

ORISSA HIGH COURT

Mani Sahoo

Vs

Lokanath Misra

F.A. No. 24 of 1945

(Panigrahi and Narasimham, JJ.)

05.01.1950

JUDGMENT

Narasimham, J.

1. This is a plaintiff's appeal against the judgment of the Additional Subordinate Judge, Puri dismissing his suit for a declaration of his right in respect of twelve annas interest in a house standing on plot No. 1069 in the town of Puri and for other consequential reliefs.
2. The said plot is within the town Khasmahal of Puri Collectorate and was settled by the Khasmahal with one Gadadhar Sahu who constructed a building thereon. One of the points agitated in the lower Court was that the house was the exclusive property of Gadadhar Sahu. But this was decided against the defendants (vide para. 7 of the lower Court's judgment) and this decision was not challenged in appeal. It may therefore be taken as well-established that the lease-hold property and the house standing on the said plot were the joint property of Gadadhar Sahu and his three brothers who admittedly were members of a Hindu joint family at all relevant times.
3. The plaintiff is a businessman and moneylender of Cuttack town. He instituted a suit (M. S. No. 127 of 34) against Gadadhar Sahu and his three brothers for realisation of the price of the articles supplied on credit to them amounting to about Rs. 12,653-8-0, He also took out an order for attachment before judgment of some of the properties of the joint family including disputed house. But before the said order of attachment was actually served at the spot the parties came to a compromise in pursuance of which a compromise decree was passed on 30th July 1934. In the operative portion of the decree one of the teems which referred to a charge being created in favor of the plaintiff decree-holder in respect of the disputed house by way of security for payment of the compromise decretal amount was not embodied but it remained in the petition of compromise which was also attached to the decree. Subsequently, however, on 16th February 1939 the said

petition appears to have been made part of the decree by an order of the Court and there is an endorsement at the end of Ex. 2 to that effect. But no evidence was led about the circumstances under which the Court passed the order on 16th February 1939 directing the compromise petition to be part of the decree and the order itself was not proved. The learned lower Court rightly refused to take the endorsement to be sufficient to show that the compromise petition also became part of the decree. The judgment-debtors failed to implement some of the terms of the compromise and thereupon the appellant decree-holder filed an execution (Execution case No. 352 of 34 renumbered as 17 of 36). It is unnecessary to describe in detail the various stages in the execution petition and it is sufficient to note that in execution of the said compromise decree the appellant purchased the disputed house on 16th September 1937 and also obtained delivery of symbolical possession on 29th April 1938. His title to the house is based on the court sale dated 16th September 1937 in execution of the compromise decree obtained against Gadadhar Sahu and his three brothers.

4. Respondent 1 is a prominent lawyer and money-lender of Puri town and he claims to have purchased the entire house in a certificate sale dated 13th February 1935 (Certificate case No. 277 of 1933-34). The certificate case arose in consequence of a certificate filed by the Income-tax authorities on 10th March 1934 against Gadadhar Sahu for realisation of income-tax dues with penalty. After the certificate sale dated 13th February 1936 and delivery of possession, the three brothers of Gadadhar Sahu filed an objection under Section 35, B. and C. Public Demands Recovery Act. But their objection was rejected on 15th November 1935. Respondent 2 is a subsequent purchaser of the disputed property from respondent 1.

5. It will be noticed that the plaintiff's purchase at court auction in execution of his compromise decree was on 16th September 1937 whereas the purchase by defendant 1 in the certificate sale was more than two years before on 13th February 1935 in the certificate proceeding. The latter's purchase would obviously prevail. But with a view to get round this difficulty the plaintiff relied on the fact that a charge in respect of the disputed house was created at the time of the passing of the compromise decree in M. S. No. 127 of 34 on 30th July 1934. He further relied on the fact that in the certificate proceeding Gadadhar Sahu alone was shown as the certificate debtor. He further argued that the right, title and interest of Gadadhar Sahu in the property amounting to one fourth share alone passed by the certificate sale and that in any case the rights of the other three brothers were unaffected by the sale and that those rights were transferred to the plaintiff by the civil court sale dated 16th September 1937.

6. In dismissing the plaintiff's suit the learned lower Court found that : (i) Gadadhar Sahu represented the joint family consisting of himself and his three brothers in the certificate proceeding and that consequently the entire interest of the family in the disputed house passed by the sale (ii) the charge created by the compromise between the plaintiff and Gadadhar Sahu and his brothers in M. S. No. 127 of 34 was not a valid charge because it was not created by a registered instrument nor was it incorporated in the operative part of the compromise decree and

(iii) in any case the suit was barred by limitation by virtue of Article 12, Limitation Act inasmuch as it was not brought within one year from the date on which the Collector on appeal maintained the order of the certificate officer rejecting the claim of Gadadhar's three brothers Satyabadi Sahu, Madan Sahu and Shyamsundar Sahu under Section 35, B. and C. Public Demands Recovery Act.

7. All these three findings of the learned Subordinate Judge have been challenged before us and it is necessary to discuss each of them at some length.

8. (After discussion of the evidence the judgment proceeds as follows :) Judging from the admissions and circumstances mentioned above I would accept the evidence of defendant 1 on this point and in agreement with the learned lower Court hold that Gadadhar Sahu effectively represented the joint family firm in the certificate proceeding. As rightly pointed out by the lower Court it is now well-settled that a Karta of a Hindu family can effectively represent the family in the certificate proceedings even though not expressly named as such (see *Lalchand v. Sheogobind*¹, *Hari Prasad v. Lal Behari*², and *Rameshwar Singh v. Ishwari Prasad*³, Therefore it follows that the entire interest of the joint family in the disputed house passed to defendant 1 by virtue of the certificate sale dated 13th February 1935.

9. Next I take up the question as to whether a valid charge was created in favor of the plaintiff by virtue of the compromise between him and the Sahu brothers in M. S. No. 127 of 1934. The compromise decree (EX. 2) dated 30th July 1934 does not say expressly that a charge was created in favor of the plaintiff-decree, holder in respect of the disputed house. Doubtless in the petition of compromise which was also attached to the decree there is a reference to such a charge in para. 3. But it has not been incorporated in the operative portion of the decree and such a charge cannot be created except by a registered instrument.

10. To meet this difficulty, Mr. Dasgupta urged that the compromise was effected at a time when the proceeding of the plaintiff in respect of attachment before judgment of the disputed house was pending before the Court and that consequently the disputed house may be held to form the subject-matter of that proceeding. He relied on *Govindaswami v. Rasu*⁴, in support of the view that even though the main suit may be a money-suit, where the parties compromise in an interlocutory proceeding in that suit in respect of some property which was sought to be attached before judgment the provisions of clause (vi) of sub-section (2) of Section 17, Registration Act would be attracted and registration was not compulsory. The Madras decision referred to was that of a single Judge and it came up for consideration in a later decision of the Bombay High Court reported in *Chhotibai v. Mansukhlal*⁵, where a Division Bench expressly dissented from the Madras view. With respect I would agree with the later Bombay view and hold that if certain property is attached before judgment in a money suit that property will not be the subject-matter of the suit or of a proceeding as contemplated in clause (vi) of sub-section (2) of Section 17, Registration Act, Registration is therefore compulsory for creating such a charge even in a

compromise petition and in the absence of such registration the plaintiff cannot claim any preferential right.

11. Moreover, in any case, the plaintiff's preferential claim in respect of the disputed house must fail because under Section 8(b), B and 0 Public Demands Recovery Act from the date the service of the notice under Section 7 of that Act a charge is created in respect of all the property of the certificate debtors and all other charges created subsequently are postponed to that charge. In the present case, the order-sheet of the certificate proceedings (Ex. 6) shows that the notice under Section 7 was served on 19th March 1934, nearly four months before the plaintiff's compromise in M. S. No. 352 of 34. Therefore even if it be held that by virtue of that compromise a charge was created in favor of the plaintiff that charge must be postponed to the prior charge of the Crown over the same property brought about by the operation of law namely, by Section 8(b), B and 0 Public Demands Recovery Act. An attempt was made on behalf of the plaintiff, at the time of argument before the lower Court, to show that the notice under Section 7 was not properly served as required by law on the certificate debtors on 19th March 1934. The lower Court rightly refused to entertain that plea at such a belated stage. The order-sheet in the certificate proceeding (Ex. 6) especially the order dated and May 1935 shows clearly that the Certificate Officer held that the notice was properly served. The plaintiff did not lead any evidence to show that there was no proper service nor did he raise any issue on this point.

12. Next I take up the question of limitation. On 15th November 1935, the Certificate Officer rejected an application under Section 35 B and 0 Public Demands Recovery Act filed by the three brothers of Gadadhar Sahu (Satyabadi Sahu, Madan Sahu and Shyamsundar Sahu). Section 37 of that Act says that a person against whom such an order is made

"may institute a suit in a Civil Court to establish the right which he claims to the present possession of the property; but subject to the result of such suit (if any) the order shall be conclusive."

The order of the Certificate Officer was passed on 15th November 1935 and an appeal against his order was dismissed by the Collector on 25th January 1936. But the present suit was filed on 21st June 1943. The plaintiff claims to be the successor-in-interest of Satyabadi, Madan and Shyamsunder who were unsuccessful applicants in the petition under Section 35, B and 0 Public Demands Recovery Act. The learned lower Court held that Article 12, Limitation Act would apply and that the present suit was hopelessly barred by limitation. I think the appropriate Article is Article 13 and not Article 12. Though that article in terms applies only to a "decision or order of a civil Court in any proceeding other than a suit" it must be deemed to apply to decisions or orders of a Certificate Officer also by virtue of Section 66(2), B. and C. Public Demands Recovery Act which says clearly that the provisions of the Indian Limitation Act shall apply to all proceedings under that Act as if a certificate were a decree of a civil Court. Limitation would

therefore be one year from the date of the appellate order of the Collector (Ex. O) dated 25th January 1936 rejecting the appeal filed by the Sahu brothers against the order of the Certificate Officer dated 15th November 1935.

13. Thus the plaintiff's suit must fail both on the ground of limitation and also because of the prior title acquired by defendant 1 by virtue of the certificate sale. I would therefore dismiss the appeal with costs.

Panigrahi, J.

14. I agree.

Appeal dismissed.

Cases Referred.

¹ AIR (16) 1929 Pat. 741 : (8 pat. 788)

² AIR (27) 1910 pat. 328 : (19 pat. 618 F.B)

³ AIR (27) 1940 Pat. 692 : (189 I.C. 114)

⁴ AIR (32) 1935 Mad. 232 : (58 Mad. 781)

⁵ AIR (as) 1941 Bom. 1 : (I. L. R. (1941) Bom. 34)