

(2012) 08 CAL CK 0101
In the Calcutta High Court
Case No : S. A. No. 519 of 1994

Nepal Chandra Paria and Others

APPELLANT

Vs

Smt. Sushila Dinda and Others

RESPONDENT

Date of Decision : 14-08-2012

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 100

Citation : (2012) 4 CALLT 679 : (2013) 2 CHN 71

Hon'ble Judges : Tarun Kumar Gupta, J

Bench : Single Bench

Advocate : S.P. Roychowdhury and Mr. P.K. Giri, for the Appellant; Sudipta Moitra, P. Khanra, S. Khanra and Mr. P. Dey, for the Respondent

Final Decision : Dismissed

Judgement

Tarun Kumar Gupta, J.—This second appeal is directed against judgment and decree dated 22nd of December, 1992 passed by learned Additional District Judge, Midnapur in Title Appeal No. 86 of 1982 reversing the judgment and decree dated 30th September, 1991 passed by learned Additional Munsif, Garhbeta, Midnapur in Title Suit No. 9 of 1990. The appellants as plaintiffs filed said suit for partition in respect of "Ka" schedule property and for declaration of title and permanent injunction in respect of "kha" schedule property. The plaintiffs' case may be summarized as follows:-

One Ashidari had 1/4th share in "ka" schedule property and full share in "kha" schedule property. After death of Ashidari his wife Kampabala inherited and possessed said properties as his only legal heir. While Kampabala was in possession of said property she sold out the same to the plaintiffs by a registered sale deed dated 29th of January, 1960 and that since then the plaintiffs were in possession of said purchase properties. Due to inadvertance the plot numbers and areas were wrongly noted in the kobala. Taking advantage of erroneous entries in the record of rights the defendants were trying to disturb the peaceful possession of the plaintiffs in the suit property and hence was the suit for

partition as well as for permanent injunction.

2. The respondent defendants contested said suit by filing a written statement denying material allegations of the plaint and contending inter alia that while Kampabala was a minor the suit properties were sold out by her guardian father to these defendants by registered kobala dated 13th of June, 1960 and since then these defendants were in possession of the same and the record of rights were accordingly prepared. It was further case of the defendants that Kampabala being a minor in 1960 had no authority to sell out any property to anybody and that alleged sale deed dated 29.01.1960 was also vitiated by fraud and false personification. The defendants took an alternative plea that they got title to the suit property by way of adverse possession and that there was a previous partition of "ka" schedule property.

3. On the basis of the pleadings of the parties learned Trial Court framed several issues including an issue as to whether Kampabala was a minor in 1960 when the alleged sale deed dated 29.01.1960 was executed and whether plaintiffs acquired any title to the suit properties on the strength of their purchase deed dated 29.01.1960 alleged to be executed by Kampabala.

4. After contesting hearing learned Trial Court passed a decree vide judgment dated 30th of September, 1991. However, learned Lower Appellate Court set aside the said judgment by dismissing the suit by the impugned judgment dated 22nd of December, 1992.

5. At the prayer of the learned counsels of the parties the following substantial questions of law were formulated on which learned counsels argued.

1. Whether learned Lower Appellate Court substantially erred in law by reversing the findings of learned Trial Court that Kampabala was major in 1960 by misreading the evidence on record.

2. Whether learned Lower Appellate Court substantially erred in law by holding that the suit was not maintainable as it was framed without applying correct legal test.

6. Mr. S. P. Roychowdhury, learned senior counsel for the appellant plaintiffs, submits that plaintiffs' purchase deed dated 29th January, 1960 (Ext.1) was executed by Kampabala and was registered as per law. According to Mr. Roychowdhury apparent state of things to be taken as real one in absence of any evidence to the contrary and that the onus was upon the defendants who challenged said purchase deeds of the plaintiffs to show that Kampabala had no capacity to execute the same being a minor at the relevant point of time or that the same was executed by practising fraud. He further submits that initially there was a decree in favour of the plaintiffs which was challenged by the defendants in an appeal being Title Appeal No. 140 of 1988 and that it was allowed by remanding the case to the learned Trial Court permitting parties to adduce further evidence for determining the age of Kampabala in 1960 as the evidence

on record on that score, adduced by the parties, were found to be insufficient to come to a definite conclusion on that score. According to Mr. Roychowdhury though after said order of remand plaintiffs adduced further witnesses namely P.W.5, P.W.6 and P.W.7 to prove the age of Kampabala in 1960 while she executed the sale deed in favour of the plaintiffs, but the defendants failed to adduce any further evidence in support of their claim that Kampabala was a minor of about 9 years at the relevant time. Mr. Roychowdhury next submits that if Kampabala was really a minor in 1960 at the time of execution of the plaintiffs' purchase deed dated 29.01.1960 then she could have challenged the said document within three years of attaining her majority in terms of article 60 of the Limitation Act but no such step was taken by Kampabala. Mr. Roychowdhury further submits that the Kampabala's father had no authority to sell the suit property to the defendants by a deed dated 11.06.1960 (Ext.C) as guardian of Kampabala when Kampabala was really a major at that point of time and hence defendants did not acquire any title to the suit property on the strength of their alleged purchase deed (Ext.C) as Kampabala being a major already executed a sale deed dated 29.01.1960 (Ext.1) in favour of the plaintiffs. It is further submitted by Mr. Roychowdhury that plaintiffs filed challans (Ext.3 series) to show their possession of the suit property on payment of rent and that defendants were not entitled to get any advantage for wrong recording of the suit property in their name in the record of right. According to Mr. Roychowdhury learned Lower Appellate Court failed to appreciate the entire evidence on record in their true perspective and came to a wrong finding that plaintiffs failed to establish that Kampabala was major having authority to execute the sale deed dated 29.01.1960 (Ext.1) in favour of the plaintiffs. According to him, learned Lower Appellate Court wrongly reversed the well reasoned judgment of learned Trial Court by applying wrong legal test and that the impugned judgment and decree are not sustainable in law. In support of his contention he refers a case law reported in Santosh Hazari Vs. Purushottam Tiwai (Dead) by Lrs., wherein Hon'ble Apex Court held that where conflicting oral evidence were adduced before Trial Court and the Trial Court has decided the issue concerned on the basis of credibility of witnesses in that case Appellate Court ought not to interfere with the findings of Trial Judge on a question of fact unless the latter has overlooked some peculiar feature connected with evidence of witness or such evidence on balance is sufficiently improbable so as to invite displacement by Appellate Court.

7. Mr. Sudipta Moitra, learned counsel for the respondent defendants, on the other hand, submits that plaintiffs are bound to prove the case by adducing evidence and that they cannot succeed on the weakness, if any, of the defendants' case. He further submits that at the time of passing the order of remand in Title Appeal No. 140 of 1988 learned Trial Court was directed to permit the parties to adduce fresh evidence to prove the age of Kampabala in 1960 as well as to give an opportunity to the plaintiffs to take steps for local investigation to ascertain the correct plot number and area of the suit plots as

admittedly as per averments in the plaint there were mistakes on that score in the purchase deed of the plaintiffs, but no step was taken from the side of the plaintiffs to have local investigation in terms of said remand order. According to him, learned Lower Appellate Court was justified to hold that in absence of said local investigation it cannot be said with any certainty that the plots as well as areas mentioned in the plaintiffs' purchase deed were identical with suit properties as described in schedule "ka" and schedule "kha" of the plaint. He next submits that record of rights was standing in the name of the defendants and that the entries in the record of rights have presumptive value of correctness though said presumption was rebuttable. The plaintiffs, according to him, failed to rebut said presumption by adducing any convincing evidence. He next submits that the suit was not maintainable as two distinct properties with different distinct prayer were amalgamated in the suit. He further submits that Article 60 of the Limitation Act has no application whatsoever so far as plaintiffs' alleged kobala dated 29.01.1960 is concerned as it was not executed by the guardian of the minor. His last but not the least important submission is that whether Kampabala was a major or a minor in 1960 was a question of fact and that no substantial question is involved in the matter and that the second appeal should be rejected on that ground alone. In support of his contention he refers case laws reported in *Kondiba Dagadu Kadam Vs. Savitribai Sopan Gujar and Others*, , *Baidyanath Dutta and Others Vs. Radheshyam Dutta and Others*, and AIR 1959 SC 57 (*Deity Pattabhiramaswamy vs. S. Hanymayya*) to trial the limited scope of interference u/s 100 of the Code of Civil Procedure.

8. There was no denial that 1/4th share of the "ka" schedule property and entire "kha" schedule property belong to Ashidari and on his death the same devolved upon his wife Kampabala. It came out from evidence that plaintiffs produced one kobala dated 29.01.1960 (Ext.1) alleged to be executed by Kampabala in their favour relating to the suit property. Again admittedly, the defendants also produced one kobala dated 11.06.1960 (Ext.C) executed by the father of Kampabala as guardian of Kampabala relating to suit property. The moot question came up for decision before the Courts as to what was the age of the Kampabala at the relevant time i.e., in 1960. Admittedly what was the age of a person at a particular time is a pure question of fact. A question on fact even if decided wrongly or erroneously cannot be a ground of interference in the second appeal u/s 100 of the Code of Civil Procedure. However, if it can be shown that the findings of fact of the learned Lower Appellate Court was based on no evidence, or was based on extraneous matters or was passed by applying wrong legal test, then only the High Court in exercising its powers u/s 100 of the CPC can interfere treating the same to be a substantial question of law.

9. In order to prove the age of Kampabala in 1960 both the parties adduced oral as well as documentary evidence in support of their respective claims. While plaintiffs' claim that Kampabala was major in 1960 when she allegedly executed the kobala dated 29.01.1960 (Ext.1) in their favour, the defendants allege that Kampabala was only aged about 9 years at the relevant time and that on the

ground of said minority of Kampabala her father executed the kobala dated 11.06.1960 (Ext.C) for transferring the suit property in favour the contesting defendants. The defendants adduced oral evidence of D.W.1, D.W.3 (mother of Kampabala), D.W.5 and also the certificate of birth of the third issue of Karali (Kampabala's father) (Ext.A). The defendants tried to make out a case that Kampabala was the second issue but the eldest daughter of Karnali and that Pushpabala whose birth certificate (Ext.A) was produced was the third issue of Karnali and that the age gap of the issues were around three years. As per Ext.A. the date of birth of the third issue (female) of Karali Samanata of village Jamda was 03.06.1954. So according to the defendants in 1960 said third issue (Pushpabala) was aged about six years and Kampabala being the second issue of Karali having three years age gap was about 9 years of age.

10. On the other hand, oral evidence of P.W.2, P.W.5 and P.W.7 and birth certificate showing birth of a female child of Karnali in 1940 (Ext.2) show that Kampabala was aged around 19 to 20 years at the time of execution of said kobala (Ext.1) in their favour and that Kampabala being major lawful title passed to the plaintiffs. Learned Trial Court accepted said evidence adduced on the side of the plaintiffs and accordingly passed the decree. It appears from the impugned judgment of learned Lower Appellate Court that said birth certificate of 1940 (Ext.2) did not disclose the identity of the child and as such learned Lower Appellate Court in the earlier occasion (Title Appeal No. 140 of 1988) did not put any reliance on the same and permitted the parties to adduce further evidence on the point of age of Kampabala. It further appears that learned Lower Appellate Court also analyzed the oral evidence of P.W.5, P.W.6 and P.W.7 as adduced by the plaintiffs after the order of remand, and came to a finding of fact that said evidence was not at all consistent or reliable to prove the age of Kampabala. It is true that after the order of remand the defendants did not adduce any evidence to prove the age of Kampabala. But the plaintiffs' case must stand on its own legs and that weaknesses of the defendants' case cannot prove plaintiffs' case. learned Lower Appellate Court analyzed the evidence of those subsequent witnesses examined by the plaintiffs namely P.W.5, P.W.6 and P.W.7 together with other evidence on record to come to a finding of fact that the age of Kampabala could not be ascertained with any certainty by the evidence on record adduced by the parties of the cases. At the time of hearing of the second appeal there is no scope of substituting the findings of fact of learned Lower Court with the findings of fact of this Court even if there is scope of coming to a different findings of fact on the basis of evidence on record. At the time of hearing of the second appeal u/s 100 of the CPC this Court cannot act as the third Court of findings of fact. It came out that at the time of hearing of the suit in the Trial Court Kampabala was alive but neither party cared to bring Kampabala in the witness box. As I have already stated that it is always the headache of the plaintiff to prove his case. The non-examination of Kampabala went against the plaintiffs though it may not go in favour of the defendants.

11. As per plaintiff's case as well as evidence there were alleged errors crept in

the purchase deed of the plaintiffs regarding plot number as well as area. In view of said admitted discrepancies learned Lower Appellate Court in the first instance while passing the order of remand in Title Appeal No. 140 of 1988 gave liberty to the plaintiffs to pray for local investigation for relayment of the suit property for ascertaining whether the lands purchased by the plaintiffs through Ext.1 were really the lands as described in the schedule of the plaint. But the plaintiffs did not care to take the advantage of said order of remand by praying for appointment of a local Investigation Commissioner. As such, learned Lower Appellate Court rightly held that the suit property was not also definite for passing any decree. It also came out from the documents on the record that though the plaintiffs made a prayer for partition relating to "ka" schedule property but all the co-sharers were not made parties to the suit.

12. In view of the discussions made above, I am of opinion that the impugned judgment of learned Lower Appellate Court cannot be said to be perverse on any of the grounds as stated above, requiring interference by this Court u/s 100 of the Code of Civil Procedure.

13. As a result, the appeal is hereby dismissed on contest.

14. However, I pass no order as to costs.

15. Send down Lower Court record along with a copy of this judgment to Lower Court at the earliest. Urgent photostat certified copy of this judgment be supplied to learned counsels of the parties, if applied for.