
(1959) 05 GAU CK 0005
In the Gauhati High Court
Case No : Second Appeal No. 7 of 1958

Thokchom Nabakumar Singh	Vs	APPELLANT
Mayengbam Haridas Singh		RESPONDENT

Date of Decision : 29-05-1959

Acts Referred:

Evidence Act, 1872 — Section 101, 101, 104, 104, 92, 92

Citation : AIR 1960 Manipur 11

Hon'ble Judges : T.N.R.Tirumalpad, J

Bench : Single Bench

Advocate : Y.Imo Singh, B.B.Sen, Advocates appearing for Parties

Judgement

1. This second appeal has been filed by the plaintiff in T. S. No. 212 of 1954 in the Court of the Munsiff at Imphal. He filed the said suit against 3 defendants for a declaration of his title to 2 plots of land, Dag Nos. 3111 and 3113 under patta No. 117/535Khabam Pana and for possession of the same from the defendants. He based his title on the sale deed Ext. 1 dated 3851 executed in his favour by the second defendantsecond respondent for a consideration of Rs. 200/.

His case was that after the said sale, he leased out the two plots of land to his vendor on rent and that he received 18 pots of paddy for the year 195152, but only 6 pots of paddy for 195253 and 195354 as rent and that subsequently the whereabouts of his vendor became unknown. Then, according to the appellant, he let out the plot, Dag No. 3111 to defendant No. 3 and the plot Dag No. 3113 to another person. When he called upon the defendant No. 3 to pay the rent for the plot Dag No. 3111 in November and December, 1954, the latter went on delaying and ultimately said that he would pay the rent to defendant No. 1.

(2) It may be mentioned here that defendant No. 2 had executed a sale of the selfsame plot Dag No. 3111 in favour of defendant No. 1 for Rs. 500/on 7152 under the sale deed Ext. A/1 without making any reference therein to the earlier sale deed Ext. 1 in favour of the appellant. Defendant No. 1 got the patta for the

said plot transferred in his name on 22952 in Mutation Case No. 260 of 195253. Then the appellant filed Mutation Case No. 275 of 195253 praying that the mutation in the name of the defendant No. 1 may be cancelled and that both the plots Nos. 3111 and 3113 may be mutated in his name 011 the strength of his purchase from defendant No. 2 by the sale deed Ext. 1 dated 3851.

In the said proceedings, defendants 1 and 2 herein were made parties. Defendant No. 2 contended before the S. D. C. that though the document in the name of the appellant was in the for to of a sale deed, it was really a mortgage and that the rent which he was paying to the appellant was only by way of interest on the mortgage and further that he had sold the plot No. 3111 to the defendant No. 1 and was paying rent to him for the said land. Defendant No. 1 also appeared and objected to the mutation in the name of the appellant. The S. D. C. repelled the contentions of defendants 1 and 2 as the sale in favour of the appellant was anterior to the sale in favour of the defendant No. 1.

He, therefore, ordered mutation in the name of the appellant by his order dated 171252 vide Ext. 2. The first defendant did not thereafter file any suit to set aside the order of the S. D. C. cancelling the patta in his name for plot No. 3111 and ordering the registration of patta in the name of the appellant.

(3) When the suit came up for hearing before the learned Munsiff, defendant 2 and defendant 3 did not appear and were set ex parte. Defendant No. 1 alone appeared and he raised the contention that he purchased the land Dag No. 3111 on 7152 after making proper enquiries and that ever since then he has been in possession of the same. He denied that the appellant was at any time in possession of the land and he asserted that the transaction between the appellant and defendant No. 2 was only a mortgage.

(4) The learned Munsiff raised many issues of which only two are material for our purpose, namely, issue Nos. 1 and 2.

(5) Issue No. 1 Was there any delivery of possession of the land Dag No. 3111 under patta No. 117/535Th. T. after the partition covered by patta No. 117/545Th. T. by defendant 2 to the plaintiff? Was the plaintiff in possession of the land through defendant No. 2 who was his tenant? Issue No. 2 Is the transaction between the plaintiff and defendant No. 2 a sale or a mortgage of the land under patta No. 117/535 Th. T?

(6) It will be seen that as far as Dag No. 3113 was concerned there was no contest at all in the suit as defendant No. 2 was ex parte and issue No. 1 related only to Dag No. 3111. The appellant contended before the learned Munsiff that defendant No. 1 should not be allowed to raise the contention that the sale deed Ext. 1 was only a mortgage and that no oral evidence should be allowed to be let in the face of S. 92 of the Evidence Act.

But the learned Munsiff did not accept the appellant's contention holding that defendant No. 1 cannot be called a representative in interest of defendant No. 2

and as such oral evidence was admissible to vary the contents of the document. Oral evidence was thus allowed to be let in. Though "the burden was certainly on defendant No. 1 to prove that Ext. 1 was only a mortgage and he had to lead evidence in support of that case, the learned Munsiff called upon the appellant first to lead evidence. Accordingly, the appellant examined 5 witnesses and marked documents on his side and the defendant No. 1 then examined 4 witnesses of his side and marked his documents.

Then the learned Munsiff proceeded to decide the question whether Ext. 1 amounted to a mortgage or a sale deed. He took into account the inadequacy of consideration paid by the appellant. He also held that there was no delivery of possession by the transferor to the appellant. Another circumstance was that the appellant did not apply for mutation for 11/2 years after his purchase by which time the mutation of Dag No. 3111 had already been made in the name of defendant No. 1.

On these circumstances, the learned Munsiff was satisfied that the transaction in the name of the appellant was not an out and out sale but only a mortgage. He therefore held that defendant No. 1, would be entitled to the land Dag No. 3111 subject to the mortgage right in favour of the appellant. As the appellant's right amounted only to a mortgage over the two plots of land the learned Munsiff held that the appellant was not entitled to any declaration of title of possession of the two suit plots and accordingly he dismissed the suit with the costs of defendant No. 1.

(7) The appellant took the matter in appeal to the District Judge, Manipur, in Civil Appeal No. 79 of 1957. There also the appellant contended that defendant No. 1 should not have been allowed to plead or to let in evidence that the transaction amounted to a mortgage. But the learned District Judge agreed with the lower Court that defendant No. 1 was entitled to let in evidence and that S. 92 of the Evidence Act was not a bar.

He also relied on the inadequacy of consideration and on the nondelivery of possession and on the delay in the application for mutation and held in agreement with the learned Munsiff that the transaction was only a mortgage and the suit was rightly dismissed. It may be mentioned that in the appellate Court also defendants 2 and 3 were ex parte and only defendant No. 1 contested the appeal.

(8) Now the appellant has filed the second appeal and he has raised the same contentions before me. He argued that defendant No. 1 was a representative in interest of defendant No. 2 within the meaning of S. 92 of the Evidence Act and hence when defendant No. 2 was himself barred from contending that Ext. 1 amounted only to a mortgage, defendant No. 1 cannot also be allowed to raise the said contention and that the learned Munsiff was wrong in allowing the said contention to be raised and further in allowing oral evidence to be taken in support of the contention.

He further contended that even if evidence was admissible, both the Lower Courts erred in holding that the appellant did not get possession of the land on the evidence adduced before them and their findings were perverse. He further pleaded that inadequacy of consideration even if established was by itself not a criterion to hold that the document was not a sale deed as the owner of a land has every right to sell his land below the market price.

It was also urged that the delay of 1½ years in applying for mutation was not a circumstance to prove that the document was only a mortgage. In that connection he pointed out that since Ext.

1 was a registered document it was sufficient notice to any subsequent purchaser that defendant

2 did not have any further title to convey in the land and that therefore the subsequent purchase by the first defendant cannot convey to him any title to the property.

(9) Before I proceed to deal with these contentions it is necessary to make some reference to the procedure adopted by the first Court in dealing in this case. The appellant had brought the suit on the strength of the sale deed Ext. 1. The written statement of defendant No. 1 who alone contested the suit showed that he did not dispute the fact that there was such a document of sale in the name of the appellant. His contention was that though in form the document was a sale, deed, in actual fact it was intended by the parties to the document only to be a mortgage.

He was only repeating the contention advanced) by defendant No. 2 before the S. D. C. in Mutation Proceedings No. 275 of 195253. On the above pleadings, the learned Munsiff ought to have trained the issue in the case with the burden thrown on the first defendant and he ought to have called upon defendant No. 1 to lead evidence in support of his contention that Ext. 1 was only a mortgage. This was all the more necessary, because defendant No. 2 had admitted before the S. D. C. that he was paying rent to the appellant after this sale deed Ext. 1, thereby, accepting the appellant's case that he had leased out the lands, to defendant No. 2 after the sale (vide Ext. 2).

It will be seen from issues 1 and 2 that the burden was thrown on the appellant to prove that Ext. 1 was a sale deed and that he got delivery of possession of the land Dag No. 3111. This was certainly an error committed by the first Court. I also find that after the appellant and the first defendant let in their evidence, the first Court proceeded to deal with the question again as if it was, for the appellant to prove that the transaction was a sale deed. I find that the appellate Court has also committed the same error in dealing with the evidence.

(10) The question was therefore whether the suit should be remanded for fresh disposal in view of the obvious errors committed by the lower Courts, But the records in the case showed that the first Court had given every opportunity to

both parties, to let in all their evidence. All that remained to be done was to consider the entire oral and documentary evidence in the case keeping it in mind that it was for the first defendant to establish that Ext. 1 was a mortgage and not for the appellant to prove that it was a sale.

The mistake committed by the lower Courts was in the appreciation of the evidence as if the appellant had to show that he paid proper consideration for the sale, that he got possession, and that he treated the document as a sale. As the entire evidence is before the Court, the mistake can be corrected if necessary in second appeal and it is not necessary to remand the case.

(11) But before dealing with that matter, we have to determine the question whether defendant No. 1 was a representative in interest of defendant No. 2 within the meaning of S. 92 of the Evidence Act and whether he was entitled to plead, and to prove that Ext. 1 was a mortgage, and not a sale deed.

(12) Now it will be seen that Ext. 1 is worded as an out and out sale of the property. It states that defendant No. 2 has sold the two Dags of land to the appellant for a consideration of Rs. 200/ for the purpose of purchasing another land and that the possession of the suit lands was delivered to the appellant on the day of the sale and further that defendant No. 2 had no objection to mutation being effected in the name of the appellant. Ext. 1 further mentions that the lands were free of any encumbrances and that defendant No. 2 would be responsible if any objection arose subsequently.

The terms of the document are thus quite explicit and do not give room for the slightest doubt as to whether the parties intended it to be a sale or not. Under section 92 of the Evidence Act, defendant No. 2 or his representative in interest would be estopped from letting in any evidence to vary the terms of that "document and trying to show that " it was intended only to be a mortgage.

In this very suit, defendant No. 2 being a party would not have been allowed to raise such a contention. What we have to decide is whether defendant No. 2 can be called his representative in interest. It is clear that defendant No. 1 derived his title to the land from defendant No. 2 and that he is therefore a person who claims under defendant No. 2. If the appellant had filed the suit against defendant No. 2 after getting sale deed Ext. 1 and obtained a decree declaring his title to the two plots and if the sale in favour of defendant No. 1 by defendant No. 2 had taken place subsequently defendant No. 1 would have been barred under section 11 C. P. C. from raising the present contest on the ground of res judicata, because under Section 11 C. P. C. a party to the suit as well as persons, who claimed under him will be bound by such a decision.

The words used in section 11 C. P. C. are "between the same parties or between parties under whom they or any of them claim". Defendant No. 1 having derived his title from defendant No. 2 will certainly come within that meaning and so he will "be certainly bound under section 11. But we are not here concerned with a case of estoppel by judgment. We are concerned with the

question whether defendant No. 1 will be estopped by the terms or the document Ext. 1 from letting in evidence to vary or contradict the said terms under section 92 of the Indian Evidence Act. Now section 92 does not use the same words as section 11 C. P. C. ""Between the same parties or between parties under whom they or any one of them claim".

Instead the words used are "Between parties to the instrument or their representatives in interest". The learned Munsiff as well as the learned appellate Judge held, as I said, that a representative in interest of a party will not mean and include a person purchasing subsequently from a contracting party to the earlier instrument of transfer and that he will have to be treated as a stranger to the instrument within the meaning of section 92.

(13) The question therefore arises whether a subsequent purchaser from a party who was the vendor in a prior sale deed of the very same property will be a representative in interest of the said vendor within the meaning of section 92 of the Evidence Act and whether he would be precluded from contending that the first sale deed was only a mortgage and not a sale deed. The expression "representative in interest appears in three sections of the Evidence Act, namely, section 21, section 33, proviso 1 and section 92.

But the expression has not been defined either in the Evidence Act or in the General Clauses Act. Nor has my attention been drawn to any case decided under section 92 of the Evidence Act, in which the question whether such a subsequent purchaser would come within the meaning of representative in interest of his vendor within the meaning of that section has been decided. I find that cases have arisen in Courts regarding the meaning of the said "expression as used in section 33 proviso 1 of the Evidence Act. In the decision Krishna Rao v. Verikatakumara, reported in AIR 1927 Mad 733, it was held by the Madras High Court that

"A representative in interest of the parties will mean, persons who derive their title through or claim under them or, shortly, are their privies".

Another decision of the Patna High Court, Chandreshwar Prasad v. Bisheshwar Pratab, reported in AIR 1927 Pat 61, has held that :

""The expression representative in interest in section 33 must at least include privies in estate". A third decision S. Ramakrishna Pillai v. Tirunarayana Pillai, ILR 55 Mad 40: (AIR 1932 Mad 198), which is cited in the judgment of the first Court, observes

"It may be true that the phrase representative in interest in section 33 is not for all purposes synonymous with the expression "the person claiming under" in section 11 C. P. C."

The decision goes on to say that cases may be cited in which the former has been deemed to apply to several members of a class, but that unless the plaintiff in that case can be said to be claiming under Gopalaswami within the meaning of

section 11 C. P. C.. in no other way can he be said to be Gopalaswami's representative in interest. Thus the decision would indicate that their Lordships considered the term representative in interest was actually wider in its import than the expression "the person claiming under".

(14) In the Law of Evidence by Woodroffe and Ameer Ali, 10th Edition, at page 360, we find mentioned as follows:

""No definition has been given of this somewhat vague expression "representative in interest". Whatever scope may be given to these words, it is apprehended that they will, generally speaking, include most of the privies in blood, law or estate".

(15) In section 18 of the Evidence Act, the words used are "persons from whom the parties to the suit have derived their interest in the subject matter of the suit". In dealing with this subject, Sarkar on Evidence 9th Edition at page 173, states that the term "privity" denotes mutual or successive relationship to the same rights of property, and privies are distributed in several classes according to the manner of this relationship.

Thus, there are privies in estate as, donor and donee, lessor and lessee, joint tenants, and successive bishops, rectors and vicars, privies in blood, as heir, and ancestor, and coparceners, privies in representation as executors and testators, administrators and intestates, and also privies in law.

(16) Thus the term representative in interest so far as judicial decisions and commentaries go is to be taken to mean privies in estate or persons who derived their interest from or claimed under a party. There is certainly privity of estate between defendant No. 1 and defendant No. 2 as defendant No. 1 is the purchaser from defendant No. 2 and thus derives his interest through defendant No. 2.

It may however be urged that the interpretation of the expression representative in interest under sections 21 and 33 of the Evidence Act should not be applied to the same expression used in section 92, as sections 21 and 33 relate to the relevancy and admissibility of admissions and depositions in judicial proceedings, whereas section 92 relates to the admissibility of evidence regarding any oral agreement or statement for the purpose of contradicting, varying, adding to, or subtracting from the terms of certain documents.

In fact, it was urged that defendant No. 1 did not represent defendant No. 2 in any manner in these proceedings, that he was an utter stranger to the transaction between the appellant and defendant No. 2, that there was no common interest between him and defendant No. 2 and that in no sense can he be called the representative in interest of defendant No. 2. The Manual of Law Terms by K. J. Aiyer, 3rd Edition, was cited before me for a definition of the term ""representative".

It defined a "representative" as one who represented the interest of another and

included a heiratlaw, a devisee, an administrator or executor, the guardian of a minor and the committee or other legal curator of a lunatic or idiot. It was pointed out that a purchaser of a property from a party was not included in the said definition as a representative of his vendor.

It was pointed out that any representative character of a purchaser ended the moment the document was executed, whereas in the case of a mortgagor and mortgagee, lessor and lessee, heiratlaw, administrator and others, the representative character clearly continued. In the face of such arguments it will be as well if the meaning of the term representative in interest in section 92 is considered independently.

(17) A representative as defined in Bouvier's Law Dictionary is one who represents or is in the place of another. The doctrine of representation was a subsequent development in law. It was a fiction created by law for the purpose of putting the representative in the place degree or right of the person represented. The representative being entitled to the rights of the person whom he is to represent, is also bound to fulfil the duties and obligations which are binding upon him in that character. It is mostly in relation to property. The clothing of the representative with the rights, duties and obligations of the person whom he represented was intended to give a continuity in the matter of such rights, duties and obligations.

(18) Now taking the case of the parties to a sale deed, namely, the vendor and the vendee, the vendor when he executed the sale deed granted to the vendee all his rights in the property sold and at the same time saddled him with the duties and obligations which bound the vendor as far as that property is concerned. Having done so, it was not open to the vendor or to the vendee to attempt to contradict, vary, add to, or subtract from the terms of the document, openly entered into by them.

If they are given that volition, then there will be no finality to contracts and other dispositions of property freely entered into. It was with this aim in view that section 92 of the Indian Evidence Act was enacted, to prevent evidence of any oral, agreement or statement changing the terms of the document except as provided in the provisos to the said section with which we are not concerned" for the present. Thus the vendor will have no right to say that the document was not a sale deed, but was intended by them only to be a mortgage and attempt to set xtp any rights in himself over the property sold.

If however the same vendor arrogates to himself any further rights in the property and executes a subsequent sale in favour of another of the very same property the second purchaser will get only whatever rights his vendor had and he will be saddled with all the duties and obligations of his vendor. The second purchaser cannot have any right which his own vendor did not have. He will be in every sense the representative of his vendor having the same rights and being bound by the same duties and obligations and prohibitions as his vendor.

There is not much difference in the meanings of the terms "representative" and "representative in interest". Perhaps the words "in interest" are added only to emphasize the fact of the continuity of the same interest in relation to estate. The expression "representative in interest of a party" is even the term than the expression "person who has derived his interest from a party". But it is certain (that the former expression will include the latter.

If it were not so, then it is easy as in a case like the present for a vendor, who wants to avoid the estoppel under section 92 to execute a second sale deed in the name of another person so as to enable the second vendee to get a right which he himself did not have. Startling consequences would follow if the second vendee were allowed to let in evidence, to change the terms of the first sale deed.

He could not be prevented from examining the vendor as a witness in support of his contention and the result will be that the vendor will be enabled to speak to matters in support of his second vendee's position, which he himself would be prevented from, doing by section 92. One fails to see why the second vendee should be given any right which his own vendor did not have. A sale deed as in the present case is a document which is compulsorily registrable.

A second purchaser is put on notice of the first sale deed by the very fact of registration. Before he takes the second sale deed, he could make enquiries in the Registration Office. In the present case defendant No. 1 gave evidence that he did not make any such enquiry which if he had done would easily have disclosed to him, the existence of the first sale deed. Under such circumstance, a second, purchaser cannot be given rights which his own vendor did not possess. There can be no doubt that, defendant No. 1 in the present case is a representative in interest of defendant No. 2 and as such he would be prevented from letting in evidence changing the character of the first sale deed.

(19) The learned Munsiff has therefore clearly erred in allowing defendant No. 1 to let in evidence in support of his contention that Ext. 1 was only a mortgage and not a sale deed. It is clear even from the written statement of defendant No. 1 that he had no personal knowledge that Ext. 1 was intended as a mortgage and not as a sale. It was at best only a surmise on his part having regard to the low consideration for Ext. 1. Perhaps he was guided by what defendant No. 2 had stated before the S.D.C. in the Mutation Proceedings. The owner of a property has every discretion to sell his property for a price below the market value.

When the said owner himself is precluded after the sale from attempting to explain away the low consideration by setting up that he intended it only to be a mortgage, the subsequent purchaser from him is also equally bound. My finding therefore is that defendant No. 1 had no right to raise the contention that Ext. 1 was a mortgage and not a sale and he should not have been allowed to let in oral evidence in support of the contention.

(20) In the above view, it becomes quite unnecessary for me to deal with the

evidence adduced in the case to decide whether Ext. 1 amounted only to a mortgage.

(21) The appellant produced the evidence of 3 witnesses before the learned Munsiff to prove the document Ext. 1 as required under section 91 of the Evidence Act. Even such proof was unnecessary as defendant No. 1 himself had admitted the document. Such evidence was necessary only against defendant No. 2 and defendant No. 3 who were ex parte. It follows therefore that the appellant is entitled to a decree for a declaration of his title to and for possession of the plot Dag No. 3111 from the defendants.

As for the plot Dag No. 3113, the appellant is entitled to a declaration of his title to the said plot as against defendant No. 2. But he is not entitled to a decree for possession as he has not impleaded the person in possession of the property as a party to the suit. He has only stated in the plaint that he has let out the said land to another person, without even disclosing the name of the person.

(22) The decrees and judgments of the Courts below are therefore set aside and a decree is passed in favour of the appellant granting prayers (a) and (h) in the plaint. As regards the prayer (c) in the plaint, it is allowed as far as the plot Dag No. 3111 is concerned against all the defendants. The prayer for possession of the plot Dag No. 3113 is disallowed. As the appellant has substantially succeeded in the appeal, he will be entitled to costs of the appeal from the first defendant and also to his costs in both the Courts below.