
(2013) 03 CAL CK 0032
In the Calcutta High Court
Case No : F.A. No. 164 of 2010

Sailesh Saha and Others

APPELLANT

Vs

Gour Saha and Another

RESPONDENT

Date of Decision : 22-03-2013

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 32 Rule 15, Order 41 Rule 22, Order 41 Rule 33, Order 41 Rule 5, 105
Registration Act, 1908 — Section 58, 59, 60

Citation : (2013) 2 CALLT 386 : (2013) 3 CHN 618

Hon'ble Judges : Mrinal Kanti Sinha, J; Jyotirmay Bhattacharya, J

Bench : Division Bench

Advocate : Bidyut Kr. Banerjee and Ms. Shila Sarkar, for the Appellant; Asish Chandra Bagchi and Mr. Partha Sarathi Bhattacharyya for the Plaintiff/ Respondent No. 1, Mr. Sabyasachi Bhattacharyya and Ms. Shohini Bhattacharyya for the Respondent No. 2, for the Respondent

Final Decision : Dismissed

Judgement

Jyotirmay Bhattacharya, J.—This appeal is directed against the judgment and preliminary decree passed by the Learned Civil Judge (Senior Division), Malda on 31st March, 2010, in Partition Suit No. 172 of 2007, at the instance of the defendant Nos. 1 to 7/appellants. A preliminary decree for partition was passed in the said suit by holding inter alia that the plaintiff/respondent No. 1 has acquired 1/8th share in the suit property by virtue of his purchase of 1/8th share from an admitted co-sharer, namely, Ashima Sana through a registered deed of conveyance dated 28th May, 2007. Though, the legality of the said sale was challenged by all the defendants including Ashima Sana by filing two sets of written statements; one by Ashima herself and another by the remaining defendants, namely, defendant Nos. 1 to 7, but the defendant No. 8, namely, Ashima did not ultimately contest the said suit as she withdrew herself from participating in the proceeding of the said suit while others contested the said suit by participating in the proceeding of the said suit. As a matter of fact, said

Ashima Sana, after filing her written statement independently in the said suit, filed an application under Order 32 Rule 15 of the CPC praying for permission of the Court for allowing her to defend the said suit through the next friend as she was deaf and dumb and was unable to protect her interest in the suit property by reason of her mental infirmity. The said application of the defendant No. 8 was rejected by the Learned Trial Judge on 4th February, 2010, vide Order No. 63, by holding that the said defendant is not a person of unsound mind though she was deaf and dumb, and as such, she cannot be allowed to be defended in the said suit through her next friend. The said defendant No. 8 did not challenge the said order in any higher forum. Thus, she accepted the said order which attained its finality. However, she stopped participating in the trial of the said suit thereafter and allowed the suit to be decided ex parte against her. It is only when the said suit was ultimately decreed in the preliminary form after the same was contested by the defendant Nos. 1 to 7, who are the other brothers and sisters of Ashima, the said defendant No. 8 appeared in this appeal which was filed by the other brothers and sister of said Ashima and participated in the hearing of the appeal for defending herself by taking the plea which she set up in her written statement filed in the suit. In fact, Mr. Bhattacharjee, learned Advocate, appearing for the said respondent No. 8, tried to impress upon us that the order passed by the learned Trial Judge rejecting her application under Order 32 Rule 15 of the Code of Civil Procedure, was illegal as the said application was rejected by the learned Trial Judge without holding any inquiry as contemplated under the provision of Order 32 Rule 15 of the Civil Procedure Code. He further submitted that since his client, being a deaf and dumb, was incapable of protecting her interest by reason of her mental infirmity, she should have been allowed to contest the said suit through her next friend in terms of the provision contained in Order 32 Rule 15 of the CPC and the learned Trial Judge having not allowed her to be represented by her next friend, the decree which was passed in such a suit, was a nullity and as such the said decree cannot be given any effect.

2. Mr. Bhattacharjee, however, frankly admitted before this Court that appointment of a guardian and/or a next friend over a person, who is deaf and dumb, is not a matter of course. However, once it is proved that a deaf and dumb is incapable of protecting her Interest in the suit property by reason of her mental infirmity, he or she should be allowed to be represented in the suit either by his or her guardian or next friend. He further submitted that the provision contained in Order 32 Rule 15 of the CPC contemplates an inquiry as to the mental infirmity of such a person who is deaf and dumb and if it is found in such enquiry that he/she is unable to protect his/her interest in the suit property because of his/her mental infirmity, then prayer for appointment of guardian and/or next friend for her cannot be denied and the vice-versa is also true. In support of his submission he relied upon the following decisions of different High Courts:--

- (i) S. Chattanatha Karayalar Vs. Vaikuntarama Karayalar and Another,
- (ii) Raveendran Vs. Sobhana and Another,

3. In both the aforesaid cases it was uniformly held that for ascertaining mental infirmity of a deaf and dumb person in the context of Order 32 Rule 15 of the Civil Procedure Code, the Court is bound to conduct inquiry as to whether the deaf and dumb person is capable of protecting his own interest or not and if the Court finds that such a person is incapable of protecting his interest, the Court is obliged to appoint next friend for such a person. It was further held therein that if on the other hand the Court finds on such inquiry that the person is otherwise capable of protecting his interest without a next friend, the Court shall remove the next friend, if already available and permit the person, who alleged to be of unsound mind or suffering from mental infirmity, to conduct the litigation himself.

4. By giving anxious consideration to the said decisions of the Hon'ble Madras and Kerala High Courts, we have no hesitation to hold that before coming to the conclusion as to whether the person is incapable of protecting his interest by reason of his mental infirmity or not, an inquiry as contemplated under Order 32 Rule 15 of the CPC is necessary. Admittedly, no such inquiry was held in the instant case. As such, on apparent looking at the said order it may be held that the order which was passed by the Learned Trial Judge is ex-facie illegal. But before coming to this conclusion, we will have to consider herein as to how far such apparent view can be accepted as real in the facts of the instant case. We feel it profitable to decide this issue first before entering into the merit of the appeal as the merit of the appeal is practically dependant upon the fate of such order passed by the learned Trial Judge on the application of the defendant No. 8 under Order 32 Rule 15 of CPC as the decree against a deaf and dumb who is incapable of protecting her property because of her mental infirmity, without being represented by a next friend, is a nullity.

5. We have no hesitation to hold that without filing any independent appeal or cross-objection for challenging the preliminary decree, Ashima may be permitted either to support or not to support the said preliminary decree in view of the provision contained in Order 41 Rule 22 and 5 Order 41 Rule 33 of the CPC but her right to challenge the order passed on her application under Order 32 Rule 15 of the CPC in this appeal, is doubtful in view of section 105 of the CPC which authorizes the appellant to challenge any order passed in the suit affecting the decision of the case, provided the grounds of such challenge are set forth in the Memorandum of Appeal. In the present case the grounds for challenging the said interlocutory order, have not been set forth in the Memo of appeal and Ashima is not the appellant herein. In our view, this right of challenge of any interlocutory order in ultimate appeal against the decree was given to the appellant alone in view of section 105 of the Code of Civil Procedure.

6. Let us now consider the legality of the said order in the facts of the instant case.

Here is the case where this Court finds that Ashima, the defendant No. 8, who claimed herself to be a deaf and dumb person, filed her written statement in the suit independently, challenging the legality of the impugned transaction made

between her and the plaintiff/respondent. She stated in her written statement that the impugned sale is nothing but a product of fraud as she never consciously executed the said deed for transferring her interest in the suit property in favour of the plaintiff/appellant on acceptance of consideration money. The said written statement was not only signed by her but she herself verified and affirmed the said written statement. After filing the said written statement she herself filed an application under Order 32 Rule 15 of the CPC seeking permission from the Court for appointment of a next friend so that she could have defended the suit through her next friend as she was unable to protect her interest in the suit property by reason of her mental infirmity. Despite she claimed that she was deaf and dumb person and she expressed her inability to defend the suit without any next friend because of her mental infirmity, she did not furnish any medical certificate and/or any other document in support of her claim that she was either deaf and dumb or was suffering from mental infirmity, and her infirmity was of such nature which might suggest that she was unable to protect her interest in the suit property herself. Unless these materials are placed before the Court, we are of view that the Court had no obligation to hold an inquiry for finding out as to whether she was mentally infirm or not or because of her mental infirmity she was unable to protect her interest in the suit property Independently or not. This conclusion we arrive at by relying upon a Division Bench decision of this Hon'ble Court cited by Mr. Bagchi, learned Advocate, appearing for the plaintiff/respondent, in the case of Sm. Usha Doshi and Another Vs. Sm. Suprava Sundari Devi and Others, , wherein it was held that non-holding of any inquiry itself cannot vitiate the decree if the party responsible to furnish material for satisfaction of the Court about his mental infirmity, failed to do its duty by failing to discharge the primary onus to furnish such materials before this Court. In this regard, we also find support from another decision of Andhra Pradesh High Court in the case of Khaja Majeedullah v. Jameelunnisa Begum, reported in AIR 2002 NOC 123, wherein it was held that it is not open for the Court to extend the provision of Rule 15 of Order 32 of the CPC to a deaf and dumb automatically, but it can be done only after such disability impaired the mental faculty and being satisfied that the party in a given case is not capable of protecting his interest.

7. Let us now consider as to how far the said defendant No. 8 was able to prove that she was unable to protect her interest in the suit property because of her mental infirmity. We have already mentioned above that she filed written statement in the suit herself. She verified and affirmed the said written statement by herself. Pleadings in the written statement were signed by her. Very effective stand was taken with regard to the impugned sale deed, in her written statement. Besides the aforesaid facts, it also appears from the material on records that she entered into various transactions earlier independently with regard to the suit property. She executed a deed of exchange concerning the suit property on 6th October, 1988 in which her brother Sailesh Chandra Sana was a party. She executed another sale deed dated 5th September, 2006 for

transferring her interest in a part of the suit property in favour of Kalpana Sana. She along with her brothers and sisters decided to raise marketing complex over the suit property. She filed a partition suit being, P.S. Suit No. 234 of 2003 in the same Court praying for partition of suit property but the same was ultimately dismissed for default. She was admitted in school and obtained school degree. She is a married lady residing with her husband. If all these facts are taken together along with the fact of non-production of the basic documents in support of her claim towards her mental infirmity and she filed such an application under Order 32 Rule 15 of the CPC independently without seeking the help of any other person, we have no hesitation to hold that she was not mentally infirm and she was not incapable of protecting herself and/or her property by reason of any mental infirmity in her.

8. As such, we hold that the learned Trial Judge was absolutely justified in rejecting her said application under Order 32 Rule 15 of the Civil Procedure Code. The said order of the Learned Trial Judge, in our considered view, does not require any interference in the facts of the instant case.

9. Let us now consider the merit of the appeal in the facts of the instant case. Admittedly, one Sukdev Saha was the original owner of the suit property. He died leaving behind him five sons and three daughters as her legal heirs and heiresses. On the death of Sukdev Saha, the suit property was inherited by all the eight sons and daughter of the deceased in equal share. Two of the daughters, namely, defendant Nos. 6 and 7, gifted their share in the suit property in favour of their brothers on 11th May, 2007. Thus, the defendant Nos. 1 to 7, having 7/8th share in the suit property jointly remains undisputed. The share of Ashima Saha, being the defendant No. 8 to the extent of 1/8th share in the suit property is not in dispute in the suit. The dispute is with regard to the legality of the sale of 1/8th share in the suit property by the said Ashima Saha through which the plaintiff/respondent No. 1 is claiming interest in the suit property. All the defendants including the defendant No. 8 claimed that said Ashima never transferred her interest in favour of the plaintiff and if any such deed of transfer is ultimately found, such transfer having been effected by fraud and without passing of consideration money for such transfer, the impugned sale is a nullity.

10. Let us now consider the evidence of the respective parties in this regard. We have already indicated above that though the defendant No. 8 filed her written statement challenging the legality of such transfer yet she did not ultimately come forward to prove her stand taken by her in her written statement. In fact, she withdrew herself from the suit. She did not even cross-examine the plaintiffs' witnesses being P.W.1, P.W.2 and P.W.3, namely, the plaintiff himself, one of his relatives and the lawyer who drafted the sale deed and conducted the sale proceeding on behalf of the parties to the sale deed, respectively. Though the plaintiff being P.W.1 stated in his evidence that he had no bank account and he did not pay any income tax and he had no written document to show that

consideration money mentioned in the sale deed was paid by him, yet his evidence regarding conscious execution of the deed and/or registration thereof by Ashima remained unchallenged and/or unshaken in cross-examination. Though a case of fraud in the process of execution and registration was sought to be made out by the defendant yet neither any particular of fraud exercised upon the said Ashima in the process of execution and registration of the sale deed was pleaded in the pleading nor any attempt was made to prove that such deed of sale was procured by the plaintiff by commission of fraud upon said Ashima. Though the left thumb impression of said Ashim in the sale deed was identified by one Bablu, son of the plaintiff, yet we cannot lose sight of the fact that even execution of the said deed by Ashima has not been denied by the defendants' witnesses. Moreover, the husband of the said Ashima Saha was a witness to the execution of the said sale deed by Ashima. Ashima did not come forward either to say that she did not execute the said document or she executed the said document unconsciously or the deed was procured from her by commission of fraud upon her and her husband nor she initiated any suit or proceeding for cancellation of the said document. Her husband also has not come forward either to support the stand of the defendant No. 8 or to support the defendant Nos. 1 to 7. Coupled with this fact, if the evidence of the Sailesh Saha, D.W. 1 is taken into consideration then there cannot be any iota of doubt that the defendants have failed to prove that the impugned deed of sale was not executed by the defendant No. 8, namely, Ashima, consciously. The defendants' witness, being D.W.1 stated in the cross examination that "not a fact that Ashima Saha has not sold her share in the suit property to the plaintiff on 8th May, 2007". He further stated that he cannot say the details about the execution of the sale deed. He was not a witness to the deed. He never claimed that he was present at the time of execution and registration of the sale deed. No step was taken by the defendants either to examine said Ashima or her husband who was a witness to the deed, who were the best witnesses who could have explained the circumstances in which the said deed was executed by Ashima. Even nonpayment of the consideration money by the plaintiff to Ashima could not be proved by the defendants. No definite pleading is made out regarding nonpayment of consideration money by the plaintiff to the defendant No. 8. On the contrary the receipt of the consideration money was acknowledged by said Ashima in the deed itself. Thus, on consideration of totality of the evidence on record, we hold that the presumption regarding the legality of such transaction attached to the registered document under sections 58, 59 and 60 of the Registration Act remains unrebutted.

11. Though, by relying upon the judgment of the Hon'ble Supreme Court cited by Mr. Banerjee, learned Counsel, appearing on behalf of the appellants, in the case of Vidhyadhar Vs. Manikrao and Another, we accept the submission of Mr. Banerjee, learned Senior Counsel, appearing on behalf of the appellants, that a stranger to a deed can also challenge the legality of the sale made by the defendant No. 8 in favour of the plaintiff by setting up defence in the written

statement, still we have no hesitation to hold that the defendants have miserably failed to establish that there was no genuine and/or real sale and/or transfer of 1/8th share by Ashima in favour of the plaintiff/respondent by the impugned deed. We, however, feel it profitable to record here that we cannot agree with the submission of Mr. Banerjee that in all cases a stranger, even though he is a busy body, can challenge the legality of sale between two parties in which such stranger was not a party. On careful reading of the said decision of the Hon''ble Supreme Court, we are of the view, that it is only when the right of a third party is under threat of infringement at the Instance of the parties to the deed or in other words when the exercise of the right of the third party, being a stranger to the deed, is at stake when the parties to the transaction enforce their right under the deed, the stranger even though, he was not party to the transaction, can challenge the legality of such sale between the parties to the document.

12. If we look at the present problem in the aforesaid context then we have no hesitation to hold that the defendant Nos. 1 to 7 can challenge the legality of such transaction though they were not parties to the said sale deed, as their right to enjoy the suit property jointly with the other co-shares was really under threat when the plaintiff filed the suit to enforce partition as a co-sharer claiming 1/8th share in the suit property which he acquired by virtue of his purchase from an admitted co-sharer through the impugned deed.

13. We also find from the evidence of P.W.2 that the defendant No. 8 delivered possession of the suit property in favour of the plaintiff in pursuance of the impugned sale. This part of his evidence remains unshaken in cross-examination. Though the deed writer namely, P.W.3 stated in his evidence that he did not know said Ashima personally and this part of his evidence to some extent is contradictory to his earlier statement in chief where he stated that he drafted the said deed as per the instruction of Ashima, yet merely because of such contradiction in this part of his evidence, we cannot ignore the presumption regarding legality of such transaction as contemplated under sections 58, 59 and 60 of the Registration Act by ignoring the evidence of D.W. 1 who admitted in his evidence regarding the sale of the suit property by Ashima to the extent of her interest in favour of the plaintiff by the impugned deed and Ashima did not ultimately come forward to challenge the legality of such sale in the suit even after filing written statement therein.

14. Thus, on overall consideration of the materials on record we do not find any reason to disturb the findings of the learned Trial Judge and/or to upset the preliminary decree passed by the learned Trial Judge which is under challenge in this appeal. The judgment and/or the preliminary decree passed by the learned Trial Judge in this suit, is, thus, affirmed in this appeal. The appeal, thus, fails. The parties are given one month's time for partition of the suit property amicably as per their shares declared by the learned Trial Judge in the preliminary decree, in default, the parties may approach the learned Trial Judge for drawing up a final decree in the partition suit for effecting partition of the suit

property through Court as per the shares of the parties as declared by the learned Trial Judge in the preliminary decree. The appeal is, thus, disposed of.

Urgent Photostat certified copy of this judgment, if applied for, be given to the parties as expeditiously as possible.

Mrinal Kanti Sinha, J.

I agree.