

L. Basant Lal And Anr. vs Rameshwar Prasad And Ors. on 17 October, 1955

Equivalent citations: AIR1957ALL287, AIR 1957 ALLAHABAD 287

JUDGMENT

Chatuevedi, J.

1. The suit which has given rise to this appeal was promoted by one Sm. Ram Janki on her own behalf and as next friend of her two minor sons, Basant Lal and Behari Lal, for the partition of family property, moveable and immovable, detailed at the foot of the plaint.

2. It appears that the family, which owned the property, was comprised of Rameshwar Prasad and his two minor sons and his wife Sm. Ram Janki. The plaintiffs claimed a three-fourths share in the property. It was, however, alleged in the plaint that the defendant Rameshwar Prasad, who was the father of plaintiffs 1 and 2, and husband of plaintiff 3, was a person of weak intellect and immoral habits. He had executed certain documents and sale deeds in respect of debts which were non-existent and which were also vitiated by fraud and conclusion.

The plaintiffs, therefore, claimed that the share allotted to them should be free from all such encumbrances. The persons in whose favour the deeds stood are defendants 2 to 7. Defendant a Sm. Ram Piari, had a maintenance charge against the family property and was also impleaded as a defendant in the suit. Gofaardhan Das, defendant 2, died during the pendency of the suit and his two sons, Bankey Lal and Bijai Kumar, were substituted as his heirs and were numbered as defendants 271 and 2/2. One of the plaintiffs, Behari Lal, also died during the pendency of this appeal and Sm. Ram Janki is his legal representative.

3. The suit was contested by defendants 2, 4, 5 and 6. Defendant 3 was omitted from the array of defendants subsequently as it was found, that he held no claim against the family property on the basis of any document. Defendant 2, Gobardhan Das, since dead, alleged that Rameshwar Prasad executed four pronotes in his favour, one dated 28-4-1944, for Rs. 1500/-, another dated 10-6-1944, for Rs. 1000/-; a third dated 15-7-1944, for Rs. 1500/- and the last dated 15-9-1944, for Rs. 1500/- and that on the date, when the last pronote was executed, Rameshwar Prasad executed a security deed for Rs. 5500/- to secure the amount due under all the pronotes.

A suit was instituted on the basis of this security deed on 15-1-1945, and a consent decree was obtained on 30-1-1945. It was further alleged on his behalf that this amount had been borrowed by Rameshwar Prasad and was binding upon the plaintiffs inasmuch as the money was borrowed for payment of antecedent debts as also for family necessity. Defendant 4 Ganesh prasad, held a

pronote for Rs. 500/- dated 23-13-1944, accompanied by a security deed executed by Rameshwar Prasad. He alleged that this sum was borrowed for family necessity and was binding upon the plaintiffs as it was a simple money debt.

4. Defendant 5, Ram Kishore, alleged that the house property, items Nos. 1, 2 and 3, in list A appended to the plaint, had been transferred by Rameshwar Prasad to him by means of a sale deed dated 12-4-1945, for a sale consideration of Rs. 3000/- and the property had passed into his possession. It was further alleged by him that the sale was made by Rameshwar Prasad for payment of antecedent debts and for family necessity and as such it was binding upon the plaintiffs.

5. Defendant 6 Lachhman Das held a pro-note for Rs. 4000/- dated 20-8-1944, and a suit was instituted on the basis of this pronote followed by a decree of the Court. Rameshwar Prasad had transferred his cash certificates of the face value of Rs. 5000/- in payment of this decree and it was alleged that the plaintiffs had, therefore, no claim on the cash certificates.

6. In substance the defence of the contesting defendants was that the encumbrances, transfers or deeds made by Rameshwar Prasad were justified: because they were made either for payment of antecedent debts or for the purpose of family necessity. It was also denied that the property was ancestral. Defendant 1 did not file any written statement and the suit proceeded ex parte against him.

7. The learned Civil Judge framed as many as 16 issues, but some of these issues overlap each other and some are also not material for the disposal of this appeal. He came to the conclusion that all the decrees which stood against Rameshwar Prasad were binding upon the plaintiffs and that the transactions made by Rameshwar Prasad were not brought about by fraud or collusion. He, therefore, decreed the suit for a partition of three-fourths share in the property excepting the property which had been transferred to defendants 5 and 6, subject to all the decrees and debts outstanding against defendant 1. The plaintiffs have now come up in appeal.

8. The four sets of contesting defendants have claims of varying nature and it would, therefore, be convenient to discuss the evidence in respect of those claims separately. Before entering into a discussion of the evidence adduced in this case, some broad aspects of the case will have to be taken into consideration so that the evidence may be judged in the light of those circumstances.

It is in evidence that the property of Rameshwar Prasad, defendant 1, was partitioned when he was about 22 years of age by means of a suit brought by his father against him and this suit for partition was brought on the ground that Rameshwar Prasad was a person of a refractory nature and prone to fighting. The ancestral nature of the property has, however, not been seriously challenged in this appeal because property obtained by a person in partition would amount to ancestral property if the whole of the property which was partitioned happens to be ancestral property.

Barring the house, item No. 4, which is said to have been acquired by Rameshwar Prasad after this partition, the rest of the property was property which had been obtained by partition. The cash certificate and the pronotes as also the household effects mentioned in the list were accretions to the

property out of the income of the joint family property comprised of Rameshwar Prasad and his sons. We may if necessary advert later to the nature of the property mentioned as item No. 4 in the list of property mentioned in the schedule.

9. The allegations of the plaintiffs were that Rameshwar Prasad was a person of weak intellect and very unbusiness like and as such he was led into evil habits by one Hasan Raza and it was Hasan Raza who induced him or prevailed upon Rameshwar Prasad to execute various documents in favour of various persons within a very short time. From 21-2-1944 to 2-11-1944, Rameshwar Prasad is said to have borrowed loans almost invariably on the basis of pronotes amounting to Rs. (sic). These pronotes have been written almost in quick succession at very short intervals. In fact a loan of Rs. 2200/- is said to have been taken on 7-7-1944, on the basis of a pronote and another sum of Rs. 1500/- is said to have been borrowed almost a week after on 15-7-1944, from Gobardhan Das. There is no evidence on record as to what became of all this money if it was really borrowed by Rameshwar Prasad. It is also in evidence that on 24-7-1944, a sum of Rs. 15,000/- was received by Rameshwar Prasad on account of a mortgage which stood in his favour and this amount was deposited in the bank. In spite of the receipt of this sum of Rs. 15,000/- it was alleged that he borrowed Rs. 4,000/- on 20-8-1944, and another sum of Rs. 1500/- on 15-9-1944, and again a sum of Rs. 700/- on 2-11-1944.

Rameshwar Prasad has been examined in this case and he states that all these pronotes had been executed by him at the bidding of Hasan Raza and that he received no consideration for any of them. He further states that he was initiated into the evil habit of drink, and was also introduced to a prostitute Sm. Anwar, by Hasan Raza and he being under the influence of Hasan Raza . put his signatures on whatever documents Hasan Raza wanted him to do.

It would thus appear that a very large sum of money is said to have been borrowed by Rameshwar Prasad without there being; in existence any prima facie necessity for these loans.

10. Gobardhan Das (substituted subsequently by respondents 271 and 272).--It was alleged on behalf of respondents 271 and 272- that Rameshwar Prasad executed four pronotes in favour of Gobardhan Das beginning from 28-4-1944, to 2-11-1944 and that on 15-9-1944, a security deed for Rs. 5,500/-, which was the total amount due on account of the four earlier pronotes, was executed by Rameshwar Prasad. A suit was filed by Gobardhan Das on 15-1-1945, on the basis of this security deed and the date of hearing fixed in this case was 23-2-1945.

Even before the date of hearing, on 30-1-1945, a compromise was filed on behalf of Rameshwar Prasad and Gobardhan Das in which Rameshwar Prasad admitted the entire claim and prayed that a decree for the entire claim and costs be passed. It is significant that summons and notice of hearing for this suit were served on the 30th January at 3 p.m. In the court compound on Rameshwar Prasad and Gobardhan Das as both of them happened to be present and immediately after service of summons was made the deed of compromise was filed and a consent decree was passed the same day.

It has been argued on behalf of the respondents that the existence of a decree in favour of Gobardhan Das against Rameshwar Prasad was sufficient proof of the existence of a debt against Rameshwar Prasad. On behalf of the appellants, however, it has been urged that the decree passed in the circumstances mentioned above would be in the nature of a contract and not in the nature of a decree. It is not disputed that the decree obtained by Gobardhan Das was a mortgage decree and the liability for the debt was a charge upon the property created by the security deed.

The case for the plaintiffs was that there was no debt in existence and that the pronotes and the security deed were wholly without consideration. The lower Court seems to have accepted the contention on behalf of the defendants that the existence of a decree would be sufficient proof of the existence of the debt and in support of this contention reliance has been placed upon an observation made in *Sidheshwar Mukherjee v. Bhub-neshwar Prasad*, AIR 1953 SO 487 (A) and *Surin-dra Nath v. Saralia Hindi Mahajanl School*, AIR 1950 EP 282 (B). In the Supreme Court case, AIR 1953 SC 487 (A), the nature of the decree or the existence of the debt was not denied. It was observed by their Lordships:

"Be that as it may, the money decree passed .

against the father certainly created a debt payable by him. If the debt was not tainted with immorality, it was open to the creditor to realise the dues by attachment and sale of the sons' coparcenary interest in the joint property on the principles discussed above."

The only point for consideration before their Lordships was whether the share of the sons in coparcenary property was liable to be seized in execution of a decree passed against the father and the existence of the decree was held to create a debt. In the *East Punjab* case, AIR 1950 EP 282 (B), Kapur J. observed as follows :

"But where there has been a bona fide contest between the father and the creditor or where -a decree has been fairly obtained, in my opinion - it is not open to the son to re-agitate the question of the existence of the debt."

The observations clearly go to show that the existence of a decree against the father obtained fairly and in a bona fide manner would prove the existence of the debt. In the present case we find that the decree obtained by Gobardhan Das was a consent decree. The Court did not go into the merits of the case nor was any contest put forward by Rameshwar Prasad.

Soon after the suit was filed he came forward and asked the Court to pass a decree in favour of the plaintiff in that suit. The learned counsel for the appellants has urged that the observations in the two above cases, relied upon by the learned counsel for the respondents, would not apply to a consent decree.

If no distinction is to be made between a consent decree and a decree on merits, it will always be open to an unscrupulous father to execute a pronote and then to get a suit filed and a consent decree

passed to avoid a challenge of the existence of the debt, for once, according to the contention Of the learned counsel for the respondents, a decree is passed, all controversies about the existence of the debt would come to a rest. The corner stone Of the argument on behalf of the respondents is that a decree passed against the father is a representative decree and would bind his son.

11. In the case of a decree passed on merits the question as to whether a minor is or is not to be affected by the decree does not arise. If, however, a claim is admitted, or a compromise is filed by a person on behalf of himself and on behalf of a minor the Court has to examine the benefit which the minor is to derive from the terms and then to give leave for the making of the compromise before it takes the shape of a decree.

In the case of an adjustment or a compromise it is not open to the Court to refuse to pass a decree on the basis of the compromise and the decree incorporates only the terms of the compromise which is the basis of the decree. The learned counsel for the appellants has placed before us some cases having a bearing on this point.

We need not refer to all those cases, but the point has been discussed in *Ram Dayal v. Nimar Singh*, 11 OLJ 360: (AIR 1924 Oudh 133) (C). In this reported case it was, held that a compromise decree obtained against the father was in reality no better than a contract made by the father and the mere existence of the decree could not deprive the sons of their share in the joint family property. The mortgagee must show that the debt was contracted for legal necessity or for the payment of antecedent debt.

The same view taken in *Sham Nath Chau-dhri v. Ramjas*, ILR 34 All 143 (D), where it was observed that a consent decree has no greater significance than the contract on which it is based. As remarked above, a consent decree incorporates the terms of the contract and the Court cannot do anything more than incorporate in the decree the terms of the contract.

The mere fact that the contract has taken the shape of a decree should not therefore alter the nature of the transaction. We are, therefore, unable to agree with the contention that a consent decree should, be placed on the same footing as a decree passed after a contest or on merits so far as the sons of the person at whose instance the consent decree was passed are concerned. The contention, therefore, that the mere existence of the decree in favour of Gobardhan Das was evidence of the debt cannot be accepted.

It was the duty of Gobardhan Das to prove that the debts were in existence which constituted antecedent debts and as such the security ,bond executed on the 15th September in which the family property was hypothecated by Rameshwar Prasad was binding on the plaintiffs. The plaintiffs put Rameshwar Prasad into the witness box.

A perusal of his statement shows that he is a person who cannot be said to have any business sagacity even if he is not found to be wholly foolish in his transactions. He gave inconsistent answers sometimes and was unable to explain fully as to why he executed a large number of documents.

His explanation was that he was -under the influence of Hasan Raza who had "his own axe to grind in getting the witness to execute the documents from time to time in favour of Gobardhan Das.

12. It has been argued on behalf of the respondents that the burden of proving that there was no debt in existence lay upon the plaintiffs and not upon Gobardhan Das. Even if this proposition of law be accepted (although we may not be understood to subscribe to the correctness of this proposition of law) all that the plaintiffs could do to prove a negative fact was to put the person, who was concerned with the transaction, in the witness box. He denied having borrowed any money from Gobardhan Das.

No evidence whatsoever was adduced on behalf of Gobardhan Das. He did not even file the pronotes which were said to have been executed by Rameshwar Prasad although three pronotes were shown to Rameshwar Prasad while he was in the witness box by the learned, counsel for Gobardhan Das. Why these documents were not filed in Court in this suit, which has given rise to this appeal, or in the suit brought on the basis of the security bond has not been explained.

Perhaps Gobardhan Das was for obvious reasons too sure of getting a consent decree in the suit brought on the basis of the security deed and he did not think it necessary to file the pronotes in that Court. Rameshwar Prasad had received a sum of Rs. 15,000/- on 24-7-1944, and this amount was deposited in the bank. Evidently it carried only the usual rate of interest allowed on a bank deposit which could not be more than three to six per cent, yet we are asked to believe that Rameshwar Prasad borrowed a sum of Rs. 1,500/- from Gobardhan Das on the 15th September with interest payable at 12 per cent per annum and executed the security deed for Rs. 5,500/- in respect of all the four pronotes. It was quite easy for Rameshwar Prasad, if he needed money on 15-9-1944, to have withdrawn the requisite amount from the bank and also to pay up the earlier pronotes which were said to be due by him.

13. Interrogatories were served on the sons of Gobardhan Das who were substituted in his place during the pendency of the suit, and they were asked whether they had the bahi-khatas of Gobardhan Das in their possession and if there were entries of the debts in those baht-khatas. The reply to question 5 of the interrogatories was that the bahikhatas of Gobardhan Das were in the possession of the sons and that the aforesaid debts were entered in the bahi-khatas. These bahi-khatas were however not filed in the suit.

No witness was examined on behalf of defendants 2/1 and 2/2 nor did any of them choose to enter into the witness box. We, therefore, find that there is absolutely no evidence worth the name to show that any money was borrowed by Rameshwar Prasad from Gobardhan Das or that the pronotes standing in his name were executed on the dates mentioned in the pronotes. Looking to the circumstances of the case we feel that all these pronotes were executed presumably on one and the same date and the purpose of bringing into existence these pronotes was to create evidence of antecedent debts and that no money was lent by Gobardhan Das to Rameshwar Prasad.

A cheque for Rs. 800/- is said to have been passed to Rameshwar Prasad on 4-10-1944, in part payment of the consideration of the pro-note of 15th September and the bank accounts of

Gobardhan Das were summoned in this connection. No effort was, however, made to summon the accounts of Rameshwar Prasad as it was alleged that this cheque was credited, to the account of Rameshwar Prasad in his account in the bank.

We do not know whether this money was credited only for the purpose of creating evidence of the payment of the consideration or was in fact meant to be credited to the account. The account of Rameshwar Prasad would have shown if this amount was not withdrawn the same day or soon after. No explanation has been given as to why the account of Rameshwar Prasad was not summoned and produced in the lower Court.

14. Another point pressed on behalf of Gobardhan Das was that the decree passed in favour of Gobardhan Das was a representative decree which stood against the sons also. In view of the distinction which we have pointed out between a decree passed on merits and a consent decree, the question whether the sons could also be held to be bound by the decree passed against the father does not arise.

Explanation 6 to 8. 11, Civil P. C., applies only to cases in which there is some indication that the suit was of a representative character and the observations of their Lordships of the Privy Council in *Amissah v. Krabah*, AIR 1936 PC 147 at p. 149 (E), lend support to this view. In this reported case it was observed :

"Their Lordships do not doubt that an action by or on behalf of a family may result in a *res judicata*, but such an action, if it is to bind absent or future members of the family, must be so constituted according to the local rules of procedure or by a representation order or in some other way that all such members can be regarded as represented before the Court."

These observations no doubt were made presumably in a case in which some members of the family figured as plaintiffs, but the observations will hold equally good if the father or a member of the family happens to be a defendant.

15. Defendants 2/1 and 2/2 have, therefore, failed to establish the existence of any debt against the family property and the plaintiff cannot, therefore, be bound by the consent decree obtained by Gobardhan Das against Rameshwar Prasad. (His Lordship then considered the defence set up by Ganesh Prasad, Ram Kishore and Lachman Das. With respect to the charge on property created in favour of Ganesh Prasad it was held that the debt was not binding upon the plaintiffs and they were entitled to a partition of the property free from encumbrances' in favour of Ganesh Prasad. While considering the transaction evidenced by a sale deed D/- 12-4-1945 executed in favour of Ram Kishore, his Lordship was of the opinion:) It would thus appear that out of the various items which constitute the sale deed there is only a sum of Rs. 800/- said to have been paid to Wazir Hasan which can be said to be a justifiable necessity inasmuch as this sum may be taken to constitute an antecedent debt. Only a small portion of the sale consideration having been found to be justified, the sale deed cannot be allowed to stand. In equity, however, Ram Kishore would be entitled to this sum of Rs. 800/- and as the plaintiffs' share in the property comes to three-fourths, they should pay

three-fourth of the amount, namely, Rs. 600/-, to Ram Kishore before getting their share partitioned.

(And finally with respect to the defence of Lachman Das who had obtained a sale: deed in respect of the cash certificates of the value of Rs. 5,000/- and odd from Rameshwar Prasad in lieu of a consent decree passed in favour of Lachman Das on the basis of the pronote dated 20-8-1944 for Rs. 4,000/- his Lordship observed:) Lachman Das was also served with interrogatories and a question was asked about the necessity for the loan and his answer was that the money was borrowed for family necessity, but what that family necessity was has not been indicated. Another question which was asked in the interrogatories was if Lachman Das carried on money lending business and he stated that he did not carry on money lending business. In reply to the question whether he had any bahi-khatas, or not, the answer of Lachman Das was that that question was irrelevant.

We find that originally the defendants, or at any rate, one of them, refused to answer the interrogatories and the Court passed an order that the interrogatories should be replied to and if there was any question about the relevancy of which the defendants had any objections they might note their objections and they would be decided at the time of the hearing.

We, however, find that the Court at no stage decided the question as to whether the interrogatories which were said to be irrelevant were or were not irrelevant. It appears to us that almost all the questions put by the plaintiffs to the various defendants were most material and should have been answered by the defendants. Lachman Das did not enter the witness box and it was therefore not possible for the plaintiffs'-counsel to elicit an answer to all the questions put in the interrogatories at any stage of these proceedings.

A consent decree, as has been discussed above, is no better than the original contract on the basis of which the decree is obtained. The mere fact that a suit was instituted and the consent of the defendant was obtained only four days after the suit had been filed would not enhance the value of the contract. If the pronote was a bogus transaction, the passing of the consent decree on the basis of that pronote would not add any significance to the value of the pronote. Rameshwar Prasad had evidently no necessity to borrow money and- it is well nigh impossible to believe that Lachman Das would have so readily advanced Rs. 4000/- to Rameshwar Prasad without making any inquiries about his property or about the necessity for the loan. We are satisfied that this pronote was a wholly fictitious transaction and was written to create evidence of a debt to deprive the family of Rameshwar Prasad of the cash certificates.

The cash certificates have been shown to have been obtained from the money which Rameshwar Prasad had received on account of an ancestral mortgage. Lachman Das was also questioned by means of interrogatories if he knew the source of the acquisition of these cash certificates but he chose to reply that he had no knowledge whence the cash certificates had been obtained.

The evidence adduced by the plaintiffs clearly shows that the cash certificates were part of the family property and could not be parted with by Rameshwar Prasad except for valid necessity. In fact the sale of the cash certificates in favour of Lachman Das itself was a bogus transaction and cannot be

upheld as binding on the plaintiffs. This disposes of all the claims made by the various defendants against the property sought to be partitioned.

16. We are constrained to remark that the learned Civil Judge did not "take pains in going into the questions in issue with care and caution. He adopted an easy course and accented the consent decrees passed under very suspicious circumstances as good evidence of the existence of the loans.

None of the claims made by the various defendants against the family property has, therefore, been established as binding upon the plaintiffs and the plaintiffs are, therefore, entitled to a partition of their share in the family property free from all encumbrances held by the defendants. No other point arises for determination in this appeal.

17. As a result the appeal is allowed and the, Decree passed by the lower Court is modified to this extent that the plaintiffs' suit shall stand decreed" for partition of three-fourths share in the entire property in suit free from debts and encumbrances held by the various defendants except Mt. Ram Piari who holds a valid charge for main tenance.

As a sum of Rs. 800/- paid by Ram Kishore to Wazir Hasan has been found to be binding upon Rameshwar Prasad and the plaintiffs, the plaintiffs shall pay Rs. 600/-, which represents their share in this liability, to Ram Kishore as a condition precedent to getting actual possession of their share in the property comprised in the sale deed of Ram Kishore. The plaintiffs shall get their costs in both the Courts from the contesting defendants.