

(2015) 06 GAU CK 0083
In the Gauhati High Court
Case No : RSA No. 53 of 2004

Andheri Musalmani and Others

APPELLANT

Vs

Sarifat Ali and Others

RESPONDENT

Date of Decision : 22-06-2015

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 145
Evidence Act, 1872 — Section 90

Citation : (2015) 4 GLT 127

Hon'ble Judges : Arup Kumar Goswami, J.

Bench : Single Bench

Advocate : M.N. Choudhury, for the Appellant; A. Barkataky, for the Respondent

Final Decision : Allowed

Judgement

Arup Kumar Goswami, J.—Heard Mr. M.H. Choudhury, learned counsel for the appellants. Also heard Mr. A. Barkataky, learned counsel for the respondents. This is an appeal by the defendants against the judgment and decree dated 14.01.2004, passed by the learned Civil Judge, Senior Division, Morigaon, in Title Appeal No. 25/03, setting aside the judgment and decree dated 08.08.2003, passed by the learned Civil Judge, Junior Division No. 2, in Title Suit No. 16/99.

2. The original plaintiff died during the pendency of the suit and the present respondents are her sons, Momin Ali and Islam Uddin through her two husbands.

3. The appeal was admitted to be heard by an order dated 11.05.2004 on the following substantial question of law:

"Whether the registered Relinquishment Deed, executed in the year 1969 in favour of the appellant along with delivery of possession could be retracted from after expiry of more than 30 years claiming recovery of possession affecting the appellant by removing their residential premises?"

4. On 17.06.2015, two further substantial questions of law were framed, which

are as follows:

"1. Whether the learned Lower Appellate Court was correct in holding that Ext. "Kha" is not genuine?

2. Whether the learned Lower Appellate Court was correct in concluding "Ext.-"Ga", in absence of any challenge, to be not a valid deed?"

5. It is pointed out by the learned counsel for the parties that Ext-"Ka" has been wrongly recorded as Ext.-"Ga" in the second substantial question of law framed on 17.06.2015.

6. Ext.-"Ga" shall be read as Ext.-"Ka" in the substantial question of law No. 2 framed on 17.06.2015.

7. The original plaintiff, Ramjani Begum, pleaded that the suit land, comprising in three distinct and separate plots of land, indicated as Schedule-A, measured 15 Bigha 1 Katha and 9 Lecha in different Dags and pattas and the same originally belonged to one Kashem Sheikh. Her mother Kulsum Bibi had earlier married one Numai Ali and, through the aforesaid marriage, defendant No. 1, Andheri Begum, Pro forma defendant No. 1, Hozhi Sheikh and pro forma defendant No. 2, Joneki Begum were born. Kashem Sheikh had married one Karpati Begum and she died issueless. Kulsum divorced Numai and, after death of Karpati, got married to Kashem and, out of that wedlock, plaintiff was born. When Kulsum married Kashem, she had brought her children from her earlier marriage to the house of Kashem. Ramjani married one Momin Ali and, after obtaining divorce, she married Mohammad Hussain and started living in Lahorighat, some distance away from the suit land. The case projected is that she was given half portion of the property left behind by Kashem through an amicable partition made by the villagers and the rest half portion was given to the children of Kulsum from her earlier marriage. Though she was entitled to inherit the entire estate of Kashem being his daughter, she consented to the amicable partition for avoiding disputes. She was possessing the land by giving the same on "Adhi" and, at times, also by engaging her own labourers. In the month of February, 1999, when she had gone to the suit land with her labourers, she was obstructed by the principal defendants from entering into the suit land and they started claiming the same to be their own land. With the aforesaid pleadings, the plaintiff filed the suit for Schedule-B land, which is a part of Schedule-A land, whereby half portion of all the three plots of land, as indicated in Schedule-A, was claimed alongwith recovery of khas possession.

8. In the written statement filed by Andheri, defendant No. 1, she pleaded that while the plaintiff was the younger sister, she was the elder daughter of Kashem Sheikh, who had no son or other daughter. Kashem had executed a registered gift deed on 30.03.1957, being gift deed No. 956/57, in favour of his minor daughters to protect their interest. She had married one Kulamoni Sheikh, who was residing in the house of Kashem. The plaintiff met one Bangladeshi national and married him. She executed a registered sale deed No. 4116768 relinquishing

her right, title and interest in respect of the suit land, including other plots, by delivering possession to the defendant, before she left for Bangladesh. She had been cultivating and possessing both the shares of land uninterruptedly after constructing dwelling houses and her name was also mutated some 30 years back. The plaintiff came back from Bangladesh about 20 years later, after she had been divorced and, then, she got married to another person at Juria, in the District of Nagaon. This marriage did not survive long and after divorce, she got married to one Muhammad Hussain of Lahorighat. In the year 1983, one Md. Malou Sheikh denied the right, title and interest of defendant No. 1 and threatened to dispossess her from the suit land and, accordingly, she instituted Title Suit No. 22/83 against said Malou Sheikh and others in the Court of Munsiff No. 1, at Morigaon, for right, title and interest and for confirmation of possession. The suit was dismissed by judgment dated 29.04.85 and, thereafter, an appeal, being Title Appeal No. 21/85, was preferred. The appeal was allowed by judgment and order dated 20.09.86. It was also pleaded that the first plot of Schedule-B is cultivable land. In the second plot of Schedule-B land, the defendant No. 1 resides in her dwelling house and, in the third plot of Schedule-B land, her daughter resides after she had been gifted the land about 18 years back. The plaintiff purchased some land in village Rahdhala and claimed the suit land with a fictitious story. Plaintiff also instituted one Section 145 Cr.P.C. proceeding, after institution of the suit. The same was subsequently dropped. Accordingly, she prayed for dismissal of the suit.

9. The learned Trial Court framed 8 issues, out of which Issue Nos. 5, 6 and 7 are relevant for this appeal and therefore, they are reproduced below for a better appreciation:

"5. Whether the defendant No. 1 Must. Andheri Musalmani is the daughter of Late Kasem Sheikh?

6. Whether the defendant No. 1 Must. Andheri Musalmani has acquired any right, title and interest over the suit land through registered Sale Deed No. 4166/68?

7. Whether the plaintiff has got right, title and interest over the suit land?"

10. During trial, both the parties examined three witnesses each.

11. The defendant No. 1 exhibited the registered gift deed dated 20.03.57 as Ext.-"Ka", and the registered deed No. 4166/68 as Ext-"Kha". The defendant also exhibited the certified copy of the judgment and decree dated 20.09.86, passed in Title Appeal No. 21/85, as Ext.-"Gha". The learned Trial Court recorded a finding that the plaintiff was pro forma defendant No. 5 in Title Suit No. 22/83 and that, as plaintiff of the said suit, the present defendant No. 1 had taken a stand that by the registered deed dated 07.03.68, Ramjani (present plaintiff) had relinquished title of her share in her favour. The learned Trial Court came to the conclusion that plaintiff and defendant No. 1 got share of 50% each in the suit land by the gift deed, Ext-"Ka", executed by Late Kashem Sheikh. Ext-"Kha" being a registered document more than 30 years old, the learned Trial Court

invoked the provision of Section 90 of the Evidence Act. It was noted that in the judgment in Title Appeal No. 21/85 it was recorded that the present plaintiff had contested the suit and had denied that she had relinquished her 50% share in favour of the present defendant No. 1 in the year 1968. It was also held that the plaintiff had left for Bangladesh after execution of Ext-"Kha". Issue No. 5 was decided by the learned Trial Court holding that their mother is same and, therefore, they are sisters. However, no explicit finding was given as to whether defendant No. 1 was daughter of Kashem Sheikh.

12. The Learned Lower Appellate Court, on the other hand, set aside the finding recorded in Issue No. 5. The finding was reversed on the evidence of the plaintiff as also opining that pro forma defendant Nos. 1 and 2 deliberately did not contest the proceedings after appearance as in that case, truth would have come out. Thus, it was held that the defendant No. 1, 2 and 3 are foster children of Kashem Sheikh. The learned Lower Appellate Court rejected the gift deed, Ext-"Ka" and held that plaintiff received the 50% share not because of Ext-"Ka" but because of an amicable settlement. At the same time, it was held that defendant had proved Ext-"Ka". The learned Lower Appellate Court noticed that while the pleaded version in the written statement was that the Deed No. 4166/68 was a registered sale deed, Ext-"Ka" was a Relinquishment Deed. It was held that in view of the challenge to Ext-"Kha", presumption under Section 90 of the Evidence Act could not have been drawn and the defendant No. 1 failed to prove Ext-"Kha". It was, accordingly, held that the same was not a genuine document. Ext-"Ka" was also held to be not a valid deed as the gift had been made in favour of minors. In substance, the learned Lower Appellate Court held that the plaintiff could prove her case and, accordingly, decreed the suit.

13. Mr. M.H. Choudhury, learned counsel for the appellant has submitted that both the exhibits, namely, Ext-"Ka" and Ext-"Kha" were admitted into evidence without there being any objection. Though the plaintiff had stated in the plaint that there was an amicable settlement on the basis of which she received 50% share, in her cross-examination she had stated that the defendant No. 1 and she got 50% of share through a registered deed. It is submitted by Mr. Choudhury that when the document was admitted into evidence without any objection, and when the documents were produced from proper custody and the same being more than 30 years old, the learned Lower Appellate Court committed manifest error of law in not relying upon Ext-"Ka" and Ext-"Kha", though Ext-"Ka" was held to have been proved. It is further submitted that a mistake in naming the Deed No. 4166/68 as a sale deed will not be of any consequence as the document speaks for itself. In absence of any challenge, learned Lower Appellate Court acted illegally in holding Ext-"Ka" to be a void document. He submits. In Ext-"Ka", Kashem Sheikh had expressly stated that the plaintiff and defendant No. 1 are his only two daughters and he had no sons or any other issue and, in order to protect the interest of the daughters, such gift deed was made. This part of Ext-"Ka" has not been challenged by the plaintiff and her entire case is based on total falsehood, Mr. Choudhury contends.

14. Drawing attention of the Court to the evidence of P.W. 1, Mr. Choudhury submits that Kashem had, by a registered deed of gift, gifted the property to Ramjani, the plaintiff, and Andheri, the defendant. He also contends that the defendant No. 1 was in possession of the suit land for the last 30/32 years and that PW 3 had also stated that the plaintiff was in Bangladesh. Mr. Choudhury concludes his argument by contending that the plaintiff had utterly failed to prove that she was in possession of the suit land and that she was prevented only in the year 1999 from cultivating the suit land.

15. Mr. Barkataky, learned counsel for the respondents, on the other hand, has supported the impugned judgment of the learned Lower Appellate Court. It is contended that the specific case of the defendant is based on a sale deed. While Ext-"Kha", being only a Deed of Relinquishment, the entire case set out by the defendants falls flat and the learned Lower Appellate Court rightly concluded that Ext-"Kha" is not a genuine document. Both the courts had recorded a finding that the plaintiff and the defendant No. 1 were entitled to 50% each of the share left behind by Kashem Ali, which is also the case of the defendant No. 1 and therefore, the plaintiff is entitled to relief, as claimed for in the said suit and the Lower Appellate Court rightly decreed the suit by allowing the appeal.

16. I have considered the submission of the learned counsel for the parties and have perused the materials on record.

17. It is noteworthy that the finding of both the courts below that both the plaintiff and the defendant No. 1 were entitled to 50% share of Kashem Sheikh is not in dispute, but there is a dispute with regard to the basis on which they were entitled to such 50% of the share. Though the professed claim made by the plaintiff was that there was an amicable settlement, no such evidence is forthcoming to validate her claim of such amicable settlement at the intervention of the villagers. On the other hand, in her cross-examination, she has stated that her father had divided the shares by means of a registered deed. This totally contradicts her claim in the plaint. If she was entitled to 50% share by virtue of a registered deed made by her father, there should not have been any plausible reason to introduce a story that shares were divided on 50:50 basis at the behest of the villagers. There could be only one reason for such a stand inasmuch as in Ext-"Ka", the father of the plaintiff had categorically stated that he had two daughters, Andheri Musalmani, defendant No. 1, and Ramjani Musalmani, the plaintiff, and he had no other sons or daughters.

18. No issues were framed with regard to the question as to whether Ext-"Ka" was a void document. The parties to the trial also did not go to trial with any understanding that the validity or otherwise of Ext-"Ka" was in question. There was no challenge to Ext-"Ka" and, therefore, in absence of any challenge, the learned Lower Appellate Court was wholly unjustified to hold that Ext-"Ka" was a void document on the ground that minors could not contract in the aforesaid circumstances, the declaration that Ext-"Ka" is a void document is wholly uncalled for. Accordingly, the substantial question of law No. 2, framed on

17.06.2015, is liable to be answered in favour of the appellant. Ext-"Ka" had been held to be proved by the learned Lower Appellate Court also and, therefore, it is established that the plaintiff and defendant No. 1 were both daughters of the same father and mother.

19. The evidence on record unmistakably demonstrates that the plaintiff had no possession whatsoever over the land for the last 30/32 years. It is also clear from the evidence on record that the plaintiff had left for Bangladesh. It is true that in the written statement, Deed No. 4166/68 was styled as a "sale deed". There is no manner of doubt that Deed No. 4166/68 is not a sale deed. The evidence on record has disclosed that defendant No. 1 had to file a suit for declaration of her right, title and interest over some portion of the suit land against one Malou Sheikh, who had threatened to dispossess her. Her suit, namely, Title Suit No. 22/83 was dismissed. However, the appeal filed against the dismissal of her suit, being Title Appeal No. 21/85, was allowed declaring her right, title and interest and confirmation of possession. Learned Trial Court noted that in the judgment and order dated 20.09.86 in Title Appeal No. 21/85, it had been specifically recorded that the plaintiff, who was pro forma defendant No. 5 in the said suit, had contested the suit and prayed for dismissal of the said suit. Ext.-"Gha", the judgment of the learned Appellate Court in Title appeal No. 21/85, goes to show that the present defendant No. 1 had relied on the registered deed dated 07.03.68, by which Ramjani (plaintiff herein) had relinquished her title over her share in favour of the plaintiff of Title Suit No. 22/83 (defendant No. 1 herein). The plaintiff, in her evidence, feigns ignorance about the said suit and the appeal. In the judgment and order dated 20.09.86, the Appellate Court had clearly noted that pro forma defendant No. 5 had denied to have relinquished her claim in favour of the plaintiff (defendant No. 1 herein) and she had also prayed for dismissal of the suit with cost. The decree shows that the present plaintiff was the pro forma defendant No. 5. The plaintiff of the present suit maintained a stoic silence with regard to the aforesaid judgment and decree wherein the Appellate Court had upheld the claim of Andheri with regard to the relinquishment of the share by Ramjani. The learned Lower Appellate Court glossed over this crucial aspect of the matter though specific observations were made by the learned Trial Court in this regard. Even otherwise, Ext-2 is a 30 years old document, which was admitted into evidence without there being any objection.

20. In our adversarial system of jurisprudence, pleadings are drafted by the advocates on the basis of information given by their clients as per their knowledge, understanding and experience, in the instant case, the original of the Relinquishment Deed, Exhibit "Kha" was very much available. May be, it was not placed at the time of drafting the written statement and the written statement was prepared on the basis of instructions taking it to be a case of transfer by sale. In the alternative, though the deed was produced before him, a mistake was committed by the counsel due to inadvertence in terming the Deed of Relinquishment to be a sale deed.

21. I am of the considered opinion that when the document itself has been produced and had been admitted into evidence without any objection, mis-description of the document in the written statement should not be attached too much of importance, more so, when side by side with the word "Sale deed" the word, "relinquishment" is finding place.

22. In view of the above discussion, I am of the considered opinion that the learned Lower Appellate Court was not justified in holding that Ext-"Kha" is not a genuine document Accordingly, the substantial questions of law are answered in favour of the appellants.

23. In the result, the appeal is allowed. The impugned judgment of the learned Lower Appellate Court is set aside and the judgment and decree of the learned Trial Court is upheld. No cost. Registry will send back the records.