
(2015) 12 AHC CK 0102
In the Allahabad High Court
Case No : Second Appeal No. 710 of 1981

Barkat Ali and Others

APPELLANT

Vs

Ali Ahmad Khan and Others

RESPONDENT

Date of Decision : 02-12-2015

Acts Referred:

Administration of Evacuee Property Act, 1950 — Section 10(2)(o)
Transfer of Property Act, 1882 — Section 54

Citation : (2015) 12 AHC CK 0102

Hon'ble Judges : Mahendra Dayal, J.

Bench : Single Bench

Advocate : M.A. Khan, M.A. Siddiqui and Sharad Nandan Ojha, for the Appellant; G. Kalwani, Azmal Khan and M.S. Siddiqui, for the Respondent

Final Decision : Allowed

Judgement

Mahendra Dayal, J.—The plaintiff-appellant Asghari Begum has filed this second appeal assailing the judgment and order dated 29.05.1981 passed in Civil Appeal No. 196/1996, whereby the appeal was partly allowed and the judgment and decree of the learned trial court passed in Suit No. 244/1964 was set aside.

2. The brief facts are that the plaintiff-appellant Smt. Asghari Begum brought a suit for partition against the respondents-defendants in respect of the house in question. The case of the plaintiff-appellant was that her share in the house in suit is 4/5 share while she had purchased 3/10 share from custodian. The rest half share was obtained by her by means of an oral gift deed and inheritance. The original defendant No. 2 in the original suit had also purchased 1/5 share from custodian and had sold the same to the original defendant No. 1, who demolished the house in part but tried to take possession over the entire house. This again on the part of the original defendant No. 1 promoted the plaintiff-appellant to file a suit for partition. The original defendants No. 2 to 11 did not contest the suit and allowed the same to proceed against ex-parte. However, the defendant No. 1 contested the suit merely on the ground that the house in

question was constructed by Hamid Ali Khan and Sadiq Ali did not live there. It was further alleged that Hamid Ali Khan alone had been in possession. Mohd. Hassain Khan inherited full share from his father. He has sold the entire house to him on 29.08.1964. It was also pleaded that the suit was barred by limitation.

3. Learned trial court framed two issues and by means of judgment and decree dated 14.10.1965, the suit was decreed in respect of 133/360 and 2/50 share of the plaintiff-appellant in the entire house in dispute.

4. Feeling aggrieved by the aforesaid judgment, an appeal was filed which was numbered as Appeal No. 285/1965. This appeal was allowed and the judgment of the learned trial court was set aside. The matter was remanded to the trial court for a decision afresh. It was also directed by the learned first appellate Court to implead Smt. Tahira Begum as widow of the defendant.

5. After remand of the case, Smt. Tahira Begum was impleaded as widow of the defendant and the trial Court again by means of judgment and decree dated 05.09.1966 decreed the suit in respect of 953/1800 share of the plaintiff-appellant. This judgment was again challenged by way of Civil Appeal No. 196/1966 and the learned first appellate Court this time allowed the appeal partly and the judgment of the trial court was modified to the extent that plaintiff-appellant had only 133/360 share in the house in question. For rest of the claim, the suit was dismissed. It is against this judgment and decree that the plaintiff-appellant has preferred this second appeal.

6. The second appeal was admitted by this Court on the following substantial question of law:--

"Whether the sale of a share in the property in favour of a co-sharer who is already in possession of the property would still required possession to validate the sale?"

7. During the pendency of second appeal, the original plaintiff-appellant Asghari Begum died and in her place Barkat Ali and Azmat Ali were impleaded. The respondent No. 1 also died and his legal heirs were also substituted. Respondents No. 11, 12, 13, 14, 17, 18 and 19 also died during pendency of the second appeal and their names were deleted by the appellant with the permission of this Court.

8. I have heard Shri Mohd. Arif Khan, learned Senior Advocate appearing on behalf of appellants assisted by Shri Mohd. Aslam Khan and Shri M.A. Siddiqui, learned counsel for the contesting respondents.

9. It has been argued by the learned Senior counsel appearing on behalf of the appellants that the learned first appellate court has partly allowed the appeal only on the ground that the sale of a part of the property by custodian in favour of the plaintiff-appellant was not a valid sale and, therefore, no title was conferred upon the plaintiff-appellant by the sale certificate issued by the custodian. The ground for such finding was that although the value of the

property transferred by the custodian was less than Rs. 100/-, but for completion of transaction of sale, delivery of possession was necessary and the same has not been proved by the plaintiff-appellant. The learned first appellate Court has observed that by virtue of the sale certificate, 3/10 share out of the share of Sadiq Ali Khan was transferred by assistant custodian to the plaintiff-appellant. The contesting respondents challenged this sale by assistant custodian on the ground that it was neither by registered instrument nor by delivery of possession.

10. It is not in dispute that the assistant custodian did not execute any registered instrument and the sale was affected only by way of issuing sale certificate. According to learned first appellate Court, the only method of affecting transfer of immovable property is either by way of executing the registered instrument if the value of property is more than Rs. 100/- or by way of delivery of possession if the value of the property is less than Rs. 100/-. In the present case, the value of the property transferred by assistant custodian was less than Rs. 100/-, therefore, the property could be transferred only by way of delivery of possession but the plaintiff-appellant could not prove either by oral or documentary evidence that the assistant custodian while issuing sale certificate also delivered possession of the sold property. According to learned first appellate Court the transfer of 3/10 share in the property by the assistant custodian in favour of the plaintiff-appellant was, therefore, a nullity and did not create any title in her favour. With these observations, learned first appellate court found that the share of the plaintiff-appellant in the house in question was only 133/360 share and for this only the suit was decreed. For rest of the share, the suit was dismissed. The submission of the learned Senior Advocate is that it is not in dispute that the plaintiff-appellant was also one of the share holders in the house in question and as such he would be deemed to be in constructive possession of every inch of the property unless the same is divided by metes and bounds. Since the appellant-plaintiff was already in possession of the house in question, therefore, there was no need to deliver the possession at the time of issuance of sale certificate by assistant custodian. The submission of the learned Senior Advocate is that the observation of the learned first appellate court in this regard is erroneous.

11. The learned counsel for the respondent has placed reliance upon a Full Bench decision of Hon"ble the Bombay High Court reported in Bhikhabhai Nanabhai Patel Vs. Chimanlal Maganlal Shah and Others, . In this case, the Full Bench of Bombay High Court held that the delivery contemplated by Section 54 of the Transfer of Property Act is not constructive or symbolic delivery but actual or real delivery. Therefore, where a mortgagor sells the mortgaged property to a sub-mortgagee in possession, as the sub-mortgagee is already in possession, no further possession can be given to him and hence, even assuming that the equity of redemption constitutes a tangible immovable property, the sub-mortgagee can acquire title to the property only, if he obtains a registered instrument.

12. Learned counsel has drawn attention of the Court towards the copy of sale

certificate issued by assistant custodian, a perusal of which reveals that the property was transferred by way of sale in pursuance of the power conferred upon the assistant custodian under Section 10(2) (o) of the Administration of Evacuee Property Act. It is not in dispute that the value of the property transferred by assistant custodian was less than Rs. 100/- and, therefore, no registered instrument was required for completion of sale. The requirement of the law in such cases is that sale may be affected by way of delivery of possession. The only question which is under consideration in this second appeal is as to whether the plaintiff-appellant was already in possession of the property in question and as such no delivery of possession was required or the sale was not valid for want of delivery of possession.

13. Shri M.A. Siddiqui has on the other hand submitted that Section 54 of the Transfer of Property Act does not contemplate constructive or symbolic delivery of possession. The possession by delivery must be actual. The sale certificate nowhere discloses that at the time of issuance of the sale certificate, plaintiff-appellant was also put in possession thereof. Since the sale was affected in respect of undivided share, therefore, the delivery of possession could not have been made in respect of a specified share. He has further submitted that although every co-sharer is deemed to be in constructive possession of every inch of property till the same is divided by metes and bounds but such type of possession is only a constructive possession. This does not fulfill the requirement of Section 54 of Transfer of Property Act.

14. It has also been argued by the learned counsel for the respondents that Assistant Custodian was not authorized to issue sale certificate in respect of a part of property without permission of the Custodian General. He has also challenged the maintainability of second appeal on the ground that in a suit for partition, every co-sharer is a necessary party as every co-sharer arrayed as defendant is the plaintiff, for the reason that he may at any time, approach the Court that his share may also be separated on payment of court fees. Since some of the defendants died during pendency of the second appeal and their names were deleted by the plaintiff-appellant and the legal heirs of the deceased respondents were not substituted, therefore, in the absence of all co-sharers, the second appeal was not maintainable.

15. In reply to the aforesaid arguments, it has been argued on behalf of the plaintiff-appellant that authority of Assistant Custodian to issue sale certificate cannot be raised at this stage firstly because no such ground was taken by the respondents either before the trial court or before the learned first appellate court and secondly the law does not permit any action of the Assistant Custodian to be challenged before the civil court. The proper remedy for the respondents to have challenged the sale certificate was before the court of competent jurisdiction and not before the civil court. With regard to deletion of some of the respondents, the submission on behalf of the plaintiff-appellant is that respondents whose names were deleted, did not contest the case either at the

stage of trial court or first appellate court and their names were deleted with the permission of the court, therefore, their deletion would not affect the maintainability of the second appeal.

16. So far as the pedigree and the shares of the shareholders is concerned, there is no dispute between the parties. The only dispute is with regard to only that much of share which was purchased by the plaintiff-appellant from Assistant Custodian. It is established from the evidence on record that a sale certificate in respect of 3/10 share was issued by the Assistant Custodian to the plaintiff-appellant. It is also established that the value of the property sold was less than Rs. 100/-, therefore, the execution of any registered instrument was not required. The only requirement was that issuance of sale certificate must have been followed by the delivery of possession. The plaintiff-appellant was not a stranger to the family of the original owner. She was also one of the co-sharers in the house in question. In order to increase her share, she purchased 3/10 share from Assistant Custodian by way of sale certificate. The share in the property belonging to Hamid Ali Khan, which was declared enemy property as Hamid Ali Khan died leaving behind Mohd. Ahsan Khan and Sadiq Ali Khan as his sons. Tahira Bibi was his daughter. The property in which Hamid Ali Khan had share was not his self-acquired property but was an ancestral property. The learned trial court has rightly recorded a finding that on the basis of law inheritance, the share of the plaintiff-appellant in the house in question was 133/360. This finding has also been affirmed by the learned first appellate court. The dispute is only with regard to rest of the share of Hamid Ali Khan which was devolved upon his children. The plaintiff-appellant and the original defendant No. 2 had purchased 1/5th share in the evacuee property. Tahira Begum, who was the daughter of Hamid Ali Khan also got her share in the property of her father. Thus, the shares of two sons of Hamid Ali Khan, namely Mohd. Ahsan Khan and Sadiq Ali Khan was 2/10 while the share of Tahira Begum was 1/10. The plaintiff-appellant had purchased 1/5 share in the said share of Hamid Ali Khan, therefore, share of the plaintiff-appellant came to 2/50. The learned trial court found that the plaintiff-appellant was entitled to get 133/360 share + 2/50 share, which was acquired by her by way of sale certificate. The learned first appellate court found that the plaintiff-appellant was entitled to get only 133/360 share. With regard to 2/50 share, learned first appellate court has found that since the sale certificate was not a valid sale for want of delivery of possession, therefore, she would not get 2/50 share as held by the trial court.

17. It is not disputed that where there is a sale of an immovable property, the value of which is less than Rs. 100/-, the execution of registered instrument is not required. The only requirement is that sale must be followed by delivery of possession. It has been held that the delivery of possession as contemplated by Section 54 of the Transfer of Property Act is actual delivery and not constructive and symbolic delivery. The question is where the co-sharer is already in possession of such a share in the property, even than actual delivery of possession is required. The learned first appellate Court has found that sale

certificate is invalid document on the ground that there was no oral or documentary evidence on record to show that there was actual delivery of possession over the share sold by Assistant Custodian to the plaintiff-appellant.

18. The requirement of law to deliver the possession at the time of sale of a tangible property if the value of the property is less than Rs. 100/- has been interpreted so because of the fact that when a sale is affected by a registered instrument, it is actual sale but when the value of tangible immovable property is less than Rs. 100/- the execution of registered instrument is not required and sale can be affected by any other mode followed by delivery of possession. The requirement as contemplated under Section 54 of the Transfer of Property Act is because of the fact that when sale is not being affected by registered instrument, there must be at least some indication and act on the part of the vendor to show that the property has been sold. It is evident from the law laid down by the Hon"ble Supreme Court that where the legislature talks of delivery of possession, the delivery must be actual and not symbolic. The sale certificate issued by the Assistant Custodian although nowhere indicates that the property was also delivered to the purchaser but it cannot be ignored that the plaintiff-appellant was already in possession over a part of the property and the sale was in respect of undivided share. In these circumstances, since the plaintiff-appellant was a co-sharer and was also in possession of share, therefore, the delivery of possession of undivided share by Assistant Custodian to the plaintiff-appellant was not required. The observations of the learned first appellate Court in this regard is erroneous. The plaintiff-appellant being in possession of the property in question would be deemed to be in possession not only in respect of her share but also in respect of entire property unless the actual partition takes place by metes and bounds. The learned trial court rightly held that the plaintiff-appellant in addition to her 133/360 share was also entitled to get 2/50 share on the basis of sale certificate issued by the Assistant Custodian in her favour.

19. For the aforesaid reasons, the substantial question of law framed in this second appeal is decided in the manner that the sale of a share in the property in favour of co-sharer, who is already in possession of the property, no delivery of possession would be required to validate the sale.

20. In the result, the judgment and order of the learned first appellate Court dated 29.05.1981 is liable to be set aside and the second appeal deserved to be allowed.

21. The second appeal is allowed and the judgment of the learned first appellate Court dated 29.05.1981 in Civil Appeal No. 196/1966 is set aside and the findings arrived at by the learned trial court declaring the plaintiff-appellant to get 133/360 + 2/50 share in the property in question is hereby affirmed.

22. The parties shall bear their own costs.