

IN THE HIGH COURT OF JUDICATURE AT PATNA
Second Appeal No.8 of 2004

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Smt.Sakuntala Devi wife of Sri Mithu Choudhary, resident of Mohalla Shahganj, P.S. Sultanganj, P.O. Mahendru, District Patna

... ..Plaintiff/Respondent/ Appellant
Versus

1. Mahendra Choudhary
2. Sri Surendra Chaudhary
3. Sri Kalendra Chaudhary, all are sons of Jalim Chaudhary and all are residents of Mohalla Shahganj, P.O.Mahendru, P.S. Sultanganj, District Patna

... ..Defendants/Appellants/Respondent/s

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Appearance :

For the Appellant/s : Mr. Jitendra Prasad Singh
For the Respondent/s : Mr. Abinash Kumar

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CORAM: HONOURABLE MR. JUSTICE CHAKRADHARI SHARAN SINGH

ORAL JUDGMENT AND ORDER

Date : 30-01-2018

The appellant in the present second appeal under section 100 of the Code of Civil Procedure was the plaintiff in the suit. She has filed the said Title Partition Suit No. 33 of 1986 seeking partition to the extent of 396 sq.ft. in the suit property and to put her in separate possession thereof. She alternatively sought for declaration of title and recovery of possession of the suit property. By a judgment and decree dated 28.11.1992, the suit came to be decreed in her favour. The respondents herein, who were defendants, preferred an appeal giving rise to Title Appeal No. 140 of 1992 against the said judgment and decree of the trial court. The 1st Additional District Judge at Patna has allowed the



appeal and has reversed the findings recorded by the trial court by the judgment and decree dated 30.09.2003 which has been put to challenge in the present second appeal. By an order of this Court dated 15.01.2008, while admitting the present second appeal, following substantial question of law was framed which, in Court's opinion arose out of the second appeal:-

“Whether the judgment and decree passed by the lower appellant court ignoring the recital of the sale deed of the plaintiff with respect to the area of the suit house is legal?”

2. In course of hearing of the present second appeal, Mr. Dhruv Narain, learned senior counsel has submitted that in addition to the question of law which has been framed by this Court under order dated 15.01.2008, another substantial question of law also arises i.e. whether or not the deed of rectification, executed by Laxmi Choudhary (owner) is in conformity with the provisions laid down under Section 26 of the Specific Relief Act. Upon hearing the learned counsel for the appellant and the respondents, this Court, by order dated 24.11.2017, formulated another substantial question of law which the second appeal involves in the following terms:-



“Whether the deed of rectification, executed by Laxmi Choudhary (owner), is in conformity with the provisions laid down under Section 26 of the Specific Relief Act.”

3. These are, thus, the two substantial questions of law which in the Court's opinion arise out of the present second appeal which are put to be dealt with.

4. It would be apt first to take into account the rival stand of the parties in their pleadings before coming to the evidence adduced on their behalf at the trial before addressing the substantial questions of law formulated as noted above.

5. The suit property has been described in Schedule-I of the plaint as a house bearing Holding No.65A/55, Circle No. 49, Ward No.15 (old)21 (new) M.S. Plot No.821 in which the plaintiff claimed her share to the extent of 396 sq.ft.

6. The case of the plaintiff-appellant, as unfolded in the plaint is that the suit property situate in Mohalla-Shahganj, P.S. Sulgtanganj, Patna City in the district of Patna earlier belonged to one Laxmi Choudhary, being absolute owner and in possession of the same. It was her case that the said Laxmi Choudhary sold 396 sq.ft out of 792 sq.ft of the land and the house from the southern side of the plot through a registered sale deed dated 21.09.1983 for a valuable consideration and the



plaintiff was put in possession after the sale. It was her further case that the said vendor continued to hold and possess the northern portion of the disputed land and house and thus both the plaintiff and Laxmi Choudhary came in joint possession of the said M.S. Plot No. 821 with the house standing thereon. It was her further case that subsequently the vendor Laxmi Choudhary transferred the remaining portion of the disputed holding which was in his possession, to defendant nos. 1 to 3 through a registered sale deed dated 22.11.1985. The defendants thus stepped into the shoes of the vendor Laxmi Choudhary after the execution of the sale deed dated 22.11.1985 and thus the plaintiff and the defendants came in joint possession of the suit property and thereby the plaintiff had half share in the suit holding to the extent of 396 sq.ft. Since the defendants respondents were not agreeing for the partition of the suit holding to the extent of 396 sq. ft. and the plaintiff was facing inconvenience, he filed the said title suit.

7. The defendants, on the other hand, resisted the suit by filing their written statement. Their case, as asserted in the written statement, was that admittedly the suit holding belonged to Laxmi Choudhary but it was in two blocks i.e. northern block and southern block. The southern block was on



the roadside having measurement 11'6" wide east to west and 18'10" deep south to north (203 sq.ft.). The northern block was in the back of the southern block having area 25'4" long north to south and 6'10" wide east to west (154 sq.ft.). The vendor Laxmi Choudhary had sold the southern block to the plaintiff through the said sale deed dated 21.09.1983 with a condition and covenant that out of the southern block, a space of 2½' wide in the west would be left for common passage to be used by the plaintiff and the vendor Laxmi Choudhary. Specific plea was taken in the written statement that the area of the land described to have been sold through the sale deed dated 21.09.1983 was wrongly and incorrectly noted although the boundary of the suit land had been correctly mentioned in the sale deed dated 21.09.1983 of the plaintiff. The area of common passage was also wrongly described as 396 sq.ft. and when such defect was detected by the vendor Laxmi Choudhary, a correction deed dated 05.03.1987 in respect of the sale deed dated 21.09.1983 was executed.

The defendants also asserted that the plaintiff was sold only 145 sq.ft and and the plaintiff had come in possession only on southern block of the land. The northern block of the land was retained by the vendor Laxmi Choudhary, who



subsequently sold the same to the defendants through a registered sale deed dated 22.11.1985 with the right of passage over the common passage to the defendants. They accordingly came in exclusive possession in northern block. Another plea was taken that after the said purchase both the parties had gone in mutation proceeding wherein the plaintiff had claimed to have purchased half of the building and then also claimed to have purchased the rest half of it. The defendants denied the existence of any joint possession and asserted that there was nothing joint save and except the common passage.

8. Based on these rival pleadings, the trial court framed altogether eight issues. Issue nos. III, IV and V are the main issues relevant for present adjudication and are accordingly reproduced hereinbelow:-

“III. Has the plaintiff purchased entire property or holding of disputed plot?

IV. Is the plaintiff entitled to get possession over the area mentioned in her sale deed?

V. Is the plaintiff entitled to take possession of the portion in possession of the defendant no.1.”



9. The parties adduced their evidence, both oral documentary at the trial.

10. The sale deed executed by Laxmi Choudhary in favour of the plaintiff dated 21.09.1983 was exhibited as Ext. 1. The plaintiff in her deposition as P.W. 6 stated that she had purchased 396 sq.ft of the land. She also deposed that the said Laxmi Choudahry had told her that the entire measurement of land was 792 sq.ft out of which he was selling 396 sq.ft. According to her, she believed that she had purchased half of the suit holding i.e. 396 sq.ft out of 792 sq.ft through a registered sale deed dated 21.09.1983. It was the case of the defendants, on the other hand, that it was the intention of the vendor to sell only half portion of the land in his possession and not the entire land, but inadvertently the measurement was wrongly mentioned in the recital of Ext. 1 as 396 sq.ft. The vendor Laxmi Choudhary who deposed as D.W.3 said in his evidence before the trial court that he had sold the land to the plaintiff and the defendants half each whereas the passage remained in their joint possession. He admitted in his evidence that he had received the consideration money according to the measurement given in the sale deed.



11. The defendant no.1 was examined as D.W.5 who deposed that the land in question was allotted to Laxmi Choudhary through a mutual partition of which portion of the southern side was purchased by the plaintiff. The order passed in Mutation Case No. 166 of 1984-85 (Ext.D) was proved by the defendants in order to establish their case that since the plaintiff had purchased only half of the suit holding she had applied for mutation in respect thereof of the said half only. Notice of the said mutation was also proved as Ext.E.

12. The learned trial court based on the recital in the sale dated 21.09.1983 (Ext.1) to the effect that the plaintiff had purchased 396 sq.ft of the suit holding concluded that the said recital shall prevail and the recital made in subsequent sale deed dated 22.11.1985 is incorrect. What appears from the judgment of the trial court is that a pleader commissioner report was called for. The pleader commissioner report, which was proved as Ext.C, showed that the measurement of the entire suit holding which belonged to Laxmi Choudhary was 396 sq.ft. Based on that the learned trial court decreed the suit in favour of the plaintiff mainly on the ground that the recital, area of 396 sq.ft of the suit property stood transferred through the sale deed dated 21.09.1983. The court held that since the suit



was purely for declaration of title and recovery of possession as it appears from the entire evidence and document, question of partition did not arise. There was no unity of title and possession between the parties. Accordingly the trial court directed the defendants to hand over the possession of the suit property to the plaintiff as per the measurement given in the sale deed.

13. The first appellate court has, however, on re-appreciating the evidence has concluded that the plaintiff had, in fact, by the said registered deed dated 21.09.1983 purchased only half portion of the suit holding towards the south which was the front portion and the rest half towards the north was purchased by the defendants. Taking into account the recital of the deed dated 21.09.1983 and the boundary given in the deed itself, the learned first appellant court held that the boundary would prevail to identify the portion of the land sold to the plaintiff. The first appellate court accordingly held that the appellant-plaintiff was entitled for partition only to the extent of her half share in the suit property on the basis of the said sale deed 21.09.1983. The first appellate court specifically held that both the plaintiff as well as the defendants were the purchasers of half share each, from



the same vendor Laxmi Choudhary and, as such, the plaintiff was entitled for partition to the extent of only half share towards south which is mentioned in the sale deed. This is the background in which substantial question of law as to whether the first appellant court could ignore the recital of the sale deed of the plaintiff with respect to the area of the suit house was legal, came to be framed by this Court by order dated 15.01.2008.

14. I will deal with second substantial question of law first before adverting to the other. I consider it apt to refer to the submission made by Mr. Dhruv Narain, learned senior counsel with reference to the deed of rectification dated 05.03.1987 executed by the vendor Laxmi Choudhary whereby rectification in the sale deed dated 21.09.1983 was sought to be made. According to him, the rectification deed dated 05.03.1987 is apparently unilateral made by the vendor after filing of the suit and even otherwise it could not be considered as evidence by the court below and the said rectification deed is manifestly hit by Section 26 of the Specific Relief Act. He has also relied on Sections 48 and 55 of the Transfer of Property Act, 1982 in support of his contention that the second sale deed executed by the vendor Laxmi Choudhary in favour



of the defendants is inoperative and null and void since through the first sale deed dated 21.09.1983 executed in favour of the plaintiff, the entire portion of the suit holding owned by Laxmi Choudhary came to be transferred in favour of the plaintiff.

15. Mr. Dhruv Narain, learned senior counsel has also relied on a Supreme Court decision in case of **P. Chandrasekharan & Ors. vs. S. Kanakarajan & Ors.**, reported in **(2007) 5 SCC 669** in supports of his plea that the learned first appellate court below has incorrectly interpreted and thereby misread the sale deed dated 21.09.1983. According to him, the decision rendered by learned first appellate court below is result of such misreading of the document of title and, therefore, according to him, the said finding is so perverse as would require the court's interference in the present second appeal. He has relied on the Supreme Court decision in case of **W.B. Electricity Regulatory Commission vs. CESC Ltd** reported in **(2002) 8 SCC 717** in support of his plea that where the evidence is misread, this Court will have the power under Section 100 of the CPC to interfere with the findings of facts recorded by the court below.



16. Mr. Abinash Kumar, learned counsel appearing on behalf of the respondents, on the other hand, has contended that if there is discrepancy or conflict between the area or khata number/khesra number of the property on the one hand and boundary given in the document of title, the boundary shall prevail. He has submitted that the decision of the appellate court below is in conformity with this consistent legal view that in case of discrepancy of such nature, the description of boundary should prevail. He has relied on a Supreme Court decision in case of **Sheodhyan Singh & Ors. vs. Mst. Sanichara Kuer and Ors. (AIR 1963 SC 1879)** and a decision of this Court made in case of **Ram Chandra Sah vs. Abdul Hannan & Ors. (AIR 1984 Patna 313)**.

17. While considering the rival submissions made on behalf of the parties and all other materials available on record for the purpose of answering the substantial question of law raised in the present second appeal, two admitted facts are to be kept in mind. The entire case of the plaintiff is based on the sale deed dated 21.09.1983. There is clear recital to the effect that the vendor was transferred only half of what he was holding. The vendee, i.e., the plaintiff also knew that she was purchasing half of what the vendor was holding. The vendor described the



area of the vended holding as 792 sq. ft. in place of 396 sq.ft. There is no dispute over the fact that the vendor possessed only 396 sq.ft of the said holding. There is no dispute over the description of the boundary of the suit property as mentioned in the sale deed dated 21.09.1983. The suit property described in terms of the boundary admittedly does not have the area as described in the sale deed dated 21.09.1983. The very simple question which would arise in such circumstance is as to whether as to how to read and interpret such sale deed.

18 In my view, learned counsel appearing on behalf of the defendants has rightly relied on the Supreme Court decision in case of **Sheodhyan Singh** (supra). In case of **Sheodhyan Singh** the Supreme Court held that where there was no doubt as to the identity of a property, a misdescription in the recital of the deed could be treated as mere irregularity.

19. Following the decision in case of **Sheodhyan Singh & Ors.** (supra), in my view, there should not be any doubt over the legal proposition that in case a land sold is fully described by boundary and there is misdescription of area, the boundary shall prevail. The Supreme Court has noted with approval a Calcutta High Court judgment in case of **Gossain Das Kundu vs. Mrityunjay Agnan Sardar (18 Cal LJ 541)**.



20. A clear view has been taken by this Court also in case of **Ram Chandra Sah vs. Abdul Hannan** (supra) paragraph 18 of which read thus:-

“18. In the present case, admittedly no boundary has been given of the plot in question. Therefore, even the question of boundary of the plot in question being certain, definite and without any vagueness does not arise. The common boundary for all the plots mentioned in the deed is not enough for coming to finding with regard to the plot in question that even though the area was mentioned less in the deed the common boundary brings within its sweep the larger area. The lower appellate court should have looked at the case from settled principles of law, as mentioned above. Thus, I hold that there is enough force in the first submission advanced by the learned counsel for the defendant appellant.”

21. In view of above discussion, I am of the view that the learned appellate court did not ignore the recital of the sale deed dated 21.09.1983 with respect to the area of the suit house, before arriving at the conclusion. He rightly considered the description of the area given in the sale deed to be misdescription of the suit property. Taking into account the other evidence adduced at the trial the finding recorded by the appellate court, in this regard, cannot be said to perverse or contrary to settled position in law.



22. Coming to the second question of law framed, I am of the view, the deed of rectification has become inconsequential in view of the discussion above wherein it has been held that the boundary shall prevail over the description of area in a document of title, should there be any conflict between the two.

23. Having discussion as above, I do not find any merit in the appeal. This appeal is accordingly dismissed.

(Chakradhari Sharan Singh, J)

HR/-

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