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SAT 94 of 2020
With
CAN 1 of 2021

Sri Shyam Sundar Dhara & Anr.
Vs.
Sri Sudarshan Dhara & Ors.

Mr. Sovan Mukherjee
...for the appellants

The instant second appeal has been filed against the judgment of the First Appellate Court affirming the judgment of the trial Court. The plaintiffs/respondents filed the suit for declaration of title on the strength of the deed of partition executed way back 1986 and mandatory injunction for removal of the structure constructed on the encroached portion of the land owned by the plaintiffs /respondents and recovery of possession.

The facts appearing from the record are more or less undisputed. The entire property comprising of 9 satak of land was initially owned by four brothers. The plaintiffs/respondents are the descendents of one of the brothers namely

Dulal whereas the defendants/appellants are the heirs and legal representatives of another brother namely Narayan. One of the brothers, Mihir died before the alleged deed of partition was executed and the widow of the said deceased executed a deed of gift in the year 1971 in favour of all the plaintiff/respondents. Upon the death of the predecessor of the defendants/appellants, the dispute was resolved by the intervention of the friends and relatives and the deed of partition was executed and registered before the concerned registrar in the year 1986 in which the mother of the defendants/appellants was the signatory thereto. She executed the said document as natural guardian of the defendants/appellants who claimed to be minor at such relevant point of time. Nothing transpires from the pleading that there was any challenge to the dispute pertaining to the execution and registration of the deed of gift except when the plaintiffs/respondents instituted the instant suit and claimed title on the basis thereof, the defendants/appellants disputed the veracity, authenticity and the legality of the partition deed, on simple counts namely the mother as a natural guardian was incompetent to sign and execute the said document when the

defendants/appellants were minor. It is further contended that all the co-sharers were not made a party thereto and lastly the mother being an illiterate lady was not aware of the contents thereof as there is no certification to the effect that the contents have been read over and explained to her in a language understandable to her.

The defendants/appellants lost on all counts and the suit of the plaintiffs/respondents was decreed. The Appellate Court in our opinion has spent more time in reiterating the principles of approbate and reprobate than making any observations on the merit of the case. At the first blush, we thought to interfere with the impugned order but after perusing the judgment of the trial Court which elaborately and extensively considered and touched all the issues raised before it, we find that the ultimate conclusion of the Appellate Court cannot be faulted with.

However, we must record the role and the duties of the Appellate Court in deciding an appeal under Section 96 of the Code of Civil Procedure. The First Appellate Court is the last Court of fact and law and, therefore, it is a primary duty cast upon them to decide all the issues and return its

independent finding thereupon. When we use the expression "last court of fact and law" we are conscious of the proposition of law that the second appeal is restricted to a substantial question of law and not every question of law involved in the matter. The First Appellate Court must decide the matter independently and the issues of fact and the law must be discussed in extenso and the argument advanced by the respective parties should be addressed lucidly, explicitly and with clarity. Mere reiteration of the principles of law without venturing to decide the facts of the case by the Court of First Appeal is an attempt to shirk the responsibilities entrusted upon it by the statute. The right to appeal under Section 96 of the Code of Civil Procedure is not brindled with any conditions as may be seen under Section 100 of the Code. It is, thus, axiomatic to say that the First Appellate Court must examine, scan and return its independent finding on all the issues raised in the suit as well as in the said appeal and should not adopt slip shod manner by recapitulating the abstract principle of law even without indicating whether such proposition of law has any manner of application in the case.

Be that as it may we invited the learned advocate for the appellant to address us on the facts of the case for the purpose of ascertaining the involvement of the substantial question of law under Section 100 of the Code of Civil Procedure.

The learned advocate for the appellant submits that the deed of partition is bad, inoperative, ineffective and void, as all the co-sharers were not made parties. It is further submitted that there has been a clear admission on the part of the first witness of the plaintiffs that the defendants/appellants were minor at the time of execution and registration of the partition deed which itself make the deed void and inoperative. It is thus submitted that the suit is barred under the Limitation Act having not filed within three years from the date of the accrual of cause of action. Lastly, it is submitted that there is no finding that the defendants/appellants have, in fact, encroached upon the land of the plaintiffs /respondents which should be evident from the recital of the partition deed that each party would respect their allocated portion and will continue to enjoy by raising construction thereupon.

At the very outset we must say that the aforesaid pleas were taken before the trial Court

and discussed extensively on the basis of the evidence adduced by the parties and the documents exhibited therein. So far as the invalidation of the partition deed on account of non-implementation of all the co-sharers are concerned we do not find any substance therein. It is discernable from the record that the widow of the one of the brothers, Mihir executed the deed of gift before birth of the partition deed divesting all her share which Mihir had in favour of the plaintiffs. Even though it is considered that the children of Mihir were not made a party yet the defendants/appellants cannot impinge the said deed as they felt not to be affected by such deed. The position would have been different had the children of Mihir challenged the said deed saying that their share could not have been divested by the mother. Such position has not arrived and, therefore, we do not find such contention to be legally sustainable.

Further more, the defendants/ appellants were minor at the time of execution of the partition deed. It is undisputed that the mother of the defendant/appellants as a natural guardian executed and signed the said document and one can reasonably infer that the same was duly acted

upon. Though infirmity is sought to be projected as a defence but the defendants/appellants never challenged the said partition deed on the authority of the mother as a natural guardian to be one of the executant thereto even after attaining the majority. Law is somewhat settled that if the natural guardian has vested right, title and interest in respect of an immovable property belonging to the minor, the option is left the minor either to waive right to challenge such action or challenge such action within three years from the date of attainment of majority. The record would reveal that though the defence has been taken in the written statement, the counter claim was not filed nor the said partition deed was challenged by an independent suit. The Court has further held that it is too late to declare the deed void to which we do not find any fault in it. Even the mother during her lifetime never challenged the deed on the ground that contents thereof was not read over and explained to her. The plea of illiteracy has been taken but there is no cogent material forthcoming which may justify such a stand; even apart, if the executant of the document has acted upon the same the question of certification becomes academic and cannot be

treated as fatal so as to invalidate the deed in its entirety. The concept of such certification originated in medieval period when the women were not aware of the worldly affairs and able to protect her interest in the immovable property. This aforesaid proposition of law in a modern society is required to be considered in such perspective and the same has to be applied in the context of given facts and not simplicitor on the plea that she was illiterate. Our endeavour has failed to find out any such findings in the judgment delivered by the trial Court that she has put her L.T.I. but the fact which transpires therefrom that she has put her signature on the said deed. We do not think that merely because a contention is raised that she was illiterate in absence of any further corroboration before the Court, such plea cannot be taken.

The partition deed revealed the portion allotted to the plaintiffs/respondents which has been clearly described in the schedule appended thereto. It is a specific case of the plaintiffs/respondents that the defendants/appellants have encroached a portion thereof by making a construction and have ousted them from such possession. An Investigating

Commissioner was appointed by the trial Court who after relay and survey of the property submitted a report indicating that the allotted portion has been encroached upon by the defendants/appellants by making construction. The Commissioner was confronted with the report in the cross-examination made by the defendants/appellants but stood firm on his report and the trial Court did not find any lacuna or defect in such report. Once the Court finds that there is an encroachment over the property belonging to other, there is no fetter on the part of the Court in accepting the said report obviously in conjunction with other circumstances and the materials surfaced in course of a trial.

In view of the findings made hereinabove we do not find any substantial question of law involved in the instant appeal. The appeal is dismissed. No costs.

(Harish Tandon, J.)

(Bibek Chaudhuri, J.)