

(1991) 02 GAU CK 0002
In the Gauhati High Court
Case No : Second Appeal No. 87 of 1984

Ram Prasad Gowala

APPELLANT

Vs

Jogesh Goswami and Others

RESPONDENT

Date of Decision : 05-02-1991

Acts Referred:

Assam (Temporarily Settled Areas) Tenancy Act, 1971 — Section 3, 40, 50, 8, 91

Citation : (1991) 2 GLR 136

Hon'ble Judges : B.P. Saraf, J

Bench : Single Bench

Advocate : B.K. Das and B. Banerjee, for the Appellant; S.R. Bhattacharjee, for the Respondent

Final Decision : Dismissed

Judgement

B.P. Saraf, J.—This appeal of the Plaintiff's directed against the appellate judgment and decree passed by the Assistant District judge, Karimganj modifying the judgment and decree of the Munsiff No. 2, Karimganj in Title Suit No. 88/79.

2. The case of the Appellant/Plaintiff before the trial Court was that the Defendant No. 1, on receipt of a sum of Rs. 3, 000/-, executed a "Swaranlipi" on 10.4.78 agreeing to transfer his jote right in respect of 4 bighas of land referred to as "suit land" after final khatian was issued in his favour and delivered possession of the same forthwith to the Plaintiff. Thereafter though final, khatian was issued in his favour he did not execute the sale deed in terms of agreement of sale. On the other hand, he executed a deed in favour of the Defendant No. 2 in respect of a part of the said land measuring if bighas out of 4 bighas agreed to be sold to the Plaintiff. The Plaintiff, therefore, filed a suit for direction to the Defendant No. 1 to execute a registered sale deed in respect of jote right over the suit land in favour of the Plaintiff, confirmation of Plaintiff's possession over the same and issue of permanent injunction against the Defendants restraining them from interfering with the possession of the Plaintiff. The suit was contested

by both the Defendants. The learned trial Court, Munsiff, Karimganj, held the transfer of 2 bighas of the land by the Defendant No. 1 to Defendant No. 2 as violative of Section 8 of the Assam (Temporarily Settled Areas) Tenancy Act, 1971, on the ground that the Defendants being a "tailor" and he having admitted in cross examination that he did not cultivate the land him-self, could not be termed as an agriculturist. The trial Court also held that there was a valid agreement executed by the Defendant No. 1 in favour of the Plaintiff agreeing to sell the suit land to him and accordingly, decreed the suit and directed the Defendant No. 1 to execute the sale deed of the suit land in favour of the plaintiff within 30 days from the date of order. On appeal, the learned Assistant District Judge reversed the finding of the trial Court to the effect that the Defendant No. 2 was not an agriculturist. It was observed that though the Defendant No. 2 had a tailoring shop, he had also agricultural land. The learned appellate Court, there-fore, held that the fact of running a tailoring shop by itself did not in any way mitigate against the claim of the Defendant No. 2 that he was an agriculturist. An agriculturist might also run a side business and running of such business does not make him a non-agriculturist, if he is otherwise an "agriculturist" within the definition of "'agriculturist" contained in the Act. The learned appellate Court also held that there was no evidence to justify a conclusion that the Defendant No, 2 had any knowledge of the agreement to sell the suit land between the Plaintiff and the Defendant No. 1 In view of the aforesaid findings, the learned first appellate Court held the sale of a part of the suit land by the Defendant No. 1 to Defendant No. 2 as sale to an agriculturist in conformity with the requirements of Section 8 of the Act. The Court also held that the purchase of 2 bighas of land by the Defendant No. 2, being with-out any knowledge of any prior agreement of sale, was a valid sale which remained unaffected by the same the learned appellate Court, therefore, modified the decree of the trial Court and directed the Defendant No 1 to execute a sale deed in respect of the balance 2 bighas of the suit land in favour of the Plaintiff, It was also declared that the Plaintiff was entitled to a sum of Rs. 1500/- as compensation for his failure to execute the sale deed in respect of the balance 2 bighas of land. The Plaintiff, is in second appeal before this Court against this appellate judgment.

3. The first question of law that arises for consideration is whether the sale in question by the Defendant No. 1 to Defendant No. 2 was hit by Section 8 of the Assam (Temporarily Settled Areas) tenancy Act, 1971. Section 8 of the Act puts a restriction on the right of transfer of a occupancy tenant. Ho cannot transfer his holding to a non - agriculturist; Such transfer, if made, is void u/s 50(b) of the Act. The question to be decided is whether the Defendant No. 2 in the instant cases Was an agriculturist or not. The burden of proof in such a case lies on the Plaintiff. It appears that not to speak of evidence, no such plea Was taken even in the pleadings. From the pleadings, it is evident that it was never the case of the Plaintiff that the sale in question was invalid on the ground that the Defendant No 2 was a non-agriculturist. The Defendant No. 2 in fact had shown

his occupation as "cultivation". There was no pleading, no issue nor any evidence to the effect that the Defendant No. 2 was not an agriculturist. The only material on record on the basis of which such an argument was advanced (sic) by the counsel for the Plaintiff in course of hearing of arguments before the trial court was an answer given by the Defendant No. 2 to a question put to him in cross examination that he had a tailoring shop. The counsel for the Respondent submitted that such a plea cannot be allowed to be raised for the first time in course of argument. If that was the case of the Plaintiff, it should have been incorporated in the pleadings--proper issue should have been framed and evidence adduced by the Plaintiff to prove his case. The counsel for the Appellant, however, submitted that all the aforesaid objections are technical in nature and should not stand on the say of a decision on the point raised by the Appellant even in course of argument as it would materially effect the decision of the Court. He relied on two decisions of the Supreme Court in *Nedunuri Kameswaramma v. Sampoti Subha Rao* AIR 1963 SC 885 and *Bhagwati Prasad Vs. Shri Chandramaul*,

4. I have considered the rival submissions. I have also carefully perused the two judgments of the Supreme Court on the subject. I, however, do not find that these judgments in any way support the submission of the Appellant. In fact, in the aforesaid judgments, the Supreme Court had observed that consideration of form should not over-ride the legitimate consideration of substance. It was also observed that if a plea is not specifically made and yet it is covered by an issue by implication and the parties knew that the said plea was involved in the trial, then the mere fact that the plea was not expressly taken in the pleadings would not necessarily disentitle a party from relying upon it if it is satisfactorily proved by evidence. It was further observed that what the Court has to consider in dealing with such an objection is that did the parties know that the matter in question was involved in the trial, and did they lead evidence about it. If that was so, the argument that a particular matter was not expressly taken in pleading would be purely formal and technical. The principle laid down by the Supreme Court in the afore-said judgments, however, have no application to the facts of the present case where the undisputed factual position is that not only any plea of the sale being invalid on the ground of Defendant No. 2 being a non-agriculturist had not been taken in the pleadings, there was no evidence led about it. No such question was involved in the trial. The Defendants could not have known at any stretch of imagination that any such controversy was involved in the trial. It was only in course of argument that such an argument was first time advanced on behalf of the counsel for the Plaintiff. Under the circumstances, I find myself in agreement with the learned Counsel for the Respondent that such an argument based on no pleadings or evidence should not have been allowed by the Courts below. However, even on merit, I find that the learned appellate Court was right in holding that there was nothing on record to show that the Defendant No. 2 was not an agriculturist. It was also correct in holding that the fact of having a tailoring shop did not go counter to the contention of the Defendant No. 2 that

he was an agriculturist. This aspect of the matter has been discussed at length in a recent decision of this Court in *Jitendra Kumar Chakravarty v. Shanti Das* 1990 (2) GLJ 172 : (1991) 1 GLR 19. In that case it was held that cultivation by himself is not necessary to bring a person within the definition of agriculturist as given in Clause (3) of Section 3 of the Act. "Personal cultivation" has been specifically defined in Clause (10) of the said section to mean "cultivation by the person himself or by the hired labourers", As such a person who had a tailoring shop can still be an agriculturist within the meaning of Section 3 of the Act. In the instant case the learned lower appellate Court on proper consideration of the (sic) was correct in arriving at a finding that the Defendant No. 2 (sic) an agriculturist and that the sale of the land in question to him was not hit by Section 8 of the Act.

5. The next question for consideration is whether the Defendant No. 2 had knowledge of the agreement to sell. It is necessary because of the contention of the counsel for the Appellant is that the Defendant No. 2 had such knowledge and if that be so specific performance can be enforced against him also. There is no dispute (sic) with the legal proposition in this regard. Section 91 of the (sic) Act lays down that where a person acquires property (sic) notice that another person has entered into an existing (sic) affecting that property, of which specific performance can (sic) be obtained, the former must hold the property for the benefit of (sic) to the extent necessary to give effect to the contract. This (sic) came up for consideration before the Supreme Court (sic) *Prasad v. Deep Chand* AIR 1954 SC 75 wherein it was (sic) that in spite of the existence of a previous contract (sic) a sale to a subsequent purchaser even with notice is not (sic) voidable at the instance of the party agreeing to purchase (sic) Previous contract and except for the obligation arising from (sic) of the Trusts Act and paragraph 2 of Section 40 of the (sic) of Property Act the title to the property will pass from the vendor to the subsequent transferee. For all other purposes and as between the purchaser and the vendor, the purchaser is the owner., From the aforesaid decision it is evident that in order to hold a particular transaction of sale voidable at the instance of the party agreeing to purchase under a previous contract, it is necessary that the subsequent purchaser must have had knowledge of such previous contract of sale. Then and then only the obligation can be enforced against the subsequent purchaser. In the instant case the first appellate Court after proper consideration of the evidence on record, arrived at a finding that the Defendant No. 2 had no such knowledge of the previous agreement to sell. Nothing could be pointed out to justify interference with the aforesaid finding of fact. In that view of the matter, in the instant case, the agreement of sale cannot be enforced against the subsequent purchaser namely Defendant No. 2 The finding of the first appellate Court on that point therefore, is correct and cannot be interfered with.

6. In view of the aforesaid discussion, I do not find any merit in the appeal and the same is therefore, dismissed with cost.