

(1985) 05 GAU CK 0012

In the Gauhati High Court

Case No : Second Appeal No. 51 of 1978

Lakhi Pradsad Bhar and Ghalua Bhar

APPELLANT

Vs

Sree Kulendra Chandra Das

RESPONDENT

Date of Decision : 09-05-1985

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 100

Registration Act, 1908 — Section 30(2)

Transfer of Property Act, 1882 — Section 3, 51, 53A, 55

Citation : (1985) 2 GLR 289

Hon'ble Judges : T.C. Das, J

Bench : Single Bench

Advocate : B. Acharyya, for the Appellant; G. Sarma, for the Respondent

Final Decision : Dismissed

Judgement

T.C. Das, J.—Mr. B. Acharyya, the learned Counsel for the Appellant at the outset found it difficult to face the judgment of the learned appellate Court below being on finding of facts on a simple issue relating to the case wherein the Plaintiff claimed for specific performance of the contract. While unfolding the facts, the learned Counsel for the Appellant has admitted that he desires to attack the impugned judgment with regard to issue Nos. 3 and 4. Issue Nos. 3 and 4 run as follows:

3. Does the suit suffer from defect of parties?

4. Is the Bainapatrarin question valid and legal?

These two issues arise out of the pleadings of the parties. The Plaintiff (Respondent herein) brought an action against the present Appellant Defendant for specific performance of a contract for sale of the land described in Schedule to the plaint. The case of the Plaintiff is that on 22nd July, 1971 the Defendant executed an agreement for sale of the land in favour of the Plaintiff at a consideration of Rs. 1,000/- in total. On the day Defendant having failed to

execute the sale inspite of execution of the agreement, the Plaintiff paid a sum of Rs. 300/- as an advance amount and as a part performance, the Defendant in accepting the amount, delivered possession of the land to the Plaintiff. It was agreed between the parties that the balance amount of Rs. 700/- would be paid by the Plaintiff at the time of execution of the sale deed. The Defendant having failed to execute the sale deed inspite of the demand made by the Plaintiff, there was no alternative for the Plaintiff than to approach the Civil Court with a prayer for decree for specific performance of the contract. The suit was instituted in the Court of the Munsiff No. 2 at Silchar.

2. The Defendant contested the suit by filing written statement. The main plea of the Defendant was that the alleged agreement was false as he never executed the agreement as he had no title to the land on the day of execution of the agreement. The further case of the Defendant was that the suit land had been sold to one Ashotosh Paul Choudhury by a registered sale deed on 22.5.71 much earlier to the date of execution of the agreement at a consideration of Rs. 1,500/-. Besides, the Defendant pleaded non-joinder of necessary party as because the Plaintiff did not implead Ashotosh Paul Choudhury as a Defendant in the suit inspite of the fact that the Plaintiff had prior knowledge of the said transaction between the Defendant and said Ashotosh. The Defendant denied the execution of the agreement. Parties led evidence, oral as well as documentary. The learned trial Court decided issue Nos. 3 and 4 against the Plaintiff. Consequently, the suit was dismissed by the learned trial Court. On appeal being preferred by the Plaintiff, the learned Assistant District Judge could not agree to the findings of the learned Munsiff and reversed the trial Court's judgment and decided the appeal in favour of the Plaintiff. Against the said impugned judgment and decree, the Defendant has approached this Court with this Second Appeal.

3. Mr. Acharyya has urged before me that there is no finding of the appellate Court below that the Plaintiff was ready and willing to pay the balance money at least till the date of institution of the suit. It is true that in so many words the learned Appellate Court did not give its finding on the above point but in paragraph 9 of the plaint the Plaintiff has categorically stated "the Plaintiff is still ready and willing to pay the balance of the purchase-money of the said property to the Defendant; and the Plaintiff would deposit the same upon and according to the orders of the Hon'ble Court."

4. The next submission of the learned Counsel is that Section 53A of the Transfer of Property Act (for short "the Act"), is not attracted as because the Defendant never delivered possession of the suit land to the Plaintiff as alleged by him. As regards possession of the suit land, the learned appellate Court below considered the evidence of the Plaintiff and the testimony of other witnesses and come to the finding that Plaintiff got possession of the suit property. This finding is based on evidence on record and it is a clear finding of fact. As regards the execution of the agreement (Exhibit 1), the learned appellate Court found that the Plaintiff had no knowledge about the earlier transaction between the Defendant and

Ashotosh Paul Choudhury as because the registered sale deed was executed on 22.5.71 but it was not registered till 18.8.71. The learned appellate Court also found that the sale deed (Exhibit A) was not a genuine document as because the stamp was purchased on 18.1.71 by different persons, might be, for different purpose. It was not purchased in the name of the vendor or the purchaser. There was no explanation in this regard. All those discrepancies could not be explained by the Defendant and in the absence of any supporting evidence in favour of Defendant as regards Exhibit A, the learned appellate Court gave an adverse finding against the Defendant. This finding also is purely a finding of fact. The Defendant could not deny his signature in the agreement. On security of the evidence on record, namely, the evidence of P.Ws. 2, 3 and 4 who were the witnesses to the agreement, (Exhibit 1), the learned appellate Court disbelieved the story of the Defendant and concluded that Exhibit 1 was a genuine document executed Defendant without any prior knowledge of the Plaintiff as regards so called prior execution of the sale deed by the Defendant in favour of Ashotosh Paul Choudhury. Can be held that the Plaintiff had the notice of such execution in view of the provision of Section 3 of the Transfer of Property Act? In terms of Section 3 of the Transfer of Property Act, a person is to have notice of a fact when he actually knows that fact or when, but for willful abstention from an inquiry or search which he ought to have made, or of his gross negligence he could know it. Explanation 1 to Section 3 of the Act runs as follows:

"Explanation 1"-Where any transaction relating to immovable property is required by law to be and has been effected by a registered instrument, any person acquiring such property or any part of, or share or interest in, such property shall be deemed to have notice of such instrument as from the date of registration or, where the property is not all situated in one sub-district, or where the registered instrument has been registered under Sub-section (2) of Section 30 of the Indian Registration Act, 1908 (XVI of 1908) from the earliest date on which any memorandum of such registered instrument has been filed by any Sub-Registrar within whose sub-district any part of the property which is being acquired, or of the property wherein a share or interest is being acquired, is situated:

Provided that-

- (1) the instrument has been registered and its registration completed in the manner prescribed by the Indian Registration Act, 1908 (XVI of 1908) and the rules made thereunder.
- (2) the Instrument or memorandum has been duly entered or filed, as the case may be, in books kept u/s 51 of that Act, and
- (3) the particulars regarding the transaction to which the instrument relates have been correctly entered in the indexes kept u/s 55 of that Act.

The evidence on record shows that the sale deed (Exhibit A) was registered on 18.8.71 only about three months after the execution of the agreement Exhibit 1.

Therefore, the learned appellate Court has correctly held that the Plaintiff cannot be said to have any prior notice of any such transaction like Exhibit A. As regards the part performance the provision of the Act, is certainly unambiguously clear. I quote herein below the relevant provision of Section 53A of the Act.

53A. Part performance.-Where any person contracts to transfer for consideration any immovable property by writing signed by him or on his behalf from which the terms necessary to constitute the transfer can be ascertained with reasonable certainty,

and the transferee has, in part performance of the contract, taken possession of the property or any part thereof, or the transferee, being already in possession, continues in possession in part performance of the contract and has done some act in furtherance of the contract,

and the transferee has performed or is willing to perform his part of the contract,

then, notwithstanding that the contract, though required so be registered, has not been registered, or, where there is an instrument of transfer that the transfer has not been completed in the manner prescribed therefore by the law for the time being in force, the transferor or any person claiming under him shall be debarred from enforcing against the transferee and persons claiming under him any right in respect of the property of which the transferee has taken or continued in possession other than a right expressly provided by the terms of the contract;

Provided that nothing in this section shall affect the rights of a transferee for consideration who has no notice of the contract or of the part performance thereof.

5. The learned appellate Court below found that the Plaintiff could prove by evidence that he paid a sum of Rs. 300/- as part payment of the consideration money on execution of Exhibit 1 by the Defendant and that the Plaintiff was put to possession by the Defendant as a taken of part performance of the contract. This being a finding of fact, this Court was not certainly disturb that finding. The learned appellate Court found on evidence on record that Exhibit A, the sale deed, is a collusive document and that no right, title and interest could be vested to Ashotosh Paul Choudhury in respect of the suit land. In that, view of the matter, the appellate Court held that the plea as to the non-joinder of Ashotosh Paul Choudhury in the suit as raised by the defendant falls because of the fact that by Exhibit A which is held to be a collusive document, no right and title could be acquired in respect of the suit land by Ashotosh and the title remained with the Defendant coupled with the facts that the Plaintiff was delivered possession immediately after execution of Exhibit 1 and has been in occupation of the land. It is settled law that the High Court shall confine to question of law in dealing with Second Appeal. If the appellate Court records a definite finding of fact, it is not open to the High Court to attempt to reappreciate the evidence and give its own finding, on that aspect. The provisions of Section 100 of the CPC are

clear and unambiguous. There is no jurisdiction to entertain a Second Appeal even on the ground of erroneous finding of fact however gross the error may seem to be. It is not the case of the parties here that the finding of the Court below suffers from any substantial error or defect in the procedure. That being the position, it would not be possible to disturb the finding of fact arrived at by the learned appellate Court below. No other point has been raised by Mr. Acharyya.

6. The appeal appears to be meritless. In the result, the appeal is dismissed. But in view of the facts and circumstances of the case, I leave the parties to bear their own cost as none appears on behalf of the Respondent.