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Court : Jharkhand

Decided On : Aug-24-2007

Reported in : 2008(56)BLJR404; [2008(1)JCR535(Jhr)]

Judge : D.G.R. Patnaik, J.

Appeal No. : Appeal from the Appellate Decree No. 5 of 1991 (R)

Appellant : Sarva Deo Singh and ors.

Respondent : Ramchandra Singh and anr.

Advocate for Def. : Srijit Chaudhary, Adv.

Advocate for Pet/Ap. : N.K. Prasad, Sr. Adv. and; V.K. Prasad, Adv.

Disposition : Appeal allowed

Judgement :

D.G.R. Patnaik, J.

1. This second appeal filed by the defendant/appellant, is directed against the judgment dated 1.12.1990 and its corresponding decree dated 10.12.1990 passed by the 5th Additional Judicial Commissioner, Ranchi in Title Appeal No. 71/29 of 1987-1990, whereby he allowed the appeal filed by the plaintiff/respondent by reversing the judgment dated 25.7.1987 and decree dated 5.8.1987 passed by the

Sub-Judge, 7th, Ranchi in Title Suit No. 248/39 of 1984-1987, dismissing the suit of the plaintiff. During the pendency of this appeal, the original appellant namely, Smt. Rima Devi having died, her legal heirs have been substituted. The suit as filed by the plaintiff was for specific performance of contract and for cancellation of the sale deed dated 11.1.1982 executed in favour of defendant No. 1.

2. For better appreciation of the dispute and the questions raised for determination, a brief statement of the facts of the case may be recorded.

According to the case of the plaintiff, the property bearing M.S. Plot No. 1446 measuring 0.007 karis and another plot bearing M.S. Plot No. 1447 measuring 0.107 karis within ward No. II stood recorded in the name of Ram Kumar Mahto, father of Rajeshwar Mahao, Proforma defendant. The suit property comprises of land with khapparposh house measuring 2 katthas as described in the Schedule of the plaint, within the aforesaid plots of lands. On the plea of providing medical treatment to his ailing father, the proforma defendant went on borrowing money from the plaintiff from 20.7.1980 with an assurance that he would transfer his land by way of sale to the plaintiff. The father of the proforma defendant died on 16.8.1980 leaving behind Braj Kishore Mahto (Proforma defendant) and his elder brother Rajeshwar Mahto and on the plea of meeting the funeral expenses, the proforma defendant borrowed more money from the plaintiff. Ultimately, on 4.12.1981 the proforma defendant executed an Agreement for sale in favour of the plaintiff in respect of the suit lands claiming the same to be within his share of the entire property, for consideration of Rs. 6,000/-. He acknowledged the receipt of a sum of Rs. 3,500/- which he had earlier received from the plaintiff as earnest money. The plaintiff who was initially inducted as tenant within the suit premises, continued to remain in possession of the same even after the aforesaid date of Agreement as part performance of contract. The proforma defendant agreed to execute the Deed of transfer in favour of the plaintiff after receiving the sum of Rs. 2,500/- being the balance of the consideration amount. However, despite repeated requests of the plaintiff and his willingness to pay the balance of the consideration amount, the proforma defendant did not execute the sale deed in respect of the property assured in the Agreement, in favour of the plaintiff. On the other hand, the proforma defendant and his brother executed a sale deed in favour of the

defendant No. 1 on 11.1.1982 in respect of the entire; 10 katthas of the property including the portion which the proforma defendant had agreed to sell to the plaintiff. On the basis of the above stated pleadings, the plaintiff has prayed for a decree for specific performance of contract in terms of the Agreement entered into by and between him and proforma defendant and for cancellation of the sale deed dated 11.1.1982 executed by proforma defendant and his brother in favour of the defendant No. 1 declaring the same as void, illegal, inoperative and fraudulent.

3. The proforma defendant namely respondent No. 2 appeared in the suit and filed his written statement, whereby he had challenged the entire claim of the plaintiff denying and disputing the plaintiff's claim as being false and misleading and claiming that the suit was not maintainable and is liable to be dismissed. However, at the trial, he did not contest the suit. Rather, he figured as a witness on behalf of the plaintiff.

Defendant No. 1 namely the appellant herein, had offered full contest to the plaintiff's suit by filing her written statement and also by adducing evidence on her behalf. Denying the entire claim of the plaintiff as being false and misleading and also disputing the maintainability of the suit for lacking cause of action and for non-joinder of necessary party and also being barred by limitation, the case of the contesting defendant No. 1 was that after the death of the father, the elder brother of Braj Kishore Mahto (proforma defendant) namely Rajeshwar Mahto was looking after the affairs of the family as Karta and manager of the joint family. The properties of late Ram Kishore Mahto had devolved upon both the brothers who became joint owners of the entire inherited properties and as such, the proforma defendant did not have any exclusive title or possession over the suit property. Denying the plaintiff's claim of the Agreement for sale, allegedly executed by the proforma defendant in favour of the plaintiff, as being forged and fabricated document, and never executed by the proforma defendant, the claim of the contesting defendant was that by virtue of a sale deed executed and registered by both the brothers namely Rajeshwar Mahto and Braj Kishore Mahto, they had sold the entire 10 katthas of land, including the suit land, to the contesting defendant for a consideration of Rs. 30,000/-. Pursuant to the sale, the contesting defendant No. 1 was put in possession of the demised properties on 11.1.1982. The contesting

defendant has further claimed that the plaintiff was inducted within the suit property as tenant and he is still continuing as tenant in respect of the suit property and since the defendant No. 1 has been pressing the plaintiff to vacate the suit premises, the plaintiff has come up with the false and frivolous case to defeat the right, title and interest of the defendant No. 1 in the suit property.

4. It may be mentioned here that in his written statement, the proforma defendant (respondent No. 2) had virtually supported the entire case of the defendant No. 1. He has denied to have executed any Agreement of sale in respect of the suit property in favour of the plaintiff or to have received any money from the plaintiff as purported consideration money. He has also affirmed that he along with his brother Rajeshwar Mahto had sold away the entire lands including the suit property for a consideration of Rs. 30,000/- and brothers had executed the sale deed in favour of the defendant No. 1 on 11.1.1982 and had also delivered possession of the demised lands to the defendant No. 1. On the basis of rival pleadings, learned trial court had framed following issues.

1. Is the suit as framed maintainable?
2. Has the plaintiff got valid cause of action for the suit?
3. Is the suit bad for non-joinder of parties?
4. Is the suit barred by the Law of Limitation?
5. Whether the alleged deed of agreement for sale executed by defendant No. 2 in favour of the plaintiff on 4.12.81 is a forged and fabricated document as alleged by the defendant or a genuine document as alleged by the plaintiff?
6. Whether the defendant No. 2 was competent to execute the deed of agreement for sale in favour of the plaintiff?
7. Whether the plaintiff is entitled to a decree for specific performance of contract for sale with respect to the suit land against the defendant?
8. Whether undue influence exercised and fraud was played upon defendant No. 2 for obtaining his signature on the sale deed No. 273 of 1982 executed in favour of

defendant No. 1, Rima Devi with respect of the house property including suit property?

9. Whether the plaintiff is entitled to a decree for declaration of the sale deed No. 273 of 1982 as null and void and without consideration?

10. Is the plaintiff in possession of the suit land in view of the agreement for sale as executed by defendant No. 2 alleged by the plaintiff?

11. To what other relief or reliefs, if any the plaintiff is entitled?

5. The Trial Court had recorded its findings on all the issues against the plaintiff and in favour of the defendant No. 1 holding that the Agreement of sale (Ext.-6), as relied upon by the plaintiff, was not a reliable document as inferred from the evidences on record. The Trial Court had also held that the money receipt (Ext.-4) relied upon by the plaintiff is being the document executed by the proforma defendant, was also unreliable. The Trial Court had also held that the proforma defendant was not competent to execute any Agreement of sale in respect of the joint family property or any portion thereof in favour of the plaintiff since the suit property had constituted portion of the undivided joint family property. The Trial Court had also recorded its finding that the sale deed of the property executed by the proforma defendant and his brother in favor of the defendant No. 1 was genuine and not a fraudulent transaction. On the basis of such finding, the Trial Court had refused to grant any relief to the plaintiff.

6. The plaintiff thereafter preferred an appeal vide Title Appeal No. 71/29 of 1987-1990 before 5th Additional Judicial Commissioner, Ranchi, which was disposed of by the impugned judgment dated 1.12.1990. The appellate court by relying upon the oral evidences of the proforma defendant and accepting the same as dependable piece of evidence supporting the plaintiff's case, reversed the judgment of the Trial court by setting aside the findings of the Trial Court on the material issue namely, genuineness of the Agreement of sale relied upon by the plaintiff, purportedly executed in favour of the proforma defendant No. 2. The appellate court by the impugned judgment, decreed the plaintiff's suit for specific performance of contract in favour of the plaintiff and against the defendant No. 1

and by directing the proforma defendant No. 2 to execute the sale deed in terms of the Agreement of sale dated 4.12.1981, within a period of three months from the date of the judgment and directed the plaintiff to pay a sum of Rs. 2,500/- to the proforma defendant No. 2.

7. The present second appeal has been filed by the appellant/defendant No. 1 against the impugned judgment of the appellate court by raising following questions of law.

1. Whether the learned court below has gravely erred in decreeing the plaintiff-respondent's suit for specific performance of contract after having held that the plaintiff-respondent was not entitled to challenge the genuineness or otherwise of the registered sale deed dated 11.1.1982 (Ext.-E) executed by the proforma defendant Brajeshwar Mahto and his elder brother Rajeshwar Mahto?

2. Whether the learned lower appellate court has further gravely erred in up setting the findings of the trial court to the effect that the plaintiff's agreement dated 4.12.1981(Ext.-6) was not a genuine agreement without meeting the cogent reasonings of the trial court in that regard?

3. Whether the learned lower appellate court has further gravely erred in decreeing the plaintiffs-respondent's suit without any averment in the plaint that the appellant was a purchaser with notice of the alleged agreement of the plaintiff?

4. Whether the learned lower appellate court has committed a grave error of law in not discarding the evidence of the defendant No. 2 examined on behalf of the plaintiff as P.W. 9 which was contrary to the written statement filed by the defendant No. 2 in the suit as it is well settled that evidence contrary to ones own pleading in the suit has to be discarded?

5. Whether the learned lower appellate court has further gravely erred in recording a finding of the plaintiff-respondents alleged readiness and willingness to perform his part of the agreement for the first time without any issue or a finding on the said question by the trial court?

6. Whether the learned lower appellate court has further gravely erred in holding that an agreement of sale by a Junior co-parcener was capable of enforcement in respect of his undivided share in the property for the alleged Agreement of Sale Ext. 6 was in respect of an specific portion of the property and not in respect of his alleged share in the property?

7. Whether the learned lower appellate court has further gravely erred in decreeing the plaintiff-respondent's suit without any averment or finding that the alleged agreement of sale Ext. 6 was either for legal necessity or for any benefit of the Estate?

8. The primary question of law is, whether the findings of the lower appellate court on the issue as to whether the plaintiff's agreement for sale dated 4.12.1981 (Ext.-6) was genuine and binding upon the proforma defendant No. 2 was without proper appreciation of the evidences on record and, therefore perverse?

9. While deciding this issue, the trial court considered the pleadings of the parties and also the evidences adduced by them and had based its findings on several contradictions appearing in the evidences adduced by the plaintiff relating to execution of the impugned agreement and also of the money receipt purportedly executed by the pro forma defendant No. 2. The trial court had refused to accept the evidence of proforma defendant No. 2 who was examined by the plaintiff as P.W. 9, on the ground that his testimony is in total contradiction to his pleadings as appearing in his written statement the trial court had therefore recorded its findings that the agreement dated 4.12.1981 (Ext.-6) relied upon by the plaintiff in support of the relief claimed by her, was not a genuine document and creates no right in favour of the plaintiff.

The appellate court on the basis of the same evidence, reversed the entire findings of the trial court on this issue. The reasons assigned by the appellate court is that the pleadings of the proforma defendant No. 2 vide his written statement, is of secondary importance and what is more important is the deposition of the proforma defendant No. 2 in course of his examination as a witness for the plaintiff. The lower appellate court had demised the inference which the trial court had drawn on the basis of several contradictions appearing in the

pleadings and oral evidences adduced by the plaintiff, as being misconceived and improper. This being so, it becomes necessary to refer to the evidences adduced by the parties in order to appreciate as to whether the findings based by the trial court on the basis of the evidences on this issue were reasonable and, whether there was sufficient reason for the first appellate court to reverse the findings of the trial court on reasons directly opposed to the reasoning of the trial court. From the impugned judgment of the first appellate court, it appears that the appellate court has almost entirely relied upon the testimony of the proforma defendant No. 2 who was examined by the plaintiff as P.W. 9. The appellate court has declined to give any importance to the written statement filed by the proforma defendant No. 2 and the averment contained therein on the ground that it is the oral testimony of the proforma defendant No. 2 which deserves greater importance.

10. It may be recollected that the proforma defendant No. 2 in his written statement, had offered full contest to the claim of the plaintiff. He had not only denied to have executed the impugned agreement for sale in favor of the plaintiff, but had also denied to have executed any money receipt in respect of any money received from the plaintiff. Yet, he has subsequently chosen to support the plaintiff's case by deposing as a witness for the plaintiff and admitting virtually the plaintiff's entire claim. The conduct of the proforma defendant No. 2 clearly demonstrates that he is totally undependable. On being confronted with his written statement in his cross-examination, he adopts the easiest and safest escape by bluntly stating that he had never appeared in the suit and had never filed his written statement, although the written statement does bear his signature (Ext.-A), as admitted by him. In order to assess as to whether the agreement (Ext.-6) is a genuine document or not, no reliance can be placed on the testimony of the proforma defendant No. 2. though he was examined as a witness for the plaintiff as P.W. 9. The plaintiff has examined some more witnesses claiming that they were witnesses to the execution of the agreement and also witnesses to the execution of the money receipt by the proforma defendant No. 2. It is in the pleadings of the plaintiff that the proforma defendant No. 2 used to borrow money from time to time from him for the purposes of meeting the medical expenses incurred for the medical treatment of his father and the money receipt was executed by the proforma defendant No. 2 in respect of the total sum so received

by the proforma defendant No. 2. It is in the pleadings of the plaintiff that on the death of his father, the proforma defendant No. 2 had borrowed further amount of money from the plaintiff. Referring to the evidences of the proforma defendant No. 2 (P.W. 9), he categorically admits that it was his elder brother who used to look after the ailing father and provide medical treatment to him and used to meet the entire expenses for the medical treatment and that the elder brother had never received any money from the plaintiff. He also admits that he did not receive any money from the plaintiff after the father's demise. Thus, the claim of the plaintiff that the proforma defendant No. 2 had borrowed money from him for certain legal necessity, is contradicted by the proforma defendant No. 2 himself. On this aspect, the trial court has also found that the evidences adduced by the plaintiff regarding the execution of the money receipt by the proforma defendant No. 2 is inconsistent for the reasons, firstly that though the proforma defendant No. 2 was a literate person and did know to write, yet the receipt was not scribed by him and it only bears his signature. Secondly, although it appears from the pleadings of the plaintiff that at the time of the execution of the money receipt, P.W. 6 and P.W. 7 were also present and they too had put their respective signatures on the money receipt, but no such signature appears on the money receipt and furthermore, both P.W. 6 and P.W. 7 have denied their presence at the time of the execution of the money receipt. Another discrepancy which the trial court had observed that though it has been claimed by the plaintiff that the said money receipt (Ext.-4) was prepared on 4.12.1981, but it bears the date of 15.10.1981 and no convincing explanation has been offered either by the plaintiff or by the witnesses examined by him in respect of the discrepancy.

As regards the agreement for sale (Ext.-6), the trial court had observed that this document has also been scribed by another person and not by proforma defendant No. 2 and though the plaintiff in his pleadings and evidences and the proforma defendant No. 2 in his evidences have claimed presence of two witnesses namely Baidyanath Singh (P.W. 6) and Amar Singh (P.W. 7) at the time of execution of the agreement, but both these witnesses have denied their presence at the time of the purported execution of the agreement. The trial court has drawn inference from the several inconsistencies and contradictions appearing in the evidences of the plaintiff's witnesses that the money receipt as well as the

agreement for sale were manufactured documents prepared with the connivance of proforma defendant No. 2 and the execution of these documents have not been adequately proved by reliable and cogent evidence. An interesting point, which the trial court has observed, is that in the written statement, the proforma defendant No. 2 while denying to have executed any money receipt or the agreement for sale in favour of the plaintiff, had categorically admitted to have executed the sale deed together with his brother in favour of the defendant No. 1 in respect of the entire properties which both the brothers had inherited from his father. This fact has been admitted by the proforma defendant No. 2 (P.W. 9) who in his cross-examination has acknowledged the fact that the sale deed executed in favour of the defendant No. 1, does bear his signature. Apparently, in the recitals of this sale deed, there is no mention a disclosure that prior to the execution of the sale deed in favour of the defendant No. 1, the proforma defendant No. 2 had entered into my agreement whatsoever with the plaintiff for sale of some of the portion of the joint property to the plaintiff. The trial court had considered this circumstance adding to its doubt about the genuineness of the agreement for sale (Ext.-6) and money receipt (Ext.-4). The trial court has further taken note of the fact from the evidences adduced by the defendant No. 1 and also the facts admitted by the plaintiff and pro forma defendant No. 2 also, that the plaintiff was inducted as tenant in respect of the suit premises, even during the lifetime of the father of the defendant No. 2, and after the father's demise, the rent used to be collected by the elder brother of the defendant No. 2. The plaintiff has not brought any definite evidence on record to prove as to when he ceased to continue as tenant and when did the tenancy come to end. The trial court had also observed from the evidences on record that after having sold away the entire property together with the premise in possession of the tenant namely, the plaintiff, the vendors namely proforma defendant No. 2 and his brother had delivered possession of the demised property to the defendant No. 1 on the date of execution and registration of the sale deed.

11. From the impugned judgment of the lower appellate court, it would be apparent that it had not discussed the reasonings and findings of the trial court regarding the several contradictions appearing in the evidences on record. The lower appellate court appears to have ignored several contradictions and inconsistencies in the evidences and has relied entirely on the testimony of the proforma

defendant No. 2 (P.W.9) not only for reversing the findings of the trial court on these issues, but also for recording his own finding on this issue that the agreement for sale (Ext.-6) is a genuine document and that the same is binding upon the defendants. Learned Counsel for the appellants has rightly submitted that the findings of the lower appellate court on this issue is totally perverse and not in consonance with the evidences on record.

12. Apparently, there is, no pleading either in the plaint, nor any evidence has been adduced by the plaintiff to suggest that the defendant No. 1/appellant had any prior notice regarding the impugned agreement for sale (Ext.-6) prior to the date of execution of sale deed of property in her favour, neither has the lower appellate court or even the trial court recorded any finding on this issue. The specific pleading of the defendant No. 1 is that she is a bona fide purchaser of the property which were sold by the proforma defendant No. 2 and his brother and she had no notice of any earlier agreement of the proforma defendant No. 2 with the plaintiff whatsoever. In absence of any evidence adduced by the plaintiff to refute this stand of the defendant No. 1, it is to be accepted that the defendant No. 1 was a bona fide purchaser of the property without notice of any agreement for sale much less Ext.-6 purportedly executed by the proforma defendant No. 2 in favour of the plaintiff. Under such circumstances, the specific performance of purported agreement for sale cannot be enforced against the defendant No. 1, who is the transferee of the property and has paid money to the vendor in good faith and without notice of the previous agreement of contract between the vendors and the plaintiff.

13. For the reasons discussed above, I find merit in this appeal. Accordingly this appeal is allowed with costs. The impugned judgment and Decree of the lower appellate court is hereby set aside and the judgment and decree passed by the Trial Court, is affirmed.