
(2012) 03 GAU CK 0039

In the Gauhati High Court

Case No : Regular Second Appeal No. 205 of 2005

Sailendra Mohan Ghosh and Others

APPELLANT

Vs

Bhaktaprahallad Ghosh

RESPONDENT

Date of Decision : 21-03-2012

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 31, 100
Evidence Act, 1872 — Section 63, 65, 74(1)

Citation : (2012) 3 GLT 82

Hon'ble Judges : Anima Hazarika, J

Bench : Single Bench

Advocate : P.K. Roychoudhury and Mr. N. Debnath, for the Appellant; Abu Sharif, A.R. Bhuyan and Ms. S. Boro, for the Respondent

Final Decision : Dismissed

Judgement

Smti. Anima Hazarika, J.—The appellants herein were the defendants on the file of the Civil Judge (Jr. Div.) No. 1 Kokrajhar. The plaintiff filed a suit being Title Suit No. 7 of 2000 seeking declaration of right, title and interest over the suit land and for ejectment of the defendants from the suit land by dismantling the "Dol Bedi" and for Khas possession. The suit was decreed and on appeal the decree was affirmed. Hence the Regular Second Appeal before the Court. Heard Mr. PK Roychoudhury, learned counsel appearing for the appellants. Also heard Mr. A Sharif, learned counsel appearing for the respondents.

2. This Court while admitting the appeal has framed the following substantial questions of law: -

1. Whether the first appellate court was justified in rejecting the appeal on the evidence of a power of attorney holder instead of the plaintiff/principal;
2. Whether the mandatory provision of Order 41 Rule 31 has been complied with; and
3. Whether the gift of an immovable property can be challenged by a third

person on the ground that the gift was not followed by possession?

3. In order to adjudicate the substantial questions of law as formulated, a background of the case is necessary which is summarized hereinbelow:-

The plaintiff through his power of attorney holder filed a suit in the court of Civil Judge (Jr. Div.) No. 1, Kokrajhar being Title Suit No. 7 of 2000 against the defendants seeking a decree for declaration of right, title and interest over the suit land and ejection of the defendants from the suit land by dismantling the "Dol Bedi" and for Khas possession of the suit land. The facts pleaded in the suit is that the plaintiff had purchased the suit land by a deed of sale registered on 09.08.1975 and took delivery of possession whereupon he constructed a "chali" (chhapra), one latrine and a well thereon but could not construct a permanent structure on the suit land. But the defendants trespassed into the land, dismantled the chhapra and constructed on the suit land a "Dol Bedi" and performed puja on 20.03.2000 and 21.03.2000 and even after puja, the defendants did not allow the plaintiff to enter into the suit premises declaring that they will hold "Dol Puja" on the suit land every year and hence the suit seeking the relief as indicated above.

4. The defendants have contested the case by filing joint written statement contending inter alia that on 11.09.1999 the father of the plaintiff donated the suit land for self and on behalf of his son the plaintiff Bhakta Prahalad Ghose to the public and people of Narabari village and Bhatipara Gaon Panchayat for performing "Dol Puja" by constructing a "Dol Mandir" on the suit land. The said donation was given by executing a written document, affixing Revenue Stamp in presence of the witnesses and delivered the possession by the father of the plaintiff Shri Nani Gopal Ghose and therefore, prayed that the suit is liable to be dismissed. The defendants took the other pleas as provided under Order 8 of the CPC (hereinafter referred to as "the Code")

5. On the pleadings of the parties, the learned trial court has framed the following issues: -

1. Whether there is a cause of action?
2. Whether the plaintiff has got right, title and interest over the suit land?
3. Whether the people of village Narabari on the advice of defendant Nos. 1, 2 and 3 to perform "Dol Puja" on 20.03.2000 and 21.03.2000 on the land described in Schedule and for that they dismantled the chhapra standing on the land?
4. Whether the defendants after puja on 20.03.2000 and 21.03.2000 fenced the land by split bamboo and did not allow the plaintiff to enter into the land?
5. Whether the plaintiff is entitled to get the relief as prayed for?
6. During the trial the plaintiff examined as many as 3 (three) witnesses viz. PW 1 Biswanath Ghose (power of attorney holder), PW 2 Nani Gopal Ghose, father of

plaintiff and PW 3 Md. Abdul Sheikh along with documentary evidence whereas the defendants/appellants have also examined 5 (five) witnesses viz. DW1 Sailendra Mohan Ghose, DW 2 Bhola Ghose, DW 3 Nema Basumatary, DW 4 Kartik Ch. Goyari and DW 5 Santosh Ghose alongwith documentary evidence.

7. The trial Court on the pleadings of the parties including the documentary evidence produced by the respective parties answered all the issues in favour of the plaintiff and decreed the suit. On appeal, the appellate court, on the basis of the grounds taken up in the memorandum of appeal scrutinized the evidence on record, more particularly Ext-A proved by the defendants-appellants. The said Ext-A is a document executed by Nani Gopal Ghose in a white paper and signed over a revenue stamp. In the said Ext-A it is written that land measuring 1K 5L covered by Dag No. 193, Khatian No. 95 is donated to the people of the Narabari village for the purpose of "Dol Mandir". But PW 2 Nani Gopal Ghose in his evidence denied to have donated the land. However, he has deposed that the defendants appellants had taken signature on blank paper to hold "Dol Puja" in a meeting thereby denied the execution of Ext-A. On the basis of the aforesaid evidence the learned appellate court dismissed the appeal affirming the judgment and decree passed by the learned trial Court and hence the instant second appeal.

8. Though this Court formulated substantial questions of law as indicated hereinabove, Mr. PK Roychoudhury, learned counsel appearing for the appellants during the hearing of the appeal has argued the following points:-

(a) The certified copy of power of attorney has been introduced in the trial without taking recourse to prove the original copy and/or without taking recourse to the provisions of Sections 63 and 65 of the Evidence Act and introduction of certified copy would be inadmissible in evidence thereby requiring interference u/s 100 of the Code.

(b) The power of attorney holder under the law cannot depose for the principal in respect of the matter which only the principal can have a personal knowledge and in respect of which the principal is entitled to be cross-examined. Therefore, on this ground alone the appeal must succeed.

(c) The mandatory provisions of Order 41 Rule 31 of the Code of Civil Procedure ("Code" for short) have not been complied with which requires interference in the instant Regular Second Appeal.

9. In support of his contentions, the learned counsel has placed reliance on the following decisions, viz.: -

(1) Dr. Gurmukh Ram Madan Vs. Bhagwan Das Madan,

(2) Janki Vashdeo Bhojwani and Another Vs. Indusind Bank Ltd. and Others,

(3) Dinesh Kumar Vs. Yusuf Ali,

(4) Bidhan Paul Vs. Paresh Chandra Ghosh, .

10. Countering the attack, Mr. A Sharif, Earned counsel appearing for the-respondent plaintiff would contend that the instant appeal arises out of concurrent finding of facts which do not require to be interfered with thereby supported the judgment of both the courts below.

11. In support of his contentions, Mr. Sharif has referred the following decisions, viz.:-

(1) Smt. Gomtibai (dead) through LRs. and others Vs. Mattulal (dead) through LRs., (2) AIR 1993 Delhi 19: (Wg. Cdr (retd.) RN Dawar Vs. Smti Ganga Saran Dhama

(3) Smt. Nishamani Singh Vs. Nishamani Dibya and Others,

(4) Chand Bee and Others Vs. Hameedunnissa,

(5) Gajendra Nath Mahanta and Another Vs. Pranpati Choudhury,

12. The rival contentions are considered. Also perused the evidence on record, including the pleaded facts and the decisions relied upon by the parties. Admittedly the first substantial question of law relating to certified copy of power of attorney introduced during the trial has been raised for the first time before the court Perused the Memorandum of appeal filed before the first appellate court and the written statement filed before the trial Court as well as the evidence led thereto. When Ext-A was introduced the defendants had failed to raise objection as required under the law. The said question has also not been raised and/or argued before the learned first appellate court and hence, this Court is not inclined to interfere with the concurrent findings of facts.

13. In Bidhan Paul (supra), the decision referred to and reported in AIR 2002 Gauhati 46, this Court formulated the substantial question of law as follows: -

Whether the findings of the Courts below that a copy of the registered power of attorney is not a public document within the meaning of Section 74(1) of the Evidence Act are correct. In that context the court has held that the pre-conditions embodied u/s 65 of the Evidence Act has not been fulfilled nor the said Ext 3 has been admitted in evidence having exhausted mode of formal proof which is not the case in hand and the same cannot be made applicable in absence of objection being raised during the trial.

14. Dr. Gurumukh Ram (supra), the decision reported in Dr. Gurmukh Ram Madan Vs. Bhagwan Das Madan, is a case where the learned trial Court did not admit the document in evidence in absence of the original document not duly accounted for which is not the case in hand. In the instant case, both the courts below admitted Ext-1 in evidence in absence of objection by the defendants.

15. The second substantial question of law relates to the acts confined in respect of acts done by the power of attorney holder in exercise of power granted by the

instrument. Admittedly, the power of attorney holder, PW1 is the nephew of the principal plaintiff, who was away to Dhubri in connection with his employment. PW 1 has been examined and proved Ext-1, power of attorney without any objection and thereafter he has proved Ext-2, the deed of purchase dated 09.08.1975 by the principal plaintiff and the ouster by the defendants resulting in filing the suit seeking the decree. In the instant case, the power of attorney holder has rendered some acts in pursuance to the power of attorney and accordingly has deposed for the principal in respect of such acts as would be available from the pleadings in the plaint and the contents of the power of attorney.

It may be pertinent to mention herein that in the instant case the father of the principal plaintiff has been examined as PW 2 who has supported the case of the principal plaintiff along with PW 1 and PW 3. In this connection it would be appropriate to refer a decision reported in *Man Kaur (dead) by LRS. Vs. Hartar Singh Sangha*, wherein the Apex Court has held as thus: -

The legal position as to who should give evidence in regard to matters invoking personal knowledge can be summarized as follows:-

(a) An attorney holder who has signed the plaint and instituted the suit, but has no personal knowledge of the transaction can only give formal evidence about the validity of the power of attorney and the filing of the suit.

(b) If the attorney holder has done any act or handled any transactions, in pursuance of the power of attorney granted by the principal, he may be examined as a witness to prove those acts or transactions. If the attorney holder alone has personal knowledge of such acts and transactions and not the principal, the attorney holder shall be examined, if those acts and transactions have to be proved.

(c) The attorney holder cannot depose or give evidence in place of his principal for the acts done by the principal or transactions or dealings of the principal, of which principal alone has personal knowledge.

(d) Where the principal at no point of time had personally handled or dealt with or participated in the transaction and has no personal knowledge of the transaction, and where the entire transaction has been handled by an attorney holder, necessarily the attorney holder alone can give evidence in regard to the transaction. This frequently happens in case of principals carrying on business through authorized managers/attorney holders or persons residing abroad managing their affairs through their attorney holders.

(e) Where the entire transaction has been conducted through a particular attorney holder, the principal has to examine the attorney holder to prove the transaction, and not a different or subsequent attorney holder.

(f) Where different attorney holders had dealt with the matter at different stages of the transaction, if evidence has to be led as to what transpired at those

different stages, all the attorney holders will have to be examined.

(g) Where the law requires or contemplated, the plaintiff or other party to a proceeding, to establish or prove something with reference to his "state of mind" or "conduct", normally the person concerned alone has to give evidence and not an attorney holder. A landlord who seeks eviction of his tenant, on the ground of his bona fide" need and a purchaser seeking specific performance who has to show his "readiness and willingness" fall under this category. There is however a recognized exception to this requirement. Where all the affairs of a party are completely managed, transacted and looked after by an attorney (who may happen to be a close family member), it may be possible to accept the evidence of such attorney even with reference to bona fides or readiness and willingness". Examples of such attorney holders are a husband/wife exclusively managing the affairs of his/her spouse, a son/daughter exclusively managing the affairs of an old and infirm parent, a father/mother exclusively managing the affairs of a son/daughter living abroad.

16. A reading of the decisions referred by the learned counsel for the defendants/appellants in Janki Vashdeo Bhojwani and Another Vs. Indusind Bank Ltd. and Others, and the decision in Mankaur(supra) referred to hereinabove alongwith the evidence adduced by PWs 1 and 2 to dislodge Ext-A of the defendants and the public notice issued at the instance of power of attorney holder makes it clear that he has rendered some acts in pursuance to power of attorney and accordingly he has deposed for the principal in respect of such acts and there is no infirmity to act on behalf of the principal, more so, when PW 2, the father of the principal plaintiff has come forward to support the case of the principal plaintiff, deposing the entire facts though cross examined at length where nothing has come out adverse to the case of the principal plaintiff and as such the second question is answered in the negative.

17. The third substantial questions of law relates to non-compliance of the provisions of the Order 41 Rule 31 of the Code. It is an admitted position where the lower court judgment is well written and exhaustive, an appellate court may simply express concurrence, however, there should be enough to show that the court of appeal has considered it fully and formed its own opinion. In the instant case in hand, a perusal of the judgment and order passed by the first appellate court, it would reveal that the first appellate court has fully discussed the evidence alongwith the exhibits and had formulated its own opinion. Therefore, this Court finds no reason to interfere with the concurrent finding of facts of the both the courts below. The third substantial questions of law is answered accordingly.

18. There is no ambiguity in the decision rendered in Dinesh Kumar (supra). The judgment rendered by both the courts below have dealt with the entire matter judiciously holding Ext-A is not a legal document thereby dismissed the claim of the appellants decreeing the suit in favour of the principal plaintiff for which the court do not incline to interfere with the concurrent findings of facts indicated

above.

19. The scope of Section 100 of the Code came up for consideration before this Court in the cases reported in Upendra Kumar Majumder Vs. Tapan Majumder and Others, , 2005 Suppl GLT 665: (2004) 3 GLR 239: Rita Das & Ann Vs. Girindra & Ors. and 2004 Suppl. GLT 680: (2004) 3 GLR 397 : Anjali Debi Thapa & Ors. Vs. Sandhya Debt Thapa wherein this Court has held that findings of fact not open to challenge even if the appreciation of evidence is palpably erroneous. Sufficiency or adequacy of evidence to support a finding of fact is a matter for decision of a court of fact and the High Court would not interfere with the findings of fact arrived at by both the Courts below which this Court hereby do.

20. Since the Court is not inclined to interfere with the concurrent findings of facts and answered the substantial questions of law accordingly, the decisions cited by Mr. Sharif, learned counsel appearing for the respondents are not discussed as it would burden the judgment.

21. In the result the appeal is devoid of any merit and the same is dismissed affirming the judgment and decree passed by both the learned courts below. No costs. Send down the lower Court records.