

THE HIGH COURT OF TRIPURA
AGARTALA

RSA No.29 of 2009

Smt. Hemlata Sarkar,
wife of Sri Swapan Sarkar,
resident of village-Jampuijala, Takarjala,
P.S. Takarjala,
District-West Tripura,
Presently residing at village-Jatrabari (Khayerpur)
P.S. East Agartala,
District-West Tripura

.....**Defendant-Appellant**

- Vs -

1. Sri Rakhal Chandra Roy,
son of Sri Harendra Chandra Roy
2. Sri Ratan Chandra Roy,
son of Sri Harendra Chandra Roy,

Both are the residents of village-Amtali,
P.S. Amtali,
West Tripura District

.....**Plaintiff-Respondents**

B E F O R E
THE HON'BLE MR. JUSTICE S. TALAPATRA

For the appellant	: Mr. K. N. Bhattacharjee, Senior Advocate Mr. S. Acharjee, Advocate
For the respondents	: Mr. D. R. Choudhury, Advocate Mr. D. Deb, Advocate Mr. S. Sarkar, Advocate
Date of hearing and delivery of judgment & order	: 04.04.2015
Whether fit for reporting	: YES

JUDGMENT & ORDER (ORAL)

Heard Mr. K. N. Bhattacharjee, learned senior
counsel assisted by Mr. S. Acharjee, learned counsel appearing
for the appellant as well as Mr. D. R. Choudhury, learned counsel

appearing along with Mr. D. Deb and Mr. S. Sarkar, learned counsel appearing for the respondents.

02. This is an appeal under Section 100 of the CPC by the defendant in the suit questioning the legality of the judgment and decree dated 25.05.2009 delivered in Title Appeal No.05 of 2006 by the District Judge, West Tripura, Agartala whereby the judgment and decree dated 24.01.2006 and 30.01.2006 respectively delivered in Title Suit No.01 of 2005 by the Civil Judge, Senior Division, Court No.1, West Tripura, Agartala has been affirmed.

03. The suit instituted by the respondents herein is for specific performance in terms of the unregistered agreement for sale dated 30.08.2004 and the said suit was decreed in terms of the judgment dated 24.01.2006 directing the appellant herein to execute the sale deed in the manner as under:

It is ordered and decreed that the suit is decreed on contest with cost and the plaintiffs are entitled to get specific performance of contract of sale within 3(three) months. The defendant herself or by her constituted Attorney would be liable to execute a sale deed in favour of the plaintiffs within such time in respect of the suit land after receiving the balance consideration amount. Failing which the plaintiffs will have the right to endorse the contract after expiry of 3 (three) months from the date of decree and to get a sale deed registered through the court on payment of balance consideration amount to the defendant.

04. Being aggrieved by that judgment dated 24.01.2006, the appellant herein filed an appeal under Section 96 of the CPC. However, that appeal has been dismissed by

affirming the judgment of the trial court as stated by the impugned judgment and decree dated 25.05.2009.

05. On 28.08.2009, at the time of admitting this appeal, the following substantial questions of law have been formulated by this Court:

- "(1) Whether one can come before the Court with an unregistered Deed of Agreement to Sale ('Baina Patra') to enforce his claim over other taking the plea of an un-registered agreement to sale is having with him ignoring the provision of section 17(1) (b) of the Indian Registration Act?**
- (2) Whether the document (Exhibit-6) does not speak of any possession of the Respondents over the land in question (Suit land) and in absence of such averment in the plaint whether the court has any power to analyse the aforesaid "Baina Patra" (Exhibit-6) in exercising the power as laid down to the Proviso to the section 49 of the Indian Registration Act?**
- (3) Whether the respondents gave the money of Rs.10,000/-(rupees ten thousand) to the appellant on the alleged date of execution of the 'Baina Patra', on 30-08-2004 after taking the Title Deed, Khatian, Land Revenue Receipt, and other relevant documents of the suit land from the appellant in their possession and if so whether it was a case of mortgage by depositing the Title Deed to the respondents by the appellant?**
- (4) Whether the respondents also took the possession of the suit land from the appellant at the time of payment of Rs.10,000/-(rupees ten thousand) only to her and in that occasion whether the respondents could come before the court for the Specific Performance of Contract avoiding the provision of the section 53 A of the Transfer of Property Act?"**

The appellant was also given leave that any other substantial question of law might be raised at the time of hearing.

06. Mr. Bhattcharjee, learned senior counsel for the appellant has clearly submitted that he would only insist on the substantial question of law which reads as under:

Whether the impugned judgment is hit by the perversity in appreciation of the evidence inasmuch as incongruities in the statement made by PW-1, PW-2 and PW-3 as regards the place of entering into the purported agreement for sale (Exhibit-6) [viz. PW.1 has failed to confirm where the agreement was actually exhibited whereas PW.2 has stated on 30.8.04 agreement was created in the house of the plaintiff and I was present and the defdt. was also present]?

07. For appreciating that challenge, this Court would as well take note of the substantial questions of law as formulated by the order dated 28.08.2009 within a narrow canvas.

Section 17(1)(b) of the Indian Registration Act only applies to those instruments or documents which creates right or future right. For the purpose of reference the provision may itself be reproduced.

"17 (1)(b) Other non-testamentary instruments which purport or operate to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest, whether vested or contingent, of the value of one hundred rupees, and upwards, to or in immovable property".

08. The agreement to sale does not create any of such rights because it does not purport or operate to create, declare, assign, limit or extinguish whether in present or in future, any right, title or interest, whether vested or contingent, of the value of one hundred rupees, and upwards, to or in immovable property. The agreement to sale is an agreement which covers the way the persons have come to an agreement or

understanding as to the consideration money, payment of the earnest money, the time frame of execution of the sale deed, mode of payment etc. Even the agreement to sale may be simultaneous with the delivery of the possession. In that event, where agreement of sale is simultaneous with the delivery of possession that shall be mandatorily registrable in view of Section 17(1)(a) of the Registration Act. As in terms of the Section 53A of the Transfer of Property Act the performance means the delivery of possession for the vendor. Thus, this cannot be treated as a substantial question of law in the context of the present case. When the document (Exhibit-2) does not speak of delivery of possession, there is no impediment in admitting or reading its content for the purpose of understanding the nature of agreement that was entered by the plaintiff and the defendant. There is no application of proviso to Section 49 of the Registration Act in the present context. Proviso to Section 49 exclusively deals with those documents/instruments which are mandatorily registrable but those were not registered. This provision clearly stipulates that even those documents can be admitted in the evidence but for limited 'collateral purpose' not as evidence of transfer or assignment of the right relating to any immovable property having the value of Rs.100/- or above.

There is no dispute that on 30.08.2004 the plaintiff paid the defendant Rs.10,000/- but the question what constitutes the controversy is that what was the purpose of receiving that Rs.10,000/- by the defendant. The defendant's

case is categorically mentioned in the written statement that she took loan of Rs.10,000/- for meeting the medical expenses of her ailing husband and there was no intention of entering in any agreement to sale for purpose of transferring the suit land. According to her, the agreement to sale has been fraudulently created on the papers which she signed blank to acknowledge that she has taken loan of Rs.10,000/- in presence of witnesses. Thus, there is no question of mortgaging the properties. However, it is nobody's case that any mortgage was created by the said transaction. No further elaboration on this aspect is required.

09. The next question that has been treated as the substantial question of law is that whether the plaintiff has come in the possession over the suit land simultaneous with entering in the said agreement to sale for attracting the provisions of Section 53 A of the Contract Act or not.

10. According to the written statement the appellant has categorically stated in the para-8 as under:

"The Plaintiffs forcefully taken possession over the land of the Defendant on 5-02-2005 at about 10 AM and after receiving the said information the Defendants rushed to the suit land and requested the Plaintiff-Petitioners not to occupy the said land illegally. But Plaintiffs refused to hand over the possession of the said suit land rather they threatened to the Defendant that if she will come again the consequential (sic) will be in danger and they filed a suit against her. As a helpless lady she returned from the suit land and requested on so many people of the neighbouring persons of the suit land and other well wishers to help in this respect for recovery of her land but as the Plaintiff-Petitioners are dangerous in nature and the influential person in that locality nobody came forward to resist the Plaintiffs."

11. This Court does not think there is any application of Section 53 A of the Transfer of Property Act inasmuch as there was no delivery of possession simultaneous to the execution of the agreement to sale on 30.08.2004. As the appellant was given the leave, this Court has formulated the substantial question of law as proposed by Mr. Bhattacharjee, learned senior counsel.

12. For purpose of appreciating that substantial question of law, it would be appropriate to have a glance to the relevant facts. The undisputed fact that transpires from the records is that on 30.08.2004 the appellant, the defendant in the suit, accepted a sum of Rs.10,000/-. The plaintiff's case is that, that was the earnest money taken by the defendant or as a token of her acceptance of the terms and clauses as reduced in writing in the agreement of sale, Exhibit-6 and binding herself with the obligation as mentioned therein. The defendant however has stated that she signed some blank papers in presence of her relatives on 30.08.2004 to receive a sum of Rs.10,000/- as loan. Thereafter, the plaintiff by practising fraud on her has created the agreement itself and for mischievous purpose of grabbing the land he has instituted the suit. Few months before the institution of the suit, the plaintiff has also dispossessed her from the said land.

13. The trial court for the purpose of adjudicating the dispute as narrated hereinabove framed the following issues:

- (1) Is the suit barred by limitation?
- (2) Is the agreement between the parties legal and valid?
- (3) Whether the plaintiff was ready and willing to perform his obligation in terms of agreement?
- (4) Whether the plaintiff is entitled to get decree as prayed for?
- (5) To what other relief/reliefs the parties are entitled?

14. There is no dispute at least that has not been projected before this Court that the plaintiff was ready and willing to perform his obligation. Moreover, a draft sale deed has also been brought in the evidence at the instance of the deed writer, PW-3. It is apparent that the defendant did not press for framing any issue on whether the fraud has been exercised on her by creating the agreement to sale, Exhibit-6. However, the issue No.2 deals with the controversy that whether the agreement, Exhibit-6, is illegal and in valid. While determining that issue, element of fraud has been examined under the broad parameters. For that purpose, first this court has to see how the pleadings have been laid in the written statement. It is to be noted that the defendant has not set up any counter claim or it has not been stated to this Court that the defendant has instituted any other suit without filing the counter claim. In the written statement, in para-5, the defendant has stated that "At the time of illness of the husband of the Defendant the Plaintiffs came forward to give assistance and help to the Defendant by giving money for an amount of Rs.10,000/- to make up medical expenses of the illness of the husband of the Defendant. At that time, the defendant put her signature in some blank papers

stating inter alia that the said amount of Rs.10,000/- will be refunded within one year as the said amount was paid to her as loan. But the plaintiffs utilized the said signatures by practicing fraud and they created a fraudulent Bainapatra taking advantage of illiteracy of the Defendant and they managed to create a false document (Bainapatra). On the basis of false document the Plaintiffs filed the instant false suit against the Defendant to grab the land of the Defendant.”

15. Even in para-8 of the written statement, it has been reiterated that “On good faith the Defendant put her signature in a blank sheet of papers as they assisted and helped the Defendant when she was in crisis for money.” But she has admitted that on 30.08.2004 she received a sum of Rs.10,000/- from the plaintiff.

16. Mr. Bhattacharjee, learned senior counsel has submitted that to ascertain this aspects relating to exercise of fraud and creation of the document, the trial court or the first appellate court did not take any attempt at all. Even though it is apparent from the oral testimonies of the PWs.1, 2 and 3 that they are not certain where the purported agreement to sale was executed between the parties. For that purpose, Mr. Bhattacharjee, learned senior counsel has taken this Court to the cross examination of PW-1, namely Rakhal Ch. Roy where he has stated that “The Baina patra was executed on 30.8.04 at Agartala court premises.” It is also evident from an answer given to the court by PW-1 that “the draft deed was written as per my

dictation. But I can not say where it was written. The date of execution was not written." PW-2, namely Sudhangshu Debnath, who is an independent witness has stated that "On 30.8.04 agreement was created in the house of the plaintiff and I was present and the defdt. was also present." PW-3, namely Subrata Sarkar, the person who wrote the purported agreement to sale has stated that "This is the unregistered deed of agreement dt. 30.8.04 in between Rakhal Ch. Roy and Hemlata Sarkar. It was written by me and thereafter it was read over to the executants and thereafter both the first parties and 2nd parties put signatures on it in presence of 4 witnesses." He has further stated that "As per terms of agreement the consideration amount was fixed at Rs.1,45,000/- and towards that deal the first parties Rakhal Ch. Roy and Ratan Ch. Roy paid an advance of Rs.10,000/-" At his instance the said agreement, Exhibit-6 was admitted in the evidence. In the cross examination PW-3 has stated that "Deed of agreement was written at Agartala deed writers' office but it was executed at their residence." on this apparent congruity, Mr. Bhattacharjee, learned senior counsel has submitted that neither PW-1 nor PW-3 could state with certainty where the agreement was signed because the said agreement was created and it was not lawfully executed in presence of the witnesses. Finally Mr. Bhattacharjee, learned senior counsel has emphatically submitted that by the alleged oral agreement the timeframe given in the written agreement cannot be extended. The suit has been filed on the basis of such extension only and as such the very basis of instituting the suit

is impermissible in law. In this regard the statement in the plaint may well be revisited. At para 11 of the plaint, the plaintiffs have pleaded as under:

"11. That the cause of action of the present suit has arisen on and from 30.8.2004 when the written agreement was entered into between the parties and thereafter on 13.10.2004 when further sum of Rs.10,000/- was taken by the Defendant and again on 3.11.2004, 12.11.2004 and 16.11.2004 when the plaintiffs requested the Defendant to execute the sale Deed and finally on 24.11.2004 when Lawyer's Demand Notice was issued demanding execution of the Sale Deed."

17. Even though there is some reliance on the subsequent fact but the plaintiffs have asserted that the cause form denial so far the obligation of the defendant is concerned it accrued on various dates which fall within the three months of the date of execution of the agreement to sale dated 30.08.2004. As such, there is no substance in such objection.

18. This Court has taken a serious note of the submission as projected by Mr. Bhattacharjee, learned senior counsel as regards the congruity between the statements of PWs.1, 2 and 3. The only congruity is that PW-1, one of the plaintiffs, has stated that the agreement was executed in the deed writers' office. But other two witnesses i.e. PWs.2 and 3 have categorically stated that the agreement was executed in the residence of PW-1 and the other plaintiff. Now, how to understand that statement of PW-1? A layman like PW-1 has understood the preparation of the agreement as execution of the agreement. But that is not the case with other witnesses as

referred. The other two witnesses, particularly PW-3, are technical persons having knowledge of the agreement to sale. They have stated without any wavering that Exhibit-6 was executed in the residence of PW-1 and the other plaintiff.

19. Any statement of the witness or the witnesses cannot be considered by a court in isolation. Those are to be read in their entirety. Here is a case that not only the plaintiffs but also defendant adduced the witnesses in support of their case. The DW-1 herself has stated that she signed the papers in the residence of PW-1, even PW-2 has supported it but the defendant has stated that she signed some blank papers on good faith. It appeared to her that the questioned agreement to sale has been prepared with those signed papers. But the witnesses to the agreement have set their signatures on the agreement (Ext.6).

20. From the Exhibit-6 itself, which runs to three pages, it appears that all the pages are signed across by the defendant and thereafter 4 witnesses namely Sudhangshu Debnath, Paltu Deb, Harendra Ch. Roy and Pradip Mitra affixed their respective signatures in witness of the execution. Even the deed writer has affixed the signature just below the deed. It does appear that all the signatures of the defendants are found in a manner that it cannot be believed that those signatures were set on blank papers and afterwards, the deed has been created. Moreover, Mr. Bhattacharjee, learned senior counsel, has not referred to any other document, such as, a receipt of Rs.10,000/- (Exhibit-

1) signed by the defendant. This is a separate document which records the amount she had received in terms of the agreement entered into. However, the said document has been admitted in the evidence under protest.

21. Sudhangshu Debnath, one of the witnesses to the execution of the agreement has deposed before the court and supported the case of the plaintiff. In the cross-examination, he has categorically stated that on 30.08.2004 the agreement was entered in the house of the plaintiff and the defendant and he were also present. PW-3, the deed writer, has also supported the case of the plaintiff stating that "It was written by me and thereafter it was read over and there the parties put signatures on the deed of agreement in presence of four witnesses. As per terms of the agreement consideration amount was fixed at Rs.1,45,000/- and towards that deal the first parties Rakhal Ch. Roy and Ratan Ch. Roy paid an advance of Rs.10,000/-." He has admitted the questioned agreement in the evidence. PW-4 is the another witness who has supported the case of the plaintiffs. DW-1, Hemlata Sarkar the appellant herein as the defendant has stated that the plaintiffs by practising fraud created false and forged deed of Bainapatra and instituted the suit but she never executed such Bainapatra (the agreement to sale). She has further stated that the plaintiff had forcefully taken over possession on 05.02.2005, but she nowhere disclosed what action she had taken on the face of such apparently illegal action of the plaintiff. She has denied of issuing any receipt in respect of Rs.10,000/- in the cross-examination. But what has surprised

this Court the most is that in the cross-examination she has stated in the following manner:

"It is not a fact that the plaintiffs taking the advantage of my helpless condition managed to take my signature on a paper which was converted into 'Baina patra' subsequently."

22. This Court finds that her statement was even corrected by the Civil Judge, Senior Division, Court No.1 after recording. When Mr. Bhattacharjee, learned senior counsel was asked by this Court in this regard, Mr. Bhattacharjee has expressed his helplessness and submitted that if the entire statement is read together it would irresistibly appear that the defendant has no intention to deny the fact that taking advantage of her helpless condition the plaintiffs managed to take her signature on blank papers which were subsequently converted into a Bainapatra. However, no initiative was taken by the defendant for correction of her statement. What is further relevant to note is that in the written statement it has been asserted that the said amount was received by the defendant in presence of her relatives and well wishers. But the defendant adduced only one witness, DW-2 amongst them. Who has stated as under:

"The defendant's husband have been suffering various ailments since long and in the month of July, 2004 he fallen in ill and due to illness the defendant requested the plaintiffs to help her by giving some money and accordingly the plaintiffs agreed to help the defendant by making payment of Rs.10,000/- and it would be paid in last week of August, 2004. Thereafter on 30.8.2004 the plaintiffs paid Rs.10,000/- in cash to the defendant in my presence and at that time on good faith the defendant signed in a blank stamp paper and other blank papers so that in future she can not refuse

the said money as received from the plaintiffs. The defendant never executed a Bainapatra in favour of the plaintiff on 30.8.2004."

23. DW-2 has thus confirmed the payment of Rs.10,000/- on 30.08.2004 and also that the defendant signed some blank papers. Neither DW-1 nor DW-2 has stated who were the other persons, present at that time. It is not understandable to this Court how a well wisher like DW-2 would permit DW-1 to sign some blank papers. No favourable presumption thus can be drawn in favour of the defendant inasmuch as in the natural course of action such conduct of the defendant of signing blank stamp papers in presence of the relatives can but be presumed to have occurred. She would have insisted that the terms and conditions at least be laid down. It appears from the statement of DW-2 that he is a literate person. Moreover, the conduct of the defendant after receipt of the lawyer's notice and after allegedly being dispossessed from the suit land has surprised this Court further inasmuch as no legal action as supposed to be taken had been pursued.

24. From the other side, when Mr. Choudhury, learned counsel has submitted on relying on a decision of the apex court in ***S. Kaladevi v. V. R. Somasundaram and Ors.*** reported in ***AIR 2010 SC 1654*** that an unregistered sale deed even could be received in evidence to prove the agreement between the parties though it may not itself constitute a contract to transfer the property. The apex court in that decision has elaborated that even the agreement reduced in a draft sale deed, which was not

registered can be taken care of, for a collateral purpose and as the proof of agreement entered between the parties. The decision of the apex court cannot be fitted in the circumstances of this case. Here is a case where one of the parties namely the defendant has taken a defence that she did not sign the agreement but the questioned agreement contains her signature. She allegedly put her signature on the blank stamp papers and on other papers.

25. To support the contention as set up in the written statement by the defendant, the defendant could not show any subsequent action, such as whether she has refunded that Rs.10,000/- or not, within the stipulated time as it appears from her examination-in-chief that "on 30.8.2004 in presence of Sri Satyendra Biswas and at that time the plaintiff requested me to put my signature in 'a stamp paper' as I received the said amount of Rs.10,000/- from them. It is also agreed that I will repay the said amount in future but no time limit has been settled. The plaintiffs as a relatives they all through helped me and also looked after my land as I am residing at Jatrabari, Khayerpur." Even after such dispute, nowhere had the defendant stated that whether she refunded that amount or not. Rather, it reveals that she had inclination even to handover the possession of the land to the plaintiffs. As such, the allegation of fraud as made against the plaintiff cannot be believed as the defendant has failed to probablise such case at all. Even she could not lay the foundation to presume fraudulent act of the plaintiff under Section 114 of the Evidence Act. Even though this Court is not in

agreement with the finding of the first appellate court that this is a case of precedence or primacy of the documentary evidence over the oral evidence, but the case that has been projected by the appellant, the defendant in the suit, is that by exercising fraud the agreement to sale has been created inasmuch as the defendant has consistently stated that she has not signed the agreement to sale nor has she received any amount in terms of that agreement. As discussed already, the defendant-appellant has failed to probablise that the agreement to sale has been created on the signed papers where she set her hand in acknowledgment of her accepting the loan inasmuch as circumstances indicate contrary to what she laboured to project. Particularly, the witnesses have supported in the credible manner that the agreement to sale was duly executed by the defendant-appellant. Moreover, on scrutiny of the agreement to sale, Ext.6 itself, it surfaces that the parties had signed on the deed after it was drafted. Having appreciated thus, the defendant's story does not appear creditworthy. As such, no interference in the impugned judgment is called for. In the result, the appeal stands dismissed.

Prepare the decree accordingly.

Send down the LCRs forthwith.

JUDGE

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