
(2013) 07 PAT CK 0019

In the Patna High Court

Case No : Second Appeal No. 339 of 1996

Ezaz Ahmad and Others

APPELLANT

Vs

Sk. Aurangzeb and Others

RESPONDENT

Date of Decision : 18-07-2013

Acts Referred:

Citation : (2014) 1 PLJR 761

Hon'ble Judges : Mungeshwar Sahoo, J

Bench : Single Bench

Final Decision : Disposed Off

Judgement

Mungeshwar Sahoo, J.—This Second Appeal has been filed by the plaintiffs-respondents-appellants against the judgment and decree dated 11.10.1996 passed by the learned 4th Additional District Judge, West Champaran at Bettiah in Title Appeal No. 20 of 1994 whereby the learned Lower Appellate Court allowed the appeal and reversed the judgment of the trial court dated 19.1.1994 passed by the learned Munsif, Bagaha in Title Suit No. 82 of 1992. The plaintiff-appellant filed the aforesaid suit for declaration that the gift deed dated 25.5.1989 executed by Md. Munif in favour of the defendant is null, and void and is not binding on the plaintiff and also prayed for injunction. The plaintiffs claimed the aforesaid relief alleging that in fact, the property belonged to Md. Munif who in lieu of Dower Debt executed a registered deed by moksha on 14.4.1984 in favour of his wife, Imam Bandi. Imam Bandi gifted the property by registered gift deed dated 5.2.1985 in favour of the plaintiff and since then the plaintiffs after accepting the gift are in possession of the property. The defendants fraudulently obtained a registered gift deed on 25.5.1989 and on the basis of the same, the defendants are interfering with the peaceful possession of the plaintiffs.

2. The defendants filed written statement alleging that in fact, imam Bandi died in the year 1985, therefore, the property reverted to Md. Munif and thereafter Md. Munif has executed the gift deed in favour of the defendants. The gift deed

of the plaintiff is not legal and valid and on the basis of the same, the plaintiff never came in possession. The trial court on the basis of the evidences, decreed the plaintiff's suit holding that the property was given to Imam Bandi by her husband in lieu of Dower Debt and she had the authority to execute the gift deed in favour of the plaintiffs.

3. On appeal, the Lower Appellate Court allowed the appeal and dismissed the plaintiff's suit holding that the gift deed said to have been executed by Imam Bandi in favour of the plaintiffs and Md. Munif in favour of the defendants are void in view of the Section 32 of the Bihar Consolidation of Holdings and Prevention of Fragmentation Act, 1956.

4. At the time of admission of this Second Appeal on 7.4.1998, the following substantial questions of law were formulated:--

(a) Whether the appellate court is right in affording the defendants-appellants to raise and argue the mixed question of law and facts at the time of hearing while the defendants appellants neither raised the aforesaid mixed question of law and fact in their written statement nor evidence was adduced, nor ground taken in memorandum of appeal as to whether the notification u/s. 3 of the Act was issued in 1978 and as such the gifts are void without permission u/s. 5 of the Act?

(b) Whether the appellate court is right to declare that as no oral evidence in court was adduced in respect of "offer" of the gift dt. 15.2.1985, though the same was neither objected by defendants in their written statement nor oral evidence adduced by defendants, rather there is a clear statement of making "offer" in the registered gift deed in plaint as well as oral evidence adduced by the plaintiffs?

5. The learned counsel for the appellants submitted that the question about the notification u/s 3 of the Consolidation Act is not a pure question of law but is a mixed question of law and fact. The defendants never raised any objection in the written statement and there is no pleading regarding the issuance of notification u/s 3 and likewise, there is no evidence also in support of the said fact but the Lower Appellate Court on the basis of the submission of the learned counsel for the defendant held that in view of the notification u/s 3 issued in the year 1978, the gift deeds of both the parties are void. The learned counsel submitted that since there was no pleading and no evidence, the finding of the Lower Appellate Court should be ignored in view of the decision of the Hon'ble Supreme Court reported in Union of India (UOI) Vs. Ibrahim Uddin and Another, . The learned counsel placed reliance on paragraph 69 clause (vii) of the said decision.

6. So far the second substantial question of law is concerned, the learned counsel submitted that the plaintiff specifically pleaded that they are in possession of the property on the basis of the gift deed executed by Imam Bandi and the Lower Appellate Court also recorded the finding that the plaintiffs are in possession but held that no evidence has been produced by the plaintiff in support of the fact as to whether there was any offer made by the donor

although, it is not the case of the defendant that no offer was made. According to the learned counsel, the gift deed is registered deed, therefore, there is presumption of its validity and the onus was on the defendant to prove the fact that the plaintiff never came in possession of the property. Accordingly, the learned counsel submitted that both the substantial questions of law are to be answered in favour of the appellants.

7. As stated above, nobody appeared on behalf of the respondents.

8. From perusal of the impugned judgment of the Lower Appellate Court, at paragraph 9, it appears that no dispute was raised by the plaintiff-appellant regarding the issuance of notification u/s 3 sub-section 1 of the Consolidation of Holdings and Prevention of Fragmentation Act i.e. the notification No. S.O. 932 dated 24.7.1978. In such circumstances, there was no dispute before the Lower Appellate Court that there is a notification issued u/s 3 of the Act. From perusal of the memo of appeal filed before the Lower Appellate Court, it appears that the defendants specifically at paragraph 23, mentioned that the suit is barred u/s 4 of the Consolidation Act. This fact was never disputed by the present appellant. So far the decision relied upon by the learned counsel for the appellant i.e. Union of India vs. Ibrahimuddin is concerned, the Hon"ble Supreme Court at paragraph 69 clause (vii) has held that the court cannot travel beyond the pleadings as no party can lead the evidence on an issue/point not raised in the pleadings and in case such evidence has been adduced or a finding of fact has been recorded by the court, it is just to be ignored. Though, it may be a different case where in spite of specific pleadings, a particular issue is not framed and parties having full knowledge of the issue in controversy, lead the evidence and the court records a finding on it. Therefore, in view of the settled proposition of law laid down by the Hon"ble Supreme Court if the finding of fact recorded on the basis of evidence when there is no pleading, the same shall be ignored. In the present case at our hand, so far the question of fact i.e. regarding issuance of notification u/s 3 of the Act is never disputed. Therefore, so far the fact is concerned, it is not disputed. In such circumstances, it cannot be said that if the facts are admitted, the law cannot be made applicable. In the memo of appeal, this specific fact was brought to the notice of the Lower Appellate Court and the plaintiff who was respondent never raised any objection regarding the issuance of the notification but participated before the court and thereafter when the result went against him, this plea has been taken before this second appellate court. In my opinion, since the fact is not disputed, the plaintiff-appellant was not taken into surprise about the fact. It is not his case that no notification was issued or that he has no knowledge about the notification but the question raised before this court is that this is a mixed question of law and fact. In my opinion, therefore, in the present facts and circumstances of the case, the decision relied upon by the learned counsel for the appellants is not applicable.

9. In the case of Bibi Rahmani Khatoon and Others Vs. Harkoo Gope and Others, , the Hon"ble Supreme Court has held that where a notification is issued

bringing the land involved in a dispute in the civil proceeding under a scheme of consolidation, the proceedings pending in the civil court either in the trial Court, appeal or revision, shall abate as a consequence ensuring upon the issue of a notification and the effect of abatement would be that the civil proceeding as a whole would come to a naught and accordingly not only the appeal or revision would abate but the judgment, order or decree against which the appeal is pending would also become non est as they would also abate and this would leave consolidation authority free to adjudicate the claims of title or other rights or interest in land involved in consolidation. This decision of the Hon''ble Supreme Court has again been followed in the case of Paras Nath Rai and Others Vs. State of Bihar and Others, .

10. In view of the above settled proposition of law when it is admitted by the parties that there is a notification and no denotification has been made, the judgment of both the courts below abated. However, from perusal of the judgment of the Lower Appellate Court, it appears that Lower Appellate Court instead of abating the proceeding, the judgment and decree of the trial court has dismissed the suit. Therefore, the judgment and decree of the Lower Appellate Court is modified to the extent that the plaintiff's suit and the judgment and decree of both the courts below abated.

11. The substantial questions of law formulated in this Second Appeal are accordingly answered against the appellants. In the result, this Second Appeal is disposed of with the above observations.