

(2009) 08 GAU CK 0034

In the Gauhati High Court

Case No : Regular Second Appeal 1 (SH) of 2004

Sudhir Ranjan Chanda

APPELLANT

Vs

Uma Dutta

RESPONDENT

Date of Decision : 28-08-2009

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 100

Contract Act, 1872 — Section 56

Meghalaya Transfer of Land (Regulation) Act, 1971 — Section 2, 3, 3(1), 4

North Eastern Areas (Reorganisation) Act, 1971 — Section 2(b)

Transfer of Property Act, 1882 — Section 53A, 54

Citation : (2010) 1 GLR 8 : (2009) 5 GLT 681

Hon'ble Judges : B.K. Sharma, J

Bench : Single Bench

Advocate : R. Choudhury, for the Appellant; S. Chakraborty, for the Respondent

Final Decision : Dismissed

Judgement

B.K. Sharma, J.—This second appeal is against the concurrent findings of fact and law arrived at by the learned courts below. The trial courts judgment and decree is dated 7.7.2003, while the first appellate courts judgment and decree is dated 14.5.2004.

2. Briefly stated the facts leading to filing of the Title Suit being TS No. 25(H)/1997 is that the father of the plaintiff respondent late Kamini Kumar Gupta was the absolute owner of a landed property covered by Patta No. 112, plot No. 20 and holding No. 53 (new No. 45) of the Shillong Municipality. The land is situated at Jail Road, Shillong, which is specifically described in the schedule to the plaint.

3. Shri Sudhir Ranjan Chanda, the defendant appellant had entered into an un-registered agreement of sale with the plaintiff, respondent's father on 26.2.1978 in respect of a plot of land measuring more or less 3,000 sq. ft., which forms part of the aforesaid landed property described in the schedule to the plaint. The

consideration stipulated in the agreement was Rs. 8,000. Again on 8.3.1978, another agreement was entered into by and between the parties, i.e., the appellant and the plaintiff respondent's father in respect of the same plot of land raising the consideration money from Rs. 8,000 to Rs. 12,000.

4. The property being situated in the normal area of Shillong, permission for transfer of property by way of clear sale was mandatory. Accordingly, the father of the plaintiff respondent and the defendant appellant submitted an application to the competent authority of the State Government seeking the statutory permission for transfer of the suit land. Pending permission for the transfer, the defendant appellant was allowed by the father of the plaintiff to occupy his servant's quarter standing on the plot of land on the presumption that the permission for the transfer of the land would be accorded by the concerned authority. However, the competent authority of the State Government rejected the application, submitted by the father of the plaintiff and refused the permission to transfer the plot of land to the defendant appellant. Such refusal was communicated to the father of the plaintiff by the Deputy Commissioner, East Khasi Hills District, Shillong vide his letter dated 6.1.1986.

5. The father of the plaintiff died on 8.7.1992 leaving behind his widow and the plaintiff respondent as the surviving legal heirs, following which the entire property together with the suit land devolved on the plaintiff respondent and her mother. The plaintiff respondent approached the revenue authority for mutating her name in the suit property to which her mother had given full consent. Accordingly, the application for mutation submitted by the plaintiff respondent, was registered as Mutation Case No. 35/1994 and the mutation was allowed vide order dated 26.8.1994.

6. According to the plaintiff respondent, in view of the refusal of permission by the concerned authority to transfer the suit land and on the death of her father, the agreement (Ext. 1 and 2) became infructuous, leaving no scope for transfer of the suit land to the defendant appellant in accordance with law.

7. The case of the plaintiff respondent in the suit is that the defendant appellant is a rank trespasser and after refusal of the permission for sale of the land, he ought to have vacated the suit land. Her request for vacating the land having not been yielded any result, she filed the suit after following the due procedure.

8. The suit was resisted by the defendant appellant raising the usual plea like non-maintainability of the suit, no cause of action, under valuation of the suit land, the suit being barred by principles of waiver, estoppel and acquiescence, and being bad for non-joinder and mis-joinder of necessary parties, etc. On merit, it was contended that the suit land was disposed of by the father of the plaintiff respondent in favour of the defendant appellant. On the basis of the pleadings, the following issues were framed.

1. Whether there is any cause of action for the instant suit?

2. Whether the suit is maintainable in its present form?
3. Whether this Court has got the Jurisdiction to try this suit?
4. Whether the suit is properly valued and the requisite court fees have been paid by the plaintiff?
5. Whether the suit is barred by principles of Estoppel, Waiver and Acquiescence?
6. Whether the suit is bad for mis-joinder and non-joinder of the necessary parties?
7. Whether the father of the plaintiff has any claim of ownership over the land in suit during his lifetime?
8. Whether the defendant has purchased the land in suit?
9. Whether the plaintiff has obstructed the defendant in mutation of the part of the suit property?
10. Who is in possession of the suit land?
11. Whether there is any existence of transaction between the defendant and the father of the plaintiff?
12. Whether the plaintiff is entitle to relief/reliefs as prayed for?

9. The plaintiff respondent examined herself as PW1 and her son as PW2, while the defendant appellant examined himself as DW1. He also examined one Shri Subodh Chanda as DW2. Both the P Ws and D Ws were cross-examined. The learned trial court has answered the issue No. 8 and 9 together. The issue No. 8 and 9 are as follows:

8. Whether the defendant has purchased the land in suit? and
9. Whether the plaintiffs have obstructed the defendant in mutation of the part of the suit property?
10. While the PW1 expressed her doubt about the alleged agreement dated 26.2.1978 and 8.3.1978, there being no signature of the defendant appellant in page Nos. 1 and 2 of the agreement dated 26.2.1978, the DW1 in his examination in chief stated that he had purchased the suit land from the father of the plaintiff respondent in the year 1978. He also stated that after the agreement dated 8.3.1978, he had paid Rs. 22,000 to the father of the plaintiff respondent. The learned trial court has found that as per the evidence on record, the defendant and the father of the plaintiff applied jointly to the competent authority for permission for transfer of the suit land. However, the application was rejected by the competent authority of the Government (Ext. 3). After the death of the father of the plaintiff respondent, the authority granted the permission in the year 2000 for transfer of the suit land. According to the plaintiff respondent, such permission was of no consequence since in the mean time the

joint application had spent its force and there was no joint application filed by the defendant appellant and the plaintiff respondent.

11. The trial court also found that the permission granted in the year 2000 was subsequently cancelled by the authority vide letter dated 15.9.2000. Such cancellation of permission was admitted by the defendant appellant. Although, an argument was advanced on behalf of the defendant appellant that, in fact, the sale deed was prepared with signature, etc., but the same was never indicated in the written statement nor any question was put to the plaintiff respondent in cross-examination. Further, the said sale deed was also not produced on the date fixed for production of documents. Be that as it may, the sale deed is of no consequence, the same having not been executed.

12. It is on the above basis, the learned trial court has decreed the suit in favour of the plaintiff respondent granting the relief prayed for in the suit, which are as follows:

On the basis of my findings and decisions in the foregoing issues, I hold that the plaintiff is entitled to a decree for declaration that:

1. The plaintiff has got the right and title over the land in suit.
2. The plaintiff has the right of possession over the property described in the schedule of the plaint, that is over the land measuring 3,000 sq.ft. with a temporary shed thereon.
3. The plaintiff is entitled to the full cost of the suit from the declaration.
4. The defendant is a rank trespasser in the eye of law.

The suit is decreed on contest against the defendant. And with these relief/reliefs in favour of the plaintiff, this suit is decreed and finally disposed off on contest.

13. Being aggrieved by the aforesaid judgment and decree, the defendant preferred appeal being RFA (TCA) No. 4(H)/2003, before the learned District Judge, Shillong. The appeal having been dismissed by judgment and order dated 11.5.2004, the present second appeal has been preferred by the said appellant.

14. The first appellate court after taking into account all the relevant facts, evidence on record and the findings arrived at by the trial court, has dismissed the appeal affirming the judgment and decree passed by the learned trial court. Hence, this second appeal by the unsuccessful appellant defendant.

15. There is no dispute that no permission, which is the condition precedent before entering into an agreement for sale was granted by the competent authority towards transfer of the land by way of sale. Without such permission from the competent authority of the Government, the sale was impossible. It is in this context, the learned appellate court has referred to the provisions of Section 56 of the Indian Contract Act, 1872, which stipulates that an agreement to do an act impossible in itself is void and in that case, the only remedy is

compensation. The learned appellate court has also dealt with the provisions of Section 53A of the Transfer of Property Act. On the basis of the materials on record, it has been found that the plea of protection u/s 53A of the Transfer of Property Act was not even raised in the written statement nor any issue was framed. It has been observed by the learned appellate court that to give protection u/s 53A, the relevant facts are required to be pleaded and proved which is missing in the instant case.

16. While admitting the instant appeal, at the first instance, on the basis of the submissions made by the Learned Counsel for the appellant, the following questions of law were formulated:

1. Whether the Jurisdiction of the trial court vis-a-vis the Court Fees Act, 1870 as decided by the first appellate court was based on conjectures, assumptions and erroneous findings?

2. Whether the construction and interpretation of provisions of Section 53A of the Transfer of Property Act, 1882 and of Section 56 of the Indian Contract Act as made out by the courts below are correct or not?

3. Whether the sale was complete as envisaged u/s 54 of the Transfer of Property Act.

17. However, subsequently the Learned Counsel for the appellant submitted before the court that new substantial questions of law which are not similar to the above have been formulated. Accordingly, notice was issued to the respondent. Thereafter the aforesaid questions of law were substituted by the following substantial questions of law:

1. Whether, for initial refusal of permission for sale which was subsequently granted but again cancelled at the instance of the Plaintiff, the learned lower appellate court was justified in holding that such refusal rendered the contract of sale "impossible of performance" so as to attract Section 56 of the Contract Act, 1872?

2. Whether, the factual ingredients of the doctrine of part performance of contract having been established from the pleadings as well as the evidence on record, the learned First Appellate Court was justified in refusing to invoke the provisions of Section 53A of the Transfer of Property Act, 1882, on the ground of absence of specific pleading and non-framing of any issue in that regard by the trial court?

18. I have heard Mr. R. Choudhury, Learned Counsel for the appellant and so also Mr. S. Chakraborty, Learned Counsel appearing for the respondent.

19. Mr. Choudhury, Learned Counsel for the appellant referring to the entire materials on record submitted that the defendant appellant is entitled to the protection as envisaged u/s 53A of the Transfer of Property Act, 1882. As regards the applicability of the Provisions of the Meghalaya Transfer of Land (Regulation)

Act, 1971, he submitted that the provisions of the said act are not applicable to the suit land. In this connection, he has referred to the notification dated 7.6.1978, which reads as follows:

No. RDS.11/76/187. - In exercise of the powers conferred by proviso to Sub-section (1) of Section 3 of the Meghalaya Transfer of Land (Regulation) Act, 1971 (Act 1 of 1972), the Government of Meghalaya hereby prohibit transfer of land by a tribal to non-tribal or by a non-tribal to another non-tribal within the areas specified below:

(1) The areas within the East Khasi Hills District except the areas to which the Act aforesaid does not apply.

(2) The areas within the Jaintia Hills District.

(3) The areas within the West Khasi Hills District.

20. He has also placed reliance on the decisions reported in Shrimant Shamrao Suryavanshi and Another Vs. Pralhad Bhairoba Suryavanshi by Lrs. and Others, ; Ramlal and Another Vs. Phagua and Others, ; Boothalinga Agencies Vs. V.T.C. Poriaswami Nadar, and Piru Charan Pal and Another Vs. Sunilmoy Nemo and Another,

21. Countering the above argument, Mr. S. Chakraborty, Learned Counsel appearing for the respondent submitted that both the courts below having concurred in their findings of facts, this Court exercising its jurisdiction u/s 100 of the Code of Civil Procedure, will be reluctant to sit on appeal on such finding of facts. According to him, the questions of law as has been formulated by the appellant as the substantial questions of law are not at all relevant for the purpose of deciding the appeal and, in fact, there is not at all any substantial questions of law involved in the appeal.

22. Referring to the 6th schedule of the Constitution of India, he submitted that since the suit land was not transferable, the purported agreement by the father of the plaintiff respondent with the appellant was of no consequence. His further submission was that the agreement being in respect of an act of impossibility, Section 56 of the Indian Contract Act will come into operation. He has also placed reliance on the decision of the Apex Court Sardar Govindrao Mahadik and Another Vs. Devi Sahai and Others, and Hiralal Agarwala Vs. Bhagirathi Gore and Others,

23. There is no dispute that the agreement which was entered into by and between the parties never materialised as the required permission was not accorded by the competent authority of the Government of Meghalaya. The permission accorded in the year 2000 is of no consequence, inasmuch as, by that time the father of the respondent plaintiff had expired. He died on 8.7.1992. There was no joint application filed by the defendant appellant and the plaintiff respondent, who after the demise of her father inherited his properties including the suit land. Thus, the permission accorded was in the name of a dead person

and subsequently, the permission was also cancelled.

24. As regards the application of the provisions of Section 53A of the Transfer of Property Act is concerned, as recorded in the findings of the learned lower appellate court, such a plea was neither raised in the written statement nor brought in evidence by the defendant appellant. Section 53A deals with part performance and the same is quoted below:

53A. Part performance. - Where any persons contracts to transfer for consideration any immovable property by writing signed by him or on his behalf from which the terms necessary to constitute the transfer can be ascertained with reasonable certainty,

and the transferee has, in part performance of the contract, taken possession of the property or any part thereof, or the transferee, being already in possession, continues in possession in part performance of the contract and has done some act in furtherance of the contract,

and the transferee has performed or is willing to perform his part, of the contract,

then, notwithstanding that where there is an instrument of transfer, that the trans has not been completed in the manner prescribed therefore by the law for the time being in force, the transferor or any person claiming under him shall be debarred from enforcing against the transferee and persons claiming under him any right in respect of the property of which the transferee has taken or continued in possession, other than a right expressly provided by the terms of the contract:

Provided that nothing in this section shall affect the rights of a transferee for consideration who has no notice of the contract or of the part performance thereof.

25. In the instant case, although, it was the pleading of the plaintiff respondent in her plaint that after the agreement, her father allowed the defendant appellant to occupy his servants quarter standing on the suit land but in the written statement, the defendant appellant categorically denied the same and put the plaintiff to strict proof thereof. It was never pleaded case of the defendant appellant that after the agreement, possession of the land was given to him as part performance, as envisaged u/s 53A of the Transfer of Property Act.

26. Even otherwise also, under the provisions of the Meghalaya Transfer of Land (Regulation) Act, 1971, no sale/transfer of land was permissible between non-tribal and non-tribal (which the parties are). As per Section 2 of the Act, the provisions of the act extends to the tribal areas within the State of Meghalaya, as specified in Part-II of the table appended to paragraph 20 of the 6th Schedule of the Constitution of India.

As per Section 3 of the Act, no land in Meghalaya shall be transferred by tribal to a non-tribal or by a non-tribal to another non-tribal, except with the previous

sanction of the competent authority. Thus, the agreement of sale without the previous sanction of the competent authority was of no consequence. Although, the defendant appellant wanted to project the case as that of execution of sale deed but it is in evidence that no such sale deed was executed. This aspect of the matter has been discussed by the learned courts below.

27. The 6th Schedule of the Constitution of India makes provisions as to the administration of tribal areas in the States of Assam, Meghalaya, Tripura and Mizoram. Clause 20 of the schedule deals with tribal areas which are specified in Part-I, II, II(A) and III of the table and shall respectively be the areas within the State of Assam, State of Meghalaya, State of Tripura and the State of Mizoram. Clause 20 reads as follows:

20. Tribal areas - (1) The areas specified in Parts I, II, IIA and III of the table below shall respectively be the tribal areas within the State of Assam, the State of Meghalaya the State of Tripura and the State of Mizoram.

(2) Any reference in Part I, Part II or Part III of the table below to any district shall be construed as a reference to the territories comprised within the autonomous district of that name existing immediately before the day appointed under Clause (b) of Section 2 of the North-Eastern Areas (Reorganisation) Act, 1971; Provided that for the purposes of Clauses (e) and (f) of sub-paragraph (1) of paragraph 3, paragraph 4, paragraph 5, paragraph 6, sub-paragraph (2), Clauses (9a), (b), and (d) of sub-paragraph (3) and sub-paragraph (4) of paragraph 8 and Clause (d) of sub-paragraph (2) of paragraph 10 of this Schedule, no part of the area comprised within the municipality of Shillong shall be deemed to be within the Khasi Hills District.

(3) The reference in Part IIA in the table below to the "Tripura Tribal Areas District" shall be construed as a reference to the territory comprising the tribal areas specified in the First Schedule to the Tripura Tribal Areas Autonomous District Council Act, 1979.

28. On a scrutiny of the relevant paragraphs indicated in the aforesaid proviso, it is found that they do not deal with the transfer of land as the same are not relating to the transfer of land. It is in this context, Mr. Chakraborty, Learned Counsel appearing for the plaintiff respondent submitted that the suit land is not excluded from the purview of bar of transfer of land between non-tribals and that the aforesaid notification dated 7.6.1978 is of no consequence.

29. Section 2(d) of the Meghalaya Transfer of Land (Regulation Act, 1971), dealing with the transfer of property, defines the terms "Transfer" to mean the conveyance of land of one person to another and includes gift, sale, exchange, mortgage, lease, surrender or any other mode of transfer. From the provisions of the act mentioned above, it is obvious that the transfer of land from a tribal to a non-tribal or from a non-tribal to a non-tribal (which is the situation in the present case), can be affected only after obtaining previous sanction of the competent authority and any transfer made without such sanction shall be void

and cannot be enforceable in any court. The un-disputable fact on record is that there is no sanction behind the transfer of the land by sale in favour of the defendant appellant. Although, permission was sought for jointly by the father of the plaintiff respondent along with the defendant appellant but such permission was rejected. Thus, in absence of any such permission, the agreement for sale was of no consequence. Further, the subsequent permission granted in the year 2000 was also non est in the eye of law, in view of the fact that long before, one of the joint applicants i.e., the father of the plaintiff had expired.

30. In the case of Subrata Dutta and Others Vs. State of Meghalaya and Others, it was observed that in the scheme of the Meghalaya Transfer of Land (Regulation) Act, 1971, transfer of land from a tribal to non-tribal or from a non-tribal to a non-tribal can be affected only after previous sanction of the competent authority and any transfer made without such sanction shall be void and cannot be enforceable in any court. Similarly, in the case of Abdul Halim Dewan v. State of Assam 2004 (Supp.) GLT 410, this Court dealing with the provisions of Mikir Hills District (Transfer of land) Act, 1959, observed that by virtue of the provisions of the said act, no land can be transferred within the district by a tribal to a non-tribal or by a non-tribal to another non-tribal without the previous permission of the Executive Committee in question. In that case, the petitioners could not produce any document to show that the transfer deed was executed after obtaining the permission of the Executive Committee. Therefore, it was held that the transfer was made in violation of Section 3 of the Act which is in pari materia with Section 3 of the Meghalaya Act.

31. In view of the above, the appellant is not entitled to protection as envisaged u/s 53A of the Act. Section 56 of the Indian Contract Act, 1872 deals with the agreement to do impossible act. Section 56 is reproduced below:

56. Agreement to do impossible act - An agreement to do an act impossible in itself is void.

Contract to do act after wards becoming impossible or unlawful - A contract to do an act which, after the contract is made, becomes impossible, or, by reason of some event which the promissory could not prevent, unlawful becomes void when the act becomes impossible or unlawful.

Compensation for loss through non-performance of act known to be possible or unlawful - Where one person has promised to do something, which he knew, or, with reasonable diligence, might have known, and which the promise did not know, to be impossible or unlawful, such promisor must make compensation to such promisee for any loss which such promisee sustains through the non-performance of the promise.

32. It is in the above context, Mr. Chakraborty, Learned Counsel for the respondent submitted that the agreement between the appellant defendant and the father of the plaintiff respondent was of no consequence in view of the provisions of the aforesaid Meghalaya Act. Even if the un-registered agreements

were executed, same was of no consequence, inasmuch as, the act and the performance envisaged in the said act was impossible, in view of the restrictions and embargo put by the aforesaid Meghalaya Act. It is in this context, the provisions of Clause 20 of the 6th Schedule to the Constitution of India was referred to. In the aforesaid facts and circumstances, the substantial question of law formulated and referred to above are answered in the affirmative in favour of the plaintiff respondent and against the defendant appellant.

33. I now proceed to deal with the decisions on which the Learned Counsel for the parties have placed reliance. In *Shrimant Shamrao Suryanshi (supra)*, the purport and import of Section 53A of the Transfer of Property has been discussed. It was observed that for invocation of Section 53A, the necessary conditions amongst others are that there must be a contract to transfer for consideration any immovable property. The said decision is *dehors* the special provision like the Meghalaya Act. Further there was also no valid contract in the eye of law. The agreement entered into by and between the parties was to do an impossible act, inasmuch as, the land could not have been transferred in view of the special provisions of the Meghalaya Act.

34. In *Ramlal and Anr. (supra)*, it was held by the Apex Court that in case of any erroneous finding of facts and non-appreciation of oral and documentary evidence, the High Court is at liberty to re-appreciate the evidence and record and to arrive at its own conclusion for reversing order passed by the lower courts. There cannot be any second opinion regarding the said proposition laid down by the apex court. However, it is not a case of recording of any erroneous findings by the courts below and non-appreciation of oral and documentary evidence.

35. In *Boothalinga Agencies (supra)*, the apex court observed that the provisions of Section 56 of the Contract Act cannot be applied to a case of "Self-induced frustration". This case is of no help to the case of the petitioner as it is not a case of self-induced frustration.

36. In *Piru Charan Pal (supra)*, it was observed that the defendant can raise defence u/s 53A of the Transfer of Property Act, even if not specifically pleaded in the written statement, if all the ingredient facts of the section are stated. Apart from the fact that the ingredient facts of Section 53A was not pleaded in the written statement nor raised in evidence, the defendant appellant is also not entitled to the protection u/s 53A of the act in view of the special provisions of the Meghalaya Act, discussed above.

37. Mr. S. Chakraborty, Learned Counsel for the respondent has placed reliance on the decision of the Apex Court in *Sardar Govindrao Mahadik (supra)*. In the said case, the Apex Court dealing with the provisions of Section 53A of the Transfer of Property Act and on the doctrine of part performance, observed that to qualify for the protection to the doctrine of part performance, it must be shown that there is a contract to transfer for consideration immovable property

and the contract is evidenced by a writing signed by the person sought to be bound by it and from which the terms necessary to constitute the transfer can be ascertained with reasonable certainty. It was further observed that after establishing the said circumstances, it must be further shown that a transferee had in part performance of the contract either taken possession of the property or in part thereof or the transferee being already in possession continues in possession in part performance of the contract and has done some act in furtherance of the contract. There must be a real nexus between the contract and the acts done in pursuance of the contract or in furtherance of the contract and must be unequivocally referable to the contract. Any one act by itself may nor may not be of such a conclusive nature as to conclude the point one way or the other. It was further observed thus:

...Therefore, the correct view in India would be, look at that writing that is offered as a contract for transfer for consideration of any immovable property and then examine the acts said to have been done in furtherance of the contract and find out whether there is a real nexus between the contract and the acts pleaded as in part performance so that to refuse relief would be perpetuating the fraud of the party who after having taken advantage or benefit of the contract backs out and pleads non-registration as defence a defence analogous to Section 4 of the Statute of Frauds.

38. As discussed above, it was neither the pleaded case of the defendant appellant nor any evidence was adduced evidencing part performance as envisaged u/s 53A of the Transfer of Property Act. This aspect of the matter has been discussed by the learned lower appellate court.

39. In the instant case, apart from the contract agreement being for an act of impossibility, the agreement also spent its force once the permission was rejected by the competent authority of the Government of Meghalaya. The subsequent permission granted after long 8 years of expiry of one of the joint applicants, i.e., the father of the plaintiff respondent is of no consequence. Moreover, the said permission has been withdrawn. The doctrine of part performance and the protection sought for thereunder is a mixed question of fact and law. As noticed above, the said protection was neither pleaded in the written statement nor brought on evidence. Now, at the appellate stage, the appellant, without any material whatsoever, cannot be permitted to fall back on the said doctrine, so as to frustrate the legitimate claim of the plaintiff respondent. Further, Section 53A of the Act also does not have any application to the facts and circumstances of the instant case discussed in detail above.

40. For all the aforesaid reasons, I do not find any merit in the second appeal and accordingly it is dismissed upholding the judgment and decree passed by both the courts below.

41. Let the LCR be sent down to the courts below along with the copy of this judgment.