

Item-32. 07-09-2022

SAT 46 of 2014
CAN 1 of 2015 (old CAN 2828 of 2015)

sg

Ct. 8

Naba Kumar Mukherjee & Ors.
Versus
Sourindra Nath Banerjee, since deceased,
represented by his legal heirs and representatives,
namely, Pratipa Banerjee & Anr.

Mr. Shamit Sanyal, Adv.
Mr. Debasish Karmakar, Adv.
Ms. Priyakshi Banerjee, Adv.
...for the appellants

The second appeal has come up for admission. The learned counsel for the appellants has urged that the learned Trial Court as well as the learned First Appellate Court has completely disregarded the evidences adduced on behalf of the appellants and he has been relied upon the Commissioner's report in dismissing the claim of the appellants. It is argued that the relevant documents and/or exhibits as a testimony of PW-1 would show that the finding arrived at by the learned Trial Court as well as the First Appellate Court in respect of the plots being plot nos. 625/780 and 625/781 was erroneous. The appellants have laid claim on those two plots of land.

We have carefully considered the materials on record and have carefully gone through both the judgments.

The plaintiffs field a suit for declaration, injunction and recovery of possession. The plaintiffs are the legal heirs of Ananda Mohon Mukherjee. The plaintiffs claimed that the defendants have encroached RS plot no. 625/781 and had started raising construction on the said plot although, they had no right over the said plot. For the purpose of deciding whether there has

been any encroachment, an Advocate Survey Passed Commissioner was appointed. The Advocate Commissioner has taken into consideration the four deeds for the purpose of ascertaining as to whether the plaintiffs have any right, title and interest in respect of the properties or a portion of the property over which they were ascertaining their rights as co-owners thereof. The report of the Commissioner refers to four deeds. The immediate vendees were Anita Banerjee, Ranu Gupta, Gita Mukherjee and Shyamarani Sanyal. The areas measured on the basis of the description mentioned in the four deeds. The existence and execution of the said deeds were never questioned and/or disputed by the plaintiffs. The properties were also sold between 1963 and 1966. It is mentioned that the areas of land sold in respect of plot no. 625/780. During evidence, it transpires that prior to the said plot of land, Ananda Mohan Mukherjee had no other property and obviously the question arose whether the reference to RS plot No. 625/781 was erroneous. The Advocate Commissioner in order to allay in misgivings or fear of not considering existence of the said plot, prepared the report after relaying the four deeds and measuring the areas according to the description mentioned in the said four deeds. The total area covered by the said four registered deeds of conveyance was equivalent to approximately 29 cottahs or around 48 decimals. It was by reason of finding, the question obviously arose that if plot no. 625/780 has total area to the extent of around 40 decimals and if by dint of four registered deeds of conveyance the vendors transferred more than the area specified in the plot then what could be reasonable consequence.

This was answered by the First Appellate Court in the following manner:

“Firstly, the last deed of conveyance executed by the vendor to the extent of an area more or above the 40 decimal is void and secondly the vendor by mistake mentioned only plot no. 625/780 in the last deed of conveyance instead of both the plots. It is not the case of the plaintiffs that the registered deed of conveyance executed in favour of Anita Banerjee is void as their father had no transferable title in respect of plot no. 625/780 to the extent of 9 cottahs 10 chittaks after the execution of the first three deeds. The question in this respect boils down to the fact as to what was the intention of the vendor at the time of execution of the deeds. If the vendor intended to transfer both the plots but by mistake described only one plot in the deed of Anita Banerjee is a question of fact and such question was not only examined by the trial court. The trial court directly came to the conclusion on the basis of the commissioner report.

The commission report obviously is a vital piece of evidence or a tool to decipher the intention of the vendor. To find out the intention of the vendor, it is imperative to understand to understand the fact of possession that was handed over to the transferee. If the possession transferred to Anita Banerjee to the extent of 9 cottahs 10 chittaks comprised in plot no. 625/780 as well as the suit plot then obviously it can be said that the vendor had intention of writing the suit plot in the registered deed of conveyance but by mistake mentioned only plot no. 625/780 in the deed of conveyance. It appears from the cross-examination of P.W.1 that the witness was confronted with the registered deed of transfers made in favour of Anita Banerjee and the witness did not admit the signature of Ananda Mohon Mukherjee in the deed. Although the witness denied the signature of his father in the deed but no specific evidence was adduced by the plaintiffs in order to refute the deed executed in favour of Anita Banerjee. When there is no definite evidence to the effect that the deed was not executed by the father of the plaintiffs coupled with the fact that the witness admitted time and again in the cross-examination that he is not acquainted with the transfers made by his father in respect of plot

no. 625/780 then obviously I have no hesitation in my mind that in my mind that Ananda Mohon Mukherjee executed a registered deed of sale in favour of Anita Banerjee. The defendants made a specific case on this point that immediately after transfer of the property in favour of Anita Banerjee she took possession of the same by installing some concrete pillars. Admittedly, the plaintiffs are out of possession and they have prayed for recovery of possession of the suit property from the defendant. The boundary appended with the schedule of the plaint tallies exactly with the schedule and the boundary by which Anita Banerjee transferred to Ram Shankar Chatterjee and subsequently to Samarendra Nath. It also appears that the property transferred in favour of Anita Banerjee also has more or less the same boundary. It goes without saying that the deed of Anita Banerjee and the deed of Ram Shankar Chatterjee cannot have the identical boundaries as Anita Banerjee purchased 9 cattahs 10 chittaks and out of that 9 cattahs 10 chittaks, Ram Shankar purchased just 4 cattahs. So if the boundaries are taken as a whole then obviously the boundary to the schedule of the property transferred to Anita Banerjee unequivocally shows that the vendor shows that the vendor had intention of transferring plot no. 625/781 along with plot no. 625/780. If the vendor had only intention of transferring plot no. 625/780 and not the suit plot then obviously the boundary appended to the deed of Anita Banerjee would have been different.”

It is a settled law that for mis-description of the plot, the purchaser cannot suffer. In the deeds that were relied upon before the Advocate Commissioner, it is crystal clear that all the purchasers have purchased duly demarcated portion of land and the possession of the respective purchasers conformed to the description mentioned in the four registered deeds of conveyance. The title of any of the property cannot be extinguished on the basis of mis-description of the property. It is a clear finding of fact that the deed of Anita Banerjee, Ram Shankar Chatterjee and

Samarendra Nath were almost identical at least in terms of boundaries and if the same parcel of land was subsequently transferred to the transferee along with the same boundary description, then it can be safely concluded that the said possession in respect of the first transfer in favour of Ananda was handed over to the transferee. Ananda got possession of the suit property in the year 1966 and thereafter subsequent transfers had taken place.

The plaintiffs could not establish possession in the suit plot from the year 1966 till the date of filing of the suit. Once the plaintiffs fail to establish their possession with proper description in a suit for encroachment, the parties are required to establish the identity of the properties with clear description.

The plaintiffs were unable to prove their title to the disputed property and in order to ascertain whether there has been any act of encroachment, in our view, the trial court has rightly appointed the Commissioner to find out the respective possession and to assist the Court to find out whether there has been any encroachment. The plaintiffs could not prove any record to substantiate their claim of possession during the intervening period.

The Commissioner after relying of the deeds with the Mouza map opined that the boundary to the schedule of the transferred deeds goes to suggest that along with the plot no. 625/780 the suit plot was also transferred. Then the obvious conclusion could be that although Ananda may not have mentioned anything about the suit plot in the transferred deed of Ananda but he intended to sell the plot and in consequence of such

intention, handed over possession of the suit plot to the transferee.

The findings of fact are based on the oral and documentary evidences including the Commissioner's report. We are of the opinion that the view taken by both the Courts is correct and is only possible view as a court can desire on appreciation of evidence. The Court observed that the substantial question of law is involved in this appeal.

The learned Counsel for the appellants has submitted that this order may operate as *res judicata* in the event an independent claim is made by the petitioners with regard to any unauthorised construction being made by the respondents.

We feel no such observation is necessary as the list is required to be decided on the basis of the pleadings. The appellants have alleged unauthorised construction or an encroached area. In that context, both the courts have decided the issue against the appellants.

In view of our aforesaid observation, we find no merits to admit the second appeal. The second appeal is dismissed at the admission stage. The application accordingly stands dismissed. However, there shall be no order as to costs.

(Uday Kumar, J.)

(Soumen Sen, J.)