

18.05.2023
SL No.26
Court No.8
(gc)

SAT 313 of 2016

**Masarul Islam (Major) & Anr.
Vs.
Debabrata Nashipuri & Ors.**

The appellants are not represented, nor any accommodation is prayed for on behalf of the appellants. The appeal is of the year 2016. The matter is appearing in the list from 14th February, 2023. The appellants have due notice about the listing of the matter.

The appellate judgment and decree dated 1st April, 2015 affirming the judgment and decree dated 30th November, 2006 passed by the Trial Court in a suit for declaration is a subject matter of challenge in this second appeal.

We have carefully read the judgment of both the Courts and the grounds of appeal. The plaintiffs are the appellants herein. The plaintiffs claimed declaration on the basis of the deed of exchange which was fraudulently procured and they are required to be declared as null and void. The transfer by the defendant No.1 or defendant No.7 of the 'kha' schedule property is illegal. The suit property belonged to the plaintiffs and their minor deceased brother and their father, the defendant No.7. The defendant No.7 had no right either to execute a deed of exchange or transfer any share in the suit property.

The suit was contested by the defendant No.1. It was alleged by the defendants that the suit property was purchased by the defendant No.7 with his own money in the name of his minor sons from Nanda Dulal Mondal and Jashoda Dulal Mondal. The defendant No.7 did not get possession of the said property for which he filed a suit before the Assistant District Judge, Berhampore on 06.11.1989. the defendant No.1 runs a grocery shop and the defendant No.7 was his regular customer. A friendship developed between two. The defendant No.7 concealing the fact that the property was purchased in the name of the minors executed a deed of exchange for the welfare and interest of the minor sons regarding 'ka' schedule property. However, when the defendant No.1 went to take physical possession of the property he was resisted for which he has filed a suit. The suit is pending. The defendant No.1 after being aware of the fact that the defendant No.7 purchased the said property in the name of the minors, established contact with them and was alleged that they wanted to sell the property to the defendant No.1 and they would not accept the said deed of exchange. He also received life threat. The defendant No.1 further alleged that on the advice of the persons and finding no other alternative, he executed two deeds in favour of the wife of the defendant No.2 and four sons of Monsur Sk. who were in possession of the said property

forcibly. Both the parties adduced evidence, oral and documentary.

The evidence shows that the alleged 'kha' schedule deed of exchange was executed by defendant No.1 to defendant No.7. The question whether the father of the minors was entitled to execute alleged deed of exchange regarding suit property in favour of the defendant No.1 according to the provision of Mahomedan Law. The learned Trial Judge relied upon Section 362 of Mulla's Principles of Mahomedan Law which shows that a legal guardian of the property of minor had no power to sell the immovable property of the minor except in the following cases, namely :-

- i) Where he can obtain double its value,
- ii) Where the minor has no other property and the sale is necessary for his maintenance,
- iii) Where there are debts of the deceased and no other means of paying them,
- iv) Where there are legacies to be paid and no other means of paying them,
- v) Where the expenses exceed the income of the property,
- vi) Where the property is falling into decay and
- vii) When the property has been usurped, and the guardian has reason to fear that there is no chance of fair restitution.

According to the Section 359 of the Mahomedan Law father is a legal guardian of the property of a minor. In the instant suit the deed of exchange i.e. Ext. A or 1 (Certified copy of Ext.A) it was executed on 28.1.88 and on the strength of said deed 'ka' schedule property of the plaintiff came into ownership of defendant no.1 and the 'ka' schedule property of Ext. A came into the ownership of plaintiffs and their deceased minor brother Izazul Islam in lieu of 'ka' schedule property of the plaintiff and the said deed was not a deed of sale rather the deed of exchange, in place of one property to another property.

The Trial Court as well as the First Appellate Court have held that the suit was engineered by the defendant No.7 with a view to unsettle the transaction that he had entered into the property of the defendant No.1 and by reason whereof the defendant No.1 has acquired interest over the suit property. In fact, relying upon the deed of exchange, the defendant No.1 may further transfer. The defendant No.7, however, contended that he was induced to execute the deed of exchange or that it was not for the benefit or welfare of the minor. It is an admitted position that the entire consideration for acquiring the property was paid by the defendant No.7 and the said property was purchased in the name of his two minor sons. Moreover, it appears that the assertion of the plaintiffs that they are in possession of said property measuring 15 decimals was false and untrue. The conduct of the defendant No.7

would show that he remained as the owner of the property. The Appellate Court on reappreciation of evidence has arrived at a finding that the defendant No.7 used the name of his sons and the minor in order to make money for himself and also keep for his sons at the expenses of the defendant No.1 or the subsequent transferees. He accepted the said property with the defendant No.1. He knew well that he had no possession over and in respect of the suit property. He due to the defendant No.1 in making a deed of exchange and then filing a suit against the original vendors and obtained a decree for Rs.36,000/- which money the real claimant would be the defendant No.1.

On such consideration, we do not find any reason to interfere with the order passed by both the Courts.

Accordingly, the second appeal stands dismissed at the admission stage.

However, there shall be no order as to costs.

(Uday Kumar, J.)

(Soumen Sen, J.)