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Ct-08

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SAT 49 of 2015
with
I.A No. CAN 1 of 2015(Old CAN No. 2838 of 2015)
CAN 2 of 2015 (Old CAN No. 2839 of 2015)

Smt. Usha Rani Roy & Anr.
Vs.
Satya Rani Roy

Re: CAN 1 of 2015(Old CAN No. 2838 of 2015)
Section 5

The department has reported that the appeal has been filed within the period of limitation. In view thereof, the application for condonation of delay is misconceived. We dispose of the said application the by recording that the appeal is filed within time.

The appeal appeared in the warning list on 6th March, 2023 with a clear indication that the same shall be transferred to the regular list on 21st March, 2023, since then the matter is appearing in the list. The appellant is having deemed notice of the matter.

None appears on behalf of the appellants today.

The appellate decree dated 4th September, 2014 affirming the judgment and decree passed by the trial court on 25th November, 2010 in a suit for recovery of khas possession, demolition of chitey bera room and declaration that the defendant has no right in the suit property are the subject matter of challenge in this second appeal.

We have carefully read the judgment of the trial court as well as the first appellate court and the grounds of appeal.

Briefly stated that the plaintiffs Usha Rani Roy and Ava Rani Mondal (Roy) are the full-blood sisters who jointly with their brother Rabindra Kumar Roy had purchased a piece of 'danga' land measuring about 02 cottah on 31.10.1984 more specifically described in the schedule of the plaint. Thereafter, said Rabindra Kumar Roy being the owner of 1/3rd undivided share of the property transferred his share by a registered sale deed bearing no. 4267 executed and registered on 15.11.1991 at a consideration price of Rs.3,000/- in favour of his two sisters i.e. the present plaintiffs. Plaintiffs thus became the absolute owner of the suit property more fully described in schedule 'A' of the plaint. The defendant, namely, Satya Rani Roy being the wife of said Rabindra Kr. Roy along with her two brothers forcefully tried to encroach some portion of the suit property consisting of a room of 'Darma bera' with tile shed measuring approximately 10 ft x 8 ft having a front side verandah which is more specifically mentioned in schedule 'B' of the plaint. The defendant again attempted to encroach the suit property forcefully on 15.11.2003 when the defendant and her associates attacked the plaintiffs causing injury. The plaintiffs made a general diary and filed a case before the Executive Magistrate for remedy. The plaintiffs ultimately filed this suit.

On the basis of the pleadings the trial court framed six issues.

To prove the plaint case the plaintiff no. 2 deposed as P.W 1 by filing affidavit-in-chief and in support of her case she exhibited three documents, namely, sale deed dated 31.10.1984(Exhibit-1), sale deed dated 15.11.1991 (Exhibit-2) and mutation certificate

dated 06.05.2005 (Exhibit 3 series). The defendant herself deposed as D.W. 1 and her brother Arun Das deposed as D.W2. The defendant in order to support his case relied upon SC certificate in the name of her son (Exhibit-A), voter identity card (Exhibit-B), certified copy of the maintenance case (Exhibit-C), her son's class-VIII certificate (Exhibit-D) and letter to post office (Exhibit-E).

Learned Trial Judge dismissed the suit on the ground that the plaintiffs had failed to prove the cause of action as made out in the plaint and also taking into consideration the fact that the plaintiffs were confused in their claim for recovery of possession as nowhere in the pleading or evidence they stated that the defendant actually entered into the suit property. As encroachment of the suit property by the defendant was not the basis of the claim of the plaintiffs and not proved, the trial court held that the plaintiffs have failed to make out any case.

The trial court further observed that the defendant has been able to establish his possession from the year 1991 and the suit was filed on 13.02.2004 beyond the period of limitation the suit is barred by limitation.

The basis of the claim of the plaintiffs is that the defendant being the wife of their brother forcibly encroached some portion of the suit property consisting of darma bera room with tile shed measuring 10 ft x 8 ft with a verandah and on 15th November, 2003 the defendant with outsiders attacked the plaintiffs for which they lodged General Diary being no. 315 dated 15.11.2003 at Sarsuna P.S and also filed a case before the Executive Magistrate at Alipore registered as M.P Case No. 3344/2003. The

cause of action, according to the plaintiffs, arose on 15.11.2003. On the contrary, the defendant's claim is that on 21.05.1991 the husband of the defendant accompanied with the plaintiffs assaulted her for which she lodged a complaint at Thakurpukur P.S being G.D.E no. 1094 dated 21.05.1991 and she had to be treated at Vidyasagar Hospital. In view of the said complaint, the husband made a declaration in writing undertaking to provide due maintenance to the defendant/wife and their son. But the husband of the defendant deserted them and compelled to leave the tenanted house of her husband and the defendant took temporary shelter in her brother's house. Sometimes in the month of June 1991 the defendant ultimately erected a darma bera room with tile shed roof at the suit property belonging to her husband and since thereafter she along with her son has been residing therein openly continuously without any interruption and to the full knowledge of the plaintiffs.

The defendant/wife filed a maintenance case on 08.07.1991 under Section 125 of Cr.P.C against her husband registered as M. Case no. 352 of 1991 before the 3rd J.M Court at Alipore. The defendant in spite of her best efforts failed to trace out the whereabouts of her husband. A huge amount of maintenance is lying due by virtue of the order of the learned Judicial Magistrate, 3rd Court at Alipore, warrant of arrest was issued against her husband, which is still pending.

The defendant claimed that she has every right to remain in possession of the suit property which belongs to her husband.

From the evidence it is emerged that the defendant is the wife of Rabin Roy, who according to the plaintiffs has transferred his share in the suit property in favour of the plaintiffs at a consideration price of Rs.3,000/- vide deed no. 4267 which was registered and executed on 15.11.1991.

The documents exhibited by the defendant show that the defendant is in possession of the suit property prior to 15.11.2003, specifically from the year 1991. Hence the plaintiffs' claim that the defendant encroached the suit property on 15.11.2003 is untenable and false.

The order passed in the criminal proceeding would show that the husband appeared in the said case on 28.08.1991 but did not appear in the said case since 11.10.1991. The alleged transfer of the suit property from the husband of the defendant took place thereafter i.e. 15.11.1991.

It further appears that during the pendency of the maintenance proceeding the husband allegedly transferred his share in the suit property to his sisters and thereafter became untraceable. That being the position, the sisters being the plaintiffs in the suit property would not be said to be the bona fide purchaser. The wife's right to maintenance creates a charge on the property of the husband either self acquired or joint family and the same would be enforced under Section 39 of the Transfer of Property Act, 1882 read with Section 22 of the Hindu Adoptions and Maintenance Act, 1956. Accordingly, irrespective of the question whether the property devolves upon the heirs on success, intestate or testamentary or on transfer inter vivos gratuitously or for consideration the

property remains liable under the charge.

The first appellate court relied upon the decision in the case of the Hon'ble Supreme Court in ***S. However in Tulasama Vs. Sheshda Reddy reported in AIR 1977 SC 1914*** in which it was held : *"when the husband is alive, he is personally liable for the wife's maintenance which is also a legal charge upon his property, this charge being a legal incident of her marital co-ownership in all her husband's property – the Hindu females' right to maintenance is not an empty formality or an illusory claim being conceded as a matter of praise and generosity, but is a tangible right against property which flows from the spiritual relationship between the husband and the wife and is recognized and enjoined by pure Shastric Hindu Law and has been strongly stressed even by the earlier Hindu Jurists starting from Yajnavalkya to Manu. Such right is against the property and the husband has a personal obligation to maintain his wife and if he or the family has property, the female has the legal right to be maintained therefrom. If a charge is created for the maintenance of a female, the said right becomes a legally enforceable one."*

When a dispute or lis between the spouses arise regarding provision for maintenance the concluding part of Section 39 of the Transfer of Property Act, 1882 pre-supposes that the maintenance can be recovered from the property. In the instant case the plaintiffs are the sisters of the husband of the defendant and are very much aware about the fact of pendency of maintenance proceeding and to avoid payment the husband of the defendant became untraceable and transferred the property on 15.11.1991, however, M. Case no. 352/91 was filed on 08.07.1991 by

the defendant against her husband. The sisters have failed to prove that they have no notice of pendency of the maintenance proceeding.

On such consideration, the first appellate court affirmed the judgment of the trial court and dismissed the appeal on the basis of the aforesaid facts and evidence on record. The concurrent finding of facts of the trial court as well as the first appellate court does not call for any interference.

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 2839 of 2015 is also dismissed.

There will be no order as to costs.

(Uday Kumar,J.)

(Soumen Sen, J.)

