
(1989) 03 GAU CK 0014
In the Gauhati High Court
Case No : First Appeal No. 24 of 1980

Smt. Alimon Nessa and Others	Vs	APPELLANT
Sudhir Chandra Dey and Others		RESPONDENT

Date of Decision : 31-03-1989

Acts Referred:

Citation : AIR 1991 Guw 13

Hon'ble Judges : S.K. Homchoudhuri, J

Bench : Single Bench

Advocate : A. Sarma and B. Dutta, for the Appellant; S.K. Sen, B.R. Dey and S. Dutta, for the Respondent

Final Decision : Dismissed

Judgement

S.K. Homchoudhuri, J.—This First Appeal by the defendants Nos. 3 to 7 is directed against the judgment and decree dt. 29th Jan., 1980 passed by the learned Assistant District Judge, Jorhat in T.S. No. 51/76 decreeing the plaintiff's suit for specific performance of contract by the defendant/respondent Shri Mirza Zamal Hussain. The defendant-appellants Nos. 3 to 7 are the heirs and legal representatives of late Mohfil Hussain, the step brother of defendant respondent Shri Mirza Zamal Hussain. Defendant- respondent Smti Aklima Khatun is the step-mother of Mirza Zamal Hussain.

2. Plaintiff-respondent instituted a Title Suit No. 51/76 in the Court of learned Asstt. District Judge for specific performance of contract by the defendant-respondent, Mirza Zamal Hussain to sell the suit property comprising of land measuring 1K 2L with houses, latrine standing thereon, fully described in the Schedule "A" to the plaint, in terms of written contract dated 23-4-76. Plaintiffs case was that defendant-respondent No. 2, Mirza Zamal Hussain became the sole owner of the suit property by virtue of a gift deed executed by his mother late Saruaiti and that by a written agreement dt. 23-4-76 defendant respondent No. 2, entered into a contract to sell the suit properties for a consideration of Rs. 30,501.00 and received a sum of Rupees 3001.00 as advance. In the written

contract it was stipulated amongst other that plaintiff should pay the balance of the consideration money, Rs. 27,500/- to the defendant-respondent No. 2 within 26-6-76 in the Sub-Registrar Office, Jorhat and defendant-respondent No. 2 would execute the registered sale deed selling the suit property to the plaintiff and would deliver khas vacant possession thereof, after evicting defendant-respondent No. 3 therefrom in the meantime. Plaintiffs further case was that late Saruaiti was the sole owner of land measuring 2K 4L pertaining to dag No. 4052/3803 of periodic patta No. 223/426 of block No. 1 of Jorhat town with standing structures thereon and that by registered deed of gift. dt. 18-3-67, the gifted half of the said property (namely suit property) to defendant-respondent No. 2 and that the defendant appellants, by virtue of other deed of gift executed by late Saruaiti became the owner of other half of the said property.

3. Defendant-respondent No. 2 not having performed his part of the contract of selling the suit property plaintiff filed the suit for decree of specific performance of contract of sale of the suit property to him by the defendant-respondent No. 2 and delivery of vacant possession thereof. Plaintiff deposited the balance amount of consideration money Rs. 27,500/- in the Court with notice to the defendant-respondent No. 2. In the suit defendant respondent No. 2 was impleaded as defendant No. 1, defendant respondent No. 3 as defendant No. 2 and the appellant as defendants Nos. 3 to 7.

4. Mirza Zamal Hussain, the defendant No. 1 in the suit, contested the suit by filing written statement. In the written statement, he admitted the execution of the agreement dt. 23-4-76 contracting to sell the suit property but contended that it was not possible on his part to sell the suit property, as he could not evict the defendant No. 2 from the suit property within 26-6-76. Defendants Nos. 3 to 7 contested the suit by filing a written statement. Contending amongst others, (i) that the agreement dt. 23-4-76 between the plaintiff and defendant No. 1 was void and inoperative (ii) that the agreement was executed fraudulently (iii) that defendant No. 1 had no right, title and interest over the suit property and (iv) that the plaintiffs suit was frivolous and contrary to the spirit of law and the entire claim of the plaintiff was hit by the provision of Muslim Law, inasmuch as they got right of pre-emption. They also denied that defendant No. 1 had possession over the suit property. Defendant No. 2, did not however, contest the suit. On the pleadings of the parties following issues were framed :--

ISSUES

1. Whether State is any cause of action for this suit?
2. Whether the suit for specific performance is maintainable?
3. Whether the agreement dt. 23-4-76 is valid and in operation in law and was got executed by exercising fraud, coercion and undue influence.
4. Whether the defendant No. I had any right, title and interest over the suit premises?

5. Whether the defendant No. 1 revoked the agreement for sale the suit land?
6. Whether the defendants 3, 5, 6 have the right of pre-emption?
7. To what relief/reliefs the plaintiff is entitled?

5. In the hearing of the suit plaintiff examined 4 witnesses including himself in support of his case and filed and proved a number of documents. The registered deed of gift dt. 18-3-67 and which late Saruaiti gifted the suit property to the defendant No. 1 and as well as registered deed of gift executed by her gifting other half of her property in favour of the Mohfil Hussain, were marked as Ext. 2 and Ext. 1 respectively. The deed of agreement was also proved and marked Ext. 5. Other documents were also proved and marked as exhibits. Defendant No. 1 examined himself as sole witnesses on his behalf. On behalf of defendants Nos. 3 to 7 one witness namely defendant No. 5 was examined as sole witnesses. Defendant respondent No. 2 in his evidence stated that he was ready and willing to execute the registered sale deed as per the agreement.

6. Learned Asstt. District Judge on consideration and evidence and materials on records by the impugned judgment and decree, decreed the plaintiffs suit. Being aggrieved, defendants 3 to 7 have filed this appeal in this Court impugning the judgment and decree.

7. The evidences on records, reveal that late Saruaiti was the sole owner of entire plot of land measuring 2K 4L pertaining to Dag No. 4052/3803 of periodic patta No. 223/426 of block No. 1 of Jorhat town with standing structures thereon, and that she gifted the said property equally to her two sons namely Mirza Zamal Hussain defendant-respondent No. 2, and Mahfil Hussain, the predecessor-interest of the applicant, by registered gift deed executed on 18-3-67 and on 23-3-67. The suit property is the one half of said property of late Saruaiti, gifted to Mirza Zamal Hussain by Ext. 2.

8. Mr. A. Sarma, learned counsel for the appellant has assailed the impugned judgment and decree on two grounds namely (i) although suit property was gifted by late Saruaiti by registered deed of gift deed vide Ext. 2 in favour of defendant-respondent No. 2, he not having taken possession of the gifted property, the gift was not complete and no title was passed to the donee namely the defendant-respondent No. 2. As such he has no right to sell the suit property, (ii) Assuming, but not admitting that defendant-respondent No. 2 became the owner of the gifted property namely the suit property, the proposed sale of the property as per agreement is hit by law of pre-emption as provided in Mohammedan Law.

9. In para 4 of their written statement the defendant appellants pleaded that defendant-respondent No. 2, had no right, title and interest over the suit property and he was bound to return the advance money amounting to Rs. 3001/- received from the plaintiff-respondent. In para 6 thereof, they pleaded that plaintiffs suit was frivolous and contrary to the spirit of law and the entire

claim of the plaintiff was hit by the provision of Muslim Law and that their right of pre-emption was violated by the alleged agreement to sell made by the defendant No. 1 with the plaintiff. In support of pleadings, defendant-appellant No. 3 examined himself as the sole witnesses on behalf of defendant-appellants. His age on the date of deposition (22-12-79) was recorded as 32 years. As such he was about 20 years old when the registered deed of gift namely Ext. 2 was executed by late Saruaiti gifting the suit property to defendant-respondent No. 2. This witness deposed that he came to know about the gift after the suit was filed, on the other hand he stated on oath that defendant-respondent never took possession of the suit property according to the deed of gift and defendant respondent No. 2 had no right to sell the suit property. He deposed that he did not know as to whether his father became the owner of the half of the property of his grandmother by virtue of a deed of gift executed in favour of his father. He stated that his father had filed a suit for eviction of plaintiff from part of their house which plaintiff came to occupy as tenant; but could not say whether his mother had taken steps in that suit after his father's death or adduced evidence in that regard. He stated that he did not know whether late Saruaiti, mother or his father and defendant-respondent No. 2 had been residing on the suit land in March, 1967. Admittedly, he had no knowledge about the gift etc. prior to filing of the suit. He was about 20 years at the time of execution of the gift. As such his evidence that defendant-respondent No. 2 did not get possession of the suit premises after execution of the deed of gift by late Saruaiti, does not inspire confidence. The evidence of this witness is absolutely silent in respect of the pleading made in" para 6 of the written statement that the proposed sale is hit by the provision of Muslim Law inasmuch as the defendant appellants got their right of pre-emption as per provision of Mohammedan Law. Defendant-respondent No. 2, who examined himself as sole witness in support of his case, stated that before the execution of the 2 deeds of gift namely Ext. 2 and Ext. 1 by their mother, he and his step brother had already divided the mother's property in equal parts and had been in possession of the respective part. After execution of the two deeds of gift his elder brother demolished the part of the house taken in his share and built a two storied house in its place, while the other part of the property, namely the suit property gifted to him remained as it was. In connection with his service in A.C.C., he had to stay at Digboi and he kept his mother in the suit house, gifted to him and kept on visiting her from Digboi and when his mother became ill, his wife and children came from Digboi and stayed in his house for about a month. After the execution of the deed of gift, he personally had water connection installed and weeds cleared. When his mother's condition worsened on receipt of wire from his wife, he came to Jorhat and took his mother to Digboi and he asked his step-mother (defendant No. 2) to look after the house. His mother died at Digboi in 1968. The defendant-respondent further stated that he had been paying taxes, revenues for the suit land and houses etc. and that Ext. "Chha" was one such revenue receipt. He further stated on oath that when the plaintiff made a proposal for purchase of suit property, he told him that he would come to Jorhat for negotiation. Shortly

after that he came to Jorhat and asked his sister-in-law namely appellant No. 1, whether she would buy the suit property otherwise he would sell the same to others. His sister-in-law however, offered to buy the property by making payment of consideration in instalment to which he did not agree and accordingly entered into the agreement to sell the property to plaintiff. After the agreement, he told his step mother about it and offered to take her to Digboi. I find that the evidence of defendant-respondent No. 2 is consistent and his evidence is not at all shaken by cross-examination.

10. Another circumstance, cannot be overlooked. Defendant-respondent No. 2 and late Mahfil Hussain predecessor-in-interest of the defendant-appellants were the only 2 sons of late Saruaiti. It was quite natural that to avoid future complication the mother by executing Exts. 1 and 2 gifted her property in equal shares to her two sons. It cannot be held that while the deed of gift (Ext. 1), executed on 23-3-67 in favour of one son, namely predecessor-in-interest of defendant- appellants was given effect to, other deed of gift namely Ext. 2, executed on 18-3-67 in favour of another son (defendant-respondent No. 2) was not given effect to. Taking into consideration of the entire facts and circumstances of the case, I am inclined to hold that defendant-respondent No. 2 became owner of the suit property by virtue of deed of gift namely Ext. 2, Mr. A. Sarma, learned counsel for the appellant placed reliance on decision of case of Maqbool Alam Khan Vs. Mst. Khodaija and Others, in support of the contention that without delivery of possessions a gift does not confer title of the gifted property on the donee. In the instant case, from the facts and circumstances and materials on record, it is clear that the defendant-respondent No..2 got possession of the suit property in pursuance to the deed of gift and become the owner thereof.

11. As to the other ground, the learned counsel refers to Chapter XIII of Mohammedan Law and has submitted that the proposed sale of the suit property to the plaintiff-respondent as per the agreement is hit by provision of Mohammedan Law of pre-emption. Para 226 of the Mohammedan Law provides that right of "Shufaa" or pre-emption is a right which the owner of immovable property possesses to acquire by purchase another immovable property which has been sold to another person. However, that right, as rightly pointed out by Mr. S. K. Sen, the learned counsel for the respondent No. 1, is controlled by para 236 of the Mohammedan Law, which provides that no person is entitled to right of pre-emption unless, he declared to assert the right immediately on receiving the information of the sale. Mr. Sen has submitted that unrebutted and unchallenged evidence of defendant-respondent No. 2, was that before entering into the contract to sell the suit property to the plaintiff-respondent, he offered to sell to defendant-appellant No. 1, but she offered to purchase the suit property by making payment of consideration in instalments to which defendant respondent No. 2 did not agree. Besides there is no evidence on records either oral or documentary to show that the defendant-appellants either jointly or individually declared the intention to assert the right of preemption on receipt of

the information of proposed sale of the suit property, to plaintiff-respondent. On perusal of the materials on records, I find much force in the submission of Mr. Sen, and I hold that the appellants either individually or jointly not having declared the intention to assert the right of pre-emption after coming to know about the proposed sale, are not entitled to take shelter under the right of pre-emption. No other grounds are urged by the appellant.

12. Grounds assailing the impugned judgment and decree having failed, the appeal is liable to be dismissed and the appeal is therefore dismissed with costs to be paid to the plaintiff-respondent.