

IN THE HIGH COURT AT CALCUTTA
CIVIL APPELLATE JURISDICTION

The Hon'ble **Justice Harish Tandon**

And

The Hon'ble **Justice Kausik Chanda**

S.A.T. 179 of 2018
With
CAN 1 of 2018 (Old No. CAN 3122 of 2018)

SK. GOLAM LALCHAND

-VERSUS-

NANDU LAL SHAW @ NANDU LAL KESHRI @ NANDU LAL BAYES AND
OTHERS.

For the appellant : Mr. Kushal Chatterjee, Advocate.

For the respondent no. 1 : Mr. Somnath Ray Chowdhury, Advocate.

Hearing concluded on : 23.02.2021

Judgment on : 06.07.2021

KAUSIK CHANDA, J.:-

The present suit for declaration and injunction has been filed by one Nandu Lal Shaw @ Nandu Lal Keshri @ Nandu Lal Bayes as the plaintiff.

2. The plaintiff made out a case in his plaint that the suit property originally belonged to his late father Salik Ram and Salik Ram's brother Sita Ram in equal share by virtue of a sale from one Sahdori Dasi in the year 1959. Sita Ram never possessed the suit property and all along he used to reside at his native village along with his other family members. The suit property all along was under the occupation of the plaintiff's father, Salik Ram and his four sons. Salik Ram died in the year 1992 leaving his wife, plaintiff and three other sons. The other co-sharer of the property, namely Sita Ram, also died leaving behind his only son Brij Mohan. After the death of Salik Ram the plaintiff has been possessing and enjoying the suit property absolutely. Brij Mohan was never in possession over the suit premises and he used to reside in his native village. There are total seventeen tile shed rooms in the suit premises, out of which Sk. Golam Lalchand is a tenant in respect of one room, which has been described in the Schedule-B to the plaint. There are also other tenants who have been inducted in respect of other rooms. Golam and his father-in-law had made attempts to disturb the peaceful enjoyment of suit property of the plaintiff and attempted to erect a wall by blocking the common passage. The plaintiff, being so informed, rushed to the suit property when it was disclosed by Golam and his father-in-law that Golam had purchased the entire suit

property from Brij Mohan. The plaintiff in his plaint contended that Brij Mohan cannot acquire an absolute right over the suit property and as such he could not transfer the same or deliver possession of the same to Golam. The plaintiff perceived a threat to his title and possession over the suit property and filed the suit.

3. In the said suit, Golam and his father-in-law have been impleaded as defendant nos. 1 and 2 respectively. Brij Mohan has been impleaded as defendant no. 3. Three other sons of Salik Ram have been impleaded as proforma defendant nos. 4, 5 and 6.

4. The plaintiff has prayed, inter alia, for a decree of declaration that defendant no. 1 could not have acquired any right, title and interest by virtue of the Deed of Sale being, Exhibit-F and for an injunction restraining the defendant nos. 1 and 2 from making any type of obstruction in exercising the lawful right of the plaintiff as landlord and collecting the rent from the tenants who have been lawfully inducted by the plaintiff.

5. The suit was contested by the defendant nos. 1 and 2 by filing a joint written statement. Defendant no. 3 also filed a separate written statement supporting the stand of the defendant nos. 1 and 2. The defendants made out a common case that after the deaths of Sita Ram and Salik Ram, the suit property was mutually partitioned by a family settlement amongst their respective legal heirs. The suit property in its entirety was allotted in favour of

the defendant no. 3. The plaintiff, defendant nos. 4, 5 and 6 and defendant no.3 inscribed their signatures on the said family settlement. The plaintiff, in particular, relinquished his claim over the suit property on the basis of the said family settlement. Thus, being the absolute owner of the suit property, defendant no. 3 by way of a sale deed, executed on May 19, 2006, sold and delivered the possession of the suit property in favour of the defendant no. 1, who was under constructive possession over the suit property.

6. The said sale deed in the course of hearing was adduced in evidence as Exhibit-F.

7. The trial Court disbelieved the story of family settlement as pleaded in the written statements as the said document of family settlement, alleged to have been inscribed by the parties to the suit, and the same was not produced or proved. The trial Court, however, dismissed the suit primarily on the ground that Exhibit-F being a registered deed, the plaintiff ought to have prayed for cancellation of the said sale deed. The trial Court also came to a finding that the plaintiff failed to prove that he used to collect the rent from the tenants of the suit premises and on the other hand, defendant no. 1 was able to prove that he used to collect rent from the tenants.

8. The appeal Court below also did not give any credence to the alleged family settlement since the same was not proved. The decree of the trial Court, was, however, reversed by the appeal Court below, holding that it was not

necessary for the plaintiff to ask for the cancellation of the sale deed being Exhibit-F. It was also held by the appeal Court that like the plaintiff, the defendant no. 1 also could not prove that he used to collect the rent from the tenants of the suit property. The appeal Court thereafter proceeded to examine the validity and efficacy of Exhibit-F in the light of its recital.

9. The recital of the said sale deed suggested that Salik Ram gifted his entire share in favour of Sita Ram in the year 1960 and after the demise of Sita Ram and his wife, the defendant no. 3 and his three sisters had stepped into the shoes of Sita Ram. It was further stated that the said three sisters had gifted their shares in favour of the defendant no. 3 and thus the defendant no. 3 became the absolute owner of the suit premises.

10. The appeal Court below discarded the story of the gift of half share of Salik Ram in the absence of any details or particulars of such transfer in the recital. The same was found to be completely contradictory to the pleading of “family settlement” in the written statements. The alleged gift made by three sisters in favour of defendant no. 3 was also disbelieved since no specific details in that regard were stated in the said recital.

11. The appeal Court below, however, quantified the share of defendant no. 3 as one eighth undivided share in the suit property on the basis of the recital. It was held that after the death of Sita Ram and his wife, the half share of Sita Ram over the suit property equally devolved upon the defendant no. 3 and his

three sisters. It was, therefore, the finding of the appeal Court below, that Exhibit-F could only have transferred one eighth undivided share in favour of defendant no. 1 by defendant no. 3. The suit was decreed, inter alia, on the following terms:-

“

It is declared that the first defendant is not the sole and exclusive owner of the property described in the schedule A to the plaint by dint of the exhibit F or otherwise.

The first defendant, his men, agents and associates are restrained by permanent injunction from extending or attempting to extend the possession of the former (i.e the first defendant) beyond the property described in the schedule B to the plaint till such time as the A scheduled property is lawfully partitioned.

The first defendant is also permanently restrained from declaring or projecting or canvassing himself to be the exclusive owner of the A scheduled property on the basis of the exhibit F or otherwise.
.....”

12. Before us it has been contended by the defendants/appellants that the appeal Court below ought to have appreciated that the suit for negative declaration was not maintainable. It was further contended that the plaintiff could not maintain the suit without a claim for a cancellation of the Exhibit-F. It was further contended that the plaintiff being a co-owner cannot restrain the other co-owners from realising the rent by way of injunction. The appellant has relied upon a judgment in support of his contention reported at **AIR 2008 Cal**

68 (Bachaspati Bhattacharya vs. Smt. Mira Bhattacharjee). It has been further argued by the appellants that the plaintiff without a prayer for declaration of his own title could not maintain a suit for injunction against the defendants. In support of such proposition the judgment reported at **(2008) 4 SCC 594 (Anathula Sudhakar vs. P. Buchi Reddy (Dead) by LRS.)**.

13. The plaintiff/respondent on the other hand contends before us that there is no bar to decree a suit by way of a negative declaration. In the present suit though the prayer has been couched in a negative language, a positive declaration is embedded in the same. The appeal Court therefore, rightly decreed the suit. In support of such submissions, the following judgments have been relied upon: **(2016) 13 SCC 308 (Balram Yadav vs. Fulmaniya Yadav)**, **(2009) 4 SCC 183 (Smt. Madhumati Atchut Parab vs. Shri Rajaram V. Parab)**, **(1942) AIR (Calcutta) 261 (Natabar Sasmal vs. Krishna Chandra Bera)**, **(2018) 6 WBLR 209 (Sayera Bibi vs. Kotulpur Farmers Service Co-operative Society Ltd)**, **(2011) 4 CalLT 342 (Smt. Pratima Das @ Kachu Das vs. Smt. Mira Das)** and **(2004) 4 AndhLD 136 (Narhar Raj (died) by Lrs. vs. Tirupathybibi)**.

14. Since the controversy relating to the prayers made in the suit has travelled to us from the trial Court via the appeal Court below, it is proper to quote the said prayer in extenso:-

“(a) A decree for declaration that the defendant no. 1 and 2 have no right to dispossess the other tenants,

who have been inducted by the plaintiff within the property covered by this suit, with a further declaration that the defendant no. 1 cannot have acquired any right, title interest by virtue of the Deed of Sale if any executed by the defendant no. 3 Brij Mohan Keshri in favour of the defendant no. 1.

(b) A decree for permanent injunction restraining the defendant no. 1 and 2 and their men and agents from taking forcible possession over any portion of the property save and except the "B" schedule room and/or restraining the defendant no. 1 and 2 along with their men and agents from making any disturbances and/or obstructions in the matter of peaceful possession and enjoyment of the plaintiff over the property mentioned and described in the Schedule "A" below save and except the "B" Schedule room and restraining the defendants and their associates from making any type of obstruction in the matter of exercising the lawful right of the plaintiff as Landlord and to collect the rent from the tenants who have been lawfully inducted by the plaintiff.

(c) Cost of the suit;

(d) Any other equitable relief or relieves of which the plaintiff be found entitled as per Law and equity."

15. To deal with, the issue as to whether, in the facts of the present case, it was necessary for the plaintiff to ask for cancellation of the deed being Exhibit-F, it has to be noticed that plaintiff was not the executant of the deed. The said deed was executed by the defendant no. 3 in favour of defendant no. 1. When it comes to cancellation of a deed by an executant to the document such person can approach the court under Section 31 of the Specific Relief Act, 1963, but when it comes to cancellation of a deed by a non-executant, the non-executant must approach the court under Section 34 of the said Act.

16. The position of law has been succinctly explained by the Hon'ble Supreme Court in the judgment reported at **(2010) 12 SCC 112 (Suhrid Singh alias Sardool Singh vs. Randhir Singh)**. Paragraph 7 of the said judgment is quoted below:-

“ 7. Where the executant of a deed wants it to be annulled, he has to seek cancellation of the deed. But if a non-executant seeks annulment of a deed, he has to seek a declaration that the deed is invalid, or non est, or illegal or that it is not binding on him. The difference between a prayer for cancellation and declaration in regard to a deed of transfer/conveyance, can be brought out by the following illustration relating to A and B, two brothers. A executes a sale deed in favour of C. Subsequently A wants to avoid the sale. A has to sue for cancellation of the deed. On the other hand, if B, who is not the executant of the deed, wants to avoid it, he has to sue for a declaration that the deed executed by A is invalid/void and non est/illegal and he is not bound by it. In essence both may be suing to have the deed set aside or declared as non-binding. But the form is different and court fee is also different. If A, the executant of the deed, seeks cancellation of the deed, he has to pay ad valorem court fee on the consideration stated in the sale deed. If B, who is a non-executant, is in possession and sues for a declaration that the deed is null or void and does not bind him or his share, he has to merely pay a fixed court fee of ₹ 19.50 under Article 17(iii) of the Second Schedule of the Act. But if B, a non-executant, is not in possession, and he seeks not only a declaration that the sale deed is invalid, but also the consequential relief of possession, he has to pay an ad valorem court fee as provided under Section 7(iv)(c) of the Act.”

17. The aforesaid judgment of the Supreme Court has been followed in a recent judgment of the Supreme Court reported at **AIR 2020 SC 4047 (Deccan**

Paper Mills Co. Ltd. vs. Regency Mahavir Properties). The relevant paragraph of the said judgment reads as follows:-

“ **25.** The reasoning in the aforesaid judgment would again expose the incongruous result of section 31 of the Specific Relief Act being held to be an in rem provision. When it comes to cancellation of a deed by an executant to the document, such person can approach the Court under section 31, but when it comes to cancellation of a deed by a non-executant, the non-executant must approach the Court under section 34 of the Specific Relief Act, 1963. Cancellation of the very same deed, therefore, by a non-executant would be an action in personam since a suit has to be filed under section 34. However, cancellation of the same deed by an executant of the deed, being under section 31, would somehow convert the suit into a suit being in rem. All these anomalies only highlight the impossibility of holding that an action instituted under section 31 of the Specific Relief Act, 1963 is an action in rem.”

18. Therefore, the appeal Court below rightly reversed the finding of the trial Court in coming to a conclusion that the plaintiff could maintain the suit without asking for the cancellation of the sale deed being Exhibit- F.

19. The issue as to the negative declaration in the prayer should be examined in the context of the pleadings made in the plaint. The object of Section 34 of the Specific Relief Act, 1963, is to protect the plaintiff's title from adverse attack and to dispel the cloud cast upon the plaintiff's title or legal character he is entitled to. A negative declaration with regard to the status of the defendants, however, cannot be maintained without showing the plaintiffs' own right. The pleadings in the plaint suggest that the plaintiff has claimed his

own right and title over the suit property by way of inheritance which has been denied by the defendants on the strength of Exhibit-F. The prayer in the plaint has already been quoted hereinabove. It is difficult to categorise such prayer as a negative declaration. In substance, the plaintiff being a non-executant of the deed has asked for the declaration that the said deed being Exhibit-F is a void and an inoperative deed. In view of the judgment rendered by the Supreme Court in **Suhrid Singh** case, the plaintiff can very well maintain the action by praying for such declaration. In that view of the matter we need not separately consider the judgments relied upon by the respondents.

20. We cannot also accept the submission of the appellant that without a prayer for declaration of his own title, the plaintiff could not maintain his prayer for injunction. In fact the judgment cited by the appellant **Anathula Sudhakar (Supra)** does not support such contention. We may quote paragraph 21 (d) of the said judgment where the position of law has been clarified as under :-

“21.

.....

(d) Where there are necessary pleadings regarding title, and appropriate issue relating to title on which parties lead evidence, if the matter involved is simple and straightforward, the court may decide upon the issue regarding title, even in a suit for injunction. But such cases, are the exception to the normal rule that question of title will not be decided in suits for injunction. But persons having

clear title and possession suing for injunction, should not be driven to the costlier and more cumbersome remedy of a suit for declaration, merely because some meddler vexatiously or wrongfully makes a claim or tries to encroach upon his property. The court should use its discretion carefully to identify cases where it will enquire into title and cases where it will refer to the plaintiff to a more comprehensive declaratory suit, depending upon the facts of the case.”

21. The present suit is not a suit for injunction simpliciter. Prayer for injunction has been preceded by a prayer for declaration relating to the title over the disputed property. There were pleadings by the respective parties with regard to title and evidence was also led in support of such pleadings. The appeal Court below has gone into the question of title and came to a finding that defendant no. 1 had become the joint owner of the property on the strength of Exhibit-F with the plaintiff and the other co-sharers. Following such declaration of title necessary prohibitory injunction was issued. It was, therefore, not necessary to relegate the plaintiff to a suit for declaration of his own title.

22. The judgment reported at **AIR 2008 Cal 68 (*Bachaspati Bhattacharya vs. Smt. Mira Bhattacharjee*)** does not lend any support to the appellants. It was held in the said case that the plaintiff being a co-sharer of 1/35th share could not be granted injunction so as to restraining other co-sharer having 34/35th share, from interfering with her alleged possession without claiming partition of the property.

23. In the case in hand, the defendant no. 1 who is a stranger to the family of the plaintiff claimed himself as an exclusive owner of the suit property on the strength of the sale deed being Exhibit-F. Such assertion seriously threatened the plaintiff's right over the suit property as the plaintiff perceived that by Exhibit-F the defendant no. 3 could not transfer the suit property in favour of defendant no. 1. It was not a case where a co-sharer of the property sought to injunct other co-sharers from exercising their legal right over the property.

24. Having said all these, we need to advert to another aspect of the findings of the appeal Court below. The appeal Court below sought to quantify the share of the defendant no. 3 in the suit property solely on the basis of the recital of the Exhibit-F. The appeal Court below was persuaded by the recital of the said deed to hold that the defendant no. 3 was the only son of Sita Ram and the defendant no. 3 had three sisters only. Though no evidence was adduced in the suit in support of such fact. If Sita Ram had more children, then the extent of the share of defendant no. 3 in the suit property would have been lesser than that quantified by the Appeal Court below. Appeal Court below ought not to have relied upon the recital of the deed to ascertain the share of defendant no. 3, particularly when other parts of the recital were discarded being "a bouquet of lies."

25. The recital contained in a document not inter parties are not admissible in evidence. **[See: AIR 1928 CAL 893 (*Ambica Charan Kundu vs. Kumud***

Mohun Chaudhury]]. Exhibit-F is not even a document executed between the strangers to the suit. Exhibit-F is a deed of sale executed by defendant no. 3 in favour of defendant no. 1. The facts as stated in the recital could become admissible under Section 157 of the Evidence Act only if the executant of the document deposed such facts in court. **[See: AIR 1927 Cal 230 (*Sheik Ketabuddin vs. Nafar Chandra Pattok*)]**. The exercise of quantification of share of defendant no. 3 undertaken by the appeal Court below, solely relying upon the recital was, therefore, flawed.

26. It was sufficient to conclude that defendant no. 1 had become the co-owner of the property only to the extent of the share of defendant no. 3 over the property. The terms of the decree of appeal Court has already been quoted above. The quantification of the share of defendant no. 1 was not necessary to pass such a decree. The decree of the appeal Court, however, does not call for any interference.

27. The appeal no. S.A.T. 179 of 2018 and the connected application, being CAN 1 of 2018 (Old No. CAN 3122 of 2018) are, therefore, dismissed without any order as to costs.

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

I agree.

(Harish Tandon, J.)

(Kausik Chanda, J.)