

(2013) 04 PAT CK 0050
In the Patna High Court
Case No : Second Appeal No. 40 of 1987

Lalo Sahu and Others

APPELLANT

Vs

Birbahadur Singh @ Nagendra Singh

RESPONDENT

Date of Decision : 03-04-2013

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 100, 100(3), 96

Citation : AIR 2013 Patna 127 : (2013) 3 PLJR 117

Hon'ble Judges : Chakradhari Sharan Singh, J

Bench : Single Bench

Advocate : Anil Kumar Mukund, for the Appellant; Surendra Kishore Thakur and Manoj Kumar Pandey, for the Respondent

Final Decision : Dismissed

Judgement

Chakradhari Sharan Singh, J.—Heard Mr. Anil Kumar Mukund, learned counsel for the appellants and Mr. Surendra Kishore Thakur, learned counsel appearing on behalf of the respondent. The present second appeal u/s 100 of the CPC has been preferred against the judgment and decree dated 22.11.1986 and 1.12.1986 respectively passed in Title Appeal No. 5 of 1979 by learned 9th Additional District Judge, Patna, whereby he set aside the judgment and decree dated 9.2.1979 passed in Title Suit No. 43 of 1967.

The appellants herein, were the plaintiffs before the trial Court.

2. The appellants-plaintiffs filed the suit for passing a decree of specific performance of contract arising out of sale deed dated 5.6.1966 executed by the defendant/respondent in favour of the plaintiffs and thereby giving the plaintiffs an opportunity to deposit a sum of Rs. 1087.50 being the balance of the consideration money and a direction to the respondents for making exchange of equivalence (takzul badlain) of the sale deed dated 5.6.1966.

3. As per the plaintiffs' case, the defendant No. 1 Surendra Narayan Singh (original respondent No. 1) was the karta and manager of a Hindu joint family.

Being in need of money he approached the original plaintiff Bhago Kuer with an intention to sale the disputed plot. The plaintiff agreed to purchase the land for a consideration amount of Rs. 2487.50 out of which the defendant received a sum of Rs. 1400/-. The defendant no. 1 is said to have executed two sale deeds, transferring the suit property having an area of 19 kathas and 18 dhurs in favour of the plaintiffs. Consideration money of Rs. 1500/- was indicated in one of the sale deeds, whereas Rs. 987.50 was indicated as a consideration money in the second sale deed. Defendant is said to have endorsed receipt of Rs. 1400/- in the sale deed itself and it was embodied in deed as well.

4. Further case of the plaintiffs before the trial Court was that he approached defendant no. 1 with ready balance money of Rs. 1087.50 for Takazul badlaim but defendant no. 1 declined. Allegedly, instead of honouring the terms of contract, according to the plaintiff, the defendant no. 1 served upon the plaintiff a legal notice dated 25.7.1966. The plaintiff further claimed that she replied to the legal notice on 1.8.1966 through her Advocate but the defendant no. 1 refused to receive it. She also pleaded that the plaintiff had already given the defendant no. 1 a notice dated 28.7.1966 for performing his part of contract as per the deed dated 5.7.1966 but the notice was refused to be received by the defendant no. 1. The plaintiff is said to have given another notice to defendant no. 1 dated 15.4.1967 through her lawyer. In spite of that the defendant did not make Takazul badlaim leading to filing of the suit and the plaintiffs had no other option but to file the suit.

5. This is to be noted that the original plaintiff Bhago Kuer died during the pendency of the suit and was substituted by her legal heirs who are appellants herein.

6. The defendants contested the suit and filed their written statement. The defendants denied to have received the said amount of Rs. 1400/- as part of consideration money from the original plaintiff. The defendants asserted that the plaintiff Bhago Kuer failed to pay the amount of consideration money and contended that no amount of Rs. 1400/- as alleged to have been paid to the defendants, was in fact paid. It was reiterated in the written statement that as a matter of fact the defendants gave notice to the plaintiffs for payment of consideration money in terms of the agreement between them but the plaintiffs did not respond.

7. On the basis of the rival pleadings of the parties, the learned trial Court framed altogether eight issues including issue no. v which goes to the root of the matter and is being quoted hereinbelow:-

v. Have the plaintiffs made payment of Rs. 1400/- to the defendant no. 1?

The issue no. v being the primary issue for consideration before the trial Court, it was taken as the first issue to be considered by the trial Court.

8. From the judgment of the trial Court as well as the first appellate Court, it will

appear that evidence were adduced on behalf of the parties, both oral and documentary in support of their respective claims before the trial Court. Learned trial Court after considering such evidence and material on record came to a finding that the said consideration amount of Rs. 1400/- prior to registration of the document was paid to the defendant and thus, decided the issue in favour of the defendants. The trial Court, accordingly, directed the plaintiffs to deposit a sum of Rs. 1087.50 in the Court within two months from the date of the judgment.

9. Being aggrieved by the findings of the trial Court, the defendants filed an appeal u/s 96 of the CPC which was listed in the file of learned 9th Additional District Judge, Patna. Learned first appellate Court, on the basis of the grounds raised to challenge the judgment of the trial Court as well as other material on record formulated three points for consideration, point nos. 1 and 2 are quoted hereinbelow:-

1. What right did plaintiff-respondents acquired by virtue of the sale deeds?
2. Are the plaintiff-respondents entitled to a decree for specific performance of contract for sale?

10. Dealing with point Nos. 1 and 2 and considering the oral as well as documentary evidence on record, learned first appellate Court came to a finding in paragraph 10 that it was difficult to hold that plaintiff no. 1 Bhago Kuer had in fact paid a sum of Rs. 1400/- to the defendant no. 1 out of the consideration money of Rs. 2487.50. Learned first appellate Court in its judgment, in view of the findings as noted above, held that no consideration money was paid by the vendee Bhago Kuer at the time of execution of the two sale deeds. Having held so, the first appellate Court recorded that the two sale deeds (Exhibits 2 and 2/A) were therefore such deeds for which no consideration amount had been paid and, therefore, title would not pass upon the plaintiffs. Learned first appellate Court held that no relief for declaration of title was sought by the plaintiffs and further by virtue of execution of two sale deeds the title did not pass to Bhago Kuer. In view of such findings, learned first appellate Court upset the finding arrived at by the learned trial Court and set aside the judgment and decree passed by the learned trial Court by its judgment dated 22.11.1986.

11. Mr. Anil Kumar Mukund, learned counsel appearing on behalf of the appellants has submitted that the first appellate Court illegally set aside the judgment of the trial Court without assigning proper reasons and dealing with the reasonings assigned by the learned trial Court while decreeing the suit in favour of the plaintiffs. Learned counsel for the appellants has submitted that it was evident from the sale deeds itself that an amount of Rs. 1400/- was paid and there was no other evidence on record to come to the conclusion that though there was recital in the sale deeds as regards payment of amount of Rs. 1400/-, the same was not paid. Learned counsel for the appellants has submitted that finding of the first appellate Court reversing the judgment of the trial Court is

contrary to evidence available on record. Referring to an observation made by the learned first appellate Court, learned counsel for the appellants has submitted that the first appellate Court totally misdirected itself while appreciating the evidence. The specific observation of first appellate Court as referred to by learned counsel made in paragraph 9 under appeal is being quoted hereinbelow:-

9..... If the aforesaid amount would have been paid at the registration office, it must have been paid within the view of the Registrar and in that case the Registrar would have made endorsement of this fact. There is no such endorsement by the Registrar in any of the documents. The recital of receipt on Exts. 2 and 2/A cannot, therefore, taken to be an evidence of payment of Rs. 1400/-.

12. Learned counsel for the appellants, referring to this observation has submitted that the learned first appellate Court took irrelevant things into consideration and based its judgment on completely wrong presumption. He would, accordingly, submit that the findings recorded by the first appellate Court are perverse. On the basis of the findings and other material available on record, learned counsel for the appellants submits that the present second appeal involves a substantial question of law as to whether the finding arrived at by the first appellate Court are perverse and contrary to the evidence on record. The other substantial question of law, according to Mr. Mukund, which the present second appeal involves is as to whether the first appellate Court was duty bound to deal with each and every reasoning of learned trial Court while disturbing the findings of learned trial Court.

13. Mr. Surendra Kishore Thakur, learned counsel appearing on behalf of the respondent, on the other hand, supporting the judgment and decree passed by the learned first appellate Court, has contended that recital in the sale deeds itself is not proof of payment of part consideration money of Rs. 1400/-. According to him, there was no evidence available on record before the Courts below to come to a conclusive finding that the said amount was in fact paid. Referring to the evidence of the plaintiffs' witnesses, learned counsel for the respondent has submitted that they are self contradictory as regards the place where the payment were said to have been made. He has contended that an intention of the original plaintiff could be assessed from her conduct that in spite of service of notice by the defendant they did not respond and file the suit after several months.

14. Learned counsel for the respondent has further contended that the present appeal does not involve any substantial question of law which would require determination by this Court in exercise of power u/s 100 of the CPC and further submits that the appeal is fit to be dismissed on this score alone.

15. Before I go into the rival contentions raised on behalf of the parties in the present second appeal I must point out that the second appeal was admitted by

order dated 7.8.1987. However, no substantial question of law which the second appeal involved was framed at the time of admission and issuance of notice to the respondents. This is also to be noted that even in the memo of appeal, the appellants have not framed any substantial question of law. Section 100 (3) of the CPC mandates that the memorandum of appeal shall precisely state the substantial question of law involved in the second appeal. Absence of such substantial question of law in the memo of appeal, in my view is a serious defect which cannot be cured at the stage of final hearing of the present second appeal. The High Court can exercise its jurisdiction u/s 100 of the CPC only on the basis of substantial questions of law which are to be framed at the time of admission of the second appeal and the second appeal has to be decided on the basis of such duly framed substantial questions of law. This, however, does not take away or abridge the power of the High Court to hear, for reasons to be recorded, the appeal on any other substantial question of law, not formulated by it, if it is satisfied that the case involves such question.

16. I am further of the view, on the basis of rival contentions made on behalf of the parties in the present appeal that no substantial question of law is involved in the present appeal and the dispute in the present appeal is confined over the fact that as to whether the amount of Rs. 1400/- was in fact paid by the original plaintiff to the original defendant no. 1 or not. The first appellate Court after having dealt with and analyzed the evidence, both oral and documentary came to a conclusive finding that the amount of Rs. 1400/- was not paid by the original plaintiff to original defendant no. 1 which cannot be said to be perverse without evidence or contrary to evidence on record. In view of the above, I do not find any reason to entertain this appeal and to interfere with the finding of the first appellate Court. The second appeal is, accordingly, dismissed.