
(2002) 03 JH CK 0051

In the Jharkhand High Court

Case No : Appeal from Appellate Decree No. 53 of 1991

Mathura Mahto and Another

APPELLANT

Vs

Jagdish Mahto

RESPONDENT

Date of Decision : 12-03-2002

Acts Referred:

Evidence Act, 1872 — Section 114, 91, 92

Citation : (2002) 03 JH CK 0051

Hon'ble Judges : Vikramaditya Prasad, J

Bench : Single Bench

Advocate : P.K. Prasad and V.K. Prasad, for the Appellant; Manjul Prasad, Binod Kumar and S.K. Sharma, for the Respondent

Final Decision : Dismissed

Judgement

Vikramaditya Prasad, J.—Defendants are the appellants.

2. The substantial question of law to be answered in this appeal is :

"Whether the learned Court of appeal below erred in reversing the finding of the trial Court to the effect that the plaintiff would be entitled to 1/3rd share in the property in suit only on the basis of the evidence of PW 3 to the extent that the plaintiff had paid a sum of Rs. 500/- and rest Rs. 500/- was paid by the defendants, although there was no such recital in Ext. 1 itself."

3. The aforesaid question arose out of the following short facts :

Certain piece of lands were transferred by a deed of sale vide Ext. 1 by the vendor to the following persons (1) Jagdish Mahto, son of late Neman Mahto, (2) Mathura Mahto and (3) Basudeo Mahto, both sons of Namchand Mahto. The consideration amount for the sale of the land was Rs. 1000/-. Both the parties remained in joint possession of the land and, thereafter, on 3.3.1996 the defendants, namely, Mathura Mahto and Basudeo Mahto gave out that this year they would take 2/3rd of the produce from Schedule-A land 1/3rd would be of

the plaintiff on the ground that in the sale-deed the names of the plaintiff and defendants are entered and therefore the defendants are laying claim that on the basis of their names they have got 2/3rd share. It was also claimed by the plaintiff that as per the demand of vendor the factum of passing the consideration amount to the extent of half by the plaintiff and having half share in the land and remaining half was contributed by the defendant and, thus, the plaintiff claimed that in the said land the plaintiff had got half share and the defendants together half share on that consideration the sale-deed was executed. It was also pleaded that the defendants were in cultivating the lands only to the extent of half share without any partition by metes and bounds and the produce is also appropriated accordingly. Thus, the claim is consideration for the purchase of the land was passed to the vendor and in that 50% i.e. Rs. 500/- was paid by Jagdish Mahto and remaining Rs. 500/- was paid by Mathura Mahto and Basudeo Mahto jointly and thus Jagdish Mahto had 50% share in the said land and Mathura Mahto and Basudeo Mahto have got 50% share in the said land and they are also in cultivating possession of that land according to their share. But because of the aforesaid claim of Mathura Mahto and Basudeo Mahto, the aforesaid suit was filed.

4. It appears that in the trial Court no issue was framed to decide exactly on this matter but an issue was whether the plaintiff is entitled to get a decree for partition of Schedule-A land and this discussion on this issue has been mentioned in paragraph 7 of the judgment. The learned trial Court found that in support of the payment of half and half consideration, thus, Rs. 500/-, the plaintiff examined Babuni Mahaton and Nando Mahaton as PW 2 and PW 3 who were vendors and they had stated before the Court in their evidence that they had sold half land to the plaintiff and half land to the defendants through one sale-deed and the defendants have given them Rs. 500/- towards the consideration amount and thus, this witness also proved before the Court below that both the parties were in cultivating possession and jointly used to distribute the crops but the witnesses did not say as to what ratio of the crops were used to be distributed. The learned trial Court considered that this admission of payment of half of the consideration by the plaintiff and half of the consideration by defendants is not mentioned in writing. DW 5 had been examined on behalf of the defendants and he has stated in his evidence that the consideration amount has been given by the purchasers jointly to the vendors as per contributing 1/3rd each and after obtaining the sale deed three purchasers occupied about 1 Acre each and the land was never cultivated jointly and he denied that half of the consideration amount was paid by the plaintiff. On consideration of the evidence and considering the backdrop of Sections 91 and 92 of the Indian Evidence Act and also considering the recital, the trial Court came to a finding that the plaintiff was not entitled to half share as claimed because his interest in the suit land cannot be more than 1/3rd share. Thus, the learned trial Court found that the consideration amount was not paid half and half by the plaintiff and the defendants, rather it was laid in the ratio of 1/3rd each.

Being aggrieved by the judgment and decree of the trial Court, the first appeal was filed and the learned 1st Appellate Court vide paragraph 16 of the judgment held that PWs 2 and 3, the vendors have come before the Court to give their version, who stated that the plaintiff paid half of the consideration amount.

There is nothing to disbelieve the version of the vendors they were the most competent witnesses because he was to depose on the point under consideration. Thus even according to the vendors, the share purchased by the plaintiff was to the extent of half and not 1/3rd, as alleged by the defendants. The learned Appellate Court vide paragraph 17 also examined that the land of Dar-raiyati khata, the share of the plaintiff, as referred to above, was half. There was no question of purchasing 1/3rd share by the plaintiff in the lands in which he had already got half share and this fact also lends support to the case of the plaintiff and in this view of the matter the finding of the learned trial Court was reversed.

5. In fact, the determination of the question involved herein depends upon the interpretation of Section 91 and 92 of the Evidence Act, Section 91 of the Evidence Act provides that evidence of terms of contract, grants and other dispositions of property if reduced to form the document, then the document itself or secondary evidence of its contents is admissible excepting the matter falling in one of the exceptions appended to that section.

6. Section 92 provides that when terms of any such contract, grant or other disposition of property or any matter required to be reduced to the form of a document, have been proved according to the last section, ie. Section 91, no evidence of oral agreement or statement shall be admitted, as between the parties to any such instrument or their representatives in interest, for the purpose of contradicting, varying, adding to or subtracting from, its terms. There are certain proviso appended to the section, which make certain exceptions and illustrations depicting the real intent of this section.

7. Thus, u/s 92, terms of such contract cannot be allowed to be contradicted, varied, added or subtracted from the terms. More basic question is whether the consideration by itself is a term of contract or whether it is a foundation of the contract, whereafter the terms of the contract do follow. For example, if some person has taken a lease and there is a consideration that on payment of such and such amount the lease deed be executed. Then in that circumstances, unless the consideration is paid, the lease cannot be executed and while framing the document, the terms with regard to the payment of rent of the premises, with regard to the maintenance of the leasehold properties etc, can be decided. But these terms do come after there being an agreement and the consideration has been agreed to be paid/paid. There may be cases when consideration is not paid and then it forms the part of terms the contract, then in that circumstances, the consideration may become a part of the term, but it is not a general situation. Thus, a consideration differs from the terms of the contract and therefore, when the question does arise as to whether the consideration passed or not, the matter has to be proved by evidence. Thus, in my view, consideration does not

become either a terms of the contract or a part of it, in the same manner, the date of execution of a particular deed or some error appearing in the name of the parties does not form the term of the contract and evidence can be led that the date of execution is wrong. In support of my view, I rely on a decision rendered in the case of *State Bank of India v. M/s. Premco Saw Mill, Ahmedabad & Ors.* AIR 1984 Guj 93.

8. This is a settled law that notwithstanding an admission in a sale deed that the consideration has been received it open to the vendee to prove that no consideration has actually been paid and that if it was not so, there would be a fraud at the grassroot. It is not an infringement of Section 92 of the Act for a Court to accept or to prove oral evidence between the vendee and the purchaser that consideration money was not passed by the purchaser and under the conditions agreed between them.

9. Learned counsel for the respondents, relying on a decision of our own High Court reported in 1995 (2) ALR 578 argued that in view of this decision, the oral evidence on the point of consideration would not have been taken. I have gone through the aforesaid judgment and find that in paragraph 11 of the aforesaid judgment, it has been considered that if the fraud was there, then the illegality can be proved and at best, a vendor and not. the defendants-appellants, can prove by oral evidence that no consideration was paid or recovered. The decisions rendered in *Most. Savitri Devi Vs. State of Bihar and Others*, and AIR 1984 Alla219 were taken into consideration, while coming to this finding.

10. In the case in hand, there is no question of fraud. The only question is whether when there is controversy as to how much of consideration has been paid by each of the vendees, can this be proved by oral evidence or not? In the cases where there is a single purchaser, it may be presumed that the total consideration was paid by him, but if there are more purchasers, and the controversy arises as to the ratio of contributions in passing of the consideration made by each of them and the documents are silent on the point, then, in my opinion, oral evidence can be led, even though there is no element of fraud. Either of the parties may lead evidence thereon. In the instant case, there are two sets of purchasers one is Jagdish Mahto son of late Neman Mahto and the other two purchasers are Mathura Mahto and Nasudeo Mahto, both sons of late Namchand Mahto. It is not a case that all these three persons are strangers and formed a partnerships contributing equally, even in that case a controversy may arise as to who contributed what. If I take the cue from the Section 114 of the Evidence Act, then the Court may presume the existence of any fact which it thinks likely to happen, regard being had to the common course of natural events human conduct and public and private business in their relation to the facts of the particular case. Now if the matter is examined from this angle that Jagdish Mahto was one person as a son of a particular man who was the first set of the purchasers and the rest two purchasers, who were full brothers, being sons of a particular different man constituted the 2nd set of the purchaser then

in that circumstances, regard being had to the common course of natural events that the two full brothers would jointly purchase a property in absence to contrary the other person will purchase it for his own purpose. Therefore in such a situation, human conduct shows that the full brothers would have borne the consideration jointly out of the total consideration and not separately. If this view is taken then if the consideration was Rs. 1,000/-, then definitely 50% of the consideration would have passed from Jagdish Prasad and the rest 50% would have passed by the two brother together. I am just saying it because u/s 114 one can presume any fact which it thinks likely to have happened and , when the matter came in controversy, then if the vendor himself came to prove not with regard to the terms of the contract but with regard to the payment of the consideration, then he is the most natural and competent witness and he cannot be disbelieved. Consequently the learned trial Court does appear to have erred in coming to the findings in question.

11. In the result, the judgment and decree of the first appellate Court is confirmed and the second appeal fails and the same is dismissed.