

Hem Chandra De Sarkar Vs. Amiya Bala De Sarkar

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Court : Kolkata

Decided On : Jun-27-1924

Reported in : (1925)ILR52Cal121

Judge : Suhrawardy and ;Duval, JJ.

Appellant : Hem Chandra De Sarkar

Respondent : Amiya Bala De Sarkar

Judgement :

Suhrawardy and Duval, JJ.

1. In this case the plaintiff, appellant before us, sued the defendant No. 1, his great aunt (making two other ladies defendants) on the allegation that on the 11th January 1919-she executed in his favour a baina patra, whereby she agreed to sell her interests in certain lands and in the ancestral house of both parties and took from him Rs. 200 in advance out of the purchase price Rs. 500, but that on the 21st January, she sold most of her interest in the said properties to the other two lady-defendants and refused to convey the properties to him. Defendant No. 1 pleaded that she was hard pressed to satisfy her debts and the plaintiff delayed the completion of the transaction and so on the advice of the husband of defendant No. 2, she sold her interest partly to defendant No. 2 and partly to another lady-defendant No. 3, a certain amount being kept back out of the purchase price to compensate the plaintiff for the breach of contract.

2. Both defendants Nos. 2 and 3 denied the genuineness of the baina patra of the plaintiff and claimed they were bond fide purchasers without notice.

3. The first Court found that the baina patra was genuine and that the defendants Nos. 2 and 3 were not bond fide purchasers without notice and decreed the suit.

4. On the appeal by defendants Nos. 2 and 3 coming up before the Subordinate Judge (who, we notice, had not the benefit of having the case argued before him by pleaders) it was held that the baina patra was a genuine document, but that the onus lay heavy on the plaintiff to prove that the defendants Nos. 2 and 3 had knowledge of the baina patra and on the evidence there was no reason to believe they knew of it. The learned Subordinate Judge accordingly allowed the appeal of those defendants refusing specific performance but ordered that on proper court-fees being paid plaintiff was entitled to recover damages against defendant No. 1.

5. The first point argued before us is that the burden of proving that the defendants Nos. 2 and 3 had notice of the contract with the plaintiff before their purchase has been erroneously cast on the plaintiff. In our judgment this contention is sound and ought to prevail. Under Section 27 of the Specific Relief Act such a contract is enforceable against the promisor and every person claiming any interest in the subject matter of the contract through the promisor unless such person is a transferee in good faith for valuable consideration and without notice. Ordinarily when a party claims exemption from a general provision of law the onus lies upon him to prove that he comes within the exception. If the test, as indicated in Section 114 of the Evidence Act, is applied to this case and no evidence is adduced on either side, the contract being proved or admitted, the plaintiff should succeed as it is binding on the contracting party and every person deriving any interest from him since the contract. There is no direct authority in this Court but the view that we have adopted has found favour with the Bombay High Court in the case of *Himat Lal v. Vasudev* (1912) I. L. R. 36 Bom 446., with the Madras High Court in *S. Tiru Venkata Chariar v. Venkata Ohariar and Ors.* (1911) 26 Mad. L. J. 218., with the Allahabad High Court in *Naubat Rai v. Dhaunkul Singh* (1916) I. L. B. 38 All. 184., and with the Patna High Court, in *Dharamdeo Singh v. Ham Prasad Sah* (1918) 44 I. C. 470. The respondent in answer contends first, that the question-of burden of

proof loses its importance when evidence has been adduced on both sides and considered specially by the Appellate Court. As a proposition of law this view is correct but in the present case it cannot be said that the wrong placing of the onus has not affected the merits of the case. By placing the initial onus on the plaintiff to prove notice to the defendants Nos 2 and 3 of his contract, the learned Subordinate Judge has not taken into consideration several circumstances and probabilities which may support the plaintiff's case. The defendant No. 1 is the great aunt of the plaintiff living in the same house with him and presumably living under the plaintiff's protection. The defendant No. 1 says in her written statement that a portion of the purchase money of her share in the property was retained by the purchasers in order to satisfy the plaintiff's claim. No doubt, the onus of proving absence of notice may be discharged by the defendants by a simple denial and negative evidence but the entire evidence when the onus is properly placed, will be looked upon from a standpoint different from that adopted by the learned Subordinate Judge.

6. It is next argued under Section 54 of the Transfer of Property Act, the plaintiff, by the contract of sale, has not secured any interest in the property and as it is in the possession of defendants 2 and 3 he is bound to establish his right to recover possession from them by proving that the purchase by the defendants would not prevail against the contract set up by him and this includes that he must prove that the defendants had notice of the agreement with him. This, in our opinion, is not a correct statement of the position in this case. This is a suit for specific performance of an agreement for sale. The plaintiff's right to recover possession from the defendants will accrue after he has secured performance of the contract and a conveyance in pursuance thereof.

7. It is lastly argued that the view taken by the learned Subordinate Judge placing the onus upon the plaintiff is correct and reliance has been placed on the case of *Lalubhai Surchand v. Bai Amrit* (1877) I. L. R. 2 Bom. 299. This case has been considered and distinguished with disapproval in *Himat Lal v. Basudev* I. L. R. 36 Bom. 446., and we need say nothing more about it. The next case relied upon is *Chinnappa Reddi v. Manickavasagam Chetti* (1901) I. L. B. 25 Mad. 1. That was a case between two mortgagees one of whom held an unregistered 'mortgage and

the other a registered one. In the special circumstances of that case it was held that the holder of the unregistered mortgage must prove in order to succeed that the other mortgagee had notice of his previous mortgage. It was not a case under the Specific, Relief Act and the question of onus was not decided with reference to that Act. Reliance has also been placed on the case of *Thakur Prosad Singh v. Syed Yahya Hossain* (1911) 16 C. L. J. 119. In that case the plaintiff came to Court with the allegation that he had given notice of the agreement of sale with him to all the members of a joint Mitakshara family. He succeeded in proving notice to two of them and the learned Judges held that notice to some of the members of the family was not sufficient and that he must prove notice to all of them. The question as to on whom the onus of proving notice lay was not raised or examined and the only point considered was whether notice to some of the members of a Mitakshara joint family was notice to the others and sufficient in law. The cases cited on behalf of the respondents, therefore, have no bearing on the question before us.

8. In addition, however, to this misplacing of the onus on the plaintiff there are other grounds on which we consider that the learned Subordinate Judge's judgment is defective. The positions of defendants Nos. 2 and 3 are not exactly similar. Defendant No. 2 is a connection of the plaintiff and defendant No. 1, while defendant No. 3 appears to be an outsider. In her written statement defendant No. 1 asserted that Defendant No. 2's husband knew all about the baina patra and further if her statement is to be believed, both of the defendants were well aware of it, as otherwise there would have been no such arrangement as that part of the purchase money was to be kept back to compensate the plaintiff for the breach of contract. On the truth or otherwise of these two assertions (which must be kept distinct) the Subordinate Judge has come to no finding of fact. It is further admitted before us on behalf of defendants Nos. 2 and 3 that neither of them purchased defendant No. 1's share in the ancestral house and so presumably the plaintiff is entitled to that share if, as both Courts find, the baina patra is genuine. Lastly an examination of the schedule of the baina patra and the two sale deeds do not at all show prima facie that certain other properties set out in the baina patra appear in the two later deeds of sale.

9. In view, therefore, of these defects in the judgment of the learned Subordinate Judge we feel we must remand the case for retrial by the first Appellate Court.

10. Costs to abide the result.

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