

Paritosh Roy and ors. Vs. Santosh Kumar Roy and ors.

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Court : Guwahati

Decided On : Oct-30-2006

Judge : A.B. Pal, J.

Appellant : Paritosh Roy and ors.

Respondent : Santosh Kumar Roy and ors.

Advocate for Def. : Mr. D. Chakraborty

Advocate for Pet/Ap. : Ms. S. Das

Disposition : Appeal dismissed

Judgement :

A.B. Pal, J.

1. This second appeal has arisen from the common judgment dated 8.6.2001 by the Addl. District Judge, West Tripura, Agartala in Title Appeal No. 69 of 1997 and Title Appeal No. 21 of 1998. By a reverse finding, the Title Appeal No. 69 of 1997 of the plaintiff was allowed declaring his right, title and interest in the suit land and decreeing recovery of khas possession and perpetual injunction against the defendants therein. The Title Appeal No. 21 of 1998 of the defendant was dismissed. This second appeal has been preferred by the defendants.

2. The plaintiff-respondent Santosh Kumar Roy is the full- blood brother of Paritosh Roy, Ashutosh Roy, Priyatosh Roy and Smt. Monorama Roy, first, second, third and fifth appellant herein. He is the eldest son of Smt. Kamala Roy, the fourth appellant herein. When they were in a joint mess at Agartala, Santosh, the plaintiff-respondent, was posted at Melaghar in 1966 in connection with his service under the State Government while the appellants were residing at Agartala. He used to send money every month for the appellants. His mother had a plot of land at Banamalipur, Agartala which she sold for Rs. 9,000 in 1977. Thereafter, they shifted to a rented houser A joint account No. 23306 in the name of the mother and the eldest son (Santosh) was opened in the United Commercial Bank at Agartala. In the said account, his mother deposited Rs. 9,000 being sale proceeds of her land. The money sent by Santosh was also kept in the said account. Thus, when the total amount in the said account cama to be Rs. 14,400, the suit land was purchased on 19.2.1979 in the name of the plaintiff-respondent for Rs. 5,000 which was paid to the vendor from the joint account. The sale deed was executed and registered by the vendor Smt. Arati Banik on 20.2.1979. The appellants were residing in the suit land after purchase. The mother purchased another plot of land with money from the said joint account in the name of her daughter Monorama Roy, the fifth appellant. In 1990, the plaintiff-respondent applied to the Revenue authority for mutation of the said land in his name which was the first event creating discord among the family members. The appellants resisted the move before the Revenue authority and after hearing both sides the mutation was done in the name of all the appellants and the plaintiff-respondent. Aggrieved, the plaintiff-respondent travelled unsuccessfully to the appellate and revisional authority. Thereafter, he approached the Civil Judge, Jr. Division by instituting a Title Suit No. 29/1992 which was later withdrawn with liberty to file a fresh suit. Accordingly Title Suit No. 49 of 1994 was instituted seeking a declaration of title in respect of the said land and recovery of possession in respect of 'B' schedule land measuring only one ganda which is a part of the suit land specified in Schedule 'A'. The plaintiff-respondent claimed that he being the eldest son and earning member, opened the joint account with his mother so that she could operate the account in his absence and with the knowledge and consent of all the appellants, the suit land was purchased in his name with money from the

joint account where money sent by him was also deposited. He being the absolute owner of the suit land by purchase for valuable consideration paid from his joint account, the question of 'Benami' transaction cannot be raised to defeat his rightful claim. The objection raised by the appellants herein before the Revenue authority against his prayer for mutation of the suit land in his name had no basis at all and, therefore, the decisions of the Revenue authority were palpably wrong. Before the learned trial court, he prayed for declaration of his title over the entire suit and, recovery of possession of the lands mentioned as 'B' schedule land and perpetual injunction restraining the appellants from disturbing his peaceful enjoyment of the suit property.

3. The suit was contested by the appellants herein contending, inter alia, that the suit land was purchased by the mother from her own savings and the sale deed was executed and registered in the name of the plaintiff-respondent as per her desire out of affection for the eldest son. The mother being the real owner, all her sons and daughters rightfully claimed their shares in the said land and accordingly they raised objection before the Revenue authority where the plaintiff-respondent made an attempt to get the entire suit land recorded in his name.

4. Learned trial court during the course of trial framed 6 issues of which issue Nos. 2 and 3 were, (2) whether the plaintiff purchased the suit land by his own money and (3) whether the plaintiff has any right, title and interest in the suit land ?

5. As admittedly the suit land was purchased by money from the joint account which was opened in the name of the plaintiff-respondent and the fourth appellant (the eldest son and the mother), learned trial court came to hold that they are the owners of the suit land in equal share. The claims of other appellants who did not pay anything towards consideration of the suit land were rejected. Dealing with the law relating to 'benami' transaction, learned trial court held that even after prohibition of 'benami' transaction, it is possible in case of the coparceners to enter into 'benami' transaction. However, after arriving at a conclusion that the mother and the eldest son being holders of the joint account are the owners of the suit land in equal share, learned trial court rejected the prayer of the plaintiff-respondent for recovery of possession.

6. Two appeals came to be filed against the judgment of the trial court. The plaintiff's appeal was registered as T.A. No. 69 of 1997 and the defendants' appeal was registered as T.A. (Cross-appeal) No. 21 of 1998. Both the appeals were heard and disposed of by the learned Addl. District Judge, West Tripura by a common judgment impugned herein. While in his appeal, the plaintiff contended that the registered sale deed in respect of the suit land being in his name, it was not within the jurisdiction of the trial court to allow oral evidence and reject evidentiary value of the documentary evidence. Admittedly, he was the earning member and sending money to his mother every month when he was away from Agartala in connection with his service under the Government and, therefore, there is no scope to take a view that the suit land was purchased by money of anybody else including his mother. From the said joint account, his mother purchased a land for his sister which was not objected to by anybody for the reason that she had also her money in the said joint account and she bought the land by the sale proceeds of her lands. The appellants herein in their appeal before the first appellate court adumbrated their position again that the mother was the absolute owner of the suit land and, therefore, the sons and daughters being her legal heirs, it was not appropriate to get the land mutated in the name of the plaintiff-respondent though the same was purchased in his name out of affection. The learned appellate court after appreciation of the evidence and materials on record could not agree with the findings of the trial court that the mother and the eldest son are the owners of the suit land in equal share as the same was purchased by the money from the joint account standing in their names. It has been observed that a joint fund and a common fund are not same. According to the learned appellate court, a joint fund and a common fund would mean a sea difference. A joint family fund would mean that the fund was acquired out of joint family income. Mere opening of a joint account does not mean that the amount kept there belongs to the joint family members. The said court further observed that the registered sale deed in respect of the suit property in the name of the plaintiff-respondent was never sought to be cancelled by the appellants and in such premises it was not correct for the trial court to make a third case that the suit land in the name of the plaintiff-respondent should be treated as lands of mother and the son in equal share. Proceeding, thus, the plaintiffs appeal was allowed declaring his right, title

and interest in the entire suit land and ordered recovery of possession of the part of the same land shown in the schedule 'B' of the plaint. The appeal of the defendants came to be dismissed.

7. I have heard Mr. B. Das, learned senior counsel assisted by Ms. S. Das, learned Counsel for the appellants and Mr. D. Chakraborty, learned Counsel for the respondents.

8. The substantial question of law framed at the time of admitting the appeal reads:

Whether the learned first appellate court was in error in substantial question of law in not allowing the present appellants to adduce oral evidence to prove co-relation of the contents of the documents under Order 41, Rule 27, CPC though the documents sought to be produced as evidence were allowed to be admitted.

9. Admittedly, during hearing, the defendant-appellants herein, though filed a written statement, did not examine any witness or adduce any documents which, according to them, was due to lack of ignorance on the part of their lawyer. It is difficult to accept such a proposition which puts a lawyer in the dock. The appellants herein were dissatisfied with the judgment of the trial court whereby the mother and the eldest son were declared to be the owners of the suit land in equal share. They filed an appeal before the District court. In the memorandum of appeal before that court, they made no whisper about non-examination of any witness or non-production of any document before the trial court where the decision had gone against them or that they intended to examine witness or adduce evidence at the appellate stage. The law regarding production of additional evidence in the appellate court has been provided in Order XLI, Rule 27 of Civil Procedure Code (CPC) which reads as follows:

27. Production of additional evidence in Appellate court. - (1) The parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the Appellate Court. But if -

(a) the court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted, or

(aa) the party seeking to produce additional evidence, establishes that notwithstanding the exercise of due diligence, such evidence was not within his knowledge or could not, after the exercise of due diligence, be produced by him at the time when the decree appealed against was passed, or

(b) the Appellate Court requires any document to be produced or any witness to be examined to enable it to pronounce judgment, or for any other substantial cause, the Appellate Court may allow such evidence or document to be produced, or witness to be examined.

10. One of the three conditions noted above has to be satisfied for production of additional evidence in the appellate court. There is no contention that the trial court refused to admit evidence which the defendant-appellants herein sought to get admitted. According to them, they could not produce such evidence due to ignorance of their lawyer. The second situation must be that such additional evidence was not within their knowledge and after the exercise of due diligence, the same could not be produced before the trial court. Even in the grounds of appeal before this court such a stand has not been taken. It has to be specifically pleaded what are the additional evidence which were not within their knowledge and could not be produced even after exercise of due diligence and how the same has any relevance to the issues in the proceeding. Nowhere in the memo of appeal or during submissions, the nature and relevance of such documents were disclosed and no argument was placed in what way such additional evidence could have altered the decision of the court. Therefore, the plea of not allowing the additional evidence at the appellate stage by a first appellate court has no merit. It needs no reiteration that documentary evidence would always prevail over oral evidence. In the case at hand, no oral or documentary evidence was placed before the courts below by the appellants herein and the reasons shown as ignorance of the lawyer is not acceptable for the reasons aforementioned. Even before the first appellate court, no serious attempt was made to lead any evidence, oral or documentary, by the appellants herein after satisfying one of the conditions

provided in Order XLI, Rule 27 of CPC. The nature or relevance of such evidence which the appellants herein intended to place on records at the appellate stage was not even whispered in the memorandum of appeal before that court as has not been done in the memo of appeal before this court. The question of jurisdiction of the trial court on ground of value of the suit and payment of court fee thereon is a late runner not figuring anywhere as a substantial question of law and, therefore, I do not feel necessary to advert to the same.

11. For the reasons and the discussions aforementioned, this second appeal has no merit and consequently, the same is dismissed leaving the parties to bear their own cost.

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