

(2002) 01 GAU CK 0006

In the Gauhati High Court

Case No : Second Appeal No's. 93 and 105 of 1989

National Grindlays Bank Ltd. (P) and Another

APPELLANT

Vs

Dibakar Sarma and Others

RESPONDENT

Date of Decision : 09-01-2002

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 101, Order 21 Rule 89, Order 21 Rule 90, Order 21 Rule 91, Order 21 Rule 92
Evidence Act, 1872 — Section 160, 161, 162, 68

Citation : (2002) 1 GLT 321

Hon'ble Judges : Ranjan Gogoi, J

Bench : Single Bench

Advocate : B.C. Talukdar and S.P. Roy, for the Appellant; S.P. Roy, for the Respondent

Final Decision : Dismissed

Judgement

Ranjan Gogoi, J.—Both the appeals having raised common question of law on identical facts and the challenge in both the appeals being in respect of a common judgment and decree passed by the learned lower appellate Court, both the cases have been taken up for consideration together and are being disposed by this common judgment and order.

2. In Second Appeal No. 93/89 there is no representation on behalf of the Appellant. In Second Appeal No. 105/89 Mr. S.P. Roy, learned Counsel for the Appellant has been heard. There is no representation on behalf of the contesting Respondents in either of the second appeals.

3. Before advertng to the merits of the grounds advanced in support of the questions of law framed and as also the question of law required to be additionally framed by this Court, a brief resume of the facts of Second Appeal No. 105/89 is considered necessary.

The principal Respondents in the said Second Appeal No. 105/89, as Plaintiffs,

instituted Title Suit No. 108/82 in the Court of the Assistant District Judge No. 1, Guwahati (now Civil Judge, Sr. Division) praying for a declaration that the auction sale of the suit land measuring 1 Bigha 2 Kathas held on 23.12.81 and the confirmation of such sale made on 26.02.82 in Title Execution case No. 7/78 arising out of Title Suit No. 32/73 as null and void. The further relief of setting aside the sale of the suit land and of delivery of possession to the Plaintiff as well as for temporary injunction restraining the Defendant No. 2 in the suit from disturbing the peaceful possession of the Plaintiffs were also prayed for. The reliefs prayed in the suit having been refused by the learned trial Court by judgment and decree dated 17.11.87. Title Appeal No. 1/88 was filed before the first appellate Court. The first appellate Court by judgment and decree dated 04.01.89 reversed the decree of dismissal and decreed the suit of the Plaintiffs giving rise to the present appeal by the Defendant No. 2 in the suit.

4. According to the Plaintiffs on 21.3.73 the Plaintiff No. 1 and 2 by registered sale deeds (Ext. 6 and 7) purchased 2 Kathas and 1 Bigha of land respectively (hereinafter referred to as "the suit land"). The aforesaid land purchased by the Plaintiffs and covered by Dag No. 1069 was adjacent to some other land purchased by the predecessor in interest of the pro forma Respondent No. 3 and 4 in this appeal not was covered by Dags No. 1033 and 1039. The predecessor in interest of the proforma Respondent No. 3 and 4, it is alleged, fraudulently obtained mutation of the land purchased by the Plaintiffs in their favour and executed a deed of mortgage noted 17.04.71 in favour of proforma Respondent No. 5 National Grindlays Bank. On the basis of the mortgage a loan was obtained by the said predecessor of proforma Respondent No. 3 and 4. Default of the loan having been taken place Title Suit No. 32/73 was instituted by the Bank for realisation of money loaned to the predecessor in interest of the proforma Respondent No. 3 and 4 by sale of the mortgaged property. In the aforesaid Title Suit No. 32/73 a judgment and decree was passed on admission by the Defendant in the said suit. The aforesaid decree which was in nature of preliminary decree was converted into a final decree on 01.07.73. It was by virtue of the aforesaid final decree of sale that the property purchased by the Plaintiff was sold in auction to the present Appellant who was Defendant No. 2 in the suit. It may also be noticed herein that the Plaintiffs had earlier instituted Title Suit No. 7/73 praying for declaration of their title in respect of the land purchased by them and for confirmation of possession. By judgment and decree dated 29.04.77 in Title Suit No. 71/73 the title of the Plaintiff in respect of the suit land was declared and their possession was confirmed.

5. Against the above stated backdrop, the question that have been formulated by this Court at the time of admission of the second appeal may be gone into. The aforesaid questions are extracted herein below:

(1) Whether the decree obtained in T.S. No. 32/73 instituted and decided earlier to the Title Suit No. 71/73 in which the present Appellant and the vendor of the Plaintiff-Respondents were not parties can be declared void on the basis of the

judgment and decree passed in Title Suit No. 71/73 and whether the decree in T.S. No. 71/73 is binding on the Appellant?

(2) Whether the decree passed in Title Suit No. 32/73 can be declared null and void without proof of title of the Plaintiffs over the suit land on the basis of sale deeds Ext. 6 and 7 the execution of which was denied by the vendor? And

(3) Whether the sale deeds Ext. 6 and 7 which were challenged could be acted upon without proof of their execution and whether the proof of Exts. 6 and 7 can be dispensed with?

6. A perusal of the judgment and decree under challenge would go to show that though Exts. 6 and 7, namely the sale deeds by which the property was claimed to have been purchased by the Plaintiffs was not proved by examination of the attesting witnesses, the learned lower appellate Court relying on the decree passed in Title Suit No. 71/73 thought it fit to declare title in respect of the suit land in favour of the Plaintiffs. Learned lower appellate Court in the course of arriving at the aforesaid finding noticed that in Title Suit No. 71/73 Exts. 6 and 7 of the present case were exhibited as Exts. 1 and 2 and the execution of the sale deeds were duly proved in the aforesaid title suit. Therefore the learned lower appellate Court thought it proper to hold that though in Title Suit No. 108/82 Exts. 6 and 7 were not proved, the title in respect of the Suit land in favour of the Plaintiff ought to be declared in view of the operative judgment and decree dated 29.04.77 passed in Title Suit No. 71/73 which decree had attained finality in law.

7. Learned lower appellate Court having found title of the suit land in favour of the Plaintiff, came to the further conclusion that the mortgage of the same suit land by the predecessor-in-interest of the Respondent No. 3 and 4 were fraudulent and unauthorised and, therefore, the mortgage executed by the aforesaid predecessor-in-interest in favour of the Bank was invalid and consequently the sale of the suit land affected in auction was also invalid. The learned lower appellate Court on the basis of the aforesaid findings came to the conclusion that title acquired by the present Appellant/Defendant No. 2 on the basis of auction purchase was not legal and valid and that the reliefs prayed in the suit ought to be allowed and the present Appellant/Defendant No. 2 would be at liberty to invoke his rights by instituting appropriate proceedings against the Bank.

8. The facts recited in the earlier part of this judgment would go to show that though the predecessor in interest of the proforma Respondent No. 3 and 4 did not have any title to the suit land, mortgaged the said land by executing the mortgage deed on 17.04.71. Such mortgage in respect of the 1B 2K of land in respect of which title has been found in favour of the Plaintiffs in Title Suit No. 71/73, the said mortgage of the suit land by the predecessor-in-interest of the proforma Respondent No. 3 and 4 was unauthorised. The decree obtained on the basis of such mortgage in Title Suit No. 32/73 and consequential proceedings by

way of auction sale of the property would therefore be equally void as the initial mortgage as the basis of such actions of sale, were found to be unauthorised. For the aforesaid reasons, this Court does not find any infirmity with the conclusion arrived at by the learned lower appellate Court on the basis of aforesaid facts.

9. Mr. S.R. Roy, learned Counsel for the Appellant also sought to raise several other question of law in view of the leave granted to the Appellant while admitting the appeal. In view of the leave granted by this Court, Mr. Roy, learned Counsel has been permitted to address the Court on such questions which he contend to be substantial questions of law. Mr. Roy relying on the ratio of decision of the Apex Court in the case of Urban Improvement Trust, Jodhpur Vs. Gokul Narain and another, has argued that any question of law going to the core of the matter or raising a question of nudity of the decree can be raised even at this stage. While the case cited concerns the permissibility of raising a question of nullity of the decree at the stage of execution. Mr. Roy may be correct that a pure question of law touching upon the pore of the dispute between the parties or otherwise raising the issue of nullity of the decree can be raised even at the stage of hearing of the second appeal. The absence of an already framed substantial question of law affecting and touching the nullity of the decree challenged, should not act as far for the Appellant to be permitted to raise such a question, if otherwise, such question can be legitimately raised on the materials on record. Leave to raise such other question of law having been granted by this Court, it will now be necessary to answer the submissions advanced on behalf of the Appellant.

10. Mr. Roy has firstly contended that the suit of the Plaintiff out of which the second appeal has arisen was based on Exts. 6 and 7 and the said documents not having been proved, the learned lower appellate Court could not have place reliance on Ext. 1 i.e. the judgment and decree passed in T.S. No. 71/73 declaring title in favour of the Plaintiff. In this connection Mr. Roy has submitted that the vendor of the Plaintiff having denied execution of Exts. 6 and 7, it was incumbent on the Plaintiffs to prove the said sale deeds (Exts. 6 and 7) in accordance with the provision of Section 68 of the Evidence Act. While Mr. Roy is correct in asserting that Exts. 6 & 7 were the foundation of the reliefs claimed in the suit and that Exts. 6 & 7 have not been duly proved, the conclusion which the learned Counsel contends is inevitable result of the said facts does not necessarily follow. Exts. 6 & 7 have been proved as Exts. 1 & 2 in T.S. No. 71/73. Proof of Exts. 6 and 7 in Anr. proceeding may not operate as an dispensation of proof of the said documents in the present proceedings. To that extent, Mr. Roy appears to be right. But Title Suit No. 71/73 has culminated in a decree dated 29.04.77 by which the learned trial Court had decreed the title of the Plaintiff over the suit land and the said decree has attained finality in law. Obviously, the decree operating in Title Suit No. 71/73 cannot be ignored. Mr. Roy has further submitted that the decree passed in TS No. 71/73 being dated 29.04.77 was at a later point of time to the decree obtained in T.S. No. 32/73. In the considered opinion of the Court the aforesaid facts does not make any substantial difference,

inasmuch as, by virtue of subsequent decree passed in T.S. No. 71/73 the validity of the mortgage executed on 17.04.71 and the proceedings in T.S. No. 32/73 on the basis of the said mortgage does get effected and that is precisely the basis of the finding recorded by the learned lower appellate Court in the judgment and decree under challenge. The aforesaid submission of Mr. Roy, therefore, cannot have the approval of this Court.

11. The next submission advanced by Mr. Roy is that the Plaintiff No. 2 had neither signed the plaint nor signed the power for the institution of the T.S. No. 108/82 and no power of attorney was executed in favour of the Plaintiff No. 1 to pursue the suit. On the said basis the learned Counsel seeks to persuade this Court to hold that the suit itself was not maintainable. I have perused the plaint and the power executed by the Plaintiffs. While it is correct that the Plaintiff No. 2 did not put her signature on the plaint, it is not correct to say that the power was not signed. Omission to sign the plaint is an irregularity which can be cured at a subsequent stage and the suit will not fall through for such irregularity. This is a matter which the Appellant ought to have raised in the proceedings before the Courts below. Mr. Roy contends that such question was raised, but not answered by the Courts below. I do not find any operative finding on the aforesaid question recorded by either of the Courts below, In any case, at this belated stage of the proceedings, I am not inclined to remand the matter to either of the Courts below for curing the irregularity. In view of the facts and events that have taken place in the meantime, this Court is not inclined to attribute any fatal defect; to the suit on account of the aforesaid omission.

12. The third contention advanced by Mr. Roy is that a substantial question of law concerning the maintainability of the suit arises on the ground that the suit land is included within the tribal belt and therefore under the provisions of Chapter X of the Assam Land and Revenue Regulations the alleged sale made in favour of the Plaintiffs is nonest in law. A perusal of the provisions contained in Chapter X of the Regulation, particularly. Sections 160, 161 and 162 clearly shows that the said provisions of the regulation visualise the declaration of tribal areas to which Chapter X applies by issuance of a notification in the official gazette. The contention of Mr. Roy that the suit land is included in the tribal area is founded on statement/admission made by the Plaintiff in his cross-examination. No notification showing inclusion of the area covered by the suit land in the tribal belt has been exhibited in the Courts below. A mere admission of the Plaintiff without reference to the boundaries of such areas and without the requisite notification on record cannot be conclusive of the matter. In any case, the question sought to be raised by Mr. Roy, as a substantial question of law, being a mixed question of law and facts and evidence with regard the notification not being on record. I am not inclined to accept the argument advanced by Mr. Roy.

13. The next point argued by Mr. Roy, learned Counsel for the Appellant is that under the provision of Order 21 Rule 101 CPC the question of right, title and interest of the Plaintiffs to the suit land, in view of the auction sale pursuant to

the decree passed in T.S. No. 32/73 and the purchase of the same by the present Appellant has to be decided in the execution proceedings arising out of the mortgage decree and not by way of a separate suit. I have perused the provision of Order 21 Rule 101 as well as Rules 97 and 99. Under Order 21 Rule 97 the decree holder or the auction purchaser, if obstructed, in course of obtaining possession of the property, is entitled to file an application before Execution Court and the question of right, title and interest is to be decided by the said executing Court. Judicial pronouncement of the Apex Court has somewhat broadened the scope and ambit of Order 21 Rule 97 CPC by holding that even if a person in possession, files an objection with regard to attempt to dispossess him either by the decree holder or the auction purchaser, the entitlement of the parties have to be decided in accordance with Order 21 Rule 101 read with Rule 97. In the instant case neither the decree holder nor the auction purchaser or for that matter the present claimant in possession have approached the executing Court. The Plaintiffs had instituted a separate suit and the auction purchaser namely the present Appellant had participated in the said suit. On the aforesaid facts it will be difficult to hold that Order 21 Rule 101 read with Rule 97 and 99 have any bearing to the facts of the instant case.

14. The last but certainly not least of the very strenuous argument raised by Mr. Roy is that once the auction sale has been confirmed under the provision of Order 21 Rule 92, the only remedy of person aggrieved is to file an application before the executing Court to set aside the sale and a fresh suit on the said cause of action is barred by the provision of Order 21 Rule 92. I have duly considered the submissions advanced by Mr. Roy and perused and considered the provisions of Order 21 Rules 89, 90, 91 and 92 of the Code of Civil Procedure. Mr. Roy is correct to the limited extent that a fresh suit by any person against whom an order has been passed in respect of the auction sale is barred. Such a person cannot be allowed to turn back and question the auction sale by way of a fresh suit. But the right of a third party to institute such a suit has been expressly recognized by the provisions of Order 21 Rule 92 Sub-clause (3) and (4). In fact the aforesaid sub-clauses inserted on the recommendation of the Law Commission by the 1976 Amendment imposes a condition precedent for such a suit i.e. the auction purchaser/decreed holder/judgment holder shall be impleaded as parties to the suit. In the instant case the auction purchaser has been impleaded as Defendant No. 2 and the decree holder as Defendant No. 1 as also the judgment debtor. The pre-conditions imposed by Sub-clause (4) to Rule 92 of the Order 21 have been duly complied with. For the aforesaid reasons, I am not inclined to accept the said submission of Mr. Roy.

15. Before parting with the record, this Court notices that the learned Court below in the judgment and decree under challenge thought it fit to leave open the right of the auction purchaser/Defendant No. 2 to institute a proceeding against the decree holder/Bank for refund of the money paid by him. Under the provision of Order 21 Rule 92(5) upon a decree being passed in the separate suit instituted by a third party, it is the duty and obligation of the Court to direct the

decree holder to refund the money to the auction purchaser and if such order is passed the execution proceeding in which sale took place, unless otherwise directed, shall stand revived at the stage at which sale was ordered. Having regard to age of the litigation this Court is not inclined to revive the execution proceeding, but having regard to the provision of Order 21 Rule 92(5) this Court considers it proper to direct the Bank i.e. the proforma Respondent No. 5 in the appeal to refund the money received from the Defendant No. 2.

16. Mr. Roy learned Counsel for the Appellant submits that the proforma Respondent No. 3 and 4 were minors and that the case has been decided adverse to their interest without appointing a guardian. The aforesaid persons alleged to be minors were impleaded as proforma Defendant Nos. 3 and 4 in the suit and no effective order has been passed against them. That apart, no grievance has been raised by the persons impleaded as proforma Defendant No. 3 and 4 and the Appellant must be kept confined to express such grievance which are only natural to his own character and cannot be permitted to expose the cases of Ors. in the suit.

17. In view of the discussions as aforesaid, the Second Appeal No. 105 of 1989 shall stand dismissed, but without any costs. Second Appeal No. 93/89 shall also stand disposed in terms of the present order.