

(1960) 04 PAT CK 0027
In the Patna High Court
Case No : A.F.A.D. No. 492 of 1955

Smt. Lalbati Kuer

APPELLANT

Vs

Satchitanand Verma and Others

RESPONDENT

Date of Decision : 01-04-1960

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 23, 11

Citation : AIR 1960 Patna 418

Hon'ble Judges : V. Ramaswami, C.J;R.K. Choudhary, J

Bench : Division Bench

Advocate : A.C. Sinha and Nakuleshwar Prasad, for the Appellant; Lal Narain Sinha, Ch. Nawal Kishore Prasad, Parmeshwar Prasad Sinha and Sadhu Sharan Sahai, for the Respondent

Final Decision : Dismissed

Judgement

1. In the suit out of which this, appeal arises the plaintiff prayed for redemption of a Sudhbharna bond dated 22-7-1909, executed by the ancestors of the defendants second party in favour of the mother of the defendant first party with respect to 3 bighas 19 kathas 1 dhur of land. It was alleged that the plaintiff purchased the mortgaged property from the defendants second party by a registered sale deed on 6-5-1939. The suit was resisted by the defendants first party who alleged that on 25-3-1939, there was a contract for sale executed by the defendants second party in favour of the defendant first party with regard to the disputed land. The suit was dismissed by the Munsif on the ground that the plaintiff did not acquire any title under the sale deed because there was no consideration given and also because the plaintiff made the purchase with notice of the agreement for sale made in favour of the defendant first party. The plaintiff took the matter in appeal, but the appeal was dismissed by the lower appellate Court on the ground that the plaintiff had acquired no title under the sale deed because no consideration was paid. When the matter came to the High Court in second appeal (Second Appeal No. 2510 of 1946), Sinha J., remanded

the case on the ground that the finding of fact with regard to the passing of title of the plaintiff was vitiated and the appeal should be reheard by the lower appellate Court. After remand the Subordinate Judge came to a finding that the plaintiff acquired a good title under the sale deed and that she made the purchase without notice of the agreement for sale with the defendant first party. The subordinate Judge accordingly granted a decree to the plaintiff for redemption of the disputed land. The matter was again taken up in second appeal to the High Court, and Misra, J., who heard the second appeal remanded the case again to the lower, appellate Court for consideration of the question whether the agreement for sale upon which the defendants second (?) party relied was a genuine transaction and whether the agreement for a sale was executed on the date on which it was alleged to have taken place, The learned Subordinate Judge who heard the appeal on remand reached the conclusion that the Mahadanama (Ext. F) was a genuine document and that it was executed on the date on which it was alleged to have been executed and accordingly the learned Subordinate Judge dismissed the suit for redemption.

2. In support of the present second appeal learned counsel contended that even if the Mahadanama was a genuine document the suit of the plaintiff could have been dismissed. It was contended that a contract to sell Immovable property was a mere contract and did not create in itself any interest or charge on such property u/s 54 of the Transfer of Property Act. It was, therefore, argued that the suit of the plaintiff for redemption cannot be defeated merely because the defendant first party had a contract for sale in his favour prior to the purchase of the plaintiff. We do not think it is open to the appellant to raise this point at this stage. The reason is that the judgment of Misra, J., dated 22-12-1953, has finally disposed of all the matters in controversy between the parties except the point with regard to the genuineness of the mahadanama. Except with regard to this point all the matters in controversy between the parties have been decided by the learned Judge, and those points cannot, therefore, be re-opened on the principle of constructive res judi-cata. The relevant portion of the order of Misra, J., dated 22-12-1953, in Second Appeal No. 1950 of 1949 is reproduced below :

"In view of the argument by the parties, I think that the contention on behalf of the respondents is correct that the consideration of the genuineness or otherwise of Ext. F cannot be ruled out. Since, however, it appears that the finding actually recorded, to which I have made a reference above, by the learned Subordinate Judge, on remand, appears to me of an inconclusive character upon one of the vital points raised before me in this appeal, I think it fair that the case should go back again for considering the evidence on record to find as to whether in fact there was any agreement for sale executed on the date on which it is alleged to have taken place by the defendants 2nd party in favour of defendant 1st party. If the learned Subordinate Judge comes to the conclusion, on hearing the parties, that there was such an agreement, it is clear that he is bound to hold in favour of defendant 1st party and the plaintiff would not succeed in her claim for redemption as against rights of the defendant 1st party to hold the property in

his character as a vendee, since as a result of the agreement he ceased to hold the property as a mortgagee irrespective of the question of purchase by the plaintiff with or without notice of this agreement for sale. If, however, the learned Subordinate Judge comes to the conclusion that in fact there was no such agreement for sale as propounded by the defendant 1st party of a date prior to the sale deed in plaintiff's favour, then in fact the plaintiffs suit would have to be decreed.

The appeal is accordingly allowed. The judgment and the decree of the learned Subordinate-Judge are set aside, and the case is sent down again to him for a consideration of the only point indicated above and to decide it in accordance with the finding arrived at by him. The costs of the appeal will abide the result of the case in the Court of appeal below."

The principle applicable to a case of this description has been laid down by a Division Bench of this Court in *Sunder Ahir and Others Vs. Mt. Phuljharia and Another*, . It was pointed out in that case, after a review of all the authorities on the point, that if a Bench of the High Court remands a case to the lower Court under its inherent powers, the matters finally disposed of by the order of remand cannot be reopened when the case comes back to the lower Court. In our opinion, this principle applies to the present case, and in view of that principle we cannot entertain the argument advanced by learned counsel for the appellant based u/s 54 of the Transfer of Property Act. In our opinion, therefore, there is no merit in this second appeal; it is accordingly dismissed. There will be no order as to costs.