
(2009) 03 GAU CK 0051
In the Gauhati High Court

Smt. Renubala Nama and Others

APPELLANT

Vs

Smt. Renubala Das

RESPONDENT

Date of Decision : 19-03-2009

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 9 Rule 13, 96

Citation : (2009) 5 GLR 120 : (2009) 3 GLT 753

Hon'ble Judges : B.D. Agarwal, J

Bench : Single Bench

Final Decision : Allowed

Judgement

B.D. Agarwal, J.—This second appeal at the instance of the plaintiff is directed against the judgment and decree dated 13-5-1999 passed by the learned Addl. District Judge, West Tripura, Agaitala in Title Appeal No. 42 of 1993 affirming the judgment and decree passed by the learned Sr. Civil Judge No. 2, West Tripura, Agartala in T. S. No. 214 of 1993, whereby the trial Court has dismissed the suit of the plaintiff on the ground of maintainability.

2.I have heard Sri D. Chakraborty, learned Counsel for the appellant (now through legal heirs). The sole respondent is represented by Dr. H. K. Bhattacharjee, learned advocate. I have also perused the impugned judgments and the records.

3. Brief facts leading to the filing of the suit and this appeal are that the suit property originally belonged to one Sri Pyari Mohan Saha and Sri Manmohan Das. The land was sold by these two persons to one Sri Jamini Kanta Das, Kamini Kanta Das and Sachindra Malakar in the year 1957 through two different sale deeds. Within a period of less than two years, the original land owners again sold the same land to late Hriday Chandra Nama, predecessor-in-interest of the present appellants vide sale deed dated 20-8-1958. Thereafter the wife of Sri Manmohan Das (one of the original landlords), namely, Smt. Renubala Das (respondent) had allegedly repurchased the same land from Jamini Kanta Das,

Kamini Kanta Das and Sachindra Malakar in the year 1962 through 3 different sale deeds. Long after 18 years on the basis of such alleged purchase Smt. Renubala Das/respondent instituted Title Suit No. 197 of 1980 in the Court of Sadar, Munsiff, Agartala praying for declaring her title and recovery of khas possession of the land from the Hriday Chandra Nama. The suit was decreed ex parte on 12-8-1981.

4. After more than 2 years of the ex parte decree late Hriday Chandra Nama filed Title Suit No. 214 of 1983 praying for following decrees:

(A) "Declaring that the deeds of sale dated 3-9-62, 7-9-62 and 3-6-62 alleged to have executed by Jamini Kanta Das, Sachindra Malakar and Kamini Kanta Das respectively in favour of the defendant are false, fabricated, collusive, fraudulent, without consideration, void and not binding and operative against the plaintiff and these sale deeds have not affected plaintiff's right, title and interest or possession over the suit land.

(B) Declaring that the judgment passed by this learned Court on 12-8-81 in Title Suit No. 197 of 1980 and the decree which was drawn up on 29-8-1981 in pursuance of the said judgment is fraudulent, void and not binding and operative against the plaintiff and this has not affected plaintiff's right, title and interest or possession over the suit land.

5. While filing the second suit for the same piece of land the plaintiff/appellant clarified in his plaint that the former ex parte decree was obtained by Smt. Renubala Das deceitfully keeping the defendant away from the proceeding on the promise of amicable settlement/compromise. In this way the decree passed in Title Suit No. 197 of 1980 was challenged on the ground of fraud. Admittedly, it was pleaded that there was no valid sale of land in favour of the defendant/respondent.

6. Having received summons the defendant/respondent appeared in the Court and disputed the averments made in the plaint.

7. On the basis of counter pleadings the following issues were framed in the trial Court:

(i) Is the suit maintainable in its present form?

(ii) Has the plaintiff any cause of action ?

(iii) Is the suit barred by the principle of estoppel, waiver and acquiescence ?

(iv) Is the suit barred by limitation ?

(v) Are the sale deed dateds 3-9-62 and 7-9-62 and executed by Jamini Kanta Das in favour of the defendant false, collusive and void and not binding and operative against the plaintiff?

(vi) Are the judgment and decree dated 12-8-1991 passed by Sadar Munsiff, Agartala in Title Suit No. 197 of 1980 void and not binding and operative against

the plaintiff?

(vii) Is the plaintiff entitled to the decree as prayed for ?

(viii) To what relief or reliefs the plaintiff/ defendant are entitled ?

8. As could be gathered from the impugned judgments both the Courts below have dismissed the suit and appeal of the plaintiff rendering their findings about maintainability of the suit, without deciding the other issues involved in the suit. Both the Courts below have held that since the alternative forum by way of filing an application for vacating ex parte decree under Order IX, Rule 13, CPC or by way of filing appeal u/s 96 of the CPC were not availed, a separate suit for the same cause of action is not maintainable. These concurrent findings of law are under challenge in the present second appeal.

9. While admitting the appeal the following substantial question of law was framed:

Whether the separate suit for avoiding the ex parte decree on the ground of fraud is maintainable.

10. As noted earlier, the suit and appeal were dismissed on the technical ground of maintainability. In this way there is no question of re-appreciation of any evidence. Be that as it may, it is the settled position of law that if there is wrong application of law or settled legal principles it would amount to Substantial question of law and there would be no bar to entertain the second appeal even against such concurrent findings. One can easily refer to the judgment of the Hon"ble Supreme Court rendered in the case of Hero Vinoth (minor) Vs. Seshammal,

11. During the course of argument Dr. Bhattacharjee, learned Counsel for the respondent was pointedly questioned whether there is any absolute or specific bar for instituting a separate suit questioning the legality of a decree on the ground of fraud, learned Counsel fairly conceded that there is no such specific bar in the CPC. However, the learned Counsel contended that since the alternative forums were available the plaintiff/appellant ought to have exhausted those remedies.

12. Par contra, Sri Chakraborty, learned Counsel for the appellants submitted that if a decree is challenged on the ground of fraud such suit should not be thrown overboard on technical objections. Even otherwise, as submitted by the learned Counsel for the appellants, the suit could not have been dismissed on the preliminary objection of maintainability since there was additional prayer to declare the sale deeds of the defendant/respondent as illegal and void. According to the learned Counsel under Order XIV, Rule 2(2) CPC, the Courts are obliged to pronounce judgments on all the issues. The only exception to this general rule is that a suit may be disposed of without addressing issues based on facts provided the Court finds that the suit touches the jurisdiction of the Court or if there is any express bar to entertain the suit as laid down under Clauses (a) and (b) of Rule

2(2) of Order XIV, CPC and as such both the Courts below committed manifest illegality in dismissing the suit. For better appreciation of the legal issue relevant provisions of Order XIV, CPC are extracted below:

1. XXX XXX XXX XXX

2. Court to pronounce judgment on all issues.

(1) Notwithstanding that a case may be disposed of on a preliminary issue, the Court shall, subject to the provisions of Sub-rule (2), pronounce judgment on all issues.

(2) Where issues both of law and of fact arise in the same suit, and the Court is of opinion that the case or any part thereof may be disposed of on an issue of law only, it may try that issue first if that issue relates to -

(a) the jurisdiction of the Court, or

(b) a bar to the suit created by any law for the time being in force, and for that purpose may, if it thinks fit, postpone the settlement of the other issues until after that issue has been determined, any may deal with the suit in accordance with the decision on that issue.

3 to 7. xxx xxx xxx xxx

13. What should be the zeal and earnestness of the Courts when a suit or application is filed alleging fraud by a party in a judicial proceeding was considered by the Supreme Court in the case of S.P. Chengalvaraya Naidu (dead) by L.Rs. Vs. Jagannath (dead) by L.Rs. and others, The relevant observations of the Apex Court are necessary to be reproduced in this judgment to ascertain as to with what sincerity and seriousness the allegations of fraud should be examined by the Courts. Their Lordships' observations as well as thought provoking observations of the Chief Justice of House of Lords of England, referred to in the aforesaid judgment are as follows (paras 1 & 7):

Fraud avoids all judicial acts, ecclesiastical or temporal" observed Chief Justice Edward Coke of England about three centuries ago. It is the settled proposition of law that a judgment or decree obtained by playing fraud on the Court is a nullity and non est in the eyes of law. Such a judgment/decreed by the first Court or by the highest Court has to be treated as a nullity by every Court, whether superior or inferior. It can be challenged in any Court even in collateral proceedings.

"...The Courts of law are meant for imparting justice between the parties. One who comes to the Court, must come with clean hands. We are constrained to say that more often than not, process of the Court is being abused. Property-grabbers, tax-evaders, bank-loan-dodgers and other unscrupulous persons from all walks of life find the Court-process a convenient lever to retain the illegal-gains indefinitely. We have no hesitation to say that a person, who's case is based on falsehood, has no right to approach the Court. He can be summarily thrown out at any stage of the litigation."

14. It is true that in ordinary course the appellants ought to have approached the same Court by filing an application under Order IX, Rule 13, CPC or he could have filed an appeal u/s 96 of CPC. However, when an allegation of fraud was made by the plaintiff the Courts below here expected to examine the allegation of fraud instead of dismissing the suit at its threshold on equitable ground. Besides this, the impugned judgments suffer from material illegality inasmuch as the allegation of fraud has been heard and decided as a preliminary issue which, in my opinion, cannot be considered within the parameters: of Clauses (a) and (b) of Rule 2(2) of Order XIV CPC, which relate to deciding a suit on preliminary issues. As a matter of abundant precaution I have also perused the ex parte judgment passed under Order 8, Rule 10, CPC in the former suit i.e. T. S. No. 197 of 1980 filed by the preset respondent to ascertain whether there is any semblance of fraud on the part of the respondent while filing the former suit. In the aforesaid judgment, except referring to the plaintiff's version made in the plaint, there is no whisper whether the sale deeds were at all proved by the plaintiff, I am also of the view that ordinarily the suits and proceedings should be decided by rendering findings on all the issues. Strangely, both the Courts have failed to address as to whether the prayer No. (A) of the plaintiff to declare the sale deeds of the defendant as illegal, void and inoperative could have been raised in by way of filing a separate suit.

15. In the case of Sudha Devi Vs. M.P. Narayanan and Others, the Apex Court has held that even in the absence of defence the Court cannot pass an ex parte decree without reliable and relevant evidence. Similar views have also been taken by the Gauhati High Court. In the case of Arati Datta v. Eastern Tea Estate Pvt. Ltd. reported in (1985) 2 GLR 364 it has held that even the exparte judgment must show that the plaintiff had a prima facie case. Again in the case of Mahavir Prasad v. Purushottam Agarwalla reported in 1993 (2) GLR 339 : AIR 1994 (NOC) 301 this Court has held that when the defendant is absent or a decree is passed exparte it is the bounden duty of the Court to be more careful and cautious so that no injustice is caused. In my considered opinion, had this precaution been taken by the trial Court before granting the exparte decree in T.S. No. 197 of 1980 the present situation, levelling the allegation of fraud on the part of the respondent, could have been avoided.

16. Having regard to all the aspects of the matter, I hold that there are sufficient materials and grounds to interfere with the concurrent judgments. Consequently, both the impugned judgments/are hereby set aside. The Court of Civil Judge No. 2, Agartala, West Tripura is directed to decide Title Suit No. 214 of 1983 afresh by giving opportunity to both the parties to adduce evidence.

17. In the result, the appeal stands allowed. The lower Court records be returned with a copy of this judgment to the trial Court Both the parties arc directed to appear before the trial Court on 20-4-2009 and receive further directions.