

**IN THE HIGH COURT AT CALCUTTA
CIVIL APPELLATE JURISDICTION
APPELLATE SIDE**

**Present :
THE HON'BLE JUSTICE HARISH TANDON
&
THE HON'BLE JUSTICE KAUSIK CHANDA**

**S.A.T. 2 of 2020
with
C.A.N 2 of 2020**

In the matter of:

**Lalbabu Begam alias Lalbanu Begam & Ors.
-VS-
Sm. Padmamoyee Chai & Ors.**

Mr. Jiban Ratan Chatterjee, Adv.,
Mr. Shyamal Chakraborty, Adv.,
Mr. Mahammad Mahumud, Adv.,
.... For the Appellants

Mr. Probal Kumar Mukherjee, Adv.,
Mr. Farhan Ghaffar
.... For the Respondents

Judgment On: **08.04.2021**

Harish Tandon, J.

This is the second round of litigation between the parties over the subject land. The present second

appeal arises from a judgment and decree dated 30th September, 2019 passed by the Learned Additional District Judge, Second Court, Serampore in Title Appeal no. 72 of 2012 reversing the judgment and decree passed by the learned Civil Judge(Junior Divison),1st Court, Serampore on 22nd March, 2012 in Title Suit no. 226 of 2004.

Being unoblivion of the proposition of law that, at the time of admission of an appeal under Order 41 Rule 11 of the Code, the matter remained with the appellant and the court to ascertain the involvement of the substantial question of law but the peculiar facts involved in the suit invited us to take a digression from such rule to set at rest the controversy lingering between the parties and the docket of the court. The respondents were allowed to make submissions on the basis of the documents annexed with the application for stay filed by the appellant for such limited purposes.

The matter has a chequered history and the clever draftmanship to create illusory cause of action is eminent and evident from the stand of the Appellants

taken in the pleading and the findings returned by both the courts below thereupon.

The litigation over the disputed properties ensued as far back as in 1975 when the predecessor-in-interest of the plaintiff instituted Title Suit no. 93 of 1974 in the 1st Court of Munsiff at Serampore seeking declaration that the purported deed of sale executed by him is to secure mortgage and not an absolute sale.

It was a specific case made out in the plaint of the said title suit that the predecessor of the present appellant was the owner of the suit properties described in Schedule "A" and "B" thereto by virtue of the dints of purchase and was facing a financial crunch and approached the defendant therein, i.e. the Respondent no. 1, for a loan and in order to secure the same executed an ostensible sale-deed with clear stipulation that upon repayment of the same with interest it would be reconveyed. It was further averred that the possession would remain with the predecessor-in-interest of the plaintiff and, therefore, no title passed to the Defendant no. 1 or the other defendants through him in respect thereof.

The contesting defendants filed separate written statements and it was contended therein that the predecessor in interest of the present plaintiffs sold transferred and conveyed the said property to the Defendant no. 1 upon acceptance of the consideration and the possession was also delivered simultaneously therewith.

The suit came for final disposal on 23rd December, 1975 and the learned Munsiff held that although it is contended that the Defendant no. 1 was a money lender and purchased the property by taking loan from the other but it does not appear from the cogent evidence that the said Defendant no. 1 borrowed money from his wife. It was thus, held that said transaction is nothing but an absolute sale and the right, title and interest passed through said sale-deed. The Learned Munsiff further proceeded to return his finding on possession of the parties and held that the 3 rent receipts issued in 1381 BS imply the presumption of possession in favour of the plaintiff based upon the deposition of the witnesses cited on behalf of the defendant and further held that there is no satisfactory evidences adduced by either side on

possession and dismissed the suit. However, the findings on the intention of the parties in execution of the document was projected as the only criterion to dismiss the suit.

The said judgment and decree was carried in appeal before the learned Additional District Judge, 1st Court, Hooghly which was registered as Title Appeal no. 54 of 1975. The Appellate Court reversed the judgment and decree of the Trial Court on the nature of the transactions between the parties more particularly, attaching upon the purported sale-deed and held that if acquisition of property by the plaintiff in 1959 was with a sum of Rs. 800/-, it is improbable that the said property after a gap of 13 years would be sold at Rs. 1000/-. The appellate Court further held that since the consideration mentioned in the said sale-deed is abysmally low, it does not instil confidence in him to declare such transaction to be real i.e. absolute sale but Loan in substance. The Appellate Court further recorded its findings on possession and relied upon the aforesaid 3 rent receipts and raised a presumption that a person who divested his right, title and interest is not expected to

continue paying the rent to the Government for the said property and held that the possession all along remained with the plaintiff i.e. the predecessor in interest of the present plaintiffs. Appellate Court thus set aside the judgment and decree of the Trial Court declaring the transaction as loan in substance and the possession remained all along with the predecessor in interest of the plaintiffs.

The Judgment and decree of the First Appellate Court was again challenged before this court in Second Appeal being SA no 550 of 1978. This Court reversed the judgment and finding of the First Appellate Court and allowed the Second Appeal holding that the plea of low value of the property shown in the sale-deed is contrary to the judgment of this court reported in **AIR 1984 Calcutta 140** and of the Supreme Court reported in **AIR 1980 Supreme Court 16** wherein it is held that the low valuation shown is not sufficient to accept a particular transaction to be a loan in substance.

So far as the possession is concerned, this court held that there was sweeping remark made by the Appellate Court based upon the aforesaid rent receipts

but did not notice that the same was of the year 1381 BS and relatable to a 3 years rent paid at a time. This court, thereafter, reversed the findings of the first Appellate Court as well as the Trial Court on possession and it would be profitable and relevant to quote the relevant finding returned by this court which runs thus:

“78. With regard to possession learned Appellate Court made a sweeping conclusion mainly on the basis of rent receipts exhibit 2 series, but unfortunately, he did not notice that the rent receipts were obtained in 1381 BS and three years rents were paid at one time. On the question of possession both parties have led evidence and it would not be proper and safe to discard the evidence adduced on behalf of the defendant, particularly when there is a sale deed in favour of defendant no1. Thus on a consideration of the conduct of the plaintiff and his failure to prove the terms and conditions alleged to have taken place at the time of registration or before that my finding is that the

learned court could not appreciate the evidence on record, rather misappreciated the same and misplaced the onus as a result of which he came to an erroneous conclusion”

The matter was again carried to the Supreme Court and the Apex Court dismissed the special leave petition being Civil Appeal no. 250 of 1994 on February 11, 2013 with the following observations:

“We are satisfied that the view taken by the High Court is correct. Therefore, no interference is called for. The appeal is accordingly dismissed.”

Despite the dismissal of an appeal by the Supreme Court, the controversy did not rest therein but the plaintiff augmented such dispute/controversy by filing a civil suit being Title Suit no. 226 of 2004 in the 1st Court of Civil Judge,(Senior Division), Serampore for declaration that the right of the defendants/respondents herein to recover possession from the plaintiff in respect of the suit properties extinguished by operation of law namely Law of Limitation with further declaration that the plaintiffs are the absolute owner of the suit properties by dint of

adverse possession and operation of law. The consequential relief in the form of permanent injunction is also claimed therein.

The said suit came up for final disposal of 22nd March, 2012 and the learned Judge being the Court of First Instance dismissed the same. The Appellate Court vide judgment and decree dated 30th September, 2019, reversed the judgment and decree of the Trial Court both on the ground of title and on the ground of acquisition of title by adverse possession.

Mr. Jiban Ratan Chatterjee, the learned Senior Advocate appearing for the appellant assailed the finding of the first Appellate Court firstly, on the point that the first Appellate Court while allowing an application for additional evidence under Order 41 Rule 27 of the Code admitted certain documents and marked the same without affording any opportunity to lead counter evidence thereto. Secondly, there is no satisfaction recorded by the First Appellate Court on the parameters of the provisions contained in Order 41 Rule 27 of the Code. Thirdly, the application for additional evidence does not satisfy the requirements

of the said provision i.e. Order 41 Rule 27 and, therefore, it was not proper on the part of the Appellate Court to allow the said application whimsically and capriciously and fourthly, the Appellate Court could not have reopened the issues of the earlier suit which were decided finally.

On the other hand, Probal Kumar Mukherjee appearing for the respondents submits that there is no impediment on the part of the Appellate Court to allow additional evidence to be adduced by a party if the same is required for substantial reasons. He further submits that there cannot be any doubt over the additional documents sought to be relied upon by his client being the public document and marking the same as exhibits. He vehemently submits that the possession always remained with the plaintiff or his predecessor in interest and having not decided conclusively in an earlier round of litigation, there is no impediment on the part of the litigant to reagitate such issue in a subsequent proceeding and the court to return its findings thereupon. He thus submits that there is no infirmity or illegality in the judgment and

decree of the First Appellate Court nor any substantial question of law is involved in instant appeal.

From the respective submissions advanced by the Counsels before us, we thought it fit to proceed in deciding the matter on merit even at the stage of an admission upon framing the substantial question of law for the simple reason whether the points so urged can be reopened in the subsequent round of litigation if the same had already decided conclusively in a previous litigation.

The point which involved in instant appeal is whether the court of appeal can reopen the issue on the nature of the transaction, between the predecessor in interest of the respondent and the appellant, that it was not an absolute sale but a loan in substance.

The second point involved in the instant appeal is whether there was any conclusive finding returned by both the courts below in previous litigation on possession in respect of suit property; if the second point goes in favour of the plaintiff whether he has perfected the right, title and interest by way of adverse possession.

We, thus, invited the respective Counsels to address us on the aforesaid points and the submission recorded hereinabove having made thereupon. It is our ardent duty to decide the same on the basis of the materials available on record.

The judgments rendered in the previous litigation have been annexed with the application for Stay and we thus, do not find any difficulty in deciding the aforesaid points in the instant appeal.

The first and foremost duty cast upon us is to find out whether the issues involved in the first round of litigation is directly and substantially an issue in the second round of litigation and have been decided conclusively therein. The plaint of the second suit is also annexed to the application for stay. The first paragraph of the plaint pertains to the description of the property and acquisition of title through various registered deed of conveyance; whereas the second paragraph contains the averment that the predecessor in interests of the plaintiff being the owner of the aforesaid property approached the Defendant no. 1 to get an advance of a sum for creating a mortgage in respect of the properties described in Schedule A and

B to the plaint with the stipulation that the same would be reconveyed upon the payment of the loan amount with interest accrued thereupon. The subsequent paragraph relates to a statement about the low consideration mentioned in the purported deed of sale for the purpose of proving the said transaction to be loan in substance. There is a categorical statement made therein relating to the possession retained by the plaintiffs throughout. Subsequently, the plaint was amended and a little digression from the initial pleading can be visualised therefrom when the plaintiffs intended to incorporate the statement relating to the description of the properties in correlation with the dag number and the khatian maintained by the Revenue Department. The further averments pertain to previous possession upon which the claim of adverse possession is also made therein.

The meaningful reading of the statements made in the plaint leaves no ambiguity to the fact that the predecessor in interest of the plaintiff executed the purported deed of sale in respect of the properties described in Schedule A and B therein and for the first time a case is projected that there was a discrepancy

in the dag number and the khatian number which implies that the property which was executed to secure the loan is distinct and different. The aforesaid plea was not taken in a first round of litigation and it was all along the specific stand of the plaintiff that the property which he owned was put to secure a loan and not the property which is recorded in the revenue record. Furthermore, there was no corroborative evidence that apart from the said properties the predecessor –in- interest of the plaintiff was the owner of the other properties recorded in a different khatian and assigned a different dag number. All along the predecessor of the plaintiff proceeded to defend on the premise that he never sold the property to the Defendant no. 1 but executed the purported ostensible sale-deed to secure a loan.

The plea which was available in the first round of litigation having not taken shall be deemed to have been taken and, therefore, it is not open to the plaintiff to reagitate the same. The intention to avoid the purported sale-deed was taken in the first round of litigation and is very much evident that the said points are sought to be reopened taking a circuitous route

which is not permissible. The stand of the predecessor –in- interest of the plaintiff in the first round of litigation clearly exposes the specific stand where the same property was sought to have been involved in the said transaction and having failed therein, the same cannot be allowed to be reagitated or resurrected by making an illusory cause of action. Even Paragraph 2 of the plaint of the second round of litigation manifest the involvement of the sale of the property and, therefore, we have no hesitation to hold that it is the same property which was the subject matter of the earlier round of litigation as well.

There is a categorical finding of the High Court in an earlier round of litigation that mere low valuation shown as consideration in the deed of sale does not automatically make the transaction as Loan in substance. It would be apt to quote the relevant excerpts of the finding of the High Court which read thus:

“ 77. Learned Appellate Court laid emphasis on the question of low valuation of the property, but he overlooked the observations of Their Lordships in the decisions reported in AIR 1981

Calcutta Page 140 and AIR 1980 S.C.P. 16, wherein it has been observed that the low valuation is not sufficient to accept a particular transaction as a loan transaction. It is true that while examining a particular transaction under the Bengal Money Lenders Act, the Court should take into consideration the market value of the property and if it is found to be shockingly low then it may be taken to be a loan transaction. But in the instant case, as it appears from the evidence on record, the property was transferred for Rs. 2000/- while according to the plaintiff the market value was Rs. 6,000/- . This is not enough to brand an out and out sale as a loan transaction.”

Apex Court upheld the findings of the High Court in toto with categorical observation that no interference is called for. The said point would be treated to have been set at rest and cannot be reagitated in a subsequent proceeding/suit. The moment the plaintiff failed to establish that the purported deed of sale is loan in substance, it is not open to him in a subsequent suit to reagitate the

same. Therefore, there is no incongruity in holding that the title to the property involved in the present suit passed on to the Defendant no. 1 and they acquired all the right, title and interest therein.

The real controversy is raised upon the factum of possession of the said property . It was all along the stand of the plaintiff that despite the execution and registration of the purported deed of sale, the possession remained with them. On the other hand, the Defendant no.1 was categorical in his assertion that the possession was delivered to him simultaneously with the execution of registration of the said purported deed of sale.

There appears to be some dispute on the above aspect which can be seen from the findings recorded in this regard by both the courts below in the first round of litigation. The Appellate Court held that it is improbable that a person after divesting his right, title and interest of the property would continue to pay rents to the Government and therefore, there is a strong presumption of possession retained by the plaintiff despite the aforesaid transaction. The High Court reversed the said finding with categorical

observations quoted hereinbefore in this judgment and held that the purported rent receipts of the year 1381 BS was for a period of three years rent paid at a time which does not lead to any presumption that the possession was all along retained by the plaintiff. The High Court was categorical that the evidence of the defendant no. 2 cannot be disregarded, when the sale-deed has been executed in his favour.

The manner in which such observations have been recorded by the High Court prompted the plaintiff/respondent no. 2 to contend that there was no conclusive findings on possession and, therefore, this cannot be regarded as a conclusive findings to shut the door to reagitate the same. All the judgements rendered by the Trial Court, First Appellate Court and High Court contained the specific observations on possession and the same is required to be assimilated to find out the meaning and intention reflected therein. The First Appellate Court was swayed by the aforesaid rent receipts in order to arrive at the conclusion that the possession remained with the plaintiff which was not accepted by the High Court. The inescapable conclusion which have been

drawn from the findings recorded by the High Court is that the purported rent receipts do not throw light on the possession and it would not be proper and safe to disregard the evidence adduced by the Defendant no. 1. It set at rest the issue on possession which was highly disputed, which was directly and substantially an issue in the earlier round of litigation . We have no hesitation to hold that the possession of the Defendant no. 1 had been declared and recognised in an earlier round of litigation.

Since the question of the nature of the transaction and the possession has been decided conclusively in the earlier suit we are of the opinion that the same is hit by the principle of res judicata and cannot be reagitated in the second suit.

Though after our categorical finding made hereinabove, it would be a mere academic to consider the scope of the production of the additional evidence at the appellate stage and marking of document as exhibits as has been done therein, we would like to make the observations thereupon to bring clarity on proposition of law.

The provision contained in Order 41 Rule 27 of the code can be divided in four categories namely- 1) improper refusal of evidence by the Trial Court which ought to have been admitted. 2) Non-production of the evidence despite exercise of due diligence. 3) Requirement of the Appellate Court of any document to be produced or witnesses to be examined for the purpose of pronouncement of judgment and 4) any of the substantial cause. The aforesaid provision neither aimed to disregard all evidences and nor for the purpose of filling up the lacunae. Though Section 107(1)(d) of the Code of Civil Procedure bestow power upon the Appellate Court to take additional evidence but same is subject to the conditions and limitations prescribed under Order 41 Rule 27 as ordinarily the Appellate Court should not travel beyond the periphery of the lower court record. It is thus a duty of the Appellate Court permitting the party to adduce additional evidence to record its satisfaction on the existence of the parameters envisaged therein. It is a fundamental rule of evidence that an additional document filed at the conclusion of the argument or the hearing of the appeal is not permissible without

affording an opportunity to the other side to rebut the same. So far as the requirement of the court is concerned there must be a specific finding that why such additional evidence is necessary for pronouncing the judgment. The Court must record the reasons as to why such judgments are required for pronouncing the judgment without whose presence the Appellate Court finds it difficult to pronounce the judgment. Though it is a right conferred in the statute upon a litigant to produce additional evidence at the appellate stage but it is a satisfaction of the appellate court within the strict parameters laid down in Order 41, Rule 27 of the Code and such satisfaction must be surfaced in the judgment.

Application for additional evidence has been annexed to the said application containing four paragraphs and our endeavour has failed to find out any averments satisfying such conditions and the requirements under the aforesaid provisions. It is not expected from an Appellate Court to allow such application merely on the drop of the hat without embarking its journey on the area of the conditions laid down under Order 41, Rule 27 of the Code. The

Appellate Court has not recorded any reasons on the necessity of those additional evidences rather simply proceeded on the basis of those deeds downloaded from the official website of the registration authority as it cannot be disputed by the other side. The purported sale-deeds sought to be produced by way of additional evidence aimed to show that the properties comprised in the earlier round of litigation was different which does not appear to be correct as indicated above. The second paragraph of the plaint of the second suit clearly exposes the involvement of the self same property and a person who already divested his right, title and interest through a well recognised legal modes cannot redivest the same by executing a subsequent deed. The person who does not have the right, title and interest in the property if divested such right, no valid title would pass to the purchaser therein and therefore, we do not feel that those documents have any bearing on the dispute nor required for pronouncing of judgment.

On the prospectus of the findings made by us in the instant judgment both on the title of the Defendant no. 1 and the possession, there is no necessity to

make any finding on the adverse possession for the simple reason that the person who has no possession over the disputed property is not entitled to claim adverse possession. Though the broad principle of adverse possession has been recorded by the first Appellate Court but without making any observations on the facts and circumstances of the instant case. It would be sufficient to record that in order to succeed in getting a declaration by perfecting the title by adverse possession, the same is required to be decided on a three fundamental legal principle i.e., *Nec Ve, Nec Clam and Nec Precario*. The possession should not only be open, hostile, continuous and uninterrupted but to the knowledge of the true owner. Since the possession was not with the plaintiffs and the same has been declared in an earlier round of litigation in favour of defendant no.1, the plea of adverse possession simply falls thereupon.

In view of the findings made hereinabove, the judgment and decree of the First Appellate Court cannot be sustained.

The same is therefore set aside. The appeal succeeds.

As a result, the suit filed by the plaintiff/respondent is hereby dismissed.

No order as to costs.

Urgent certified website copies of this judgment, if applied for, be supplied to the parties upon compliance with all requisite formalities.

I agree,

(*Kausik Chanda, J.*)

(*Harish Tandon, J.*)