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MATA DIN v. SPECIAL MANAGER COURT OF WARDS, AJUDHIA ESTATE, GONDA.

The result is that we allow these appeals to the extent prayed for, namely that the decrees of the courts below shall read as decrees for arrears of rent only and there shall be no order for ejectment. The appellants in each case will get their costs throughout.

Appeal allowed.

APPELLATE CIVIL.

1928
December, 14.

Before Mr. Justice Gokaran Nath Misra.

MIR MOHAMMAD KHAN UNDER THE GUARDIANSHIP OF MUSAMMAT SAMIUNNISSA (DEFENDANT-APPELLANT) *v.* MOHMOODI KHAN AND OTHERS (PLAINTIFFS-RESPONDENTS).*

Pre-emption—Evidence of fictitious nature of the price entered in the sale-deed—Burden of proof—Price entered in the sale-deed being higher than market value, how far proof of fictitious nature of the price.

It is upon the plaintiff pre-emptor in the first instance to substantiate by some *prima facie* evidence that the price entered in the deed is fictitious and more than the actual consideration paid. But such slight proof as is offered by the pre-emptor as a *prima facie* proof of his case must consist of relevant and admissible evidence and must be such that if believed by the court asked to arrive at the finding would justify it in arriving at a finding as to the fictitious nature of the consideration.

To prove a *prima facie* case it would be necessary for the trial court in every instance to decide a case on the evidence both circumstantial and otherwise, whether the price entered is fictitious. The fact that the price entered in the deed is higher than the market-value would be a very strong piece of circumstantial evidence going to show the fictitious nature of the price entered in the deed, but it must be remembered that in no case should it be considered as conclusive. It is only a piece, though a very strong piece of evidence and has to be considered along with the circumstances and facts of each case.

*Second Civil Appeal No. 184 of 1928, against the decree of S. M. Ahmad Karim, Subordinate Judge of Sultanpur, dated the 15th of February, 1928, modifying the decree of Kali Charan Agarwal, Munsif of Sultanpur, dated the 23rd of November, 1927.

Bhagwan Singh v. *Mahabir Singh* (1), *Sheopargash Dube* v. *Dhanraj Dube* (2), *Abdul Majid* v. *Amolak* (3), *Dwarka* v. *Ludar* (4), *Murlidhar* v. *Kalka Singh* (5), *Shambhu Dat* v. *Jagannath* (6) and *Asaf-ud-daula Khan* v. *Abdul Ghaffar* (7), relied on.

Mr. *Mohammad Hafeez*, for the appellant.

Messrs. *Ali Zaheer* and *S. N. Srivastava*, for the respondents.

MISRA, J. :—This is an appeal arising out of a pre-emption suit.

The facts of the case are that one Musammat Sakina was the owner of a certain share in village Kansa Patti, district Sultanpur. She sold that share to Mardan Khan, the defendant-appellant, by a sale-deed, dated the 28th of June, 1926. The consideration stated in the sale-deed was Rs. 2,200. The plaintiffs who are co-sharers in this village have brought the present suit for pre-emption in respect of the said share on payment of Rs. 1,752 only, their allegation being that the price stated in the sale-deed is fictitious to the extent of Rs. 448 which was alleged to be due on account of a pro-note said to have been executed by Musammat Sakina in favour of the defendant.

The defendant admitted the plaintiffs' right to pre-empt, but contended that the price entered in the sale-deed was not fictitious and that the plaintiffs could not obtain a decree for pre-emption without the payment of the price stated in the sale-deed, namely, Rs. 2,200.

The learned Munsif of Sultanpur who tried the suit came to the conclusion that the price entered in the sale-deed had not been proved to have been fictitious and that the pronote on account of which the sum of Rs. 448 had

(1) (1883) I.L.R., 5 All., 184.
(2) (1887) I.L.R., 9 All., 225.
(3) (1907) I.L.R., 29 All., 618.
(4) (1901) 4 O.C., 247.
(5) (1911) 14 O.C., 1.
(6) (1916) 3 O.L.J., 513.
(7) (1927) 4 O.W.N., 795.

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been paid out of the consideration of the sale-deed was genuine and for consideration. On this finding he decreed the suit of the plaintiffs respondents on payment of Rs. 2,200.

The plaintiffs appealed against this decision of the learned Munsif and the learned Subordinate Judge has held in appeal that the price stated in the sale-deed is fictitious and has decreed pre-emption on the payment of Rs. 1,752 only.

Misra, J.

The defendant-appellant has now come to this Court in second appeal and the main point which has been argued before me is that the learned Subordinate Judge has erred in holding that the price stated in the sale-deed had not been fixed in good faith. The argument is to the effect that there was no evidence on the record to justify the said finding.

I have heard the arguments of the counsel on behalf of the parties at great length and have taken time to consider my judgment. I am of opinion that the finding of the learned Subordinate Judge cannot be sustained and that this appeal must be allowed.

I now proceed to give my reasons for having arrived at this conclusion.

Ordinarily a finding that the price stated in the sale-deed is fictitious would be a finding of fact and it would not be open to a court of second appeal to interfere with that finding unless it could be shown that there is no evidence to support the finding or that the evidence relied upon in support of the said finding is not relevant or legally admissible to prove the said point. Apart from this, one other principle has been relied upon by the learned Subordinate Judge in arriving at this finding, it being to the effect that very slight evidence would in a pre-emption suit, where the pre-emptor challenges the *bona fides*

of the price entered in the sale-deed, shift the burden of proof upon the defendant vendee to prove that the price entered in the deed is correct, and that the consideration stated therein has actually passed.

As to this principle there can be no doubt that it has been laid down in several cases both of the Allahabad High Court as well as of the late Court of the Judicial Commissioner of Oudh. As to the cases of the Allahabad High Court reference may be made to the cases reported in *Bhagwan Singh* v. *Mahabir Singh* (1), *Sheopargash Dube* v. *Dhanraj Dube* (2) and *Abdul Majid* v. *Amolak* (3). As to the cases decided by the late Court of the Judicial Commissioner of Oudh I would refer to *Dwarka* v. *Ludar* (4) and to *Murlidhar* v. *Kalka Singh* (5).

One point I would like, however, to indicate in connection with these cases is that, in all such cases where the rule as to slight evidence being sufficient has been laid down and where it has been held that a *prima facie* case alone has to be made out, it has always been insisted upon that such slight proof as is offered by the pre-emptor as a *prima facie* proof of his case must consist of relevant and admissible evidence and must be such that if believed by the court asked to arrive at the finding would justify it in arriving at a finding as to the fictitious nature of the consideration. It has nowhere been laid down that in every case where such slight evidence is given must be considered to be sufficient to establish a *prima facie* case. It is laid down in *Bhagwan Din* v. *Mahabir Singh* (6) that it would be upon the plaintiff pre-emptor in the first instance to substantiate by some *prima facie* evidence that the price entered in the deed is

(1) (1883) I.L.R., 5 All., 184.
(2) (1887) I.L.R., 9 All., 225.
(3) (1907) I.L.R., 29 All., 618.
(4) (1901) 4 O.C., 247.
(5) (1911) 14 O.C., 1.
(6) (1883) I.L.R., 5 All., 184 (185).

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fictitious and more than the actual consideration paid, and it would depend upon the particular circumstances of each case to determine how much evidence would be sufficient to establish such a *prima facie* case in favour of the plaintiff.

Misra, J.

In *Sreopargash Dube* v. *Dhanraj Dube* (1). EDGE C. J. states the rule as follows :—

> "That rule is that, in the first instance, the plaintiff who alleges the price to be fictitious, must give some *prima facie* evidence which would lead to the presumption that the price mentioned in the sale-deed was not the real or true price. "Having done that, it lies upon the vendor and vendee, who set up the price as true and genuine, to give such explanation by evidence as will go to rebut the presumption raised by the plaintiff's evidence. As a general rule how can that be done? The plaintiff in a case of this kind would not be a party to the transaction out of which the sale to the stranger arose. He would not, as a rule, have any actual knowledge of what the real price was. In the majority of cases, the only *prima facie* evidence which the plaintiff pre-emptor can produce would be either evidence showing that the vendor or the vendee had made an admission that the price was fictitious and this could only happen in rare cases, or evidence showing that the market-value of the property was so much less than the alleged price as would lead any reasonable man to come to the conclusion that the alleged contract price was not the real price."

(1) (1887) I.L.R., 9 All., 225.

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I would like to add to the rule enunciated by their Lordships of the Allahabad High Court which is quoted above that the *prima facie* proof can also be discharged by giving evidence as to what the real contract between the vendor and the vendee was. I must also point out that it has been held in some cases both in the late court of the Judicial Commissioner of Oudh as well as in this Court that the mere fact that a price higher than the market-value has been entered in the deed would not by itself raise a pre-emption, unless accompanied by other circumstances, that the price entered is fictitious. It has been pointed out in those cases that in many instances it happens that a vendee for good reasons may pay more than what was the actual market-value; he may even pay a fancy price yet the transaction may be a genuine one. To prove a *prima facie* case I would therefore state as my opinion that it would be necessary for the trial court in every instance to decide the case on the evidence both circumstantial and otherwise, whether the price entered is fictitious. I must, however, state that the fact that the price entered in the deed is higher than the market-value would be a very strong piece of circumstantial evidence going to show the fictitious nature of the price entered in the deed. But it must be remembered that in no case should it be considered as conclusive. It is only a piece, though a very strong piece of evidence and has to be considered along with the circumstances and facts of each case. This rule will be found to be enunciated in *Shambhu Dat* v. *Jagannath* (1) and *Asaf-ud-daula Khan* v. *Abdul Ghaffar* (2).

Having stated the rule I have to consider as to whether there is evidence on the record to satisfy the rule laid down above. As to the market-value the learned Subordinate Judge finds in his judgment that there is no

(1) (1916) 3 O.L.J., 543. (2) (1927) 4 O.W.N., 795.

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satisfactory proof showing what the market-value of the property is and I am in entire agreement with his finding. Apart from this, however, there is only one solitary statement in the evidence of Alam Khan, P. W. 4, upon which the learned Subordinate Judge has relied for proof of the fact that the consideration entered in the sale-deed is fictitious. The sentence is "The consideration was entered with the object of preventing preemption." To my mind this evidence is quite insufficient to discharge the onus which lay on the plaintiffs-respondents to prove a *prima facie* case. The witness has not stated the grounds upon which he made this statement. It was the bounden duty of the plaintiffs to elicit those grounds from the witness himself. It is impossible to accept the mere *ipse dixit* of the witness on the point. I am inclined to hold that this statement is insufficient to prove the allegation made by the plaintiff as to the fictitious nature of the price. Indeed I am inclined to hold that the evidence is not admissible to prove the said fact unless reasons were elicited from the witness as to the grounds for his making this statement. It was pointed out on behalf of the plaintiffs-respondents that no cross-examination was directed on behalf of the defendant-appellant against the witness on this point. I do not see any force in this contention because in my opinion it was the duty of the plaintiffs themselves who had produced this witness to elicit from him the grounds which would make his evidence admissible. It was not the duty of the defendant-appellant to have brought out those grounds in cross-examination. I am therefore of opinion that the plaintiffs-respondents have failed to discharge the onus which lay upon them of making out a *prima facie* case.

Under those circumstances it is not necessary for me to go into the question as to whether the pro-note, dated the 1st of January, 1926 executed by Musammat Sakina

in favour of Mardan Khan the appellant was a genuine transaction. I may, however, state that the trial court which heard the evidence came to the conclusion that the said pro-note was a genuine transaction. The defendant-appellant examined the scribe of the note and one other person who was the witness of the receipt at the time when the pro-note was executed. Both these witnesses deposed to the genuineness of the pro-note and the receipt and stated that money had been paid by the appellant to Musammat Sakina in their presence. The learned counsel for the respondents has not been able to convince me by any good reason that that finding is bad and not justified by evidence. Even the learned Subordinate Judge has not chosen to criticize that evidence. I am unable to follow the learned Subordinate Judge when he says in his judgment that because the vendee was a stranger to the village, the pro-note must be considered to have been executed for a fictitious consideration. Nor am I in a position to follow the learned Subordinate Judge when he says that the fact of no notice having been given by the vendee of his purchase showed that the consideration entered in the sale-deed was fictitious. I am of opinion that these are irrelevant matters and should not have been imported in deciding the point in issue, namely, whether the consideration had actually been paid. That depended upon the evidence of the two witnesses examined on behalf of the defendant-appellant to which reference has been made above.

I am therefore inclined to agree with the finding of the trial court that the pro-note referred to above which formed part of the consideration of the sale-deed was a genuine transaction and for consideration.

I am therefore of opinion that the decision of the learned Subordinate Judge in this case cannot be maintained and that the plaintiffs-respondents must be direct-

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ed to pay the full price entered in the deed, namely, Rs. 2,200. I therefore, accept the appeal, set aside the decree of the learned Subordinate Judge and restore that of the Munsif with costs in this and the lower appellate court. I maintain the order of the first court regarding costs, viz., that the parties shall bear their own costs of that court.

Appeal allowed.

APPELLATE CIVIL.

Before Mr. Justice Wazir Hasan, Acting Chief Judge and Mr. Justice Gokaran Nath Misra.

1928 *December*, 17.

CHANDRIKA SINGH AND OTHERS (DEFENDANTS-APPELLANTS) *v.* CHOKHEY SINGH AND THREE OTHERS (PLAINTIFFS) AND OTHERS (DEFENDANTS-RESPONDENTS).*

Res Judicata—*Civil Procedure Code, (Act V of* 1908), *section* 11—*Case decided by trial court and court of appeal in favour of a party but finding on a certain issue given against that party—Finding on that issue, whether constitutes* res judicata *in a subsequent suit between the same parties.*

The plaintiffs had brought a suit for possession of the mortgaged property on the ground that the mortgage being for ancestral joint family property was not binding on them, but the court held that the claim for possession was bared by limitation and dismissed the suit and in the judgment among other things also decided that a certain sum out of the mortgage consideration was not for legal necessity and in appeal the High Court also dismissed the suit on the point of limitation, but in deciding the other questions argued held that the legal necessity of the particular item, as held by the lower court, was not established and the plaintiffs then brought the present suit for redemption and the point arose as to whether the finding that legal necessity for certain items was not established barred the decision of the point by the rule of *res judicata*. *Held*, that as in the previous suit the plaintiffs were seeking

*First Civil Appeal No. 56 of 1928, against the decree of Mahmud Hasan Khan, Subordinate Judge of Sitapur dated the 14th of December, 1927, decreeing the plaintiffs' claim.