

(1990) 02 PAT CK 0025

In the Patna High Court

Case No : Appeal from Ori. Order No. 81 of 1989

Hafiz Mohd. Anwar and Another

APPELLANT

Vs

Mohd. Zubair Alam and Others

RESPONDENT

Date of Decision : 12-02-1990

Acts Referred:

Transfer of Property Act, 1882 — Section 48

Citation : (1990) 38 BLJR 753 : (1990) 2 PLJR 48

Hon'ble Judges : Binod Kumar Roy, J

Bench : Single Bench

Judgement

Binod Kumar Roy, J.—This appeal by the plaintiffs is directed against an appellate order of remand.

2. By an order dated 19th April, 1989, notices were issued in the admission matter to the respondents to show cause as to why this appeal, if possible, be not disposed of the admission stage itself.

3. Heard Mr. Bhartee, learned Counsel appearing for appellants, and Mr. Asghar Hussain, learned Counsel appearing for the respondents, and this appeal is being disposed of at the stage of its preliminary hearing under Order XLI, Rule 11 of the CPC with the (sic) consent.

4. The suit in question was filed by the appellants (i) for a declaration that tamliknama, comprising the properties described in Schedule A of the plaint dated 9th June, 1976 executed by their father Hakim Md. Ismail (Exhibit K) is void and not binding on them, and (ii) for granting a decree for partition of their alleged shares to the extent mentioned in the plaint comprising the properties described in Schedules 6 and 7 and (iii) for carving out of the takhta by appointing an Advocate Commissioner. The appellants alleged that they and the defendant Nos. 1 and 2 are sons of aforementioned Hakim Md. Ismail, who had two wives; that from his first wife defendant No. 1 Md. Zubair Alam was born and that from the second wife Bibi Salma Khatoon he had three sons (the

plaintiffs and the defendant No. 2) and three daughters (defendant Nos. 3 to 5); that Hakim Md. Ismail executed two sale deeds (Exhibits-3 and 3/a) in favour of the plaintiffs Nos. 1 and 2 respectively comprising the properties described therein mentioned in other Schedules of the plaint; that Ismail in lieu of dower debt executed a deed of Baimokasa in favour of his wife Bibi Salma Khatoon comprising the properties described in Schedule 6 of the plaint, which came in the joint possession of the plaintiffs and defendant Nos. 3 to 5 who were the legal representatives of Salma Khatoon aforementioned ; that the tamliknama deed was brought fraudulently by defendant No. 1 by misleading the father and it remained inoperative and ineffective and under the said deed, the defendant No. 1 did not acquire any right and the tamliknama coveted also some properties which were already subject-matter of their sale deeds.

5. Defendant Nos. 1 to 5 contested the suit through a joint written statement stating, inter alia, therein that the suit in question in fact is for setting aside the tamliknama in garb of a partition suit; the sale deeds in favour of the plaintiffs themselves were fraudulent documents and so is the Baimokasa deed in favour of Salma Khatoon all of which are farzi and showy documents.

6. Six issues were framed by the trial court out of which the three relevant ones were as follows:

3. Is the deed of gift (tamliknama) dated 9-6-1976 executed by Hakim Md. Ismail in favour of plaintiffs and defendants of this suit a fraudulently created document and fit to be declared void ?

4. Is the tamliknama dated 9-6-1976 not binding on the plaintiffs and, if so, to what effect and in respect of which property ?

5. Are the plaintiffs entitled to get decree partition to the extent of 44-4/9 percent and 36-4/9 per cent in Schedules 6 and 7 of the plaint respectively ?

7. Evidence was led by the parties.

8. The trial court decreed the suit in part by its judgment and decree dated 23rd December, 1987 holding/observing as follows:

(i) Admittedly entire suit property was the exclusive property of Hakim Md. Ismail (Vide Paragraph-12).

(ii) The tamliknama is not a fraudulent document and is not fit to be declared void (vide Paragraph 19).

(iii) Sale deeds were valid transactions and for consideration (vide Paragraph 25).

(iv) Baimokasa deed (Exhibit 5) (Exhibit L for the defendants) is not farzi document rather it is a genuine document (vide Paragraph 21).

(v) The tamliknama dated 9th June, 1986 is binding on the plaintiffs only to the extent to which it covers the property mentioned in the sale deeds and Baimokasa deed (vide Paragraph 31).

(vi) The plaintiffs are not entitled to any share in the property already disposed of through tamliknama but they will get share in the property covered by Baimokasa deed (vide Paragraph 32).

9. The plaintiffs went up in appeal against the judgment and, decree aforesaid. The appeal was admitted. No cross-objection was filed by the defendants against the findings recorded against them.

10. By the impugned order after holding that the appeal is fit for remand and directing the trial court to frame two issues namely (i) Whether the sale deeds Exhibits 3 and 3/1 are valid, genuine and for consideration ? and (ii) whether the Baimokasa Exhibit 5 is a farzi and sham transaction the case was remitted to the trial court. Further, liberty was also granted to the parties to lead evidence on the aforementioned issues.

11. Mr. Bhartee, learned Counsel appearing for the appellants, submits as follows:

The course adopted by the Court of appeal below was patently erroneous inasmuch as upto Paragraph 12 it only considered the cases of the parties and the issues framed in the suit. It nowhere even considered or mentioned the findings recorded by the trial court and in the absence of any cross objection/ cross appeal it erred in remitting back the case to the trial court and that too after giving liberties to the parties to adduce further evidence, to adjudicate the validity of Exhibits 3, 3/1 and 5. Sufficient evidence already being on the record, remand was apparently illegal.

12. Mr. Asghar Hussain, learned Counsel appearing for the respondents, on the other hand, submits that it is true that the order of remand is not a detailed one but the court below was justified in the facts and circumstances in remitting back the case after framing the specific issues mentioned in Paragraph 14 of his judgment. The appellate court was correct in holding that no issue was framed by the trial court about the validity of the sale deeds (Exhibits 3, 3/1) and Baimokasa deed (Exhibit 5).

13. Paragraph 13 of the impugned order contains the only discussion in the appeal without even mentioning as to what were the points argued by the parties before the learned District Judge.

14. I am of the view that there were sufficient materials on the record to record findings and the remand was absolutely unjustified. It is also settled law that when both parties understand the nature of issues and go to trial, absence of issue did not lead to mistrial sufficient to vitiate the decision, Kunju Kesavan Vs. M.M. Philip I.C.S. and Others, . Besides in Wali Singh v. Sohan Singh AIR 1964 SC 263 it was laid down to the effect that omission by the party will not be interfered, if it was deliberate. In the instant case non-framing of specific issues in regard to the sale deeds Exhibits 3 and 3/1 and Baikukasa deed was not fatal, even evidence was led in that regard. That besides, from the judgment of the trial court, it is also apparent that the parties addressed the court in regard to

the validity and the otherwise of the deeds and a positive finding has been recorded by the trial court in Paragraphs 19, 21 and 25 of the judgment.

15. It appears that the appellate court was not aware of Section 48 of the Transfer of Property Act, according to which if the same property has been transferred different times the subsequent transfer shall not confer any right, title or interest on the basis of the subsequent transfer vis-a-vis the first transfer. In the aforementioned view of the matter, there was no scope of its observation that the validity of the tamliknama cannot co-exist with the validity of the sale-deed because they run counter to the tamliknama.

16. I am also further of the view that the court of appeal below has completely misconceived its jurisdiction conferred by virtue of Order XLI, Rules 23, 23-A and 24 of the Code of Civil Procedure, and in writing a perfunctory judgment without even mentioning the points raised before it which the law mandatory requires.

17. For the reasons aforementioned, the impugned order is set aside and the case is remitted back to the court of appeal below for its re-disposal in the light of the observations made by me and in accordance with law. In the peculiar facts and circumstances, there shall be no order as to cost.

18. Both parties agree that 2nd May, 1990 be fixed for their appearance in the court of appeal below and accordingly. I direct them to appear on 2nd May, 1990 before the appellate court and on that day the court of appeal below shall fix a date for hearing the appeal.