

(2019) 03 GAU CK 0073

In the Gauhati High Court

Case No : Regular Second Appeal No. 72 Of 2008

Joytish Choudhury And Ors

APPELLANT

Vs

Apurba Kr. Choudhury And Ors

RESPONDENT

Date of Decision : 26-03-2019

Acts Referred:

Transfer Of Property Act, 1882 — Section 54

Citation : (2019) 03 GAU CK 0073

Hon'ble Judges : Prasanta Kumar Deka, J

Bench : Single Bench

Advocate : P Chakraborty, A Deka

Final Decision : Dismissed

Judgement

Prasanta Kumar Deka, J

1. Heard Mr. A. Barkataki learned counsel for the appellant and Mr. A. C. Sarma, learned Senior counsel assisted by Mr. G. Bharadwaj learned counsel for the respondent.

2. The present plaintiff respondent filed Title Suit No. 6/2002 in the court of learned Civil Judge(Sr.Division),Barpeta against the main defendants appellants for declaration of right, title and interest over the land measuring 8 lechas within dag No. 202 of KP Patta No. 23 at Pathsala Town which is the suit land. Umesh Ch. Deva Choudhury, the predecessor-in interest of the defendants appellants and the present proforma respondent No.2 was settled with land measuring 2 bighas 2 kathas 9 lechas covered by dag Nos. 202,204 and 1307 of KP Patta No. 23 of Pathsala Town. The said proforma respondent No.2 sold land measuring 8 lechas from the total land measuring 2 kathas covered by dag No. 202 vide registered sale deed No. 99/99 dated 1.3.1999 and delivered possession of the same to the plaintiff respondent No. 1. A 'chali' was constructed upon the said 8 lechas of land which is the suit land. The defendants appellants on 7.4.2001 broke down the C. I. Sheet 'chali' with intimation that they wanted to carry out

construction over the suit land with a further request to take away the C.I.Sheet and other building materials. Accordingly, he sought for the reliefs as hereinabove stated.

3. The defendants appellants filed their joint written statement taking the stand that Umesh Ch. Deva Choudhury had landed property as far as 17 bighas covered by several patta. Out of the said land amongst various dags, Umesh Ch. Deva Choudhury sold 16 lechas of land to one Sailen Talukdar from dag No. 202 and 14 and ½ lechas land to Basanta Kalita. Umesh Ch. Deva Choudhury died on 1.9.1978 leaving his wife and four sons i.e. the defendants appellants and proforma respondent No. 2. Each of the legal heirs are entitled to 16 4/5 lechas of land covered by dag No. 202. As late Umesh Ch. Deva Choudhury left 17 bighas of land, the proforma respondent No. 2 was entitled to 3 bighas 2 kathas of land by right of inheritance covered by various dag numbers. But the said proforma respondent No.2 sold 4 bighas 6 4/5 lechas of land in excess of his share including the one in dag No. 202 to Sashimohan Sarma by registered sale deed No. 1736/80 dated 30.5.1980 and delivered possession of the land. In the said sale deed the proforma respondent No. 2 sold 17 lechas of land covered by dag no. 202 of KP Patta No. 23 with specific boundaries although proforma defendant No.2 was entitled to 16 4/5 lechas of land only. The proforma respondent No. 2 sold his share from the western side of dag No. 202. On and the eastern part, the defendants appellants are in possession of the land covered by dag No. 202. The defendants appellants never disputed the land sold to Sashimohan Sarma and they are in exclusive possession of 4 kathas 4 lechas of land which remained after sale of land by Umesh Ch. Deva Choudhury as such there subsists no title of proforma respondent No.2 over any portion of land of dag No. 202. The plaintiff respondent No. 1 cannot acquire right, title and interest over the suit land. Thus the defendants appellants sought for dismissal of the suit.

4. The trial court framed the following issues:

"1. Whether there is cause of action for the suit?

2. Whether the suit is bad for non-joinder of necessary parties ?

3. Whether the suit is barred by Limitation?

4. Whether proforma defendant No.1 sold 4 bighas 63/5 lechas of land in excess of his share including his share in dag No. 202 to late Sashimohan Sarma by registered deed No. 1768/80 dtd. 30.5.80 and delivered possession?

5. Whether the proforma defendant has no saleable right, title and interest and possession in land of dag No. 202 after 30.5.80?

6. Whether the sale deed No. 99/99 executed by proforma defendant in favour of plaintiff is illegal, inoperative and void and plaintiff cannot acquire any right, title and interest upon the suit land by that illegal purchase?

7. Whether the plaintiff is entitled for a decree as prayed for?"

5. The plaintiff respondent No. 1 adduced five witnesses and exhibited some documents and on the other hand the defendants appellants examined three witnesses and exhibited one document. The proforma respondent No. 2 was impleaded as proforma defendant No. 1 in the suit. He did not file written statement supporting the claim of the plaintiff respondent No. 1. However, he deposed as witness PW 2 supporting the plaintiff respondent No. 1. The learned trial court decreed the suit.

6. Before advertng to the findings of the learned trial court it would be proper to look into the evidence of PW 2. In his examination-in-chief in the form of evidence on affidavit he admitted the fact of selling 8 lechas of land vide registered sale deed No. 99/99. In order to avoid the claim of his divorced wife over his landed properties he executed registered sale deed No. 1768/80, prior to execution of the registered sale deed No. 99/99, Ext.2 in favour of the plaintiff respondent No. 1. The said PW 2 vide registered sale deed No. 1768/80 sold some of his landed properties including 17 lechas from dag No. 202 in favour of his near relative Sashimohan Sarma. The said transaction was only paper transaction as the said Sashimohan Sarma during neither his life time nor his legal heirs after his death ever possessed nor mutated their names over the land sold by registered sale deed No. 1768/80. The legal heirs of Sashimohan Sarma executed a registered deed bearing No. 339/02, Ext. 3 cancelling the earlier sale deed bearing No. 1768/80 in favour of the proforma respondent No. 2. The said sale deed includes 17 lechas covered by dag No. 202 out of total area of 1 bigha 14 lechas. He has been possessing the total land covered by sale deed No. 1768/80 and on the other hand the land measuring 8 lechas covered by dag No. 202 is under the possession of the plaintiff respondent No.1.

7. The learned trial court while deciding the issues relied heavily on the said deposition of the PW 2 (proforma respondent No.2) and answered the issue regarding non joinder of necessary party in favour of plaintiff respondent No. 1 by taking into consideration Ext. 3, the certified copy of deed No. 339/2002 by way of which the deed No. 1768/80 executed in favour of Sashimohan Sarma was cancelled . Such cancellation as per the learned trial court is sufficient to remove the defect of non joinder of necessary parties so far legal heirs of Sashimohan are concerned in the suit. The learned trial court further decided issue No. 4 held that he exceeded his share but he did not deliver his share sold to Sashimohan Sarma. While deciding issue No. 5 as to whether the proforma respondent No. 2 had no saleable right, title and interest in dag No. 202 after 30.5.1980, it considered the Ext.3 i.e. cancellation deed executed by the legal heirs of late Sashimohan Sarma and held that neither Sashimohan Sarma nor his legal heirs had possessed the land covered therein as such the same is sham sale transaction and thus proforma respondent No.2 had saleable right, title and interest and possessed over the land covered by dag No. 202 even after 30.5.1980. The trial court while deciding issue No. 6 held that as the legal heirs

of Sashimohan Sarma relinquished their right, title and interest upon the land purchased by their father vide registered sale deed No. 1768/80 and the sale deed was simply executed by the plaintiff respondent No. 2 out of fear of his divorced wife, so the sale deed No. 99/99 (Ext.2) in favour of plaintiff respondent No. 1 cannot be held illegal, inoperative and the plaintiff respondent No. 1 acquired right, title and interest over the suit land by way of purchase. On the basis of said finding learned trial court decreed the suit in favour of plaintiff respondent No.1.

8. Defendants appellants being aggrieved filed Title Appeal No. 21/2004 in the court of learned Additional District Judge (FTC), Barpeta and vide judgment and decree dated 25.9.2007 dismissed the same. The first appellate court concurred the finding of the learned trial court. The defendants appellants thereafter filed this second appeal challenging the said judgment and decree of the first appellate court in Title Appeal No. 21/2004 which was admitted on 17.11.2008 on the following substantial questions of law:

"1. Whether a registered sale deed can be cancelled by the legal heirs of the purchasers by another registered sale deed, the vendor being not a party to the subsequent deed?

2. Whether the right, title and interest of a purchaser gets extinguished by elapse of time if the purchaser does not take possession of the land purchased?"

9. Mr. Borkataki relying on Section 54 of the T. P. Act submits that in order to transfer title on the basis of sale transaction possession need not requires to be delivered of the land sold but there must be a registered sale deed specifying the land and the consideration thereof. The courts below held that the sale deed in favour of Sashimohan Sarma and the land mentioned therein were never acted upon by way of possessing the same either by Sashimohan Sarma or his legal heirs. The said inference was taken only on consideration of the Ext. 3 by which the registered sale deed in favour of Sashimohan Sarma was cancelled by the legal heirs of Sashimohan but not by the vendor. The courts below considered the evidence of PW 2 without there being any pleading and on its own appreciated keeping in view the case of the plaintiff respondent No. 1 with reasons unknown to law. Accordingly, he sought for answering both the substantial questions of law in favour of the appellants.

10. Mr. Sarma learned Senior counsel on the other hand, supporting the judgment passed by the courts below submits that instead of formulation of said two substantial questions of law the issue with respect to sham sale transaction so far the sale transaction of the plaintiff respondent No. 2 with Sashimohan Sarma was concerned ought to have been framed.

11. Opposing the submission of Mr. Barkataky, Mr. Sarma submits that in order to be a valid sale tangible possession must be delivered but in the present case in hand, Ext. 3 the deed of relinquishment clearly speaks about that no delivery of possession of the land sold took place after the sale transaction. Accordingly,

he supports his stand by relying the case law in Vimal Chand Ghevarchand Jain and others Vs Ramakant Eknath Jadoo reported in (2009) 5 SCC 713.

12. I have considered the submissions of the learned counsel. From perusal of the exhibits, evidence of the witnesses and the judgment of the courts below one thing is noticed that both the courts below relied heavily on the evidence of PW 2 i.e. the proforma respondent No. 2 who is the vendor of the plaintiff respondent No. 1. The court below considered the Ext. 3 and put back the title of the proforma respondent No.2 in order to flow in favour of plaintiff respondent No. 1. The proforma respondent No.2 sold the land in the year, 1980 to Sashimohan and after the said sale the proforma respondent No. 2 had no saleable interest left out over the land which he sold in the year 1999 to the plaintiff respondent No. 1. Moreover the court below failed to consider that for a valid sale, delivery of possession is not the requirement. The submission of Mr. Sarma that tangible possession is required for valid sale cannot be accepted inasmuch sale consideration from Ext. 2 itself shows as Rs. 35,000/-and as the value is above Rs.100/- the registered sale deed is sufficient under Section 54 of the T. P. Act to transfer the title to the purchaser. Even if Ext. 3 is considered to be a relinquished deed under such circumstances also no saleable title will get transferred on the strength of Ext. 2 i.e. the sale deed in the year 1999 in favour of plaintiff respondent No.2 inasmuch as on the date of execution of Ext 2 he had no title to sell the land. The submission of Mr. Sarma that an issue ought to have been framed with respect to the sham sale transaction also cannot be accepted inasmuch as the evidence of PW 2 cannot be treated as pleadings. If there is no pleading even if best evidences are adduced, the same cannot have its evidentiary value. A legal valid sale deed cannot be cancelled at the whims of the parties to the sale deed. It is the domain of the civil court to cancel a registered sale deed. Learned courts below failed to consider the said proposition of law and misdirected itself by some reasoning unknown to the law. Accordingly, I do not find merit in this second appeal. Both the substantial questions of law are decided in favour of the defendants appellants and accordingly dismissed the suit of the plaintiff respondent No. 1.

13. Send back the LCR. No cost.