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Ct-08

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SAT 11 of 2015
with
I.A No. CAN 1 of 2015(Old CAN No. 5077 of 2015)
CAN 2 of 2015(Old CAN No. 6029 of 2015)

Chittaranjan Mondal & Ors.
Vs.
Swapan Mondal & Ors.

The appeal is defective. However, no attempt has been made to remove the defects. The appeal is of the year 2015.

The appeal appeared in the warning list on 29th November, 2022 with a clear indication that the same shall be transferred to the regular list on 5th December, 2022, since then the matter is appearing in the list. Therefore, the appellants have due notice.

The defects notified by the stamp reporter in his report dated 17.01.2015 have not yet been removed by the appellants.

The appellate decree dated 7th August, 2014 affirming the judgment and decree passed by the trial court on 30th August, 2011 in a suit for declaration and permanent injunction is the subject matter of challenge in this second appeal.

We have carefully gone through the judgment of the trial court as well as the first appellate court.

The trial court decreed the suit on contest against the defendant nos. 2 to 4. The trial court arrived at a clear finding that 4 plots comprising of the schedule property, only 15 decimal out of 1.22 acres in plot no. 775 has been recorded in favour of the contesting defendants. Therefore, it cannot be said that the defendants have obtained possession of the schedule property by

virtue of the disputed deed.

The trial court has declared the registered deed no. 665 of 2006 executed by the defendant no. 1 in favour of the defendant nos. 2 to 4 void.

On the basis of the finding it appears that one Jagannath Mondal was the original owner of the suit property. The defendants alleged that after the demise of Jagannath the schedule properties along with other non-suited properties devolved upon his four sons and one daughter and each of them had 1/5th share in the same. However, the plaintiffs have contended that they obtained the 'Ka' schedule properties, partly from Jagannath Mondal and partly from Bidyutprava Mondal and others by virtue of registered deeds in the year 1965 and 1976 respectively and accordingly they have produced such deeds by marking Exhibits 1 and 2 respectively. While defendant nos. 2 to 4 have alleged that they have no knowledge of such deeds in favour of the plaintiffs. They have in the same breath contended that Exhibits 1 and 2 are illegal, collusive without jurisdiction and as such void ab initio, though it is worth mentioning that they have sought no relief in their counter claim regarding declaration to the effect that the impugned title deeds of the plaintiffs are void.

The contesting defendants traced their title on execution of a deed in favour of the defendant no. 1, who happens to be the daughter of erstwhile owner Jagannath Mondal. The defendant no. 1 was never produced as witness to prove Exhibit-5/Exhibit-A as title deed.

The first appellate court in concurring with the views taken by the trial court noticed that the defendants did not produce any original deed

of sale being no. 665/2006. They also could not explain the occasion for executing such deed in their favour. Exhibit-5/Exhibit-A would show that that the appellant nos. 1(ka) and 1 (Gha) who were the legal heirs of the defendant no. 1 have neither participated in the alleged deed of sale nor there was any clear finding to that effect that they were present at the time of execution of the said deed.

It is an admitted position of fact that the Ka schedule property belonged to Jagannath Mandal, Bidyutprabha Mandal and others. In his cross-examination Chittaranjan Mandal, the defendant no. 2 as D.W 1 has categorically admitted that the Ka schedule land previously belonged to Jagannath Mandal and Bidyutprabha Mandal. From Exhibit-1 and the Exhibit-2 it is sprouted that Jagannath Mandal by executing deed of gift being no. 1570/1965 and Bidyutprabha Mandal, Chittaranjan Mandal, Ashok Kumar Mandal and Amar Kumar Mandal by executing deed of sale being no. 10494/1976 transferred the Ka schedule property to the plaintiffs. In his cross-examination the D.W1 has also admitted that Bidyutprava Mandal transferred her share in the suit property in favour of the plaintiffs by way of sale. Exhibit-3 and Exhibit-3(1) raise presumption that the plaintiffs are the raiyats-in-possession of the Ka schedule property. So, it is crystal clear that the plaintiffs have right, title and interest in the Ka schedule property and the learned Trial Court has rightly declared the title of the plaintiffs in the Ka schedule property.

The first appellate court had relied upon the decision of the Hon'ble Supreme Court in

Vidhyadhar Vs. Mankikrao, reported in **AIR 1999 SC 1441** with regard to the adverse interference that the court shall draw and presume when a party does not appear and give evidence with regard to the fact in issue and in **Shri Ranjit Kumar Bysack Vs. International Airports Authority and Ors.**, reported in **2001 WBLR (Cal) 659** for the consequences that are likely to follow for not producing the best evidences.

The trial court has also relied upon the decision of **Bhaskar Sahu vs. Anama Swara**, reported in **AIR 1987 Ori 138** with regard to the requirement to lead oral evidence to prove the contents of the documents. The said judgment was relied upon as the defendant was unable to produce the original sale deed. The relevant observation of the said judgment -“..... *It is so well settled in law that it requires no reference to any decided case for the proposition that a foundation must first be laid for the reception of secondary evidence and no secondary evidence of a document is permissible unless the conditions mentioned in S. 65 are satisfied.....*”

“*From the evidence on record we do not find that the plaintiff has adduced any evidence explaining the reasons for non-production of the original sale deed, even though objection was taken to its admissibility at the time when the certified copy of the sale deed was sought to be introduced in evidence. The certified copy of the sale deed was tendered in evidence through P. W. 1 and in the deposition recorded, the certified copy of the sale deed is mentioned to have been marked as Ext. 1 with objection. It was improper on the part of the Court not to make a note thereof*

in the order-sheet of the date on which the document was so admitted in evidence and not to decide the objection at all which he was expected to do either immediately thereafter or at least at the close of the evidence. It further appears that the contesting defendant did not press their objection against the admissibility of Ext. 1 for which there is no mention about the same in the impugned judgment. That apart, from the evidence of P. W. 1 we do not find any statement which will prove the contents of the original the certified copy of which was sought to be proved. When a certified copy is allowed to be produced under Section 65, Evidence Act, there is no presumption as to the genuineness or the execution of the original and the Court should not admit a document merely on the ground that it is a certified copy of the original, unless the execution of the original is proved or admitted by the persons against whom the same is to be relied on. The admission of Ext. 1 in evidence without laying the foundation for reception of secondary evidence and without proof of the contents of the original by proving its execution was improper specially when the objection raised about its admissibility was never decided by the Court.”

The first appellate court has also relied upon the decision of the Hon’ble Supreme Court in **A. Raghavamma & Ors. Vs. A. Chenchamma & Ors.**, reported in **AIR 1964 SC 136** where it has been held that “now coming to the documentary evidence, as we have already indicated, all the relevant documents admitted to have been in existence have not been placed before the Court and an adverse inference has, therefore, to be drawn against the appellant.”

The learned Trial Judge has also refused to exercise its discretion in allowing Order 41 Rule 11 of the C.P.C as it is well-settled principle of law that a party cannot be permitted to adduce additional evidence for the purposing of filling up the lacuna.

On the basis of the evidence on record, we are of the view that it is a possible view that the trial court and the first appellate court could have taken the preponderance of probabilities.

In view of the above, we do not find any reason to interfere with the concurrent finding of facts.

The appeal accordingly fails.

The second appeal is, therefore, summarily dismissed under Order XLI Rule 11 of the Code of Civil Procedure at the admission stage.

In view of dismissal of the appeal CAN 5077 of 2015 and CAN 6029 of 2015 are also dismissed.

There will be no order as to costs.

(Uday Kumar,J.)

(Soumen Sen, J.)

