

(2015) 04 GAU CK 0020

In the Gauhati High Court

Case No : Regular Second Appeal No. 133 of 2003

Satyabrata Mukherjee and Others

APPELLANT

Vs

Bishnulal Rabidas and Others

RESPONDENT

Date of Decision : 08-04-2015

Acts Referred:

Hindu Succession Act, 1956 — Section 22, 22(1)

Citation : (2015) 04 GAU CK 0020

Hon'ble Judges : Suman Shyam, J

Bench : Single Bench

Advocate : B.R. Sey, Senior Advocate, for the Appellant; P.K. Roy, Advocates for the Respondent

Final Decision : Dismissed

Judgement

Suman Shyam, J.—This second appeal has been preferred against the judgment and decree dated 31.03.2003 passed by the learned Civil Judge, (Senior Division) Karimganj, in Title Appeal No. 1/2000 dismissing the appeal filed by the appellants/defendants, thereby, affirming the judgment and decree dated 25.11.1999 passed by the learned Civil Judge, (Junior Division) No. 1, Karimganj in Title Suit No. 191/93.

2. The plaintiffs case in brief as set out in the plaint is that one Madhab Muchi, was the original owner in possession of the land described in schedule-1 of the plaint. After his death, his son, Raghu Ram Rabidas (since deceased) inherited the said property and became the absolute owner in respect thereof. Raghu Ram Rabidas had 3 (three) sons, namely, Krishna Rabidas (since deceased), the plaintiff No. 1 and the proforma defendant No. 4 as well as 3 (three) daughters, i.e. proforma defendant Nos. 9 to 11. Raghu Ram Rabidas died in the year 1984, leaving behind the proforma defendant No. 3 as his widow, plaintiff No. 1, proforma defendant No. 4, his two sons as well as the proforma defendant Nos. 9 to 11 as his daughters. Krishna Rabidas predeceased Raghu Ram Rabidas leaving behind the proforma defendant No. 5 as his widow, defendant No. 2 as his son

and proforma defendant No. 6 to 8 as his daughters. Therefore, the plaintiff No. 1, defendant No. 2 and proforma defendant Nos. 3 to 11 are the class-1 legal heirs of Raghu Ram Rabidas.

3. It is the pleaded case of the plaintiffs that the extent of share of the plaintiff No. 1, proforma defendant Nos. 3, 4, 9 to 11 in the land described in Dag No. 1 and 2 of schedule-1 would be 1/7 each and the extent of share of the plaintiff No. 2 and the defendant No. 2 as well as proforma defendant Nos. 5, 6 and 7 is jointly 1/7 of the total land and house described in schedule-1. Such being the position, the defendant No. 2 individually would be entitled to 1/42th share of the land and house described in Dag No. 1 and 2 of the schedule-1.

4. The plaintiffs have pleaded that defendant No. 1, Satyabrata Mukherjee was a monthly tenant under the plaintiff No. 1, defendant No. 2 and proforma defendant No. 3 to 11 in respect of a house standing over the land covered by Dag No. 2 of schedule-1. The said defendant No. 1 used to pay monthly rent in respect of the tenanted premises as per the Bangali calendar. He had regularly paid rent up to Baisak, 1394, B.S and thereafter, he had stopped paying the rent in respect of the tenanted premises, thereby becoming a defaulter. Since the defendant No. 1 had become a defaulter in the eye of law and the tenanted premises was also required for personal use and occupation of the landlord, hence, the plaintiffs together with the defendant No. 2 as well as proforma defendant No. 3 to 11 had instituted Title Suit No. 273/1990 in the Court of Munsiff, Karimganj for a decree of ejectment of the defendant No. 1 from the tenanted premises. During the pendency of the aforesaid proceeding, the plaintiff No. 1 on 24.06.1993 spotted the defendant No. 1 in company of the defendant No. 2 in the Karimganj Sub-Registry Office and thereafter, on the basis of relevant enquiry made by him, the plaintiff No. 1 could obtain the certified copy of a registered deed of sale executed by the defendant No. 2 in favour of the defendant No. 1 on 28.06.1993 transferring his share of the land in the ancestral property in favour of the defendant No. 1 for consideration of Rs. 3,000/-. It is the pleaded case of the plaintiffs that they had preferential right to acquire the interest of the defendant No. 2 in respect of the land transacted by the registered deed of sale dated 28.06.1993 in favour of the defendant No. 1. However, since the said transaction was done behind back of the plaintiffs as well as the proforma defendant No. 3 to 11 without their knowledge and consent, hence, the same was not sustainable in the eye of law. As such, the plaintiff Nos. 1 and 2 had instituted Title Suit No. 191/1993 in the Court of Civil judge, (Junior Division) No. 1, Karimganj, inter alia praying for a decree declaring their preferential right to acquire the land transacted vide sale deed dated 28.06.1993 with a further direction for execution of sale deed in respect of the suit land and house in favour of the plaintiff No. 1.

5. The defendant Nos. 1 and 2 contested the suit by filing separate written statement, whereby besides raising formal plea regarding the maintainability of the suit, the defendant No. 1/appellant had denied that the plaintiffs did not have

knowledge of the said transaction. The said defendant had also stated herein that an offer being made, the co-sharers were not showing any willingness to purchase the share of defendant No. 2 as a result of which, the said defendant No. 2 had sold his share of the suit land and house to the defendant No. 1 by executing the registered deed of sale bearing No. 2232 dated 28.06.1993.

6. The defendant No. 2 had also contested the suit filed by the plaintiffs by submitting his written statement. He had also denied the fact that the plaintiffs were not aware of the said transaction made by him in favour of the defendant No. 1. He has further denied that the plaintiffs enjoyed any preferential right to purchase the share of the defendant No. 2 in the suit land.

7. On the basis of the pleadings of the parties, the learned trial Court had framed as many as three issues, which are as follows:-

"(1) Is there any cause of action for the suit?

(2) Whether the plaintiffs are entitled to get a decree as prayed for?

(3) To what relief if any the plaintiff are entitled?"

8. Both the parties adduced evidence in support of their respective cases. Upon hearing the argument advanced on behalf of both the parties as well as on appreciation of the materials on record, the learned trial Court had decided the issue No. 2 in favour of the plaintiffs on the grounds and reasons cited therein. Since the issue No. 2 was a key issue having a material bearing in the outcome of the suit filed by the plaintiffs, hence, the remaining issues were also answered in favour of the plaintiffs and the suit was decreed by the learned trial Court by the judgment and decree dated 25.11.99. The operative part of the decree passed by the learned trial Court is quoted herein below:-

"In the result, the suit stands decreed on contest without cost. It is hereby declared that the plaintiff have jointly and each of the plaintiffs has separately preferential right to purchase the suit land and suit house described in dag No. 1 and 2 respectively of the schedule 1 of the plaint. The defendant No. 1 or defendant No. 2 are hereby directed to execute a sale deed in respect of the suit land suit house within 90 days from the date of passing this order on receipt of Rs. 3000/- from the plaintiff No. 1 or plaintiffs. The plaintiffs shall deposit Rs. 3000/- in the Court within 30 days from the date of passing this order.

Let a decree be prepared accordingly. Given under my hand and seal this 25th day of Nov.1999."

9. Being aggrieved by the judgment and decree passed by the learned trial Court, the defendant No. 1 as appellant had preferred Title Appeal No. 1/2000 in the Court of learned Civil Judge, (Senior Division), Karimganj. By the judgment and decree dated 31.03.2002, the learned Civil Judge, (Senior Division), Karimganj concurred with the decisions and conclusions recorded by the learned trial Court, thereby, dismissing the appeal and affirming the judgment and

decree passed by the learned trial Court.

10. Being highly aggrieved by the judgment and decree dated 31.03.2003 passed by the learned First Appellate Court in Title Appeal No. 1/2000, the defendant No. 1 as appellant has preferred the second appeal which was admitted to final hearing by this Court by the order dated 03.09.2003 by framing the following substantial question of law:-

"Whether the Courts below were justified, without considering the materials evidence on record regarding the factum of non-offer prior to execution of the sale deed executed by defendant No. 2 in favour of defendant No. 1 in decreeing the suit of the plaintiffs when the plaintiffs witness P.W.1 has not been supported by any of the co-sharers when D.W.1 has been supported by D.W. 2 in his written statement?"

11. Heard Mr. B.R. Dey, learned senior counsel appearing for the appellant. Also heard Mr. P.K. Roy, learned counsel appearing for the respondent Nos. 1, 2, 5, 6, 7, 9, 10 and 11.

12. Mr. Dey learned senior counsel for the appellant at the very outset has fairly submitted that he does not dispute the fact that the plaintiffs are class-1 heirs of late Raghu Ram Rabidas nor does he dispute the proposition of law that as class-1 heir, the plaintiffs would be entitled to preferential right to acquire the interest of defendant No. 2 as per Section 22(1) of the Hindu Succession Act, 1956. He however, submits that in the instant case, the plaintiffs were aware of the fact that the defendant No. 2 was proposing to transfer his share in the land in favour of the defendant No. 1 by executing registered sale deed. The said fact has also been established from the statement made by the plaintiffs that plaintiff No. 1 had infact seen defendant Nos. 1 and 2 together in the office of Sub-Registry at Karimganj. Since the plaintiffs were aware of the proposed sale transaction, there was no question of any offer being made to the plaintiff in respect of his share of the land. In that view of the matter, plaintiffs suit is barred by waiver, estoppel and acquiescence and liable to be declared so.

13. Per-contra, Mr. P.K. Roy, learned counsel for the respondents submits that having regard to the fact that there is no dispute regarding the entitlement of the plaintiffs to invoke their preferential right to acquire the property sold by the defendant No. 2, there is no substantial question of law that arises for determination in the present appeal. Mr. Roy submits that although the defendant No. 2 has filed his written statement opposing the claim of the plaintiffs, yet he never presented himself for examination as a witness during the trial of the suit. That apart even defendant No. 1 did not present himself as a witness and on the contrary sent his son, i.e. DW-1 as a witness without even executing a valid power of attorney in his favour. A bare perusal of the testimony of DW-1 would go to show that he had admitted in clear terms that no prior notice was given to the other co-sharers before transferring the share of defendant No. 2 by the registered deed of sale executed in favour of the

defendant No. 1.

14. Relying upon a decision of the Hon"ble Apex Court reported in Vidhyadhar Vs. Manikrao and Another, AIR 1999 SC 1441 : (1999) 2 JT 183 : (1999) 2 SCALE 93 : (1999) 3 SCC 573 : (1999) 1 SCR 1168 : (1999) 1 UJ 665 : (1999) AIRSCW 1129 : (1999) 3 Supreme 102 Mr. Roy submits that when a party to the proceeding does not present himself as a witness, no credence can be attached to the stand taken by him in his pleadings and the Court would be obliged to draw an adverse presumption against such a party. He submits that although in the instant case the defendant No. 2 has taken a stand to the effect that the plaintiffs were informed about the sale transaction, yet no credence or value can be attached to the said stand of the defendant No. 2 since he has failed to offer himself to be examined as a witness during the course of the trial. That apart, the submission made by the DW-1 leaves no room for any doubt that none of the co-sharers were aware of the sale transaction collusively carried out by the defendant No. 2 in favour of the defendant No. 1. In such view of the matter, having regard to the mandate of Section 22(1) of the Hindu Succession Act, 1956, the judgment and decree passed by the learned First Appellate Court based on concurrent finding of fact does not suffer from any infirmity and hence, the appeal is liable to dismissed.

15. I have considered the submission made by and on behalf of the parties and have also examined the records. There is no dispute about the fact that the plaintiff No. 1 is one of the class 1 heirs of Raghu Ram Rabi Das. If that be so, Section 22(1) of the Hindu Succession Act, 1956 would confer a legitimate right in the form of a preferential right upon the plaintiffs to acquire the interest of the other heirs in the property or business of intestate. Section 22 of the Hindu Succession Act, 1956 is quoted herein below for ready reference:-

"22. Preferential right to acquire property in certain cases:-

(1) Where, after the commencement of this Act, interest in any immovable property of an intestate, or in any business carried on by him or her, whether solely or in conjunction with others, devolve upon to two or more heirs specified in class I of the Schedule, and any one of such heirs proposes to transfer his or her interest in the property or business, the other heirs shall have a preferential right to acquire the interest proposed to be transferred.

(2) The consideration for which any interest in the property of the deceased may be transferred under this section shall, in the absence of any agreement between the parties, be determined by the court on application being made to it in this behalf, and if any person proposing to acquire the interest is not willing to acquire it for the consideration so determined, such person shall be liable to pay all costs of or incident to the application.

(3) If there are two or more heirs specified in class I of the Schedule proposing to acquire any interest under this section, that heir who offers the highest consideration for the transfer shall be preferred.

Explanation: In this section, "court" means the court within the limits of whose jurisdiction the immovable property is situate or the business is carried on, and includes any other court which the State Government may, by notification in the Official Gazette, specify in this behalf."

16. Based on the material available on record, the learned Courts below have concurrently recorded the finding of fact to the effect that the plaintiffs do have a preferential right of acquiring the interest of the defendant No. 2 in respect of the property that was transacted by means of the sale deed dated 28.06.1993. That apart, both the Courts below have recorded the concurrent findings of fact that the other co-sharers including the plaintiffs did not have any knowledge as regards the transaction carried out by the defendant No. 2 in favour of the defendant No. 1 transferring his share of land in the ancestral property. Having recorded the aforesaid findings, learned Court below have examined the law as regards Section 22(1) of the Hindu Succession Act, 1956 by making reference to different judicial pronouncement so as to come to the conclusion that the plaintiffs were infact entitled to the decree as prayed for. There is nothing on record to suggest that the findings of fact concurrently recorded by both the Courts below suffers from any infirmity or illegality. Such being the position, the learned Court below rightly decreed the suit filed by the plaintiffs by granting reliefs as prayed for and there is no justifiable ground for this Court to interfere with the judgment and decree concurrently passed by the learned Court below. In the result, the second appeal is devoid of any merit and the same stands dismissed. The question of law framed by this Court would also stand answered accordingly.

17. Before parting with the record it would be appropriate to refer to the submissions made by Mr. Dey, learned senior counsel to the effect that since his client would now be deprived of the enjoyment of the purchased land, the consideration amount of Rs. 3,000/- be directed to be refunded to his client with bank interest from the date of purchased till realization. Although the defendant No. 1 has not made any counterclaim in the case, yet having regard to the facts and circumstances of the case, and considering the fact that the value of the land which was transacted in the year 1993 has gone up substantially over the last nearly 22 years the submissions made by Mr. Dey cannot be brushed aside. For ends of justice and equity, it is therefore, directed that the sale deed as directed by the learned trial Court would now be executed as per the terms of the decree passed by the Trial Court. The amount of Rs. 3,000/- would be refunded to the appellant/defendant No. 1 together with interest calculated at the rate of 6% per annum from the date of the decree passed by the learned trial Court till realization subject to the condition that the defendant No. 1 complies with the decree passed by the trial Court within 90 days from today.

18. The judgment and decree passed by the trial Court would stand modified to the extent indicated above. Having regard to the facts and circumstances of the case, there will be no order as to costs. Registry to send back the LCR at the

earliest.