

Birendra Rudrapaul Vs. Nikunja Behari Debnath through LR's

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SooperKanoon Citation : sooperkanoon.com/894042

Court : Guwahati

Decided On : Mar-18-2009

Reported in : AIR2009Gau114

Judge : B.D. Agarwal, J.

Appellant : Birendra Rudrapaul

Respondent : Nikunja Behari Debnath through LR's

Disposition : Appeal dismissed

Judgement :

B.D. Agarwal, J.

1. This Second Appeal is directed against the judgment and decree dated 19-4-1999 passed by the learned Additional District Judge, West Tripura, Agartala in T. A. No. 52 of 1997 affirming the Judgment and decree dated 12-5-1997 passed by the learned Civil Judge, Senior Division, Court No. 1, West Tripura, Agartala in T. S. No. 42 of 1991. Being aggrieved with the concurrent decrees the appellant has preferred this Second Appeal.

2. I have heard Mr. D.R. Choudhary, learned Counsel for the appellant and Mr. M. K. Bhowmik, learned Senior counsel for the legal heirs of the respondents. I have also perused the impugned judgment and decree of the learned trial Court.

3. The facts giving rise to the filing of the suit are that the appellant was the 'Bargadar'/Under Raiyat of the plaintiff/respondents. Sometime in the year 1987 the plaintiff i.e. the owner of the land took a sum of Rs. 3000/- as loan from the appellant. Another sum of Rs. 5000/- as loan was again taken from the 'Bargadar'/Under Raiyat on 21-3-1987. On this second day of taking loan i.e. on 21-3-1987 the plaintiff executed a sale deed in favour of under raiyat. Simultaneously the defendant/appellant executed an agreement of reconveyance in favour of the owner of the land on the condition that he will retransfer the land provided the loan is redeemed by 14th of April, 1991. Before this stipulated date of refund of the loan the plaintiff/respondents approached the appellant to refund the loan amount. However, the appellant was found reluctant to accept the money, and as such village meetings were held. Suspecting that the appellant had ill-intention to reconvey the property unto the plaintiff/respondents the suit was filed, inter alia, praying for a decree of specific performance so as to direct the appellant to execute the deed of reconveyance on receipt of Rs. 8000/- and for recovery of khas possession of the suit land.

4. The appellant contested the suit by filing a written statement and also adducing evidence. The appellant's case was that the agreement for reconveyance was obtained by fraud and the appellant also denied having been approached by the respondents to refund the loan amount.

5. Both the sides gave oral evidences and the deed of sale as well as the agreement for executing reconveyance deed were also proved under Exts. 7 and 5 respectively. On appreciation of evidence the learned trial Court decreed the suit in favour of the respondents and directed the appellant to execute the sale deed on receipt of Rs. 8000/-. Simultaneously, the decree for recovery of khas possession of the suit land after evicting the appellant was also passed in favour of the respondents. This decree was affirmed by the first appellate Court, dismissed the appeal of the appellant in toto.

6. This Second Appeal was admitted on 20-5-1999 on the following substantial questions of law:

(i) Whether the learned Courts below committed error in law in misinterpreting Ext. 7 and 5?

(ii) Whether the Barga right of the defendant appellant would revive in case of retransfer of the suit land to the plaintiff?

7. Mr. M. K. Bhowmik, learned Counsel for the respondents submitted that the powers of the High Court are very limited while hearing a Second Appeal arising out of concurrent findings. Referring to the decision of the Apex Court rendered in the case of *Kondiba Dagadu Kadam v. Savitribai Sopan Gujar* : AIR 1999 SC 2213 and *Abdul Raheem v. Karnataka Electricity Board* 2008 AIR SCW 463, the learned Counsel for the respondents submitted that even if the concurrent findings are found to be erroneous and the High Courts have no jurisdiction, more particularly Under Section 100 of the Code of Civil Procedure to interfere with the findings on equitable grounds. The learned Counsel also submitted that even if, two views are deducible from the evidence and documents the inference drawn by the learned trial Court would prevail. The learned Counsel for the respondents also pressed into service a judgment of the Hon'ble Gauhati High Court rendered in the case of *Smt. Anjali Debi Thapa v. Smt. Sandhya Debi Thapa* : AIR 2004 Gauhati 145 which is also in the same tune of the Apex Court.

8. In the case of *Hero Vinoth (Minor) v. Seshammal* reported in : (2006) 5 SCC 545 : AIR 2006 SC 2234, the Apex Court has reiterated that re-appreciation of evidence is not permissible in second appeals. At the same time their Lordships have culled out certain exceptions to the rule of non-interference in the concurrent findings of fact. After referring catena of judgment the Apex Court has held that lower Courts findings can be interfered with if there is misconstruction of a document or wrong application of the principle of law. Their Lordships have further held that a substantial question of law can also arise if the Courts below have decided an issue ignoring or acting contrary to express provisions of law. Their Lordships have further held that interference in the concurrent findings is also permissible where (i) the Courts below have ignored material evidence or acted on no evidence; (ii) the Courts have drawn wrong inferences from proved facts by applying the law erroneously; or (iii) the Courts have wrongly cast the burden of

proof. In view of this authority it cannot be said that concurrent findings are totally immune from judicial review Under Section 100 of the Code of Civil Procedure.

9. Mr. M. K. Bhowmik, learned Counsel for the respondents also submitted that interpretation of proved documents are also immune from challenges in the Second Appeal. This submission was made with the help of a judgment of the Apex Court rendered in the case of Jangbir v. Mahavir Prasad Gupta AIR 1977 SC 27. In this judgment their Lordships have observed that 'unless interpretation of a document involves the question of application of a principle of law mere inferences from or the evidentiary value of a document generally raises only a question of fact'. From this observation also it cannot be said that the High Courts have no power or authority to examine the correctness of the interpretation of the documents by the learned Courts below. In this regard the learned Counsel for the appellant also placed another judgment of the Apex Court rendered in the case of Ramlal v. Phagua : AIR 2006 SC 623. In this judgment the Apex Court has approved fresh interpretation of the documentary evidence by the High Courts in the second appeals.

10. Amidst the aforesaid legal position I shall now proceed to examine as to whether the appellant has made out any case for interference of the concurrent findings and decrees.

11. From the impugned judgment it is apparent that the respondents have been able to prove his execution of Sale Deed and the Agreement for execution of Deed of Reconveyance by the appellant (Exts. 7 and 5 respectively). On the basis of these proved documents both the Courts below have held that once the sale deed was executed by the owner of the land in favour of his under raiyat/appellant, the relationship of raiyat and under raiyat between the parties ceased to exist. In other words, both the learned Courts below have held that in absence of any pre-condition in the sale deed dated 21-3-1987 about the reconveyance of the property on repayment of the consideration amount it was an out and out sale of the suit land and as such even after the execution of reconveyance of the property the 'Barga' right cannot be given to the appellant.

12. Mr. M. K. Bhowmik, learned Counsel for the respondents submitted that to construe a deed as a Mortgage by Conditional Sale a party has to fulfil the preconditions laid down Under Section 58(c) of the Transfer of Property Act, 1882. For ready reference the aforesaid provisions of law is extracted herein below:

58 (c). Mortgage by Conditional Sale, - Where, the mortgagee ostensibly sells the mortgaged property:

On condition that on default of payment of the mortgage-money on a certain date the sale shall become absolute, or

on condition that on such payment being made the sale shall become void, or

on condition that on such payment being made the buyer shall transfer the property to the seller,

the transaction is called mortgage by conditional sale and the mortgagee a mortgagee by conditional sale:(Provided that no such transaction shall be deemed to be a mortgage, unless the condition is embodied in the document which effects or purports to effect the sale)

13. On the other hand, Mr. D.R. Choudhary, learned Counsel for the appellant submitted that even if, the decrees regarding execution of reconveyance deed is upheld by this Court, at least the declaration regarding recovery of khas possession after evicting the appellant is unsustainable in law, inasmuch as, this part of the decree is in violation of Section 118 of the Tripura land Revenue And Land Reforms Act, 1960 (for short 'TLR & LR Act') which provides the grounds for eviction of an Under Raiyat.

14. In the case at hand, the plaintiff/respondents i.e. owner of the land had repeatedly stated in his plaint that he had put his land on mortgage and as such he was entitled to get back the land on redemption of loan amount. Mr. M. K. Bhowmik, learned Counsel for the respondents, submitted that any amount of admission in the pleading cannot give a right to the appellant to get a decree in his favour if the admission is against the law. According to the learned Counsel since there was no mention of mortgage of the land in the sale deed i.e. Ext. 7, it cannot

be construed as a conditional sale within the purview of Section 58(c) of the TLR & LR Act, 1960 and as such the learned courts below have rightly segregated the sale deed and the agreement for execution of reconveyance deed.

15. It is true that no condition was embodied in the sale deed (Ext. 7) about execution of reconveyance deed on redemption of loan nor is there any mention of mortgage. However, the facts and circumstances of the present case are beyond the parameters of Section 58(c) of the 'TLR & LR' Act. In my considered opinion, the pre-conditions for conditional sale prescribed Under Section 58(c) are neither exhaustive nor absolute one. In other words, in my view the nature and character of a deed of conveyance can be qualified and changed by way of executing a separate deed albeit simultaneously. In other words it is not sine qua non to embody the condition of mortgage in the sale deed. As a corollary if the mortgage condition is incorporated in a separate agreement it would also fulfil the pre-conditions of conditional sale.

16. As noted earlier, the appellant had executed the agreement to reconvey the property unto the respondents on the very same day of the execution of the sale deed. Had there been no such agreement for reconveyance, it could have been said to be a case of absolute sale of the property severing the under raiyat relationship. However, in view of a parallel agreement of reconveyance on redemption of loan the Sale Deed (Ext. 7) became a conditional sale.

17. In my considered opinion, if the sale deed and agreement for reconveyance Exts. 7 and 5 are read and interpreted harmoniously it would certainly indicate that the sale of the land was not an absolute one, but it was a conditional one.

18. Mr. D. R. Choudhury, learned Counsel for the appellant also submitted that the sale deed dated 21-3-1987 (Ext. 7) was not against full consideration of the loan, but it was only against security for the loan. Referring to the judgment of the Apex Court given in the case of Prasad v. Govindaswami : AIR 1982 SC 84, the learned Counsel for the appellant submitted that if a sale deed is executed with a view to stave off creditors it would not amount to a valid transfer.

19. Mr. M. K. Bhowmik, learned Counsel for the respondents submitted that inadequacy of consideration was not raised in the trial Court. Since I am not going to disturb the decree for execution of reconveyance deed in favour of the plaintiff/respondents, I do not feel it necessary to deal upon this aspect at length. However, the fact remains that the sale deed was executed against a loan amount and this aspect can certainly be kept in mind qua the agreement for executing a reconveyance deed (Ext. 5).

20. The above apart, the provisions of TLR & LR Act has laid down specific grounds for eviction of an Under Raiyat. The conditions for such eviction have been laid down Under Section 118 of the aforesaid Act. Apparently, there is no order from a competent authority under the Act for eviction of the appellant who was the under raiyat of the respondents prior to the execution of the Sale Deed. In my opinion since a decree for execution of Reconveyance Deed has been granted the relation between the parties that was existing prior to the sale of the land would stand restored.

21. In the result, this appeal stands dismissed. However, I hold that despite upholding the impugned decrees the 'Barga' right (tenancy right) of the appellant would continue. In other words, the decrees in favour of the plaintiff/predecessor-in-interest of the respondents to get the sale deed executed against the consideration amount of Rs. 8000/- (Rupees eight thousand) by the appellant in favour of the legal heirs of the plaintiff is sustained. The decree for khas possession is also upheld with a rider that there will be no eviction of the appellant so long his 'Barga' right is protected under the TLR & LR Act.