

**(2019) 08 CAL CK 0001**

**In the Calcutta High Court**

**Case No : Civil Second Appeal (SA) No. 67 Of 2015**

Paritosh Kumar Basu

APPELLANT

Vs

Sandhya Basu & Ors

RESPONDENT

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**Date of Decision : 01-08-2019**

**Acts Referred:**

Specific Relief Act 1963 — Section 26, 26(1)(b), 26(1)(c)  
Evidence Act, 1872 — Section 91, 92  
Registration Act, 1908 — Section 49  
Limitation Act, 1963 — Article 113

**Citation : (2019) 08 CAL CK 0001**

**Hon'ble Judges : Bibek Chaudhuri, J**

**Bench : Single Bench**

**Advocate : Partha Pratim Roy, Suchindram Bhattacharjee, Gopal Chandra Ghosh, Arnab Roy**

**Final Decision : Dismissed**

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## **Judgement**

Bibek Chaudhuri, J

1. This second appeal arises out of a judgment and decree of reversal passed by the lower appellate Court whereby the learned judge in First Appellate Court set aside the judgment and decree passed by the trial court in a suit for partition and permanent injunction.

2. One Monotosh Kumar Basu, predecessor-in-interest of the present appellant filed a suit for partition and permanent injunction against the defendant/appellant in the 1st Court of the learned Civil Judge (Senior Division) at Barasat which was registered as Title Suit No.171 of 2004. It was the case of the plaintiff that the father of the parties, namely, Srish Chandra Basu, since deceased, was the recorded owner of a piece of property mentioned in detail in schedule A to the plaint. By virtue of a registered deed of gift dated 15th March, 1976, the said Srish Chandra Basu transferred entire 'A' schedule property in equal share to the plaintiff and defendant. Both of them accepted the said gift and they are in joint

possession of the said property. The plaintiff further pleaded that by virtue of a registered deed of sale, he and the defendant jointly purchased 2.5 decimal of land from one Ranu Bhattacharya on 10th March, 1975. The said property is described in schedule 'B' to the plaint and mentioned hereafter as 'B' schedule property. Since the date of their purchase, both the plaintiff and defendant has been possessing 'B' schedule property jointly. Since the date of death of their father, the parties are separated in mess. The plaintiff alone spent money for maintenance of the building situated on the suit property. He alone has been paying electricity charges etc. Therefore, the requested the defendant to effect amicable partition of the suit property, but the defendant flatly refused such proposal. So, the plaintiff filed Title Suit No.171 of 2004 for partition and other consequential reliefs.

3. The defendant contested the suit by filing written statement. Specific case of the defendant is that he has no right, title and interest over B schedule property. The defendant claimed to be absolute owner of 'B' schedule property because he paid entire consideration money to purchase the said property out of his own fund. However on the date of registration of sale deed in respect of 'B' schedule property, the defendant was very much busy for medical treatment of his sister's husband and requested the plaintiff, being his elder brother to make arrangement for registration of the deed of sale of the said property. Taking advantage of his absence, the plaintiff cleverly inserted his name as one of the co- purchasers of 'B' schedule property in the deed of sale. When such illegal and fraudulent act of the plaintiff came to the knowledge of the defendant, he enquired into the matter and the plaintiff made a declaration in writing admitting his unlawful act and further declaring that he had no right, title and interest over 'B' schedule property. The original deed of sale is in custody of the defendant all long since the date of his purchase. In respect of 'A' schedule property, the defendant pleaded that though the father of the parties transferred the said property to his both sons, it was never intended by the donor that the donees would effect partition of 'A' schedule property. All other allegations made out against him in the plaint were denied.

4. On the basis of the pleadings of the parties, the trial court framed the following issues:-

- 1) Is the suit barred by limitation?
- 2) Is there any unity of title in respect of the "B" schedule property between the parties?
- 3) Are the parties co-sharers in the "B" schedule property?
- 4) Is the plaintiff entitled to get the relief as prayed for?
- 5) Is the suit maintainable in its present form and prayer?
- 6) Has the plaintiff any cause of action?

7) To what other relief or relieves the plaintiff is entitled for?

#### ADDITIONAL ISSUE NO.8

8) Whether the plaintiff make any payment to purchase the "B" schedule property or the defendant paid the entire consideration thereof?

5. The learned trial judge on due consideration of the pleadings evidence on record adduced by the parties to the suit both oral and documentary passed preliminary decree declaring equal share of the parties in respect of 'A' schedule property. In respect of 'B' schedule property, trial court held that the said property was purchased alone by the defendant from his own fund and the plaintiff is not a co-sharer in respect of 'B' schedule property. Accordingly, he is not entitled to a decree for partition.

6. Plaintiff preferred an appeal against the judgment and decree passed in Title Suit No.171 of 2004 before the 2nd Court of the learned Additional District Judge, North 24 Parganas at Barasat. The said appeal was registered as Title Appeal No.35 of 2008.

7. By a judgment and decree dated 17th June, 2015, the learned judge in First Appellate Court allowed the appeal setting aside the judgment and decree passed in Title Suit No.171 of 2004. Thus, the plaintiff's share in 'B' schedule property was also declared and the suit for partition filed by the plaintiff was decreed in preliminary form in respect of both 'A' and 'B' schedule property.

8. The instant appeal at the instance of the defendant was admitted on the following substantial question of law.

"When the plaintiff himself admitted that he was not paid the consideration money for purchasing the "B" schedule property and has not acquired any title therein, whether the learned First Appellate Court was justified in passing a preliminary decree for partition in respect of "B" schedule property where the plaintiff does not claim any title?"

9. Mr. Partha Pratim Roy, learned Advocate for the defendant/appellant submits that the lower appellate court wrongly held that both the appellant and predecessor-in-interest of the respondents were joint owners of the said 'B' schedule property. It is not, disputed that the deed of purchase (Exhibit-C) stands in the names of both the appellant and the predecessor of the respondents. Therefore, the lower appellate court held that it was very difficult to hold that the plaintiff put his name as one of the joint purchasers fraudulently in the said deed of purchase.

10. It is urged by Mr. Roy that the scope of this appeal, or, in other words, substantial question that requires to be decided in this appeal is very limited. The plaintiff himself admitted by executing a document that he did not pay any consideration money for purchasing 'B' schedule property and therefore, has not acquired any title over the said property. The said declaration was made in

writing on the letter head of his proprietorship business by the original plaintiff, since deceased on 24th April, 1980. The lower appellate court failed to appreciate that the deed of purchase was all along in custody of the defendant/appellant. The stamp paper was purchased in his name alone. The declaration and signature of the plaintiff below the said declaration relinquishing his title over 'B' schedule property was marked Exhibit-A series during trial of the suit. The plaintiff himself admitted his signature on Exhibit-A. No case was made out by him that Exhibit-A was manufactured one or that it was obtained by practicing fraud. Therefore, learned lower appellate court committed substantial error in law and failed to appreciate probative value of Exhibit-A and Exhibit-C.

11. According to Mr. Roy, Exhibit-A is clear admission on the part of the plaintiff to the effect that he did not spend any money to purchase 'B' schedule property. If the consideration money is not paid by the plaintiff for purchasing 'B' schedule property, he cannot claim title over the said property. Exhibit-A is a clear admission made by the plaintiff way back on 24th April, 1980. According to Mr. Roy, Exhibit-A is a clear statement of fact which dispenses or waives with the necessity of proving the fact against him. In support of his contention, he relies upon a decision of the Hon'ble Supreme Court in the case of Nagubai Ammal & Others vs. B. Shama Rao & others reported in AIR 1956 SC 593. Paragraph 18 of the said report is relevant for our purpose and relevant portion is quoted below:-

"18. An admission is not conclusive as to the truth of the matters stated therein. It is only a piece of evidence, the weight to be attached to which must depend on the circumstances under which it is made. It can be shown to be erroneous or untrue, so long as the person to whom it was made has not acted upon it to his detriment, when it might become conclusive by way of estoppel."

12. Mr. Gopal Chandra Ghosh, learned Advocate for the respondent, on the other hand, submits that the appellants claimed that 'B' schedule property was purchased by the money of the original defendant, since deceased by dint of a registered deed of sale dated 10th March, 1975. On the date of registration, the defendant could not be present. He entrusted his elder brother, the original plaintiff to get the said deed of sale executed and registered. The plaintiff, taking advantage of the absence of the real owner, i.e., the original defendant, inserted his name in the deed of sale along with the defendant as if they jointly purchased 'B' schedule property. Mr. Ghosh has also pointed out that the deed of sale (Exhibit-C) was executed on 10th March, 1975 and the plaintiff allegedly made a declaration relinquishing his title over the said property on 24th April, 1980.

13. According to Mr. Ghosh, title of a person in respect of an immovable property does not relinquish on the basis of a purported declaration made by a co-sharers. He goes to the extent that in the instant appeal, substantial question of law was not properly formulated at the time of admission of the appeal in as much as the plaintiff never admitted the contents of Exhibit-A series. Therefore, the contents of Exhibit-A series cannot be treated as admission as against the original plaintiff, since deceased. Learned Court of first appeal passed preliminary decree for

partition on the ground that a registered deed of sale is a conclusive proof of title of the purchaser(s). In the instant case, title of the plaintiff does not extinguish by an unregistered declaration. In other words, Exhibit-A/2 does not confer title to the defendant absolutely and exclusively.

14. Mr. Ghosh next draws my attention to the contents of Exhibit-A/2. By making declaration, the plaintiff declared that whenever the defendant would demand, he could execute deed of relinquishment of his title in 'B' schedule property. Therefore, the parties are aware about the requirement of a deed of relinquishment or release or rectification to be executed by the plaintiff if the defendant's claim of absolute ownership over the said property is to be established. Till date, the plaintiff does not execute any such deed. The original defendant or his legal heirs and representatives never demanded or took any legal step against the plaintiff/respondent for execution and registration of a deed in favour of him/them relinquishing or releasing his title over the 'B' schedule property. In fine, a declaration (Exhibit-A series) does not confer any title in favour of the defendant/respondents.

15. Mr. Ghosh next refers to the provisions of Section 91 and 92 of the Indian Evidence Act and Section 49 of the Registration Act. It is submitted by Mr. Ghosh that Section 91 of the Indian Evidence Act puts an embargo on reception of oral evidence about the terms of a document when the terms in the contract, grant or disposition of property required by law to be reduced in writing, have been embodied in the deed itself. Section 92 stipulates that when a written document is proved under Section 91 of the Evidence Act, no amount of oral evidence is admissible for contradicting, varying, adducing to or substituting from the terms thereof. Mr. Ghosh further submits that Section 49 of the Registration Act permits, inter alia, proof of collateral transaction not required to be effected by registered document, although the document is inadmissible for want of registration.

16. Relying on the above mentioned principles of law, Mr. Ghosh submits that probative value of Exhibit-A series should be considered in the light of the statutory provisions subject to admissibility of a document in evidence and its probative value. Even if the document was admitted in evidence by marking it as Exhibit, viz. Exhibit-A it does not ipso facto take away title of the plaintiff over 'B' schedule property. Title can only be extinguished by a registered deed. In the absence of such registered deed, the defendant cannot claim absolute ownership over the said property.

17. In reply, Mr. Roy submits that Exhibit-A is merely a declaration made by the original plaintiff, since deceased to the effect that he had no title over 'B' schedule property. Necessity of deed of relinquishment or release or rectification is necessary under Section 26 of the Specific Relief Act when the person executing such deed of relinquishment or release or rectification has the title over the property in question. Exhibit-A was executed by the plaintiff to declare that he did not spend any money for purchasing the 'B' schedule property. In order to

claim ownership by sale, plaintiff was required to prove that he contributed towards the consideration price at the time of purchase of 'B' schedule property. The evidence on record shows that the plaintiff failed to prove payment of consideration money or any part thereof for purchasing 'B' schedule property. Therefore, plaintiff did not acquire title over the said property. In such a case, Section 26 of the Specific Relief Act is not applicable and the learned Court of Appeal failed to appreciate that Exhibit-A ought to have been taken into consideration as an evidence of collateral transaction, not required to be effected by registered document.

18. It is further contended by Mr. Roy that in a suit for partition between the co-sharers, the material issue for adjudication is as to whether the parties are the co-sharers in respect of the property or any part thereof is absolutely owned by any of the parties to the suit. In a suit for partition such declaration like that of Exhibit-A can be used for collateral purposes to arrive at a decision as to whether a piece of property is a joint property or individual property absolutely owned by one of the parties to the suit. Thus, Mr. Roy concludes that the learned judge in lower appellate court committed substantial error in law failing to appreciate probative value of Exhibit-A.

19. In Chinnappa Reddy Gari Muthyala Reddy vs. Chinnappa Reddy Gari Venket Reddy reported in AIR 1969 AP 242, the Division Bench of the AP High Court has held that the whole process of partition contemplates three phases, i.e., severance of status, division of joint property by metes and bounds and nature of possession of various shares. In a suit for partition, an unregistered document can be relied upon for collateral purpose, i.e., severance of title, nature of possession of various shares but not for the primary purpose, i.e., division of joint properties by metes and bounds. An unstamped instrument is not admissible in evidence even for collateral purpose, until the same is impounded.

20. In K. B Saha and Sons Pvt. Ltd vs. Development Consultant Ltd. reported in (2008) 8 SCC 564, the Hon'ble Supreme Court summarized the probative value of an unregistered document which is required to be registered by law in relation to Section 49 of the Registration Act. Paragraph 34 of the above mentioned decision is relevant for our purpose and quoted below:-

"34. From the principles laid down in the various decisions of this Court and the High Courts, as referred to hereinabove, it is evident that :-

1. A document required to be registered is not admissible into evidence under Section 49 of the Registration Act.
2. Such unregistered document can however be used as an evidence of collateral purpose as provided in the Proviso to Section 49 of the Registration Act.
3. A collateral transaction must be independent of, or divisible from, the transaction to effect which the law required registration.
4. A collateral transaction must be a transaction not itself required to be effected

by a registered document, that is, a transaction creating, etc. any right, title or interest in immoveable property of the value of one hundred rupees and upwards.

5. If a document is inadmissible in evidence for want of registration, none of its terms can be admitted in evidence and that to use a document for the purpose of proving an important clause would not be using it as a collateral purpose."

21. In course of his submission Mr. Roy has repeatedly urged that Exhibit-A ought to have been considered by the learned First Appellate Court for collateral purpose. In K. B Saha (supra) it is clearly held that "a collateral transaction" is a transaction not itself required to be effected by a registered document, that is, a transaction, creating etc, any right, title and interest in immovable property of value of one hundred rupees and upwards. The expression "collateral purpose" is no doubt a very vague one and court must decide in each case where the purpose for which it is sought to use the unregistered document is really a collateral one or is to establish title directly to the immovable property sought to be conveyed by the document. But by the simple device of calling "collateral purpose", a party cannot use the unregistered document in any legal proceedings to bring about indirectly the fact which would have had if registered.

22. Bearing the above mentioned principle, let me now consider as to whether Exhibit-A can be used for collateral purpose to deny title of the original plaintiff, since deceased over 'B' schedule property. The learned Counsel for the appellant tries to impress upon me that by executing Exhibit-A the original plaintiff relinquished his title or right of ownership over the 'B' schedule property. When the plaintiff himself declared that he did not pay any consideration money for purchasing the said property, the said document can be taken into consideration to hold that the plaintiff had no title over the said property.

23. It is needless to say that relinquishment of title by a declaration by one of the co-sharers in whose name a registered title deed (Exhibit-C) exists cannot be said to be a collateral transaction and ownership can only be relinquished by a deed which is also compulsorily registrable. It is also pertinent to mention that Exhibit-A was executed by the plaintiff on 24th April, 1980. In course of evidence, DW1 stated on oath that the sale deed executed on 10th March 1975 (Exhibit-C) was in his custody from the very beginning. Therefore, the predecessor of the appellants had the knowledge immediately after registration of the said deed of purchase that it was registered both in his name as well as in the name of the original plaintiff. Again the defendant had the knowledge through Exhibit-A on and from 24th April, 1980 that the plaintiff was agreeable to execute a deed of relinquishment of his title over 'B' schedule property as and when required. The suit for partition was filed in the year 2004. The defendant did not make any attempt within three years from the registration of the said deed of sale or within the said period of limitation from the date of declaration made by the plaintiff to get a deed of relinquishment or release or rectification executed by the plaintiff. Therefore, the claim of absolute ownership in 'B' schedule property by the defendant/respondent is hopelessly barred by limitation

under Article 113 of the Limitation Act. In *Sambhu Nath Dalal and Anr. vs. Radharaman Middya and others* reported in (2003) 1 CLT 301 (HC) a question which fell for consideration of the Division Bench of this Court is as to whether or not the title when conveyed through registered instrument bore a mistake about the description of the plot, which, if remains alive until rectification of a registered deed; whether or not if relief for rectification of an instrument can be granted till specifically claimed; whether or not any party can claim for rectification either as a party to the suit or the representative-in-interest, who may institute a suit to have the instrument rectified; whether or not a suit for declaration is maintainable without rectification and whether or not the period of limitation is three years from the date of discovery of mistake. The Division Bench of this Court held, inter alia, that:-

"The title is conveyed through a registered document. If the particulars of a plot is wrongly described, though it can be understood from other relevant facts, yet it remains a mistake, requiring rectification of the deed registered under the Registration Act or through a suit filed under section 26 of the Specific Relief Act. From a plain reading of the section, it appears that the said provision provides that such rectification may be made or asked for by either of the parties or the representative in interest, who may institute a suit to have the instrument rectified. Such preference may also be made in any other suit in which incidentally such question may arise either by the plaintiff or by the defendant as provided in clauses (b) and (c) of section 26 of sub-section (1) of the Specific Relief Act. Sub-section (4) provides that no relief for rectification of an instrument can be granted to any party unless it is specifically claimed.

Section 26 is an enabling provision. It enables a transferee to seek relief by rectification. But such rectification is not the only remedy. Section 26 makes it clear that (1) it can either be pleaded in the pleadings; or (2) such pleadings can be brought about at any stage of the suit by way of amendment; (3) the relief can be sought for by either of the parties; (4) the relief can be had at any stage of the suit; (5) even if it is not asked for, the Court is not precluded from granting such relief after allowing leave to ask for such relief to the parties.

The limitation with regard to the relief is related to person, who has come to the Court. The limitation is governed under Article 113 of the Limitation Act, 1963, which is tree years either from the execution of the document or from the date of notice or knowledge about the mistake. The time would commence to run from the date of discovery of the mistake. There cannot be any time limit for discovery of the mistake."

24. The principles enunciated in the above mentioned decision is squarely applicable under the facts and circumstances of the case. Title acquired by virtue of a registered document cannot be unsettled by a mere declaration.

25. For the reasons stated above, I do not find any scope to interfere with the impugned judgment and decree passed by the learned First Appellate Court.



26. Accordingly, the instant appeal be and the same is dismissed on contest, however without cost.

27. Judgment and decreed passed in Title Appeal No.35 of 2008 dated 17th June, 2015 by the learned Additional District Judge, 2nd Court, North 24 Parganas at Barasat is hereby affirmed.

Urgent certified website copies of this judgment, if applied for, be supplied to the parties subject to compliance with all requisite formalities.