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Court : Kolkata

Decided On : Apr-07-1949

Reported in : AIR1951Cal320

Judge : Das Gupta, J.

Acts : [Evidence Act, 1872](#) - Sections 65, 74, 75, 100 and 101 to 103; ;[Code of Civil Procedure \(CPC\) , 1908](#) - Section 100; ;Hindu Law

Appeal No. : A.F.A.D. No. 1613 of 1944

Appellant : Akshoy Kumar Bose and ors.

Respondent : Sukumar Dutta and ors.

Advocate for Def. : Satindra Nath Roy Choudhury, ;Purnendu Sekhar Bose and ;Nitya Ranjan Biswas, Advs.

Advocate for Pet/Ap. : Sarat Chandra Janah and Salil Kumar Hazra, Advs.;

Judgement :

Das Gupta, J.

1. The property which is the subject-matter of this litigation was acquired by Satish Chandra Dutta, father of defendants 1 and 3 in the year 1906 by a patta from Narendra Nath Das and others. Satish had a brother named Sital. Respondent 1 is

the son of Sital and brought the suit for partition of the property on the allegation that the property, though acquired in the name of only one brother Satish, was really the joint property of the two brothers Satish and Sital. The present appellant was impleaded as defendant 4, as he had acquired a portion of the property in suit by settlement from Satish and another portion by purchase from the heirs of Satish. Other defendants were, apart from the sons of Satish, the other tenants who were in possession of parts of the property, having taken settlement either from Satish or his heirs.

2. The defence was that the property was not joint and was really the personal property of Satish acquired with his own money.

3. The trial Court rejected the defence contention, believed the plaintiff's case and decreed the suit.

4. On appeal, the learned Additional District Judge has also come to the same conclusion and dismissed the appeal.

5. Both the Courts placed considerable reliance on an admission made by Satish in a written statement said to have been filed by both the brothers Satish and Sital in Title Suit No. 646 of 1908 of the First Munsif's Court, Diamond Harbour.

6. The main contention in the appeal is that the finding of fact by the learned District Judge that the acquisition of the property, though in the name of Satish, was really by both the brothers Satish and Sital, cannot be accepted as final finding of fact binding on this Court, inasmuch as it is vitiated by errors of law. The first error of law, which Mr. Janah appearing for the appellant has alleged is that the learned District Judge did not properly consider the question as to on whom the burden of proof lay and had also not arrived at any finding on the point whether the joint family had a nucleus out of which this property could have been acquired. His second contention is that the written statement on the admission in which so much reliance has been placed was wrongly admitted in evidence. Thirdly he contended that the Court below wrongly rejected the mortgage bond which was sought to be put in as evidence on behalf of the defendants to show the source of the money with which the selami was paid.

7. The law is well settled now that in a case of this nature, where, though a document is standing in the name of one person, another party comes and claims the property to be joint family property, the burden is first on him to prove that the two were joint at the time of the acquisition and secondly that the joint family had a sufficient nucleus from which the property could have been acquired. If this burden is discharged by the party who claims the property to be joint the burden then shifts to the other side to show that really the property was acquired for himself and with his own funds. The judgment delivered by the learned District Judge does not indicate that these points were in his mind at all. It does appear that the learned Judge did come to a conclusion that the two brothers were living jointly in 1313 B. S. at the time of the settlement of the land. There is no indication that he applied his mind to the question of the presence of a nucleus. Mr. Roy Choudhury for the respondents has drawn my attention to the statement in the judgment where the Judge Says that both the brothers were in a position to earn some money and prima facie in a position to contribute towards the expenses of taking settlement of the disputed lands. This, however, falls far short of a finding that they did pool their resources in such a way as to form a nucleus and that nucleus was sufficient for the purpose of acquisition of a property of this nature.

8. I am of opinion that in view of the serious misapprehension of the position in law by the learned District Judge his findings of facts cannot be taken to be binding on this Court. I would, therefore, have to proceed to arrive at a finding of fact for myself on the evidence on the record.

9. Admittedly, a very important item of evidence on the side of the defendants would be the admission in Ex. 3. If Ex. 3 had been properly admitted in evidence, I would have no hesitation in proceeding on the evidence on the record to record my own finding. I cannot but agree, however, with the learned Advocate for the appellant that EX. 3 has not been properly admitted in evidence. There can be no doubt that the admission in the written statement would be relevant evidence, provided it was shown to be with respect to property which is now in suit. But even relevant evidence has to be brought on the record in the way allowed by law. The written statement is not a public document and so a certified copy of it is not admissible in evidence. The learned Judge remarks that there is authority for the

proposition that the certified copy of written statement can be admitted in evidence without calling for the original. I am not aware of any such authority, nor are the learned Advocates on either side aware of any such authority. In my opinion, the learned Judge is entirely mistaken in this view of the law.

10. The original of this written statement being more than 30 years old could, of course, be admitted in evidence if shown to have been produced from proper custody. Production from the Court's office would obviously be production from proper custody. If that could not be produced in spite of proper efforts by the plaintiff, secondary evidence could be given under Section 65(c), Evidence Act. A certified copy produced without any further evidence would not be sufficient secondary evidence. Evidence could be given either by the lawyer who filed the written statement, or by some other person who was present when the written statement was filed and read the written statement at about the time, that the copy filed in Court, whether certified or not, correctly represents the contents of the written statement that was actually filed. No such evidence has been given. Nor am I satisfied that a case was made out for producing secondary evidence within the meaning of Section 65(c), Evidence Act, for while it is shown that the records of case No. 71 of 1909 were called, there is nothing to support the further statement of the learned Advocate that that case was the same as 646 of 1908 of the First Munsif's Court.

11. It appears that the plaintiff did make at least two attempts to call for the records of case No. 71 of 1909. His case is, as already indicated, that this is the same case as 646 of 1908. If the record had been produced in Court in accordance with his request, the record itself would have shown whether it was really the same case as 646 of 1908. My attention has been drawn to a requisition signed by the Munsif which it appears that, though an order for calling for the records was passed sometime in September the order of requisition was not actually signed earlier than November. That left very little time for the records to arrive in the Court in time before the trial of the suit which was taken up the same month.

12. Though the plaintiff did make some efforts to call for the records of the case in which, according to him, this written statement was filed,--though it seems to me

he might have been more diligent, it appears that some negligence on the part of the Court's office was responsible for his not being able to get the assistance of the original record. If the original record had been produced, his difficulty of putting in the written statement on which so much reliance is placed in evidence, might have disappeared.

13. In consideration of all these circumstances, I think it is desirable in the interest of justice that the plaintiff should be given a further opportunity of adducing evidence as regards the written statement, in accordance with law, whether by producing the original written statement from the court record, or otherwise.

14. Accordingly, I set-aside the orders passed by the Courts below and remand the suit for decision in accordance with law to the Court of first instance. The learned Munsif will give the plaintiff an opportunity to put in the written statement in evidence of the Case No. 646 of 1908 filed on account of Satish and Sital, by producing the original, or copy, or otherwise, as may be considered sufficient in law by the Court. The defendants must also be given opportunity to produce such oral and documentary evidence as they may be advised to explain away, if possible the implications of the admission appearing in paras. 16 and 17 of the written statement. The defendants will also be given an opportunity to produce in evidence the mortgage bond to show the source of the money with which the selami was paid.

15. The case should be decided on the evidence already on the record, apart from the evidence of the written statement unless it is properly put in after remand, and on such other oral and documentary evidence as may be produced by the defendants in accordance with the directions given above.

16. The appellants will get the costs upto this stage irrespective of the final outcome of the case.