, 7-11-1933, the successors-in-interest of the auction purchasers sold their right purchased at the auction sale to Babu Santalal, the ancestor of the plaintiffs 2 to 4 and the plaintiff No. 1 for a sum of Rs. 20,000/-. The plaintiffs received Rs. 100/-per month from the estate of. Raja Enayet Hussain until June 1939, after which the payment was discontinued by the Court of Wards which was in possession of the properties left by the said Raja. The plaintiffs thereafter instituted

the present suit for realisation of Rs. 10,000/- as per account given below at the foot of the plaint. In the suit the plft's. impleaded the descendants of Syed Ata Hussain through the Manager, Court of Wards, as defendants first party and the heirs and legal representatives of the auction-purchasers as defendants second party. They pleaded, inter alia, that the grant made to Bibi Phuso alias Bibi Pasiunnissa was a heritable grant. According to them, the auction-purchasers had, in Execution case No. 7 of 1885 purchased the right of Sk. Salamant Hussain in respect of his salary of Rs. 100/- per month which he had inherited from his wife Bibi Phuso. They also pleaded that the defendants first party were estopped from challenging the right of the plaintiffs.

3. The suit was contested by the defendants first party who are the heirs of Syed Ata Hussain. They pleaded, inter alia, that the monthly grant to Mt. Bibi Phuso was intended to last for her life only and that it was neither a heritable nor a transferable grant. It was further pleaded that the arrangement between Syed Ata Hussain and Sk. Salamat Hussain dividing the annuity payable to Mt. Bibi Phuso half and half! was purely a voluntary act on the part of Syed Ata Hussain and could not change the non-heritability of the original grant made to Mt. Bibi Phuso. They asserted that the payment had been rightly discontinued by the Court of Wards.

4. The issues framed in the suit on which the parties went to trial were these:

"1. Is the suit as framed maintainable?

2. Have the plaintiffs got any cause of action against the defendants first party?

3. Was the annuity granted to Mosammat Fuso a personal grant merely for her life or was it heritable and transferable?

4 . Was Sk. Salamat Hussain entitled to any interest in the annuity of Mosammat Fuso?

5. Did the plaintiffs or their predecessors in interest acquire any right title in the said annuity of Mosammat Fuso?

6. In any event are the defendants first party now entitled to challenge the annuity to Mosammat Fuso as not heritable or transferable?

7. To what relief, if any, are the plaintiff entitled".

5. The learned Subordinate Judge answered all the issues in favour of the plaintiffs and decreed the suit. He held that the monthly grant to Mt. Bibi Phuso under the will of Raja Enayet Hussain was a permanent and heritable grant He also held that after the death of Mt. Bibi Phuso there was an agreement between Syed Ata Hussain and Sk. Salamat Hussain by which each oil the two divided the monthly grant half and half, According to him, Syed Ata Hussain was benefited by that agreement and the defendants first party, who were the heirs and legal representatives of Syed Ata Hussain, were not entitled to challenge that arrangement after their predecessors-in-interest had gained advantage by receiving half the monthly grant on the basis of the said agreement. The learned Subordinate Judge further held that Syed Ata Hussain himself having put to sale in Execution case No. 7 of 1885 the heritable monthly grant of Rs. 100/- payable to Sk. Salamat Hussain the defendants first party are estopped from challenging the heritability of the grant.

6. The defendants first party thereafter came up in appeal before this Court. The appeal was heard by a Division Bench of this Court as mentioned above. Ahmad J. was of the view that the grant to Mt Bibi Phuso was to enure for her life only. He was also of the view that the statement made in the sale certificate cannot operate as estoppel.

7. On the question of the heritability of the grant Misra, J. observed as follows:

"Mr. Baldeo Sahay appearing for the respondents, however, has not endeavoured to support the judgment of the learned Subordinate Judge on this point and accordingly it is unnecessary to canvass the question, and I agree with my learned brother that in the circumstances it might be held that what was granted to Bibi Phuso might not necessarily be a permanent and heritable interest".

On the second question, namely, estoppel, his Lordship agreed with the learned Subordinate Judge and held that the defendants first party who were successors-in-interest of Syed Ata Hussain were estopped from challenging the heritability of the grant. He, therefore, ordered that the appeal was to be dismissed with costs.

8. After going through the will of Raja Enayet Hussain, the judgment of the learned Subordinate Judge and the judgments of the two learned Judges of this court, I was inclined to agree with the learned Subordinate Judge on the question of heritability of the grant but learned Counsel for the appellants contended before me that under Section 98 of the Code of Civil Procedure and Clause 28 of the Letters Patent, Patna High Court, it is not open to me to adjudicate upon the point on which there was no difference of opinion between the two learned Judges. I therefore do not propose to give my own finding on that point.

9. Learned Counsel for the appellants con-fended that no question of estoppel would arise on the contents of the sale certificate, exhibit 2. In order to appreciate the point canvassed at the bar it is essential to quote the said sale certificate which runs as follows:

"Certificate of sale of lard under Section 316, Civil P. C. District Purnea.

In the Court of District Judge at Purnea Money Execution Case No. 7 of 1885

In the Court of the District Judge."

Saiyed Ata Hussain son of Saiyad Enayet Hussain deceased zamindar of Pargana Suralpur resident of Deorhi, Khagra pargara Surajpur district Purnea...
...Decree-holder, v. Sheikh Salamat Hussain son of Sheikh Peer Bukhsh deceased resident of Raipur, pargana Surajpur Judgment-debtor.

This is to certify that Binj Raj son of Lachhi Ram and Ram Chandra son of Lakshmi Chand deceased at present residents of Bazar Kutub Gunj, pergana Surajpur district Purnea have been declared the purchasers at a sale by public auction held on 7-9-1885 in respect of Rupees one hundred, the salary which Salamat Hussain got as inheritance of his wife Fasiunnisa, alias Fuso and which had been let out in rehan under kabuliati Mutajri the due of which stands intact this decree, the same being the property given in rehan by the judgment-debtor and 'the salary payable by the decree-holder' has been declared to be the subject-matter of execution of decide in the case.

And that the said sale has been duly confirmed by the court i. e. the sale has been confirmed on 18-11-1885 for Rs. 7,500/- and the property sold is situated within thana and Sub-Registry Office Kishunganj.

Given under my hand and seal of the Court this 10th day of April, 1886."

10. In order to appreciate the underlined (here into ' ') portion of the sale certificate, as indicated in this judgment, it may be mentioned that Syed Ata Hussain, the decree-holder of that execution case, was in possession of the estate left by Raja Enayet Hussain as the sole legatee under the will dated 30-11-1867, and in that capacity the monthly salary of Rs. 100/- to Sk. Salamat Hussain was payable by Syed Ata Hussain himself. It may be also mentioned that Sk. Salamat Hussain had given in mortgage his right to receive Rupees 100/- per month from the estate of Raja Enayet Hussain on the basis of which a mortgage decree was passed in suit No. 5 of 1882 (exhibit 3) which was affirmed by the High Court of Calcutta in First Appeal No. 134 of 1882 (Exhibit 3-a). The auction sale was held subject to that encumbrance.

11. Mr. Sinha, who appeared for the appellant, contended that no warranty of title is attached to auction sales, and as such the auction-purchasers or their successors-in-interest cannot claim on the basis of the sale certificate that Sk. Salamat Hussain was entitled to receive a monthly allowance of Rs. 100/- as an inheritance from Mt. Bibi Phuso. He also contended that the representation, if any, can be alleged to have been made at the time of the auction sale, but certainly no representation was made by Syed Ata Hussain at the time of the preparation of the sale certificate which must have been prepared by the ministerial officers of the Court.

12. Of course a third person claiming to have inherited the monthly grant payable to Bibi Phuso can say that Sk. Salamat Hussain had not inherited any portion of that monthly grant and that the auction-purchaser had purchased merely a bag of wind. In that case the auction-purchaser cannot put forward his title under the auction sale as a proof that Sk. Salamat Hussain had in fact inherited it because it was so mentioned in the sale certificate, but that is not the case here.

13. Learned Counsel for the plaintiffs contended, on the other hand, that the sale certificate should be presumed to contain a correct description of the property which was put to sale at the instance of Syed Ata Hussain. According to him, the officials, who were responsible for drawing up the sale certificate which was issued under the signature of the District Judge, Purnea, should be presumed to have noted in the sale certificate a correct description of the property which was put to sale. He submitted that in absence of any other evidence to the contrary, it must be presumed that the properties put to sale were those which were attached, according to the provisions of the Code of Civil Procedure, 1882. He thereafter referred to the judgment of Misra, J. and submitted that the properties must have been attached and sold according to their description given by the decree-holder Syed Ata Hussain or his authorised agent, in the execution petition, in the petition for attachment and in the sale proclamation.

In this connection he drew my attention to Sections 235, 236, 237 and 287 of the Code of Civil Procedure, 1882. He further submitted that from 1886 right up to 1939 nobody had even suggested that the auction-purchasers of Execution case No. 7 of 1885 had purchased merely a bag of wind. As long as Syed Ata Hussain was alive he never challenged the right of the predecessors-in-interest of the plaintiffs. He urged that under these circumstances and in absence of any evidence to the contrary it must

be presumed that the sale certificate, exhibit 2, stated correctly as to what was sold according to the description given by the decree-holder or his authorised agent at earlier stages of the execution case.

14. In my view, the contentions raised by learned Counsel for the plaintiffs are well founded in law and must prevail. In a Division Bench judgment of this Court in the case of Traders and Miners, Ltd. v. Dhirehdra Nath Banerjee : (MANU/BH/0075/1943 : AIR 1944 Pat 261 : ILR Pat 115) (A) it was held:

"The sale certificate is a document of title and is the best evidence to prove what was actually sold".

In this connection their Lordships had referred to a decision of their Lordships of the Privy Council in the case of Rambhadra Naidu v. Kadiriya-sami Naicker. 48 Ind App 155 : AIR 1922 P C 252 (B).

15. In support of his contention that the description of the property sold as mentioned in the sale certificate will not work as an estoppel against his clients, learned Counsel for the appellants relied on the decision in the case of Aman Ali v. Mir Hossain 10 CLJ 605 (C). The relevant portion of the judgment runs thus:

"It is perfectly clear that no estoppel can be founded upon the statement in the sale certificate, because the defendant has not altered his conduct by reason of any statement in the sale certificate. The defendant altered his conduct when he purchased the holding at the auction, sale. The real question then is, was there any representation by the plaintiff at or before the sale which induced the defendant to purchase the holding in the bona fide belief that the annual rental was Rs. 8/- and not Rs. 10/87- annas. Such a representation, if it was made in the sale proclamation would presumably influence the conduct of the intending purchasers, provided such intending purchasers had no previous knowledge that the representation was not true. It was, therefore, the duty of the defendant to produce the sale proclamation, and to show by reference to it that the annual rental of the holding stated therein is Rs. 8/-. The sale proclamation has not been filed in this case by either party.

"Then it has been argued that the statement in the sale certificate may be used as presumptive evidence of the fact that the sale proclamation also contained a similar statement. I do not think that any such presumption can be drawn from any such statement in the sale certificate. Regard being had to the purpose for which a sale certificate is granted, it would be overstraining the sale certificate to draw such a presumption from any statement as to the rental of the holding covered by it".

With all respect to the learned Judges, who decided that case, I am not prepared to hold that the sale certificate is not a presumptive evidence of what was sold under the sale proclamation specially when there is no other evidence available to the contrary. I would in this connection follow the Division Bench decision of our own Court reported in : (MANU/BH/0075/1943 : AIR 1944 Pat 261 : ILR Pat 115) (A) mentioned above. It is no-body's case that the estoppel arises on the sale certificate. Learned Counsel for the plaintiffs has based the argument of estoppel on the ground that the description of the property given in the sale certificate was the description of the property given in the sale proclamation also which had led the predecessors-in-interest of the plaintiff's to change their position and offer to pay Rs. 7,500/- at the

auction sale.

16. Learned Counsel for the appellants has relied also on the decision in the case of Prosonna Kumar v. Srikant Rout ILR Cal 173 at p. 182 (D). The relevant portion of the judgment runs thus :

"In the second place, no doubt, the only material on the record as to what took place in the certificate proceedings is the sale certificate and as pointed out in 10 CLJ 605 (C) the foundation of the estoppel must be laid on a representation made before and not after the sale. From this point of view, the defendants would have to produce the sale proclamation, and the sale certificate would not by itself be sufficient to sustain the plea of estoppel. I am not prepared, however, to hold on this ground that the plea of estoppel does not arise; it is well known that the description in the sale certificate is taken from the description of the property in the sale proclamation, and as no objection was taken in the Courts, below that the entry in the sale certificate did not by itself afford sufficient foundation for the plea of estoppel, the defendants would in fairness be entitled to an opportunity to produce a copy of the sale proclamation before their plea was negatived."

In my view this decision also clearly states that the description of the property in the sale certificate is taken from the description of the property in the sale proclamation. In absence of any other evidence to the contrary, I would prefer to rely on the decision in the case of Traders and Miners Ltd. (A) mentioned above and hold that the sale certificate is the best evidence to prove what was actually sold.

17. Taking into consideration the evidence led in this case. I hold that the description of the property sold as given in the sale certificate (exhibit 2) was according to, the description! given by the decree-holder Syed Ata Hussain or his authorised agent at various stages of the execution proceeding including the sale proclamation. I further hold that the property must have been similarly described in the sale proclamation also, and that the auction-purchaser was led to offer a price of Rs. 7,500/- for it on, the basis of that description. In my view, the defendants first party are estopped from challenging the right of the plaintiffs and asserting that the grant to Mt. Bibi Phuso which had been inherited by Sk. Salamat Hussain was not a heritable or transferable grant. With great respect to my learned brother Ahmad, J. I am constrained to differ from him on this point. I, how-ever, agree with the view of Misra, J. on this point.

18. I would accordingly confirm the decree of the trial court and dismiss this appeal with costs.

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