

Bhabani Sarma Vs. Narayan Sarma and anr.

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Court : Guwahati

Decided On : Mar-28-2003

Judge : S.K. Kar, J.

Acts : [Specific Relief Act, 1963](#) - Sections 26; [Code of Civil Procedure \(CPC\) , 1908](#) - Order 7, Rule 3; [Transfer of Property Act, 1882](#) - Sections 54

Appeal No. : Second Appeal No. 129 of 1996

Appellant : Bhabani Sarma

Respondent : Narayan Sarma and anr.

Advocate for Def. : H.N. Sarma, C. Bhattacharya, S.S. Barua and C.K. Sarma Barooah, Advs.

Advocate for Pet/Ap. : B.K. Goswami, N. Raikhowa, T. Goswami and H.K. Baishya, Advs.

Prior history : S.K. Kar, J. 1. I have heard in length learned Senior Counsel Mr. B.K. Goswami for the appellant, learned Senior Counsel Mr. C.K.S. Baruah for the pro forma respondent and learned senior counsel Mr. H.N. Sarma for the respondent/plaintiff assisted by their respective juniors. 2. Shri Bhabani Sarma, defendant No. 2 of the main suit has presented this second appeal. Shri Narayan Sarma is the respondent/plaintiff and Shri Ajit Sarma defendant No. 1 of the suit is the pro forma-respondent No. 2

Judgement :

S.K. Kar, J.

1. I have heard in length learned Senior Counsel Mr. B.K. Goswami for the appellant, learned Senior Counsel Mr. C.K.S. Baruah for the pro forma respondent and learned senior counsel Mr. H.N. Sarma for the respondent/plaintiff assisted by their respective juniors.

2. Shri Bhabani Sarma, defendant No. 2 of the main suit has presented this second appeal. Shri Narayan Sarma is the respondent/plaintiff and Shri Ajit Sarma defendant No. 1 of the suit is the pro forma-respondent No. 2.

3. The facts giving rise to presentation of the suit, T. S. No. 35/99, before Munsiff No. 1, Nalbari, are as follows. Respondent/ plaintiff, Narayan Sarma initially filed the suit on 2-8-1988 against pro forma respondent No. 2 for the rectification of the registered sale-deed No. 389/87 executed in his favour on 18-2-87 by Ajit Sarma.

4. Respondent/plaintiff pleaded, inter alia, that he and pro forma-respondent No. 2 were known to each other as they are neighbours and pro forma-respondent proposed to sell the land, described in the schedule appended to the plaint with definite boundaries, hereinafter called 'the suit land', promising to supply correct dag and patta numbers and assuring that the land was not encumbered which fact was found true on enquiry made by him and so he purchased the land on consideration of a sum of Rs. 2,000/- (Rupees two thousand) and got the delivery of physical possession thereupon. . On getting the delivery of possession he constructed his thatched dwelling house and started residing with family members, dug drains, planted banana plants and sowed paddy to raise seedlings. While in continuation of such possession in good faith, on 28-7-87 Bhabani Sarma (appellant/defdt. 2) caused a proceeding under Section 145, Cr. P.C. drawn with respect to suit land asserting the suit land to be appertaining to dag No. 849 of K.M. Patta No. 505 of village Sathi Kuchi, Mouza Nambarbhag and, therefore, on query respondent/plaintiff could come to understand that suit land has been described in the sale-deed in his favour by wrong patta and dag numbers although the boundaries were given correctly. Respondent/plaintiff thereafter demanded

rectification of sale-deed by serving advocate's notice but pro forma-respondent not complying with such demand he filed the suit for the purpose of getting rectification of sale-deed by retaining the description of the boundaries and substituting the dag/patta with correct dag/patta numbers. The plaint was Initially presented against Ajit Sarma only and subsequently was amended by impleading Bhabani Sarma as defendant No. 2.

5. Suit was contested by respondents/defendants Nos. 1 and 2 by presenting their separate written statements. In short, they pleaded, inter alia, in addition to different legal pleas, that suit land was duly purchased by respondent/defendant No. 2 on 9-4-87 along with other lands through registered sale-deed pursuant to a deed of agreement for sale ('Bainamapatra') dated 15-12-82 and the present appellant/defendant No. 2, Bhabani Sarma was put into physical possession on 15-12-82 itself. That respondent/plaintiff never possessed the suit land and the land which was sold to the respondent/plaintiff was, in fact, appertaining to dag No. 1288 of patta No. 509 but was collusively described with wrong boundaries. That the pro forma-respondent/ defendant No. 2 was always ready to rectify the sale-deed but respondent/plaintiff insisted only for the correction of the dag No./patta number illegally. That respondent/plaintiff caused the boundaries Inserted incorrectly being in collusion with scribe and thereafter he tried to dispossess the appellant/defendant No. 2 for which there was proceeding under Section 145, Cr. P.C. That respondent/plaintiff had the knowledge of purchase and possession of appellant/defendant No. 2 before his purchase and since 1982 but incorporated wrong boundaries. That appellant/defendant No. 2 is bona fide purchaser for value without notice and his continued physical possession had been re-affirmed by the Criminal Court in proceeding, under Section 145, Cr. P.C. and accordingly, respondent/plaintiff is not entitled to claim any relief against the appellant/defendant No. 2, particularly when the registered sale-deed No. 1223/87 in his favour is not in challenge in the present suit.

6. On the pleadings aforesaid the Court

of first instance framed the issues, which

were maintained by the first appellate Court

without determining points for decision as required by Order XLI, Rule 31, and these are as follows :--

- ' 1. Is there any cause of action for suit?
2. Is the suit maintainable in the present form?
3. Is the suit barred by estoppel?
4. Is the suit bad for non-joinder of necessary parties.
5. Whether the plaintiff is entitled to a decree for correction of the registered sale-deed No. 389/87 dated. 18-2-1987.
6. To what other relief/reliefs is any parties are entitled?
7. Is the claim of the plaintiff against defendant No. 2 barred under Order 2, Rule 2 of the CPC.
8. Is the defendant No. 2 a bona fide purchaser for value?

7. Four witnesses for the plaintiff and three for the defendants were examined. They are the plaintiff (P.W. 1), Kali Kumar Talukdar (P.W. 2), Chandra Mohan Haloi (P.W. 3) and Lalit Chandra Nath (P.W. 4); and Ajit Sarma, defendant 1 (D.W. 1), Rajat Barman, the Gaonbura (D.W. 2) and Bhabani Sarma, (defdt. No. 2 as D.W. 3). On a close scrutiny and verification of the particulars it will be seen that first appellate Court carelessly and casually held that there was another P.W. 3 as 'Upendra' Mohan Haloi. In fact, he is the same person i.e. P.W. 3 Chandra Mohan Haloi and not 'Upendra' (written inadvertently by trial Court) as parentage and all other particulars were the same, and he put his signature in the deposition as 'Chandra Mohan Haloi', Judgment of the trial Court also mentioned one P.W. 3 as Chandra Mohan Haloi which was not taken into consideration by first appellate Court.

8. Documentary evidence are the original sale-deed dated 18-2-87 in favour of plaintiff/respondent by defendant Ajit Sarma (ext. 1), certified copy of Jamanbandi, Exts 'Ka'; original resolution dated 15-7-87 of village conciliation ('MEL') and the connected papers, Ext. 'Kha', Exts. 'A' to 'E' are respectively the series of revenue-paying receipts, deed of agreement for sale ('Bainama patra') dated 15-12-82, original sale-deed in favour of defendant No. 2, dated 9-4-87, non-encumbrance certificate by sub-Registrar, C/C of order of the Sessions Judge the Criminal motion and, Ext. 'Z' is C/C of K. M. Patta No. 505.

9. Referring to citation (2001) 3 SCC 179 ; (AIR 2001 SC 965) and (2000) 5 SCC 652 learned counsel for the appellant submitted that an improper functioning of the first appellate Court would give rise to substantial question of law and that any such findings if on surmises and conjectures, can be interfered in second appeal and if needed High Court can also formulate substantial question of law. On to other hand referring to AIR 2001 SC 965 and AIR 1996 SC 2823 other side contended that findings of facts with weighty reasons cannot be disturbed in second appeal.

10. On facts, it was submitted by appellant that there was the specific non-reading of Ext. 'kha', i.e. resolution of the village

conciliation (MEL), misinterpretation of Ext.

1 vis-a-vis Ext-C and failure to take notice

of provision of Section 26 of the Specific Relief

Act. It was further contended from the side

of the appellant that judgment of first appellate Court was at variance with the prayer

of the plaintiff/respondent. That if a sale-

deed is to be executed in terms of the impugned decree now it will attract the right

of the present appellant, who, had purchased the suit land on 9-4-87, and, is a

bona fide purchaser for value etc. and his vender would have no subsisting title to transfer the same land once again. On the other hand the respondent/plaintiff has submitted that his suit for rectification of sale-deed is maintainable as he continued to possess the suit land since the date of his purchase on 18-2-87, i.e., before the purchase of appellant/defendant No. 2, and that he objected to the admission of Ext. C dated 9-4-87 which document is hit by provision of Section 54 of T.P. Act etc.

11. Giving my anxious consideration to the rival contentions and on examination of the relevant facts and materials on record, I find that the appropriate substantial questions of law in this appeal will be as hereunder notwithstanding the fact that appellant drafted fifteen such questions and during admission of appeal conceded to only two of them. The substantial questions of law are--

(i) Whether the appellant/defendant No. 2, Bhabani Sarma, acquired valid and good title on the strength of his purchase vide sale-deed dated 9-4-87, Ext. C, and was put into actual physical possession of the land so purchased next before the date of such purchase and with effect from 15-12-82 (date of agreement for sale, Ext. B) and the findings of first appellate Court to the contrary was incorrect, illogical and perverse etc.

(ii) Whether respondent/plaintiff Narayan Sarma is entitled to the rectification of sale-deed, Ext. 1, and if so, whether by way of replacing/substituting the

boundaries and retaining the dag and patta numbers or by replacing the dag and patta numbers retaining the boundaries.

12. Question No. (i) :-- Bearing in mind the submissions of the parties and on a careful and serious study of the Judgments rendered by the two Courts below, one would easily be led to maintain a view that both the lower Courts fell into error in deciding the controversial facts. Admitted facts requires no proof (See. 58 of Evidence Act) and on pleading it is admitted by the contesting parties that by execution of sale-deeds, Ext. 1 and Ext. C lands were sold to the respondent/plaintiff Narayan Sarma and appellant of this appeal Bhabani Sarma by the Pro forma-respondent Ajit Sarma. One of the facts controverted is that purchase of respondent/plaintiff appertained to dag No. 1288 of Patta No. 509 and not appertaining to dag 849 of Patta 505 as claimed by him. The other fact controverted is that respondent/plaintiff was not in physical possession of land purchased by him and he illegally tried to dispossess the appellant/defendant No. 2 after the purchase being collusion with the scribe and causing insertion of wrong boundaries on Ext. 1.

13. In order to discharge their respective burden/onus of proof parties adduced both oral testimonies and documentary evidence. Ext., E is the certified copy of order passed by Sessions Judge, Nalbari on 25-10-89 upholding the order of Executive Magistrate declaring possession of 1B, 1K. of land covered by dag 849, Patta 505 of village Sathi Kuchi gaon Mouza Nambarbhag, which is exactly the suit land here, in favour of Bhabani Sarma, present appellant on 28-7-87, (date of petition under Section 145, Cr. P.C.). Ext. 1 is the sale-deed in favour of the respondent/plaintiff to show his purchase on 18-2-87. So, respondent/plaintiff is duty bound to proof his possession on and from 18-2-87. In his deposition respondent/plaintiff, deposing as P.W. 1, has stated that Ajit Sarma himself measured out the land and delivered possession and on being put to possession he constructed house, dug drain and raised crops but five months later Bhabani instituted proceeding under Section 145, Cr. P.C. Date of proceeding being 28-7-87, it is a fact that he could not continue to possess the suit land next after five months of his purchase even if it was a fact that consequent to his purchase he was put into possession, P.W. 1 stated that suit land is bound by :--

Lanke Haloi & Chandra Haloi..... on east, Kalikanta Sarma..... on west. Other land of Ajit Sarma..... on north, and cattle path..... on south.

which fact does not fully agree with suit land when name of Chandra Haloi does not appear in the description given on plaint. P.W. 1 failed to corroborate the statement on plaint that he was residing with family in the suit land house during his deposition. P.W. 1 stated that three days after the act of delivery of possession the sale-deed was registered. But sale-deed, Ext. 1 shows it was executed and registered on the same date. During his cross-examination, P.W. 1 stated that he has no knowledge who is in possession of the land on the north of the suit land making himself unworthy of credit. Then again he admitted that there was a 'bichar/mel' (conciliation) in village before the proceedings under Section 145, Cr. P.C. and the suit, and Rajat Gaonbura (D.W. 2) was the president and Bhabani showed a sale-deed and, 'Balnama' there. Therefore, Ext. 'Kha', the verdict of 'Bichar' would become relevant to decide possession as a collateral piece of evidence, if duly proved. D.W. 2 has proved Ext. 'Kha' which supports that respondent/ plaintiff never came to possession, of the suit land. P.W. 2 is only attesting witness who admitted during cross-examination that he does not know the land that was sold and, therefore, is not a witness to possession. Thus, next witness remaining to prove possession of respondent/plaintiff is P.W. 3. P.W. 3 was also witness in proceedings under Section 145, Cr. P.C. P.W. 3 stated that both the seller and vender took part in measuring the land thus contradicting P.W. 1 who stated that measurement was done by seller himself. P.W. 3 further stated that he recorded the measurement but he could not say the length and breadth of the land, P.W. 3 also admitted that he was present in the village conciliation, but was not aware of the final result of such conciliation. This smacks of concealment of fact. Therefore, evidence to prove possession of respondent/plaintiff is neither firm nor dependable to prove delivery of possession of the suit land in his favour. Learned first appellate Court misquoted and misread the evidence of P.W. 3 (as observed earlier). Fatally for respondent/ plaintiff his vendor never supported him insofar the question of possession is concerned. Vendor is the best witness to prove delivery of possession consequent to sale.

14. Next, coming to Ext. 'Kha' P.W. 3 also admitted he was present in the village 'MEL' ('bichar') but interestingly he stated that he was not aware of the decision of the village conciliation. This is neither probable nor acceptable and as such evidence of P.W. 3 as a whole is not competent to prove anything and learned first appellate Court has totally misconceived the impact of evidence and was callous to find a fourth P.W. without applying mind as discussed beforehand in para 7 of this judgment. It is the well-settled law that evidence of a witness is to be discussed taking the totality of it and not by taking isolated part of it from here and there. Ext. 'Kha' was admitted without objection through D.W. 2 and he satisfactorily proved genuineness of this document Ext. 'Kha' dated 15-7-87 and the proceeding under Section 145, Cr. P.C. started on 28-7-87 i.e. 12/ 13 days thereafter. P.W. 1 admitted that village conciliation was before the date of proceeding under Section 145, Cr. P.C. It is mentioned specifically on this Ext. 'kha' that all villages including respondent/plaintiff Narayan Sarma had the specific knowledge that suit land was in possession of Sri Bhabant Sarma (appellant here) since 15-12-82 and it was settled that Ajit Sarma will execute sale-deed with the correct boundaries of land sold by Ext. 1. Here, there was no dispute as to any question of the area and the boundaries as contemplated by learned first appellate Court while applying ratio of AIR 1963 SC 1879. The description of land sold by Ext. 1 was complete and sufficient even without the boundaries to identify and ascertain it. We may refer to Order VII, Rule 3 to convince. Order VII, Rule 3 is as follows :--

'3. Where the subject-matter of the suit is immovable property. Where the subject-matter of the suit is immovable property the plaint shall contain a description of the property sufficient to identify it, and, in case such property can be identified by boundaries or numbers in a record of settlement or survey, the plaint shall specify such boundaries or numbers.'

Therefore, when Ext. 1 contained the identity of the land sold through it by the following particulars (given below) it was sufficient and boundaries were superfluous and optional. Ext. 1 mentioned--

'One bigha one katha of land under my title and possession situated in village Sathi Kuchigaon, Nabarbhag Mouja, police station Barama and appertaining to part of 3B.4K.15L of land covered by K.M. Patta No. 509, dag No. 1288 and bounded by.....'

So, here the boundaries were additional description given for the land sold and it may not be forgotten that defendant No. 1 alleged that it was inserted by respondent/plaintiff being in collusion with this scribe with the ulterior motive and it was he who started the trouble by threatening dispossession of Bhabani Sarma. It will be in there inquisitive invention to find that dag No. 1288 contains exactly the area of land, mentioned as 3B.4K.15L in Ext. 1, out of which the suit land of 1B.1K was sold out. Then again, Ext. C and Ext. 'B' tallies with each other in letters and spirit and by these documents a larger area of 7B.1K.2L of land inclusive of suit land was purchased by the present appellant, Ext. D, the non-encumbrance certificate of sub-registrar, although procured on 10-6-88 shows that from contents land was not encumbered till 1986, i.e., before purchase of defendant No. 2, Bhabani Sarma on 9-4-87. No doubt Ext. 'B' was admitted under objection but there is no evidence in rebuttal. Rather D.W. 3 had disposed on oath that possession of the suit land along with other lands was handed over to the purchaser appellant Bhabani Sarma on the strength of deed of agreement for sale, executed in the year 1982. Therefore, the interest of appellant is fully protected on the strength of law given by Sub-clause (2) of Section 26 of the Specific Relief Act which goes as follows :

'(2) If, in any suit in which a contract or other instrument is sought to be rectified under Sub-section (1), the Court finds that the instrument, through fraud or mistake, does not express the real intention of the parties, the Court may, in its discretion; direct rectification of the Instrument so as to express that intention, so far as this can be done without prejudice to rights acquired by third persons in good faith and for value.'

The question, thus, stands answered in favour of appellant and in affirmative.

15. Question No. (ii) :-- The discussion made as aforesaid will partially cover this question also. Pro forma respondent/defendant No. 1 of the original suit has all

along maintained in the pleadings and his evidence that he was always ready to rectify the sale-deed, Ext. 1, by way of substituting correct boundaries in place of present boundaries which, he alleges, were inserted collusively. Respondent/plaintiff tried to rely upon law given by Section 54 of T. P. Act (Act 4 of 1882) which provides inter alia, that contract for sale, of itself, does not create any interest in or charge on such property. But in the present case there is clear evidence that following the contract for sale the proposed purchaser was put into physical possession and he continued to do so uninterruptedly till execution of sale-deed and formal delivery. Therefore, this law does not protect the respondent/plaintiff under the facts and circumstances of the present case. D.W. 1 (Ajit Sarma) in his deposition on oath stated he was ready to execute deed of rectification by substituting the boundaries but respondent/plaintiff Narayan Sarma took no steps to that effect, on the contrary went ahead to take forcible possession for which Bhabani Sarma had to take shelter under Section 145 of Cr. P.C. D.W. 1, as the vendor, is the best witness to say which land he sold in case of defect in describing the land in the document effecting transfer.

16. Therefore, there is nothing to debar the plaintiff of the suit Narayan Sarma to get the deed of rectification but not in the way he desired it arbitrarily but only in accordance with the law. And law as discussed above dictates that rectification will be done by substituting the boundaries in the sale-deed, Ext. 1, with correct and proper boundaries to identity and mean part of land covered by the concerned dag No. 1288 of patta No. 509. The issue is answered accordingly.

17. In the result, the appeal is allowed. The impugned Judgment and decrees of the two Courts below stand varied, reversed and modified, as discussed before hand, to the extent and in the manner as given below.

18. The suit for the respondent/plaintiff Narayan Sarma stands partly decreed for the rectification of the sale-deed No. 389/87 dated 18-2-87 by retaining the dag number and patta number but expunging the description of the boundaries mentioned therein and substituting the same by the boundaries of the land actually sold, i.e., land measuring 1B.1K. appertaining to dag No. 1288 of patta No. 509, Pro forma respondent/defendant No. 1, Ajit Sarma will execute the deed of

rectification to be followed by registration within 30 days from today. On his failure to do so within time prescribed, the Court of Civil Judge, Junior Div., No. 1 Nalberi will execute the deed for and on his behalf. In case the boundaries are not supplied the rectification will be done, by expunging the description of boundaries given in the sale-deed No. 389/ 87 and retaining only the dag No. and patta No. within 60 days after receipt of the case records.

19. Prepare the decree accordingly. It is made clear that the decree will not in any way touch the land purchased by appellant/defendant No. 2 Bhabani Sarma, who has acquired valid title followed by his actual physical possession with respect to land under dag No. 849 patta No. 505 concerned. Court of first instance to execute the decree accordingly.

20. No costs. Send down the L.C.Rs. at once.

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