

19.01.2023
SL No.49
Court No.8
(gc)

SAT 305 of 2016
CAN 1 of 2016 (Old No: CAN 8349 of 2016)

Md. Selim Biswas & Anr.
Vs.
Sanat Kumar Das & Anr.

This matter appeared in the Warning List of 29th November, 2022 with a clear indication that this matter shall be transferred to the Regular List on 5th December, 2022. Since then the matter is appearing in the list. The appeal is of the year 2016. The appellants are not represented.

The appeal is defective. The Stamp Reporter in its report dated 28th July, 2016 has indicated to various defects. The Stamp Report in the said report has also indicated that report on sufficiency of court fee stamp paid would be subject to verification on the receipt of the decree of the Trial Court. The said decree has not been filed. In spite of due notice, no attempt has been made to cure the defects.

The appellate judgment and decree dated 20th April, 2016 affirming the judgment and decree of the Trial Court dated 30th April, 2014 in connection with a suit for declaration and permanent injunction is a subject matter of challenge in this second appeal.

The learned Trial Judge observed that the plaintiffs failed to prove their right, title and interest in respect of

the possession over the suit property based on gift deed dated 10.06.1997. In absence of the judgment and order passed by the Trial Court, we need to restrict ourselves with regard to the judgment passed by the First Appellate Court in affirming the view of the Trial Court. From the facts narrated and summarized by the First Appellate Court, it appears that according to the plaintiff, Ashwini Kumar Majhi was the original owner of the suit property situated in plot no.99 within Mouza Jethia under P.S. Raghunathganj District Murshidabad and during his possession he transferred the said suit property in favour of his daughter, Nomita Majhi by executing a deed of gift dated 10.06.1997 and which was registered on 12.08.1997 and also delivered the possession of the suit property in favour of Namita Majhi and thus Namita Majhi came into possession of the suit property where one tin shade room and a doba and some trees are existing and in course of possession said Namita Majhi transferred the suit property in favour of the present plaintiffs for a consideration by executing a deed of sale dated 27.01.1998 and that deed was registered on 29.01.1998 and the plaintiffs also started to possess the suit property by way of purchase. It is contemplated that the plaintiffs thereafter have made some improvements in the suit property and constructed a verandah near the tin shade room and also planted some trees in the suit property and they also have been using the doba (small size of pond)

which was lying inside the property for the purpose of fishery. It is contended by the plaintiff's side that the cause of action of T.S. 66/2006 (T.S. 05/1999) arose on 01.12.1998 and thereafter on 25.12.1998 when the defendants started to claim that they have interest in the suit property and were trying to change the nature and character of the suit property.

The defendants in their written statement have stated that the plaintiffs are not in actual possession of the suit property and suit is barred by the provisions of Section 34 of the Specific Relief Act. According to the defendants, they purchased the suit property by virtue of sale deed dated 10.07.1997 from Ashwini Kumar Majhi on the payment of consideration money of Rs.50000/- and that deed was drafted by Mr. Birendra Nath Mondal, Advocate and practising lawyer of Jangipur Court and the said deed was prepared as per instruction of Ashwini Kumar Majhi and after preparation of the said deed it was read over and explained to Ashwini Kumar Majhi by Sri Birendra Nath Mondal, Advocate who also acted as "Bokalam Dar" of the thumb impression of Ashwini Kumar Majhi and said Birendra Nath Mondal also signed as witness. It is contemplated by the defendants that they also obtained possession of the suit property from the defendants and after coming into possession of the suit property the defendants also renovated the suit property and constructed a tin shade structure consisting of two

rooms in place of one tin shade room which was lying in dilapidated condition. As per case of the defendants they also have erected a brick made boundary wall on the eastern side of the suit property and the defendants have also stated that since the purchase of the suit property they are in possession of the same and they also have been enjoying the usufructs of the trees standing therein. As per case of the defendants they have planted some new trees in the suit property and using the doba (small pond) lying in the suit property for the purpose of fishery.

It appears from the judgment of the First Appellate Court that Ashwini Kumar Majhi executed two deeds out of which one is the deed of gift dated 10.06.1997 which was executed in favour of his daughter Namita Majhi and another sale deed has been executed by Aswini Kumar Majhi in favour of the defendants which has been executed on 10.07.1997 by taking consideration of money of Rs.50000/-. It is also not disputed fact that Aswini Kumar Majhi executed the deed of gift on 10.06.1997 but it was registered on 12.08.1997 whereas the deed (on the basis of which the defendants are claiming title) was executed and registered on 10.07.1997 which has been executed by Aswini Kumar Majhi. It is also admitted fact that Aswini Kumar Majhi was the recorded tenant in respect of the suit property. It is also admitted picture that the plaintiffs are claiming title over the suit property by virtue of the sale deed which is executed by Namita

Majhi on 27.01.1998 and which was registered on 29.01.1998.

The aforesaid facts were taken to be admitted and on that basis, the First Appellate Court proceeded to decide the appeal. The First Appellate Court, in our view, has rightly posed the question that if the deed of gift executed by Ashwini in favour of his daughter, Namita on 10.06.1997 is found to be valid in that event Namita acquired the suit property and her transfer in favour of the plaintiff would be valid. Factually it appears that Ashwini executed the deed of gift, marked as Exhibit-1 on 12.08.1997 by which time he had already lost her title in the property by virtue of a deed of sale executed on 10.7.1997 and registered on the same date in favour of the defendants. Accordingly, he could not be gifted the property in favour of her daughter.

On such consideration, we are of the view that the First Appellate Court was justified in affirming the order of the Trial Court in refusing to grant a decree in favour of the plaintiffs.

The second appeal fails at the admission stage and, accordingly, stands dismissed.

In view of dismissal of the second appeal at the admission stage, the connected application also stands dismissed.

However, there shall be no order as to costs.

(Uday Kumar, J.)

(Soumen Sen, J.)