

Equivalent citations: AIR 1957 Pat 174

Bench: Ramaswami, R K Prasad

Ishar Singh And Anr. vs Babu Gajadhar Prosad Singh on 9/10/1956

JUDGMENT

Raj Kishore Prasad, J.

1. The two points pressed, in this Letters Patent Appeal, against the judgment of Mr. Justice S. K. Das, as he then was, are : (1) whether the plaintiff-respondent is estopped by the principle of acquiescence from claiming a greater area; and (2) whether the impugned mortgage decree is binding on Dasrath Singh, defendant-appellant 2.
2. The plaintiff-respondent brought a suit for declaration of his title and confirmation of possession, or in the alternative for recovery of possession, in respect of 40 acres of land comprised in plot No. 839, under holding No. 339, situated in village Alawalpur.
3. The plaintiff's case was that, on 30th of October 1954, Milan Singh, Ramprasad Singh, father of Dasrath Singh, defendant-appellant 2, and Ishar Singh, defendant-appellant 1, executed a mortgage deed, in favour of the plaintiff, in respect of 2.63 acres of land, which included 1.81 acres out of holding No. 339. Holding No. 339 consisted of six plots, and included plot No. 839, the disputed land also. The entire area of plot No. 839 was .79 acres.
4. On the foot of the mortgage, the plaintiff brought a mortgage suit against the executants. Admittedly, to this suit, Dasrath Singh, defendant-appellant 2, who was then a minor, was not impleaded, although his father, Ram Prasad Singh, who was one of the executants, was a party to the suit. The mortgage suit was decreed, and, a final decree was prepared, on 14th April, 1938.
5. The decree was put into execution, and the mortgaged properties were sold on 16th December, 1938, and, the delivery, of possession was given on 25th of April, 1939. By mistake, in the execution petition, sale proclamation, sale certificate and the writ of delivery of possession, the area of plot No. 839 was mentioned as .39 acres only, instead of 79 acres although in all these four documents, the boundaries mentioned were the boundaries of the entire plot No. 839, and not a portion of it only The plaintiff, thereafter, on the strength of the delivery of possession, got himself recorded in the landlord's sherista in respect of .39 acres only.
6. When the above mistake was discovered, the plaintiff applied before the Court, which passed the decree and sold the mortgaged land, to correct the area of plot No. 839 from .39 acres to .79 acres on the ground that the area was wrongly written by the scribe. This petition of the plaintiff was allowed on 1st February, 1945 but without any notice, to the judgment debtors, at the plaintiff's risk. The plaintiff, therefore, pleaded that there was a mis-description of the area of plot No. 839, in the above mentioned four documents, because the boundaries, mentioned therein, showed that the entire plot No. 839 was intended to be sold, and, the entire plot was actually sold, and, delivery of possession of the entire plot was given to the plaintiff.
7. There was an adverse order against the plaintiff in a proceeding under Section 144 of the Code of Criminal Procedure, and, therefore, the plaintiff brought the present suit claiming the reliefs stated before.
8. Ishar Singh, defendant-appellant 1 appeared in the suit, and filed a written statement to the effect that only the southern portion of plot No. 839 was mortgaged, and that was the area which was sold in execution of the mortgage decree, and, the plaintiff came in possession over that portion, and as such the plaintiff had no right to .40 acres as claimed in the suit. He, further, contended that the amendment allowed, being without notice to

the judgment debtors, was not binding on them.

He further raised a plea that Dasrath Singh, appellant 2, not having been made a party to the mortgage action, the decree passed therein was not binding on him, and, therefore, the plaintiff had acquired no title to the disputed land vis-a-vis Dasrath Singh, appellant 2. Dasrath Singh, appellant 2, also later, appeared in the suit, and adopted the written statement of Ishar Singh, defendant-appellant 1.

9. The learned Munsif, who dealt with the suit in the first instance, held that Ram Prasad Singh represented the interest of his son Dasrath Singh, and, as no prejudice had been caused to him, he was bound by the decree in the mortgage action. He further found, on a consideration of the evidence on the record, that the entire area of .79 acres, comprised in plot No. 839, was mortgaged to the plaintiff, and sold and purchased by the plaintiff and, he got delivery of possession of the entire area but only by a mere mistake in describing the area, the area, of plot No. 839 mentioned as .39 acres, instead of .79 acres, although there was no mistake in the identity of the land actually sold, or of the land of which delivery of possession was given.

Alternatively he further held that even if the plaintiff took possession of only .39 acres and got himself mutated in respect of that area only in the landlord's sherishta, the plaintiff was entitled to a decree for recovery, of possession' in respect of the remaining .40 acres inasmuch as he had a subsisting title in the disputed land. On these findings the learned Munsif gave a decree to the plaintiff.

10. On appeal by the defendants-appellants, the learned Subordinate Judge reversed the decision of the learned Munsif. The learned Subordinate Judge apparently affirmed the finding of the learned Munsif that there was a mere mis-description of plot No. 839 in the execution petition and sale proclamation, although the mortgage bond and the final mortgage decree related to the entire area of plot No. 839. He however, found that delivery of possession had been given to the plaintiff only in respect of .39 acres.

He further found that the plaintiff accepted and acquiesced in the position that only an area from the south had been purchased and taken delivery of possession by him, and, as such, he was estopped by the principle of acquiescence from claiming a greater area. He further differed from the learned Munsif and held that Dasrath Singh was not bound by the decree. On these two substantial findings, he reversed the judgment of the learned Munsif, and dismissed the plaintiff's suit.

11. On a second appeal by the plaintiff, Mr. Justice S. K. Das, as he then was, reversed the judgment of the learned Subordinate Judge on the two substantial questions, on which the learned Subordinate Judge had dismissed the plaintiff's suit. His Lordships held that no question of estoppel and acquiescence arose in the present case, and, that the mortgage decree was binding on Dasrath Singh, because Ram Prasad Singh, on the evidence on the record, effectively represented his minor son Dasrath Singh, in the mortgage action. On these findings, his Lordship allowed the plaintiff's appeal, and decreed his suit, but granted the defendants-appellants leave to appeal under the Letters Patent.

12. The plea of estoppel, raised by Mr. G. P. Das for the appellants, is based on the exhibits (Exts. C, D and E series). The appellants' contention is that as the plaintiff got himself mutated in the landlord's sherishta in respect of .39 acres only, and as, on that basis, the holding and the rental were both split up, and, the parties paid rent accordingly, the plaintiff obviously made a representation then to the landlords, and, consequently to the defendants-appellants, that he had title only to .39 acres and to nothing more, and as such, the plaintiff was estopped on the principle of acquiescence from claiming a greater area, and any title to the remaining .40 acres in plot No. 839. This contention of Mr. G. P. Das has no merit, and as such, it cannot be accepted.

13. The plaintiff acquired title to the entire area of plot No. 839 by his purchase at the auction sale. For some mistake or other, he got delivery of possession of .39 acres only, and got himself mutated in the landlords' sherishta in respect of .39 acres only, but he made no representation to the judgment debtors-appellants, which led them to act in a particular way on the face of those representations. The judgment debtors knew very well

that the boundary related to plot No. 839 in its entirety, and, the total area of plot No. 1 namely, 1.81 acres also showed that plot 839 in its entirety was sold. In these circumstances, I do not think that any question of estoppel or acquiescence arose.

14. The principle of estoppel is enacted in Section 115 of the Indian Evidence Act, 1872, Section 115 is as follows :

"115. Estoppel when one person has, by his declaration act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed in any suit or proceeding between himself and such person or his representative to deny the truth of that thing."

15. In my judgment, the section does not apply to a case like the present where the statement relied upon, (assuming that the plaintiff made any representation to the appellant although it is not a fact because the representation, if any was made to the landlord, and not to the appellants), is made to a person, who knows the real, facts, and is not misled by the untrue statement. There can be no estoppel where the truth of the matter is known to both the parties. Therefore, there can be no estoppel when the truth of the matter appears, as it does in the present case, on the face of the proceedings.

16. The proceedings of the execution, which are on the record, and important as showing that the three judgment debtors, including appellant No. 1 and the father of appellant 2, understood that the sale was in respect of the entire area of plot No. 839, and, that there was an obvious mistake in the description of the area of plot No. 839. It is not, therefore, a question of estoppel, but of fact and it is plain on the evidence on the record, as found by the Courts below, that the appellants were not deceived as to any fact or prevented by any mis-statement of the plaintiff, from asserting any rights they may have conceived themselves to possess.

No representation, whatsoever, was ever made to the appellants, on the evidence on the record and on the findings of the Courts below. Even the learned Subordinate Judge based his decision on estoppel only on the fact that the plaintiff accepted and acquiesced to the position that only .39 acres of plot No. 839 was purchased and taken delivery of possession of and, therefore, he got himself mutated in respect thereof in the landlord's sherishta. In my opinion, these facts relied upon do not at all attract the doctrine of estoppel or acquiescence to the present case.

17. But that apart the argument based on the plea of estoppel or acquiescence was not set up in the first Court. There is no issue addressed, to it, and consequently, the judgment of the first Court is not addressed to it. No doubt, that question was raised for the first time before the learned Subordinate Judge, but as Mr. Justice Das has rightly pointed out, the learned Subordinate Judge committed an error of law in founding his decision on the principle of estoppel or acquiescence, because on the facts of the present case, no such question arose against the plaintiff. In my opinion, therefore, the first contention of Mr. Das must be overruled.

18. With regard to the second question as to whether the mortgage decree was binding on Dasrath Singh. I agree with Mr. Justice Das that the learned Subordinate Judge committed an error of law. It is true the question of representation is a question of fact but if in coming to such a finding of fact, the first Court of appeal takes into consideration only a portion of the evidence of a party, and leaves but material portions of his evidence to the contrary, his finding based on consideration of such a portion of the evidence of the party, after omitting the material portion would not be binding in second appeal on the High Court. "Mr. Justice Das, therefore, was right in saying that if the statements of a party are to be taken as an admission they must be taken as a whole.

19. The learned Subordinate Judge relied on the following statement of the plaintiff :

"I sued all the defendants individually in their individual capacity. I learnt later on about a child Dasrath and I did not join him as a defendant as I thought his father was already on the record."

20. The learned Subordinate Judge, however, did not at all refer to the further statement of the plaintiff to the effect that Ram Prasad Singh represented his minor son, Dasrath. The plaintiff of the mortgage, suit was not put in evidence. The plaintiff, however further, stated :

"Milan Singh, Ishar Singh and Ram Prasad Singh lived jointly with Milan Singh as Karta."

21. The above important statement made by the plaintiff were not at all taken into consideration by the learned Subordinate Judge in determining the question as to whether Dasrath Singh was bound by the decree passed against his faddier or not. Mr. Justice Das, therefore, correctly held that if the statements of the plaintiff were read as a whole then it was clear that Dasrath Singh, a minor member of the joint family, was effectively, represented by his father; and, as such, it must be held that the decree in the mortgage action bound Dasrath Singh as well.

22. The argument put forward by G. P. Das was that as it was a mortgage action the father could not represent his son, because certain pleas, which a Mitakshara Son could take, could not be taken by the father himself, and as such, the father cannot, in law represent his son in a mortgage action. He further contended that even the Karta of the joint family, who is not the father cannot represent a minor, because it is open to a minor to raise a plea of want of legal necessity and benefit to the family, which is not open to the Karta, who is the executant of the bond. In support of his contention that Dasrath Singh was not bound by the decree, Mr. G. P. Das, relied upon Lala Suraj Prasad v. Golab Chand, 5 Cal WN 640 (A) and Ganga Prasad Singh v. Mt. Ganeshi Kuer, AIR 1944 Pat 119; ILR 22 Pat 761 (B); but these cases have no application to the facts of the present case.

23. In reply Mr. K. K. Sinha appearing for the plaintiff-respondent, relied on Sheo Shankar Ram v. Mt. Jaddo Kunwar, ILR 36 All 383; 41 Ind App 216; AIR 1914 PC 136 (C) and Ram Ajodhya Tewari v. Firangi Tewari, AIR 1936 Pat 3; 16 Pat LT 689 (D) in support of his contention that even if a minor member is not a party to a mortgage action, but he is effectively represented by the Karta of the family, and no prejudice is caused to such a minor, then the mortgage decree passed against the karta of the joint family, of which the minor is a co-parcener, would be binding against him. The contention of Mr. Sinha is well founded, and, it must prevail.

24. In the present case, in the mortgage action itself only Ishar Singh appellant 1 appeared and 'filed his written statement, but in his written, statement he did not raise, any plea that the suit was bad for non-joinder of minor Dasrath Singh. In the present action also, Ishar Singh appeared and filed his written statement and, although he pleaded that the mortgage decree was not binding on Dasrath Singh who was not a party to the action, he never averred that the mortgage debt was either not for legal necessity or for benefit to the family. Even when Dasrath Singh appeared in the suit, and adopted the written statement of Ishar Singh, he did not file any supplementary written statement to the effect that the mortgage debt contracted by his father, or by Milan Singh, the karta of the family, had been contracted not for family necessity or benefit of the joint family, or, that it was an illegal or immoral debt. In these circumstances, it is obvious that even if Dasrath Singh would have been a party to the mortgage suit, he had no effective defence to that mortgage action; and, in the absence of any allegation, or finding, that there has been any gross negligence on the part of the Karta Milan Singh, or even on the part of his father Ram Prasad Singh, and in the absence of any prejudice to Dasrath Singh, it cannot be said that the decree passed in the mortgage action, in which Dasrath Singh was effectively represented not only by the father, but also by the Karta was not binding on him.

The fact that all the adult and major co-parceners of the joint family were the executants of the mortgage bond and were also parties to the mortgage action, was itself prima facie sufficient to show that the joint family debt which was contracted by them was for family benefit and legal necessity, and was not for illegal or immoral purposes. In my opinion, Mr. Justice Das has rightly held that the decree in the mortgage action bound

Dasrath Singh, appellant 2, as well.

25. In a case like the present where there is not the slightest ground for suggesting that the karta or manager of the joint family did not act in every way in the interest of the family, the Court is not bound to set aside the execution proceeding, where substantial justice has been made, merely because every existing member of the family was not formally a party to the suit. It is well settled that there are occasions when the managers of joint Hindu family so effectively represent all others members of the family that the family as a whole is bound: Sheo Shankar Ram's case (C) (Supra).

26. It is quite clear from the facts of this case, and the findings of the Courts upon them, that this is a case where the above principle ought to be applied. It is not necessary to refer to all the cases cited at the bar, because, the above decision of the Privy Council as well as the Division Bench decision of this Court in Ram Ajodhya Tewari's case (D) (Supra) make the position absolutely clear that in a mortgage suit if all the major members of the debtors' family including the karta of the joint family, are made parties to the mortgage action, and only a minor member of the family is not made a party to such an action although his father is also a party, the minor is nevertheless properly represented by the Karta of the joint family, who had been made a party to the suit.

27. In the present case, Dasrath was represented by not only Milan Singh, the karta of the joint family, but also by his father Ram Prasad Singh. In such circumstances, it cannot be said that the mortgage decree is not binding on Dasrath. The father, even if he was not karta, could represent his sons effectively in the suit, or execution proceedings, as he could do if he was the karta himself, subject to the right of the son to assert and prove that the debt contracted by his father was not such as would be binding on him under the Hindu Law.

That being the position, he could, as a father completely represent his branch of the co-parceners consisting of himself and his sons; vis-a-vis his sons, his position would not improve in any way by his being karta of the family. This is now well established also by the high authority of the Supreme Court in Sidheshwar Mukharjee v. Bhubneshwar Prasad, 1954 SCR 177: (AIR. 1933 SC 487) (E).

28. In my judgment therefore, the fact that Ram Prasad Singh was not the karta himself, but he also was a member of the joint family of which Milan Singh was the karta, did not make any difference in principle. Ram Prasad Singh as the father of Dasrath Singh, therefore, effectively represented Dasrath Singh. In my judgment, therefore, Mr. Justice Das was right in reversing the finding of the learned Subordinate Judge, which had been arrived at without considering the material portion of the statement made by the plaintiff himself and in holding that Dasrath Singh was effectively represented by his father, Ram Prasad Singh. The second contention of Mr. G. P. Das, therefore, must also be rejected.

29. In the result, I would affirm the decision of Mr. Justice Das, and dismiss the appeal with costs.

Ramaswami, C.J.

30. I agree.