

Kanji Bibi Vs. Md. Siddique

Kanji Bibi Vs. Md. Siddique

SooperKanoon Citation : sooperkanoon.com/876187

Court : Kolkata

Decided On : Dec-15-1995

Reported in : (1996)1CALLT460(HC)

Judge : Basudeva Panigrahi, J.

Acts : [Code of Civil Procedure \(CPC\) , 1908](#) - Order 41, Rule 11; [Evidence Act, 1872](#) - Section 114

Appeal No. : S.A. No. 450 of 1981

Appellant : Kanji Bibi

Respondent : Md. Siddique

Advocate for Def. : Ashoke Banerjee, ;R. Bhattacharjee, Advs. and ;Syed Ataunnabai and ;Tapan Kr. Roy, Advs. for Respondent No. 2

Advocate for Pet/Ap. : Dhruba Bhattacharjee, Adv.

Disposition : Appeal allowed

Judgement :

Basudeva Panigrahi, J.

1. Defendant No. 1 in an appeal against the Judgment and decree dated 18th March, 1980 modifying the Judgment and decree dated 23rd February, 1978

passed by the learned Sub-ordinate Judge, 9th Court, Alipore in Title Suit No. 28/75.

2. Factual secenario leading to this appeal summarily stated thus :-

Respondent Nos. 1 and 2 (hereinafter referred to as plaintiff) filed a suit in the Court of Sub-ordinate Judge, 9th Court, Alipore in T.S. No. 28/75 for specific performance of contract of sale on the ground that the respondent No. 3, hereinafter referred to as defendant No. 1 had executed a register power of attorney on 30.3.1950 in favour of respondent Nos. 4 and 5 (hereinafter referred to as defendants 2 and 3) authorising them to sell the suit property for Rs. 8,000/ to the plaintiff's. Pursuant to the said power of attorney the defendants 2 and 3 executed an agreement in favour of the plaintiff's on 10th February, 1965, received an earnest money of Rs. 4,000/- and put them into possession of the suit premises. The defendant Nos. 2 and 3 agreed to execute the sale deed in favour of the plaintiff's immediately after the defendant No. 1 returned to India from Pakistan. When the defendant No. 1 returned to India on or about middle of March 1975 and he did not execute any sale deed in favour of the plaintiffs, there was a 'salish' between the parties but the defendant No. 1 instead of executing any sale deed in favour of the plaintiffs created a document of conveyance selling the property to the defendant No. 4. The plaintiffs were agreeable and tendered the balance consideration money to the defendant Nos. 1 & 3 but since they failed to execute the sale deed in favour of the plaintiffs, the latter finding no other alternative, filed the present suit for specific performance of the contract.

3. The defendants 1 and 4 contested the suit by filing written statement. It is, inter alia, pleaded that though the defendant Nos. 2 and 3 did not authorise him to execute any property muchless the suit premises. It is further denied that the consideration amount had been ever received by defendant No. 1. The defendant No. 4 claimed herself as a bona fide transferee for consideration and she had no notice of the earlier agreement of sale in favour of the plaintiffs as claimed by them. The specific stand was taken by the defendant No. 1 before the trial court that assuming the power of attorney executed in favour of the defendant No. 2 is true, yet the same being void, the defendant No. 2 could not have executed an

agreement in favour of the plaintiffs. The learned trial court has however, recorded a finding that the defendant No. 2 was not a minor on the date of agreement. It had also further held that the defendant No. 1 was the owner of the property. From the findings of the trial court it appears that the defendant No. 4 was a bona fide purchaser who had no notice about the previous agreement in favour of the plaintiff. Therefore, in the above situation, the trial court passed a decree for refund of the earnest money of Rs. 4,000/- by the defendant Nos. 1 to 3 jointly and severally to the plaintiff but refused the prayer of specific performance of contract.

4. Being aggrieved by the said decision the plaintiffs filed an appeal before the 9th Court of Additional District Judge, Alipore in T.A. No 250 of 1978. According to the Appellate Court, it emerged that the defendant No. 4 had notice about the agreement purported to have been executed in favour of the plaintiff. It further noticed that his sale deed in favour of the defendant. No. 4 was not supported by considerations. Therefore, the appellate court modified the Trial Court judgment and decree and passed the full decree against the defendant No. 1 directing him to execute a sale deed in favour of the plaintiffs within 3 months from the payment of the balance consideration failing which the plaintiffs will get the sale deed executed through the Court,

5. The learned Counsel Mr. Bhattacharjee, appearing for the appellant has strongly urged that the learned Trial Court has failed to consider the legal incompetency of the defendant No. 1 for executing the agreement since the birth certificate produced by him disclosed the date of birth of defendant No. 1 to be 9th November, 1940. Both the courts below have prima facie committed a manifest error in ignoring the certificate and holding that the defendant No. 1 was major by the time of agreement. The appellant has further taken an inexorable plea that even on reading ext. 2, the power of attorney, it did not specifically authorise the defendant No. 2 to sell the property. On reading the document as a whole no other inference can be drawn except the document viz. alleged power of attorney to be only an equitable mortgage. The Trial Court has also failed to consider the evidence of DW 1, the Commissioner, Titagore Municipality. It is further highlighted that both the courts have signally failed to record a finding that the plaintiffs were always ready and willing to perform their part of the contract. The

appellate court has also committed serious illegality by observing that the purchase by the defendant No. 4 was after notice of the previous agreement which was de hors the evidence of the plaintiffs.

6. Mr. Ataunnabai, the learned counsel appearing for the respondent Nos. 1 and 2 has strongly urged that the 2nd Appellate Court should not go into the question of fact which has been finally recorded by both the courts below. Unless the appellant satisfies that those findings are perverse and based on no evidence. He further indicated that the appellant had purchased the property with sufficient notice of the plaintiffs agreement. Therefore, the appellate court has correctly passed the decree directing the defendant No. 1 to execute the sale deed. When the testimony of PW 2 and DW 2 regarding the age of defendant No. 1 had been relied upon by the Trial Court, this court should not further scrutinise the evidence of DW 1 and also the age recorded in the birth certificate. In the above premises the appellate courts finding should be upheld and, consequently, the appeal should be dismissed.

7. A formidable point has been raised by the respondent Nos. 1 and 2 that this court while exercising its power in second appeal has to be circumspect and wary. Mr. Ataunnabai, has highlighted that the Trial Court of fact, i.e., 1st Appellate Court having already arrived at the findings that the defendant No. 1 was not a minor at the time of power of Attorney this court should not brush aside such finding unless the appellant has clearly satisfied that such findings are based on no evidence.

8. Mr. Bhattacharjee, the learned counsel appearing for the appellant, has relied on a decision reported in : AIR 1993 SC398 in the case of Shri Bhagwan Sharma v. Smt. Bani Ghosh. In the aforementioned case, the apex court has laid down the guidelines and the circumstances in which the High Court while exercising its power in second appeal can scrutinise and examine the evidence produced by the parties. It can certainly go into the question as to whether the findings recorded by the first appellate court which was the final court of fact were vitiated in the eye of law on account of non-consideration of admissible evidence of vital nature. It has been held as follows;-

'The High Court is certainly entitled to go into the question as to whether the findings of fact recorded by the first appellate court which was the final court of fact were vitiated in the eye of law on account of non- consideration of admissible evidence of vital nature. But, after setting aside the findings of fact on that ground the Court had either to remand the matter to the first appellate court for a rehearing of the first appeal and decision in accordance with law after taking into consideration the entire relevant evidence on the records, or in the alternative to decide the case finally in accordance with the provisions of Section 103(b). If in an appropriate case the High Court decides to follow the second course, it must hear the parties fully with reference to the entire evidence on the records relevant to the issue in question and this is possible if only a proper paper book is prepared for hearing of facts and notice is given to the parties. The grounds which may be available in support of a plea that the finding of fact by the court below is vitiated in law does not by itself lead to the further conclusion that a contrary finding has to be finally arrived at on the disputed issue. On a reappraisal of the entire evidence the ultimate conclusion may go in favour of either party and it cannot be prejudged.'

9. The Special Bench of this Court in the case of Ratanlal Bansilal and Ors. v. Kishorilal Goenka examined the power of the second appellate court and held in which situation the second appellate court can examine the propriety of the findings of fact recorded by both the courts below.

'Held:-The construction of any expression in a Section should be such as harmonious with the rest-part of the same legislation. If perversity of the fact finding for irrational or vitiated approaches and capricious assumptions is a total anathema to Section 100 it cannot go hand in hand with Section 103 of the Code or order XLI read with Order XLII of the Code. These provisions are clear pointer that the legislature contemplates interference by the High Court in second appeal even on finding of facts where such finding is vitiated.

In the tradition of judicial system of this country Section 100 of C.P.C. provides for a second appeal as a check against error of judgment in the District Court level, being the first Appellate Court. But facilities for second appeal is not an absolute

right. The right from the commencement was restricted. Nothing short of a question of law could be subject matter of a second appeal.

Therefore, second appeal would lie from a finding of fact arrived on no evidence or arrived at perversely on erroneous application of the principle of law otherwise settled.'

10. Therefore, keeping in view of the guide-lines observed in the abovementioned decision let me now advert to the circumstances placed by the appellant to find out if the first appellate Court had reached to a perverse finding on the basis of the absence of evidence or non-scrutiny of the evidence placed by the parties. The respondent Nos. 1 and 2 mainly laid their claim on the basis of the power of attorney purported to have been executed by the defendant No. 1 in favour of the defendant No. 2.

11. The power of attorney Ext. 2 is said to have been executed by the defendant No. 1 in favour of the defendant No. 2, on 21st July, 1980. The respondent Nos. 1 and 2 have however, advanced a serious contention that by virtue of this power of attorney, the defendant No. 1 had vested all rights to Messes V.C. Lalji & Co. over the suit properties including power to assign the properties in favour of any other persons. On reading the document it appears that the defendant No. 1 had permitted the defendant No. 2 only to enjoy the property as a mortgagee till the debt payable to latter was fully liquidated. In the document nowhere it was authorised that the power of attorney holder would acquire unqualified right to convey the same in favour of any person. From the findings of both the courts below I did not notice any discussion regarding the authority said to have been derived by the defendant No. 2 on the strength of the power of attorney. Assuming the power of attorney is true, it also does not create an indefeasible right on the defendant No. 2 over the suit properties.

12. Mr. Bhattacharjee, the learned counsel appearing for the appellant, has invited my attention to the birth certificate marked Ext. 'g'. In Ext. g it is shown, a male child was born to Elahi Miah on 9th November, 1940. In this regard the learned Trial Court in his judgment did not discuss about the importance of the birth register, Ext. g. It simply held that there is no evidence to connect the male issue

born on 9th November, 1940 with the defendant No. 1, therefore, the birth register would not raise any presumption. I am not in a position to approve of this observation of the learned Munsif. The birth register will certainly raise a presumption. The birth register was prepared much before the present controversy and therefore carries much probative value. In this connection reliance can be placed on the decision reported in : AIR1964 Pat301 .

'Entries in birth and death register are public documents and are admissible under Section 35 Evidence Act. The ground of reception of such evidence is that it is the public duty of a person who keeps the register to make such entries after satisfying himself of the truth. When it is the duty of a public servant to make such entries in any public or official register, it becomes admissible to prove the truth of facts entered as well as the fact that the entries were made by the officer. Entries in a register of birth, death or marriage are at least prima facie, though they may not be always conclusive, evidence. It is not necessary to prove who made the entries and what was the source of his information. AIR 1947 All 429, relied on. No doubt, identity of the person whose birth and death is entered has to be established by other evidence if that is in dispute. In that case, the informant, if available, will be a competent witness. Other kind of evidence may also be led to identify the person. But when the identity of a particular person is established, the description of the deceased person in the entry as the widow of that person can be accepted. The whole entry, which is admissible under Section 35 of the Evidence Act, need not conform to the special provisions of Section 32(5) or Section 50 of that Act. Relevancy of an evidence can be established under any of those three Sections.'

13. Admittedly, Elahi Miah had not left no other male issue than defendant No. 1. If Ext. 'g' is considered along with the testimony of DW 1 Sk. Taher Hossain, it would positively lead to an inference that the defendant No. 1 was born in or about 1940. From the evidence it further transpires that the defendant No. 1 was 9/10 years old when he left for Pakistan with his father in 1950. It is further elicited from cross-examination that when defendant No. 1 came to the village he stayed with D.W. 1. In such back-ground the evidence of DW 1 has a far reaching commence to assess the age of the defendant No. 1. If the testimony of DW 1 is accepted and

considered along with Ext. 'g', the birth register entry, Irresistable conclusion is bound to be drawn that the defendant No. 1 was a minor at the time of Agreement. Both the courts below manifestly omitted to consider this important piece of evidence resulting in arriving at perverse finding which turned out serious prejudice to the appellant. Both the courts had fundamentally reached wrong conclusion that the defendant No. 1 was not a minor at the time of agreement. A feeble attempt was made by Mr. Ataunnabi that the defendant No. 1 did not establish by evidence what such birth register relates to Nishar Ahmed. As the evidence embodied that Elahi Miah had left only one male issue, by any stretch of imagination, it cannot be said that the entry relates to some other child.

14. In the plaint, para 2, it is stated that on the death of defendant No. 1's father, he could not pay off the business debt and, therefore, he executed a power of attorney on 30th March, 1950. From the plaint it further, appears that father of the defendant No. 1 was dead when the power of attorney was executed for the discharge of the loan. In this connection the evidence of P.W. 5 Golam Rossual who is the defendant No. 5 gains significance. Therefore, if the testimony of this witness is accepted then the averment of the plaint that power of attorney was executed after the demise of the father of defendant No. 1 stands belied. On the other hand, assuming Nishar's father had left India in 1950 it stands to no reason why the defendant No. 1 would alone execute the power of attorney, who was then said to be a minor in favour of the defendant No. 2.

15. Next, it is to be considered how far Ext. 1, agreement, alleged to have been executed in favour of the plaintiff No. 1 creates any right. Admittedly, the agreement was not executed by the defendant No. It is claimed by the plaintiff No. 1 that it was executed by the power of attorney holder. From the agreement, it does not reveal that it was executed by the defendant No. 2. What all it appears from Ext. 1 is that it was executed by one Ratilal Majithia.

16. Mr. Ataunnabi, the learned counsel appearing for the respondent Nos. 1 and 2, has however, focussed his argument that Ratilal Majithia was none else than the employee of the defendant No. 2 who was authorised by the firm to execute the agreement in favour of the plaintiff No. 1. Therefore, the defendant No. 3 having

been validly authorised by the firm was competent to execute the agreement in favour of the plaintiff No. 1. I found that there is no such averment in the plaint that the defendant No. 3 had been ever authorised by the firm for executing the agreement in favour of the plaintiff No. 1. Further from the recital of the agreement also it does not show that he executed on behalf of the firm in favour of the defendant No. 1. What all it appears from the agreement is that the seal of V.C. Lalgı and Co. had been impressed on the document without any mention in the same that the defendant No. 3 was authorised by the firm and as such it cannot be held that he had requisite authority for execution of such document. The document was executed on 12.2.1965 on which date the defendant No. 1 was allegedly present in India. Therefore learned courts below have however, not considered this important piece of evidence that the defendant No. 1 was very well present on the date of execution of the agreement. PW 2 Jaleswar Prasad Shaw made an unequivocal statement that the defendant No. 1 left for Pakistan on 12.2.1963. Therefore, in the above situation, it is not understood why the plaintiff did not insist the defendant No. 1 to execute an agreement but preferred an agreement only from defendant No. 3. Neither defendant Nos. 2 and 3 filed any written statement nor the defendant No. 3 was examined by the plaintiff to support his case. Since both the courts held that the amount of Rs. 4000/- was paid to the defendant No. 3. I do not like to discuss the evidence with regard to passing of consideration to defendant No, 3. But evidently when the defendant No. 1 was available on the date of payment of consideration, namely, 10.2.95, it does not stand to reason why the plaintiff did not obtain a receipt from him in token of payment of earnest money to the defendant No. 1. This broad and important aspect had not been considered by both the courts below. Therefore, when the observations were made on the basis of non-consideration of evidence I had to discuss the evidence to reach at a proper conclusion.

17. The learned courts below had not recorded any finding that the plaintiff No. 1 was ready and willing to perform his part of the contract. In the instant case, it is already held that the defendant No. 1 was a minor at the time when purportedly the agreement was executed. Assuming the - same is true, even then it does not create any right in favour of the plaintiff No. 1. The Trial Court placed utmost reliance on the evidence of PW 3 to assess the age of the defendant No. 1 but it

failed to consider the evidence of D.W. 1 so also Ext. 'g'. Had the age of defendant No. 1 been assessed on the basis of other contemporaneous evidence and the relevant document, the evidence of the Trial Court as regards age should have been accepted. But since it did not discuss the purport of Ext. 3 and the statement of D.W. 1, the totality of evidence was required to be scrutinised afresh to come to the proper conclusion. In the plaint, there has been a specific prayer for a decree for possession of the suit properties. No specific findings had been arrived by the Trial Court that the plaintiff has been in possession of the suit properties. But the trial court without considering the prayer of the plaintiff has, however, jumped to the conclusion that the plaintiffs have been in possession of the suit properties. The plaintiff admittedly has not paid any Municipal Tax for the suit house. The Trial Court has come to the conclusion that the plaintiff No. 1 could not prove his possession which raise an irreversible impression that the agreement, assuming it to be true, was not worked out. On the other hand, the appellate court without discussing the plaintiffs evidence has recorded a finding 'the plaintiffs' possession must have put the defendant on the alert and if she did not make any inquiry, a knowledge of subsisting agreement of purchase with regard to the property must be imputed'. Therefore, such evidence has no legal basis to be sustained. Whether the defendant No. 4 is a subsequent purchaser and had previous notice of agreement becomes academic in view of the fact that the plaintiff No. 1 having not proved his right under agreement Ext. 1. Accordingly, I vacate the judgment and decree of the courts below and direct the defendant Nos. 2 and 3 to refund the consideration amount of Rs. 4000/- to the plaintiff No. 1.

18. In the result, the suit is decreed in part and the appeal is allowed. But in the circumstances without costs.