

(1973) 02 CAL CK 0026
In the Calcutta High Court
Case No : A.F.A.D No. 2083 of 1965

Sk. Nasirul Hoque

APPELLANT

Vs

Johora Khatun Bibi
 Johora Khatun Bibi Vs Sk. Nasirul
Hoque

RESPONDENT

Date of Decision : 19-02-1973

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 100

Citation : AIR 1974 Cal 248 : 77 CWN 417

Hon'ble Judges : Salil Kumar Datta, J

Bench : Single Bench

Advocate : Sailendra Bhusan Bakshi and Mrittunjoy Palit, for the Appellant; S.C. Mitter and Shyama Prasanna Roychoudhury, for the Respondent

Final Decision : Allowed

Judgement

Salil Kumar Datta, J.—This is an appeal by the defendant against a judgment of affirmance decreeing the suit. The suit was for confirmation or in the alternative recovery of possession on declaration of title and for injunction. Allegations made in the plaint are as follows : The plaintiff obtained the suit property from her father by a bemeadi lease dated 17-6-1952. The plaintiff had been since in possession thereof on payment of rent. The suit property is comprised within Dag No. 1276 being a demarcated portion measuring 2 decimals out of 9 decimals which along with land measuring half decimal of dag No. 1275 was taken settlement of as stated above. The plaintiff was aged about 14/15 years when the suit was filed on 20-11-59. The plaintiff's father purporting to act on her behalf sold the said land of dag No. 1276 on 4-2-1956 to plaintiff's father-in-law Abdul Malek. The sale was not for her interest or benefit and the recitals made in the document were false. There was never any purchase of adjacent land as recited therein as the purpose of the sale. It was also stated that the entire consideration was misappropriated by the plaintiff's father and accordingly the kobala was void and her interest was not thereby affected, as the document was

not binding on her. The defendant filed a pre-emption suit being Suit No. 102 of 1956 which was decreed by a solenama on 20-8-1958. The plaintiff's possession of the suit property was unaffected by the pre-emption decree and the plaintiff claimed a declaration of her title to the said land on the finding that the kobala dated 4-2-1956 purported to be executed on her behalf was void and the pre-emption decree was also void and also for confirmation of possession. The plaintiff further prayed for recovery of possession if it was found that she was out of possession and injunction restraining the defendant from dispossessing the plaintiff in respect of the suit land was also prayed for.. This suit, was filed by the plaintiff as minor through her guardian-husband Sk. Nurul Islam.

2. The defence filed by the defendant contesting the suit was that the suit was not maintainable by the husband, that the decree in pre-emption Suit No. 102 of 1956 was binding on the plaintiff as she was represented by her guardian in the said suit. The suit was barred by estoppel, waiver and acquiescence and the plaintiff had no right to challenge the acts done by her father. Further Abdul Malek the purchaser under the impugned deed was a necessary party. The defendant admitted the settlement in favour of the plaintiff and her being in possession thereof on that basis. But it was contended that the sale to Abdul Malek was a valid sale for consideration for plaintiff's maintenance as her father was too poor to maintain her and husband's apathy and failure to maintain her was evidenced by matrimonial proceedings between the parties. The sale was accordingly legal and valid and the case of the misappropriation of the consideration money by the plaintiff's father was untrue. Abdul Malek acquired perfect title to the suit property by his purchase and on the basis of pre-emption decree the defendant became entitled to the suit property and in Title Execution Case No. 54 of 1958 the possession was delivered to him. For these reasons the suit was liable to be dismissed.

3. On a trial on evidence the suit was dismissed by the trial Court and on appeal the case was remanded back for hearing for enabling the plaintiff to produce the certified copy of the kobala impugned in the suit. After remand the trial Court decreed the suit on the finding that the sale to Abdul Malek was void under the Mohammedan Law. It was held that the sale under Mohammedan Law for violating the conditions of transfer of minor's property was void and invalid and not voidable as in Hindu Law in respect of such transfer. Accordingly it was not necessary for her to pray for setting aside the pre-emption decree and the suit was thus maintainable. It was further held that the decree in the pre-emption suit was not binding on the plaintiff and the alleged purpose of sale for purchase of other land for plaintiff was not a valid condition of transfer. The court referred to the evidence of the plaintiff's father who stated that sale proceeds were utilised for his own purpose. Though the plaintiff's father's pecuniary condition was not good and she was forced to live with her father it was held that this fact could not override the recitals of the kobala and accordingly the sale was void. As the plaintiff was out of possession the suit was decreed declaring her title to the suit property together with the direction on the defendant to deliver possession

to her, in default the execution was to proceed for obtaining recovery of possession.

4. The defendant preferred an appeal and the appeal court held that alienation of minor's property in Mohammedan Law could not be done when the minor had no other property and sale was necessary for her maintenance. It was held that the father was the legal guardian but the recitals of impugned kobala would show that it was not for maintenance of the minor but for acquisition of other properties. There was no evidence that the sale price was double the price of the property and though matrimonial proceeding was instituted in the year 1958 by the plaintiff against her husband it would appear that there was no need for her maintenance and neither the minor was benefited by the consideration price. The sale was accordingly void and it was not necessary to have the kobala set aside and the original vendee thus was also not a necessary party. On the above findings the appeal was dismissed. This second appeal is against this decision.

5. Mr. Sailendra Bhusan Baksi learned Advocate appearing for the appellant has urged several grounds in support of the appeal. His contention is that the suit is bad for defect of parties, the original purchaser under the impugned sale deed not being made a party. Since the plaintiff was claiming for a declaration that the sale deed and the pre-emption decree are void, the vendee was a necessary party whose absence makes the suit fatally defective. It was further contended that the sale by the plaintiff's father, who was her legal guardian, on her behalf to her father-in-law was legal and valid as it was necessary for securing her maintenance and as such she was not entitled to any relief. A new point was taken for the first time in this court that the lease by a father to the minor was absolutely void so that she never acquired any title to the suit property. Mr. Bakshi also urged that the kobala was voidable and was valid so long it was not avoided by the plaintiff on attaining majority.

6. Mr. S.P. Roychoudhury, learned Advocate appearing for the plaintiff-respondent contended on the other hand that the judgment under appeal is a proper judgment in accordance with law. He referred to Article 362 of Mulla's Mohammedan Law which provides the conditions for validity of sale of the minor's property by his legal guardian. One such condition is that the sale is necessary for his maintenance and the minor has no other property. He referred to Ext. 1 (b) a sale deed dated 23-7-1955 whereby for Rs. 400/- about 1 1/2 decimal and 4 tils of land in two dags were purchased by the plaintiff's father on her behalf acting as her guardian. This document shows that the plaintiff had other properties and in absence of any need for plaintiff's maintenance, the sale was hit for violating the above condition of sale of minor's property and as such on the above law the sale was void. It was further contended that the court of appeal below has rightly referred to the recitals of the kobala disclosing the reason for sale which was for acquisition of other properties for the minor. The further evidence of the plaintiff's father was that he misappropriated the sale proceeds so that the sale had nothing to do with the plaintiff's maintenance or

benefit. If the sale was void, the legal consequence followed and it was not necessary to make the purchaser of the void deed a party. As to the plaintiff's title on the basis of lease, it was contended that the defendant should not be permitted to urge his point which is a mixed point of law and fact. Further in his written statement he admitted the title of plaintiff on the basis of the lease which only gave the right of pre-emption to the defendant on transfer of the plaintiff's interest acquired by the lease. Though the defendant could take alternative defence he could not take such alternative defence which destroyed each other. Further the lease was for minor's benefit and she being in possession had possessory title thereto in any event and on the basis of the decision in Somnath Burman Vs. Dr. S.P. Raju and Another, , she was entitled to declaration of the interest against all except the true owner who was her father. It was further contended that the findings arrived at by the court of appeal below about the invalidity of impugned sale are findings of facts based on appreciation of evidence and cannot be reopened in a second appeal. About the High Court's power of interference in second appeal he has referred to certain decision which would be considered presently.

7. The principal question for determination is whether the sale by the plaintiff's father acting on behalf of the plaintiff then a minor to her father-in-law by kobala dated 4th February, 1956 (certified copy Ext. 1c) was a legal and valid document. The appellate court has come to the conclusion that the sale was invalid in law for the following reasons:

8. There was no evidence to show that the sale value was double the real value of the property. The recital was in the document that the land was sold for purpose of acquiring adjacent agricultural lands. This recital was a clear evidence of representation by the vendor to the vendee. None of the conditions of sale mentioned in Article 362 of Mulla's Mahommedan Law was satisfied. The defence plea was that the sale was for the maintenance of plaintiff forsaken by husband. Ext. C is the certified copy of the plaint of the Suit No. 196 of 1958 filed on 2-9-1958 by the plaintiff for dissolution of her marriage with Nurul Islam -- a person who represented the plaintiff as her guardian in the connected suit and in the first appeal and also in this court till recently. Allegations therein inter alia were that the plaintiff was driven out with the clothings she had on her body in 1361 B.S. Baisakh i.e., 1954 April/May and she was forced to take shelter in her father's place. Further allegations therein were that the father was a very poor man and in a distressed condition while she was being neglected for past years by her husband and was leading a humiliating existence by begging her food and clothing from her father. According to the father the suit was filed at the instruction of Kayem. The plaintiff's father's further evidence was that the consideration money of the impugned kobala was spent by him for his own purpose. It would further appear that the husband of the plaintiff admitted in evidence that the pecuniary condition of the plaintiff's father was bad and there is also evidence that he was a day labourer. Even so it was held that it did not mean that the plaintiff's father wanted to procure money by selling the property

of his daughter for her maintenance. It was further held that the plaintiff purchased by a kobala dated 23-7-55 (Ext. 1b) another property which indicated her solvency and absence of need for maintenance. Accordingly the averments made by the plaintiffs in the matrimonial proceedings were not correct and no such representation was made to the vendor while the plaintiff was not at all benefited by the sale. For these reasons the kobala was held to be void ab initio and Mr. Roychoudhury has contended that these findings are findings of fact based on appreciation of evidence and not liable to be reopened in this appeal.

9. Limits of the High Court's power for interference in second appeal has been enunciated in several decisions. In *R. Ramachandran Ayyar Vs. Ramalingam Chettiar*, it was held that even a patently erroneous appreciation of evidence leading to grossly erroneous findings of fact not being a substantial error or defect in procedure cannot be interfered with in a second appeal, while a misplacement of onus on a wrong party and finding of fact on that wrong approach could be a defect in procedure leading to defect or error in decision warranting interference in second appeal. Similarly a wrong discarding of admissible evidence may introduce such error or defect in procedure. If again a decision is contrary to law or usage having a force of law. the conclusion would be liable to be interfered with in second appeal. In *Madamanchi Ramappa and Another Vs. Muthalur Bojjappa*, it was held that sufficiency or adequacy of evidence to support a finding of fact is a matter for decision of the court of facts and cannot be reopened in second appeal.

10. It may be noted that the interpretation of document of title has been accepted as point of law in *Sir Chunilal V. Mehta and Sons, Ltd. Vs. The Century Spinning and Manufacturing Co., Ltd.*, . Misconstruction of a document which is not merely of evidentiary value but upon which the claim of a party is based would be an error of law and the High would be entitled to correct it in second appeal as was held in *Bhusawal Borough Municipality v. Amalgamated Electricity Co. Ltd.* AIR 1966 SC 1622. The court of appeal in considering the recitals of Ext. 1 (c) held that there was no representation about the purpose of sale of minor's interest and accordingly in its absence sale not being for minor's maintenance was void. The findings about the purpose of the document on construction of recital which ultimately has the legal effect of a finding on the document of title as being void in my opinion involves, on the above authorities, a point of law and liable to be examined by this court; It will appear from examination of the said document that by the document (Ext. 1 (c)) both the landlord's interest as also the interest of the plaintiff as raiyat were being transferred. In so far as the purpose of sale of the father's interest is concerned the recital given was for acquiring adjacent land while for the sale of the minor's share it has been stated that it was done for the well-being of the minor. That being the position it would not be correct to say that there was no representation in the impugned document about the purpose of sale of the minor's interest which as we have already seen was for the well-being of the minor. We have already seen the pleadings in the matrimonial suit and it is also admitted that the suit was

decreed on compromise. The result was that the allegations made in the matrimonial suit were not withdrawn which are relevant as an admission of state of affairs during the material period. It was obvious that the plaintiff since about 1954 was forsaken by her husband and she was forced to take shelter in the father's house and had to beg her clothing and food for her existence and it is also the admitted evidence that the father was not in good pecuniary conditions and he was a day labourer. It would thus appear that there was clear evidence that the sale was for the benefit of the minor and it was amply corroborated by the said pleadings in the plaint which was not taken in consideration by the appeal court though mentioned and was in fact wrongly discarded. The document Ext. 1 (b), as we have seen is a kobala dated 23-7-1955 and the consideration of this document was said to have been paid by sale of plaintiff's other properties. This document was produced and accepted in evidence after remand contrary to the terms of the remand order as it appears and was not legally proved P.W. 3 only proving a signature of an attesting witness thereto. This kobala thus was not admissible in evidence and in my opinion even if admissible it would not by itself have established that the plaintiff was not in need of maintenance at the relevant period. There is no evidence to indicate that the usufructs of her properties as alleged thereof were available to the plaintiff to support her in the state she was during the period as stated by her in the plaint and the onus in respect thereof lay entirely on the plaintiff while challenging the validity of the impugned kobala and that onus was not discharged by her. Accordingly I hold that the impugned kobala was for the welfare of the minor which included her maintenance. In these circumstances it is to be held that the document was valid document unless otherwise invalid by any provision of the Mahomedan Law.

11. Under Article 362 of Mulla's Mahomedan Law it is laid down that when a minor had no other property and the sale is necessary for his maintenance a sale in such circumstances will be valid. This clause if given literal meaning would mean that if a minor is seized of properties more than one no sale of any of his property could validly take place at any time even if such other properties fetch no income or usufructs for the minor. The reasonable and proper interpretation of this condition in my opinion is that if the minor is seized of properties and if they yield no income it would not only be proper but essential and necessary that all or some of the properties of the minor should be sold out for his maintenance. Viewed in this light there must be evidence to prove that the usufructs of the minor's properties are sufficient for his maintenance and if it is not so and no evidence is adduced to prove that the usufructs of his properties are sufficient for his maintenance it will not be possible to contend that merely because the minor has other properties, the sale of the property by his legal guardian is void even if such sale was necessary for his maintenance.

12. About the properties comprising Ext. 1 (b) and 1 (c) there is no evidence that their income or usufructs are sufficient for maintenance of the plaintiff and the properties even from the documents appear to be too insignificant to provide for the food and clothing to the plaintiff throughout the period at least from 1954

till the date of sale. In absence of such proof it is not possible to hold that the sale of the minor's property by the impugned kobala offended any of the conditions of alienability of the minor's property as enjoined in Mahomedan Law noted above.

13. Before concluding I would like to add that the contention made by Mr. Bakshi that the kobala executed on behalf of the minor is voidable and not void is not acceptable. It would be so in case of Hindu Law in case of some transfer but in Mahomedan Law as it appears from the text book referred to above that sale violating any conditions of Article 362 will be void and not merely voidable. I also add that the misappropriation of the consideration money by a legal guardian in respect of a kobala executed by him on behalf of the minor is of no consequence. The purchaser is not required to ensure application of the consideration money for the minor's benefit and such act by the legal guardian of the minor will not affect the sale of minor's property.

14. For these reasons I am of opinion that the plaintiff has not been able to prove that the impugned sale was for any reason invalid in law. The preemption decree obtained by the defendant against the purchaser is also a valid and enforceable decree in absence of any illegality in respect thereof and the original vendor the plaintiff not being a necessary party in the said proceeding, the plaintiff can have no relief in this suit.

15. The appeal accordingly succeeds and is allowed. The judgments and decrees of the courts below are set aside and the plaintiff's suit is dismissed. There will be no order for costs in this appeal in the circumstances.

16. Leave under Clause 15 of the Letters Patent is asked for and is granted.