
(1997) 09 CAL CK 0013
In the Calcutta High Court
Case No : F.A. No. 317 of 1995

Kartick Prasad Gorai and Others

APPELLANT

Vs

Neami Prasad Gorai and Others

RESPONDENT

Date of Decision : 22-09-1997

Acts Referred:

Contract Act, 1872 — Section 17

Evidence Act, 1872 — Section 101, 102, 103, 104

Citation : AIR 1998 Cal 278

Hon'ble Judges : Satyabrata Sinha, J; Bhaskar Bhattacharya, J

Bench : Division Bench

Advocate : S.P. Roychowdhury and Farid Chowdhury, for the Appellant; Hirak Mitra and Z. Rahaman, for the Respondent

Final Decision : Dismissed

Judgement

Bhaskar Bhattacharya, J.—The instant first appeal is at the instance of defendants No. 1,3 and 4 and is directed against the judgment and decree dated August 30, 1990 passed by the learned Assistant District Judge, Katwa, District Burdwan in Title Suit No. 6 of 1989 decreeing the said suit in preliminary form after declaring plaintiff's 1/3rd share in the suit property and further declaring that two sale deeds viz. Exhibit-A and Exhibit-A1 were illegal, void, collusive and fictitious and that those were not binding upon plaintiff/respondent No. 1.

2. The respondent No. 1 brought the aforesaid Title Suit No. 6 of 1989 for partition after declaring that Exhibit-A and Exhibit-A I alleged to have been executed by Dwijapada Gorai, the father of plaintiff, defendant No. 1 and defendant No. 2 were illegal, void, collusive and fictitious and that those were not binding upon the plaintiff.

3. The case made out by the respondent No. 1 as per amended plaint was as follows:

4. One Dwijapade Gorai, the father of the plaintiff, defendant No. 1 and

defendant No. 2 was the absolute owner of the suit property. The said Dwijapada Gorai died intestate on August 2, 1989 leaving two sons viz. plaintiff and defendant No. 1 and one daughter viz. defendant No. 2. The wife of said Dwijapada predeceased him. After the death of said Dwijapada, the plaintiff along with defendant Nos. 1 and 2 became co-sharer of the suit property. The plaintiff having demanded partition, the respondent No. 1 disclosed that their father during his life time by two sale deeds dated March 2, 1982 sold away the suit property to defendant Nos. 3 and 4 who happen to be the wife and mother-in-law respectively of the defendant No. 1. According to the plaintiff, the father of the parties was illiterate and inexperienced in the matter of dealing with property. Over and above, the father due to his old age was suffering from various ailments and was living under care of defendant No. 1. Those two deeds were prepared by the defendant No. 1 by exercising fraud, undue influence and coercion upon Dwijapada. Defendant Nos. 3 and 4 had no financial capacity to purchase the suit property. The contents of those deeds were not read over and explained to the father of the plaintiff. At the relevant point of time, the father of the plaintiff had bad eye-sight and was getting deafer due to old age. Moreover, the value of the suit property at the relevant time was not less than Rs. 24,000/-. By virtue of those deeds defendant Nos. 3 and 4 did not acquire any right, title or possession over the suit property. Thus, the plaintiff prayed for the aforesaid relief.

5. The aforesaid suit was contested by the appellants by filing written statement and four sets of additional written statement. It appears from the record that the original written statement was filed by defendant Nos. 1 and 3. Subsequently, the first additional written statement was filed by defendant Nos. 1, 3 and 4. Again, the second additional written statement was filed by defendant Nos. 1 and 3. Thereafter on January 19, 1990 defendant No. 4 alone filed another written statement and ultimately on July 31, 1990, a further additional written statement was filed jointly by defendant Nos. 1, 3 and 4.

6. The long and short of the defence taken by the defendant Nos. 1, 3 and 4 in the aforesaid written statement and additional written statements was as follows :

7. Dwijapada voluntarily made declaration of sale of the suit property as he was facing acute financial trouble and had made a plan for investment of the sale proceeds in a profitable manner, the defendant Nos. 3 and 4 agreed to purchase the suit property. The defendant No. 3 paid a sum of Rs. 8,000/- for purchase of "Ka" schedule property and defendant No. 4 paid a sum of Rupees 4,000/- for purchasing "K1" schedule to Dwijapada. Dwijapada duly executed and registered the said deeds on March 2, 1982 knowing fully well about the contents of those deeds. Thus, defendant Nos. 3 and 4 had acquired valid right, title and possession in respect of the suit property. In answer to the plaint allegation that those deeds were deliberately not executed in the nearby Mongal Kote Registry Office but the same was executed at Burdwan Sadar Registry Office lest the

aforesaid fraud is known to the local people, the appellants contended that as Stamp paper of higher valuation was not easily available in the nearby Mongaf Kote Registry Office, at the instruction of Dwijapada, those were executed at Burdwan Registry Office. Thus, the appellants prayed for dismissal of the suit.

8. At the time of hearing of the aforesaid suit three persons including the plaintiff/respondent No. 1 gave evidence in support of the plaint case. P.W. 1 was the plaintiff himself. P.W. 2 Borhan Mondal gave evidence in support of the plaintiffs possession. He also deposed in support of the plaint case that Dwijapada was infirm prior to his death.

9. P.W. 3 is one Sk. Nowsad. He also gave evidence in support of the plaint case that Dwijapada became hard of hearing and had lost his normal eye-sight prior to the date of death. He further deposed that on the date of execution of the alleged sale deed he was returning from Burdwan in the same bus with the D.W. 1, D.W. 2 and D.W. 4 along with Dwijapada and they informed him that no consideration money was paid for the execution of the two disputed sale deeds.

On behalf of the defendant, four witnesses were examined.

10. D.W. 1 was the defendant No. 1 himself. He supported the defence case by asserting that those two deeds were executed by his father after knowing the contents thereof. He further stated that although his father was illiterate, the contents of both the deeds were written at his instruction and those were read over and explained to him. He maintained that his father was physically fit and mentally alert at the time of execution and registration of those deeds. D.W. 2 was one Jamini Mohan Roy who is one of the witnesses of those two deeds. D.W. 3 was one Debi Prosad Gorai and according to the defence case, the talk of sale and payment of consideration money were made at his shop one day prior to execution of these sale deeds. D.W. 4 is one Biswanath Pal and he was another witness of the aforesaid two sale deeds.

11. The learned Assistant District Judge by the aforesaid judgment and decree held that the aforesaid two deeds were illegal and void deeds and those have not been acted upon and by virtue of those deeds right, title and interest of Dwijapad did not pass to defendant Nos. 3 and 4. Accordingly the learned Trial Judge decreed the aforesaid suit in preliminary form thereby declaring 1/3rd share of the plaintiff in the suit property.

12. Being dissatisfied with the aforesaid judgment and decree passed by the learned Trial Judge, defendant Nos. 1, 3 and 4 have preferred the instant first appeal.

13. Mr. Roychowdhury, the learned senior advocate appearing on behalf of the appellants has challenged the finding of the learned Trial Judge on various grounds. The main ground of attack of Mr. Roychowdhury is that the learned Trial Judge in accepting the case of the plaintiff/respondent No. 1 has wrongly placed the onus upon his clients by erroneously relying upon a decision of this Court

reported in Banku Behari Mukherjee and Others Vs. Amulya Chandra Ghosh, .

14. According to Mr. Roychowdhury, Dwijapada, although was an illiterate person, had sufficient knowledge of dealing with the property. According to him, it appears from the evidence that Dwijapada had business of lending money by mortgaging properties, and thus, the law relating to the execution of a deed by a "Pardanashin" lady is not applicable to the two disputed sale deeds. According to Mr. Roychowdhury, in this case, the respondent No. 1 having alleged fraud, undue influence and coercion was bound to prove the same. Thus, the learned Trial Judge, according to Mr. Roychowdhury, misapplied the law by setting aside the sale deeds simply on the basis of contradictory evidence adduced on behalf of the appellants. As the onus was upon the respondent No. 1, for alleged contradiction in the evidence adduced by different witnesses on behalf of the appellants, the plaintiffs' suit cannot succeed.

15. Mr. Roychowdhury relied upon a decision of Supreme court in Sohrab and Another Vs. The State of Madhya Pradesh, in support of his contention that the conflicting testimony of the appellants' witnesses should be ignored.

16. Mr. Hirak Mitra, the learned senior advocate appearing on behalf of the plaintiff/respondent No. 1 on the other hand has supported the finding of the learned Trial Judge. According to Mr. Mitra, the learned Trial Judge on consideration of the entire materials on record having arrived at a conclusion that those two deeds were not properly read over and explained to Dwijapada, who was admittedly an illiterate man, this Court, in the absence of any cogent and convincing evidence to the contrary, should not interfere with such finding of fact. According to Mr. Mitra, the principle applicable to a case of a deed executed by "Pardanshi" lady will also be applicable to an illiterate man and as such the Trial Court rightly held that the appellants failed to prove due execution of those sale deeds.

17. We have gone through the entire materials on record. It appears from the judgment passed by the learned Trial Judge that he has accepted the version of the plaintiff/respondent No. 1 primarily in view of the following contradictions in the evidence given by the appellants' witness :

a) D.W. 1 said that defendant Nos. 3 and 4 were not present at the time of talk of sale and he himself did everything relating to the talk of sale and payment of consideration money to Dwijapada; On the other hand D.W. 2 stated in cross-examination that at the time of settlement of price at the shop of D.W. 3, defendant Nos. 3 and 4 were present.

b) D.W. 1 in his evidence said that the valuation of those sale deeds was not fixed on the basis of valuation per bigha, but D.W. 2 said that the same was fixed as per bigha.

c) D. W. 1 said in his evidence that talk of sale was held at noon but D.W. 2 said that such talk was held in the afternoon.

- d) D.W. 1 stated that no deed or parcha was consulted at the time of talk of sale but D.W. 2 said that deeds and parchas were consulted at the time of talk of sale.
- e) D.W. 3 said that defendant No. 4 was living in his house and he himself was cultivating the property of defendant Nos. 3 and 4 and was giving their shares; D.W. 2 on the other hand said that defendant Nos. 3 and 4 were separately cultivating their own property by engaging their "Munish".
- f) D. W. 3 said in his evidence that defendant No. 4 was maintaining separate mess which was contradictory to the statement of D.W. 1.
- g) D.W. 3 said no deed or other document was consulted at the time of fixation of price which was opposed to the evidence given by D.W. 2.
- h) D.W. 3 said that the defendant No. 3 agreed to purchase five bighas and defendant No. 4 agreed to purchase three bighas of land. This statement shows that they were present. Thus, such statement is contrary to the statement made by the D.W. 1.
- i) D.W. 3 specifically stated that defendants No. 1, 3 and 4 were personally present when money was paid. Such statement is at variance with the statement made by defendant No. 1 in this regard.
- j) D.W. 4, another witness of such talk of sale and execution of deeds said that defendant No. 3 paid 8.000/- and defendant No. 4 paid 4,000/- and defendant No. 1 paid such sum to D.W. 3 who counted the same and handed over to Dwijapada. The said statement was not in confirmity with the statement made by D.W. 1, D.W. 2 and D.W. 3.
- k) D.W. 4 said that the registration was completed by 12.30 p.m. whereas D.W. 1 said that it was completed by 2.30 p.m.
- l) D.W. 4 said that after the deeds were written, attesting witnesses signed first and thereafter Dwijapada affixed his L.T.I. without taking the help of other. This statement is totally contrary to the statement made by D.W. 2.
- m) D.W. 4 said that D.W. 2 himself wrote the certificate in the sale deeds that the contents were read over and explained to the executant whereas D.W. 2 said that he did not write those certificates as his hand-writing was bad.

18. Apart from the aforesaid contradiction, according to the learned Trial Judge, as admittedly Dwijapada was looked after by defendant No. 1 and defendant No. 1 having admitted that Dwijapada was treated by doctors, he could easily produce medical certificate or evidence to show what was the condition of Dwijapada at the time of execution of the sale deed. The learned Trial Judge further disbelieved the case of the defendants on the ground that in case of a transaction where a father-in-law is selling the suit property to his daughter-in-law and her mother, monetary transaction should not take place in a nearby shop. The learned trial Judge further questioned the absence of defendants No. 3 and 4 at the trial.

19. As regards the first contention raised by Mr. Roychowdhury that the learned Trial Judge wrongly placed the onus upon the appellant, we are of the view that said contention has a little force in the facts and circumstances of the present case. In this case, the plaintiff made specific allegation that his father was living under the care of defendant No. 1 and that he was aged, infirm and illiterate. It was further alleged that instead of registration of the sale deeds in the nearby registration office at Mongal Kote the father was taken to Burdwan for the purpose of practicing fraud. The defendants in their written statement did not dispute that Dwijapada was illiterate. But according to them he was well acquainted with the transactions of property and as such no question of practicing fraud or undue influence or coercion upon him arises. It was further stated in defence that as stamp papers of higher denomination were not available in the nearby Mongal Kote Registration Office he was taken to Burdwan. It appears that specific issues were framed by the learned Trial Judge as to whether the deeds mentioned in "Kha" schedule were illegal, void and binding on the plaintiff and his brother and sister, and whether there was any intelligent execution of "Kha" schedule deeds and due payment of consideration of money as alleged by defendants. On the basis of the aforesaid two issues parties led evidence. As plaintiff was admittedly not present at the time of execution of those deeds. It was not possible for him to give any positive evidence as regard due execution of those deeds. In such circumstances parties having full knowledge of the respective cases having led evidence, the question of burden became academic and insignificant. It may be true as has been submitted by Mr. Roy Chowdhury that the initial onus was on the plaintiff but the Court in a situation of this nature must consider the entire materials on records so as to arrive at a finding on the basis of preponderance of probability. In this connection reference may be made to a decision of the apex court in Narayan Bhagwantrao Gosavi Balajiwale Vs. Gopal Vinayak Gosavi and Others, , where apex Court held (at page 105):--

"The expression "burden of proof" really means two different things. It means sometimes that a party is required to prove an allegation before judgment can be given in its favour; it also means that on a contested issue one of the two contending parties has to introduce evidence. The burden of proof is of importance only where by reason of not discharging the burden which was put upon it, a party must eventually fail. Where, however, parties have joined issue and have led evidence and the conflicting evidence can be weighted to determine which way the issue can be decided, the abstract question of burden of proof becomes academic".

20. Thus, if we apply the principle laid down by the Supreme Court in the fact of the present case we must conclude that the finding of the learned trial Judge cannot be set aside merely on the ground that he had only considered the contradictory statement made by the witnesses for the defendants and on the basis of such contradiction had arrived at a conclusion that the defendant failed to prove due execution of sale deeds executed by Dwijapada.

21. In our opinion, although the protection given to a "Pardanashi" woman as regards execution of a deed is not available to an illiterate man who has sufficient experience of dealing with property, we are of the view that in case of a deed executed by such a person, the fact that the contents of the deed were read over and explained to the executant must be proved by the person who wants to take advantage of such deeds, in this case in view of contradictory statement made by the alleged witnesses of the deeds as regards execution and explanation of the contents, the finding of the learned trial Judge cannot be said to be wrong.

22. Apart from the aforesaid contradictions noticed by the learned trial Judge, we find that defendants Nos. 3 and 4, the alleged purchasers did not venture to appear as witness although they were made defendants. It appears from the evidence of D.W. 1, the husband of defendant No. 3 that he deposed only for himself and his wife. Thus, nobody gave evidence on behalf of defendant No. 4, one of the alleged purchasers from Dwijapada.

23. It further appears that in paragraph 12 of the joint written statement filed by the appellants it was specifically averred as follows :

"..... before purchasing the suit property the defendant No. 3 kept the money that she had received selling her own property invested. She purchased the property mentioned in Schedule "Ka" of the plaint at the price mentioned in Schedule "Kha" thereof with the money kept invested, with that she obtained selling her own ornament and procuring from other sources."

24. The aforesaid pleading discloses that defendant No. 3 kept some amount invested for the purpose of purchasing the suit property. But her husband in cross-examination admitted that he had been collecting the consideration money for 1 or 1 1/2 years prior to the date of registration. He further admitted that the consideration money was paid to his father by him. Thus, in view of such contradictory statement as regards the procurement of consideration money the defendant No. 3 was a very important witness, but for the reason best known to the appellants she was not examined. No reason has been also assigned for non-examination of defendant No. 4, the another alleged purchaser. The source of the consideration money was within their special knowledge and as such it was their duty to come before witness-box to explain the aforesaid contradiction and to face cross-examination by the plaintiff.

There also is no explanation as to why the defendant No. 4 had to sell her properties in 1981. The said question becomes relevant in view of the assertions of the plaintiff that the defendant No. 4 did not have any means to pay the consideration amount. The defendant No. 4 did not examine herself. She alone was competent to speak as regard her financial capacity and adverse inference, therefore, should be drawn to the effect that had she examined herself as a witness, the same would have gone against her own interest.

25. We cannot lose sight of another important matter. It appears from other

deeds executed by Dwijapada prior to the alleged execution of the disputed deeds that those were registered at the registration office at Mongal Kote which admittedly is very near to their residence. D.W. 1 in his evidence has explained the reason for registration of the deed at Burdwan Sadar Registration Office. According to this witness because the required stamp papers were not available at Mongal Kote at the relevant time, the said deeds were registered at Burdwan Sadar Registration Office. This reason is far from convincing. It is well known that in case of a sale, the cost of purchasing stamp paper and/or registration are borne out by the purchasers. In this case also, the stamp papers of the disputed sale deeds were purchased in the name of defendants No. 3 and 4. Even if we accept the case of the appellants that stamp papers were not available in the nearby Mongal Kote Registration Office, for that reason there was no necessity of registering the documents in Burdwan when admittedly Dwijapada was aged and prior to the execution of those two deeds, all the deeds were registered in the nearby registration office. If stamp papers are purchased from Burdwan there is no bar in registering the deeds in Mongal Kote Registry Office. It will not be out of place to mention here that the disputed sale deeds viz. Exhibit A and Exhibit A-1 were written on stamp papers valued at a paltry sum of Rs. 171 /- and Rs. 396/- respectively. Therefore the contention of the appellants that for the purpose of purchasing stamp paper of higher denomination, the deeds were executed and registered in Burdwan is not worthy of credence.

26. Moreover, the appellants have not been able to prove possession of defendants Nos. 3 and 4 over the suit property after the execution of the alleged deeds. Those deeds were alleged to have been executed in the year 1982 and Dwijapada died in the year 1989. Plaintiff having specifically disputed the possession of defendants Nos. 3 and 4 over the suit property, it was the duty of the appellants to show that after the alleged purchase they mutated their name or they paid rent to the Government for the suit property. Payment of rent upon mutating their names by the defendants "Nos. 3 and 4 would have lent support to their case as the defendant No. 1 in his evidence clearly stated that he had himself been cultivating the land. Payment of" rent is evidence of possession. The defendants Nos. 3 and 4 thus, have also not adduced any independent evidence to show that the impugned sale deed had been acted upon. Furthermore, filing of an application for mutation is a natural conduct of a purchaser of an Immovable property. Non-filing of such application clearly demonstrates that the defendant No. 1 intended to keep the entire matter, a closely guarded secret. This circumstance is also a pointer to the fact that the sale deeds executed by the Dwijapada Gorai in favour of the defendants Nos. 3 and 4 were sham transactions. Curiously enough, no such evidence is forthcoming in the instant case. As indicated earlier one of the witnesses for the defendant has said that the disputed property is cultivated by defendants Nos. 3 and 4 by their own "Munish" whereas the defendant No. 1 has said that he himself cultivates the suit property on their behalf.

27. We are also not convinced that there was any occasion for Dwijapada to sell

the suit property at such a low price. It appears from the evidence of defendant No. 1 himself that 8 maunds of paddy are grown per bigha from the suit property. Therefore, 64 maunds of paddy are grown per year from the suit property. Thus, [he case of the defendants that the father of the parties was incurring loss in cultivation is not at all credible. D.W. 3 stated in evidence that the purpose of sale was to invest the money in "mortgage business". No document has been produced by the defendant No. 1 to show that his father had any business of lending by mortgaging property. It goes without saying that the father was living under the care and custody of defendant No. 1 and as such if Dwijapada had any such business, documents in support thereof could be easily produced.

28. For the purpose of holding as to whether the impugned deeds of sale are vitiated or not, the Court is required to take into consideration several factors which, inter alia, are :

- (a) Fiduciary relationship between the parties,
- (b) Circumstances attending to the execution of the deeds,
- (c) Conduct of the parties prior to, during and after the execution of the deeds.

29. Admittedly, Dwijapada Gorai was residing with the defendant No. 1. That he was aged 80 at the time of execution of the deeds of sale is also not in dispute. It is also not disputed that he had been suffering from diseases and he was being treated therefor. The defendant No. 1, who had a special knowledge about the circumstances existing prior to and at the time of execution of the said deed of sale, did not state that there was any pecuniary necessity for Dwijapada Gorai to execute the sale deed at that point of time.

30. If Dwijapada Gorai did not have any financial requirement, it is unlikely that he would dispose of his entire remaining property, as a result whereof his sons were altogether deprived of any share particularly in view of the fact that admittedly two deeds of gift being Exhibit A-1 and A-2 were executed in favour of the plaintiff and defendant No. 1 respectively one year prior to the execution of the impugned deeds of sale. Even if it be assumed the relationship between the plaintiff and his father deteriorated thereafter, there was absolutely no reason as to why Dwijapada Gorai, who according to Mr. Roy Chowdhury himself was a man of wordly affairs, did not execute any will in favour of the defendant No. 1.

31. Over and above, the defendant No. 1 could not produce any document showing that his father invested the sale proceeds anywhere. Absence of any document showing investment of sale proceeds falsify the purpose of the alleged sale as mentioned in those deeds and invigorate the plaint case that those deeds were fake and no consideration passed for execution of those deeds.

32. Thus, after taking into consideration the entire fact and circumstances of the case, in our opinion, there is no reason to differ from the finding of fact arrived at by the learned trial Judge that by virtue of those sale deeds mentioned in

"Kha" schedule no title passed in favour of defendants Nos. 3 and 4 as those deeds were sham and not acted upon.

33. As regards the decision in Sohrab and Another Vs. The State of Madhya Pradesh, cited by Mr. Roychowdhury, in our opinion, the principle laid down in the said decision is not applicable to the fact of the present case. In that case the Supreme Court held that discrepancy and contradiction in the evidence of a witness is not sufficient ground of discarding entire evidence. The Supreme Court in that decision held at page 2024 (of AIR) :--

"Falsus in uno falsus in omnibus is not a sound rule for the reason that hardly one comes across a witness whose evidence does not contain a grain of untruth or at any rate exaggeration, embroideries or embellishments. In most cases, the witnesses when asked about details venture to give some answer, not necessarily true of relevant for fear that their evidence may not be accepted in respect of the main incident which they have witnessed but that is not to say that their evidence as to the salient features of the case after cautions scrutiny cannot be considered though where the substratum of the prosecution case or material part of the evidence is disbelievable it will not be permissible for the Court to reconstruct a story of its own out of the rest."

34. In the present case as noticed earlier, the appellants have failed to prove that before execution of the said two sale deeds, the contents were at all read over and explained to Dwijapada who was undisputably an illiterate person. Coupled with the aforesaid fact, the possession of the defendants Nos. 3 and 4 on the basis of such deeds has not been proved. The reason of sale mentioned therein does not tally with the materials on record. Moreover, in the instant case, the learned trial Judge had the occasion to see the demeanour of the witnesses appearing on behalf of the parties, After noticing the contradictions in the evidence of the witnesses and observing their demeanour, if the learned trial Judge has disbelieved the case of the defendants and has believed the one put forward by the plaintiff, we cannot upset the the said finding of fact unless we find that there is some special feature about the evidence of the witnesses which has escaped the notice of the trial Judge or there is sufficient balance of improbability to displace his opinion as to where the credibility lies. According to us, the evidence taken as a whole can reasonably justify the conclusion arrived at by the learned trial Judge and we cannot say that the learned trial Judge has misdirected himself by applying wrong standard of probability or has committed any error of procedure.

35. As stated above, after going to the entire materials on record we find that the appellants have failed to show that the judgment impugned is wrong and, thus, we find no merit in the instant appeal and the same is dismissed.

36. In the facts and circumstances of the case we however make no order as to costs.

Satyabrata Sinha, J.

37. I agree. Appeal dismissed.