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21.03.2023

Ct-08

FA 376 of 2008
with
I.A No. CAN 14 of 2022

ar,
sg
&
gc

Nilanjan Dey & Anr.
Vs.
Arundhati De

Mr. Gopal Chandra Ghosh
Mr. Munshi Ashiq Elahi
Md. Sahidullah Mridha
... For the Appellant

Mr. Kamal Krishna Pathak
Mr. Souvik Maji
... For the Respondent

This appeal is arising out of a judgment and decree dated 15th April, 2008 passed by 9th Civil Judge, Alipur in a suit for eviction of a licencee.

Briefly stated, Ruhini Kumar Dey, since deceased, was the common ancestor of the parties. He owned several movable and immovable properties both in East Pakistan and in India. After partition, all the family members settled in Kolkata except Sri Sushil Kumar Dey and Basanta Kumar Dey. In 1965 Ruhini died at Kolkata leaving behind his wife Saroj Bala Dey since deceased and three sons, namely, Sushil Kumar Dey, Sailen Kumar Dey and Balaram Dey.

Ruhini died leaving behind a Will. Sushil was the sole executor named in the said Will. Sushil obtained probate of the said Will on 27th March, 1969 from the court of the learned District Judge at Dhaka, East Pakistan.

Balaram Dey during his life time filed a suit for partition being T.S No. 92 of 1972 in the court of learned Second Sub-Judge at Alipur against her mother Saroj Bala Dey, since deceased, Sailen Kumar Dey, since deceased and Sushil Kumar Dey and other co-sharers in respect of the joint properties inherited by them. During the pendency of the said suit on the basis of an application filed by Sailen before the Custodian of Enemy Properties, Ministry of Commerce, Government of India, he received an *ex gratia* relief of Rs.6,85,968/- in respect of the properties assessed by the Government of Pakistan during the war between India and Pakistan in 1965. Subsequently, on revaluation and reassessment on 22.7.1976 of the compensation amount was increased to Rs.24,50,000/- and the balance compensation amount of Rs.17,64,032/- was paid to Sailen Kumar Dey.

It is claimed that Sailen distributed the said compensation amount amongst the brothers Sushil Kumar Dey, Balaram Dey and himself.

The plaintiffs are the widow and daughter of

Sailen Kumar Dey. The plaintiffs alleged that Balaram had received Rs.3,00,000/- in cash against money receipt from Sailen on account of compensation received from the Custodian of Enemy Properties. Sushil also received his money by different cheques towards his share of compensation.

It is claimed that Balaram had received a further sum of Rs.3,65,000/- by cheque on 4th October, 1976 on account of his share of balance compensation that was received from the Custodian of Enemy Properties.

It is stated that Balaram had received a sum of Rs.6,65,000/- towards his 1/4th share out of total compensation amount of Rs.24,50,000/-.

The parties in the mean time had agreed to settle their disputes in the pending partition suit being T.S. No. 92 of 1972 and accordingly, a compromise petition was filed before the Trial Court in which on the basis of solenama (joint compromise petition) filed on 9th September, 1977 the suit was decreed.

The plaintiffs alleged that in accordance with the compromise petition, joint properties were divided and partitioned amongst the parties. Smt. Saroj Bala Dey, the mother of the appellant since deceased, was allotted premises no. 24/1 Hossain Shah Road, Kolkata, Balaram Dey was allotted premises no. 24A, Syed Amir Ali Avenue, Kolkata and second and third floor of Premises No. 14 Zakaria Street, Kolkata, Sailen Kumar Dey was allotted 24-B, Syed Amir Ali Avenue, Kolkata and ground and 1st floor of Premises No. 14 Zakaria Street, Kolkata and Sushil Kumar Dey was allotted 3 Beck Bagan Row, Kolkata-17 and 21-A Jhowtala Road, Kolkata-17 and other co-sharers were also allotted their respective shares.

The plaintiffs thereafter on 6th October, 1977 entered into an agreement for sale in respect of the suit property and upon payment of entire consideration money the property was conveyed in favour of the plaintiffs.

The adjudication fee and the stamp duty were purchased on 15th October, 1977 and 17th October, 1977 for the registration of the deed of conveyance of 172/2, Rash Behari Avenue, Kolkata-29, and Smt. Chaya Dey paid the said sums.

After the said property was registered on 18th October, 1977 in favour of the widow and daughter of Sailen, they became the absolute owner of the said property. Sailen and Balaram are the attesting witnesses to the said deed of sale. The plaintiffs claimed that consequent upon such registration steps were taken for mutation and payment of property taxes.

The plaintiffs alleged that Balaram was a resident of Shillong, Meghalaya. In or around 1980-81 he came to Kolkata and was in urgent need of residential accommodation. It was on his request Balaram was allowed to live in the second floor of the suit premises no. 172/2, Rash Behari Avenue, Kolkata-29 as a licencee. Balaram as the owner of Syed Amir Ali Avenue property allotted to him under the compromise decree in T.S no. 92/1972 instituted three Ejectment Suits being Title Suit Nos. 436/1983, 437/1983 and 438/1983 respectively in the court of the Second Munsif at Alipore against three tenants of the premises no. 24/A, Syed Amir Ali Avenue on account of reasonable requirement and default in payment of rent.

The suits were decreed in favour of Balaram. As a result thereof, Balaram vacated the second floor of the suit premises by making over possession in favour of the plaintiffs on 18th January, 1989, however, the said defendant thereafter forcibly entered into possession of the ground floor of the said premises on 7th April, 1990 by dispossessing the plaintiffs therefrom and since then Balaram was occupying the said ground floor of the suit premises.

Under such circumstances, the plaintiffs filed a suit under Section 6 of the Specific Relief Act. The said suit although initially decreed was ultimately dismissed. As a consequence whereof, the plaintiffs filed the suit for eviction of Balaram from the suit premises.

Prior to the filing of the instant suit, the plaintiffs alleged that Balaram with his brother Sushil on 8th July 1991 filed a speculative civil suit being T.S No. 80 of 1991 before the 5th Court of the Assistant District Judge at Alipore for declaration, partition and injunction against the plaintiffs in which they have claimed share in the suit premises.

The plaintiffs alleged that the defendant is either a trespasser or a licencee in respect of the suit premises from 7th January, 1990. The licence was automatically revoked on 24th April, 1980 when T.S. No. 13 of 1990 was filed and also when the defendant claimed his share in the property by filing T.S No. 80 of 1991.

Balararm contested the suit by filing the written statement. In the written statement he has alleged that the suit property was purchased out of compensation amount and it was agreed by and between the parties that the suit property would be treated as joint family property. Sailen taking advantage of his absence from Kolkata, had procured the said document without his consent. The said document is sham. Balaram is a co-sharer in respect of the suit property and accordingly the question of evicting from the suit property could and does not arise.

On the basis the pleadings, the learned Trial Court framed six issues. The plaintiff has exhibited 20 documents as exhibit nos. 1 to 19(1). The documentary evidence on behalf of the defendant was marked as Exhibits A to S. Apart from the parties to the suit, one Prabir Sengupta, Inspector of Income Tax adduced evidence as DW-3.

The learned Trial Judge on the basis of the oral and documentary evidence decreed the suit in favour of the plaintiffs.

During the hearing of the appeal, the original plaintiff no. 1 and the original defendant died and their heirs and legal representatives have been substituted in their place and stead.

Mr. Gopal Chandra Ghosh, learned Counsel representing the appellants has submitted the appellant has failed to prove the payment of consideration for acquisition of the suit property. It is submitted that the original plaintiff nos. 1 and 2 have failed to produce relevant document to show that the consideration was paid by Chayya and in absence of proof of payment by Chayya, it shall be presumed that the said property was acquired out of the compensation amount received by Sailen on behalf of the other brothers. Mr. Ghosh submits that the plaintiff could not prove the compensation was distributed amongst the brothers. Neither Balaram nor Sushil had admitted of receiving the entire compensation amount. Mr. Ghosh has referred to the relevant deposition of Sushil and Balaram in this regard and submits that the plaintiffs having failed to prove any independent source of income for acquisition of the suit property, it shall be presumed that the property was purchased out of compensation amount. Mr. Ghosh has relied upon the decision of the Hon'ble Supreme Court in ***K.V. Narayanaswami Iyer v. K.V. Ramkrishna Iyer & Ors.***, reported in ***AIR 1965 SC 289*** for the proposition that where properties were acquired in the name of a joint family member, if at the date of such acquisition the joint family had sufficient nucleus for acquiring it, the property should be presumed to have been acquired from out of family funds and so to form part of the joint family property, unless the contrary is shown.

It is submitted that the Hon'ble Supreme Court, in fact, had accepted the principle laid down by the Calcutta High in ***Amritlal Sen & Ors. v. Surath Lal Sen*** reported in ***AIR 1942 Cal 553***. Mr. Ghosh submits that the onus is on the plaintiff to prove the acquisition of the property in question out of her own fund and since Chayya had failed to disclose her income tax return and other documents showing that she had adequate income or fund out of which she could have acquired this property, the case of the plaintiff that it was purchased by her and it is her own property fails.

Mr. Ghosh submits that the learned trial judge in deciding the aforesaid issue had made out a third case for the plaintiff as the learned trial judge has observed that it is quite probable that the husband of the plaintive no.1 furnished the consideration money to purchase the suit property for the benefit of his wife and daughter and in that case also the plaintiffs will be the owner of the suit property. Mr. Ghosh submits that the finding is based on conjecture and surmise and not the case made out by the plaintiff in the plaint. Mr. Ghosh submits that when the plaintiffs have not made out a case that Sailen had paid the consideration money the trial court could not have presumed existence of such fact. Mr. Ghosh in this regard has relied upon the decision of the Hon'ble Supreme Court in ***Bechhaj Nahar v. Nilima Mandal & Anr.,*** reported in **AIR 2009 SC 1103: 2008(17) SCC 491.** Mr. Ghosh has also referred to Exhibit A, a certificate issued by Sailen Kumer Dey to argue that Sailen had failed to prove that the money in fact was paid to Balaram and there was no corroborative evidence to that effect. In fact, the certified copy of the sale deed of Hussain Saha Road property dated 18.07.1988 would show that three brothers were residing at the suit premises. It is submitted that the wealth tax return for the year 1980-81 was filed by Sushil and marked as Exhibit Q wherefrom it would appear that the suit property is one of the properties of which Sushil was assessed to wealth tax. It is submitted that the evidence would show that the suit property was purchased out of the funds provided by his mother and three brothers out of compensation money of Rs.24,50,000/- received by them from the office of the custodian of Enemy Properties in India.

Sushil claimed that he had a share in the suit property. In his evidence he has stated that it was decided that the suit property would be purchased in the name of his mother and the wives of the three brothers but ultimately, the suit property was purchased in the name of the wife and daughters of Sailen. He had not received the entire share of the compensation money. Sushil claimed that the plaintiffs are benamidars. Mr. Ghosh submits that the Sushil has also referred to the partition suit in which this property was also included. Their mother contributed to the purchase of the suit property and she had a share in the suit property. Mr. Ghosh submits that the aforesaid evidence would show that Sailen had betrayed his brothers and procured the purchase deed in the name of his wife and daughter although it was acquired out of the compensation amount and joint fund. Mr. Ghosh submits that the plaintiff has failed to prove her right, title and interest in the property in question.

Mr. Kamal Krishna Pathak, learned counsel appearing on behalf of the respondent, has submitted that Balaram in his evidence was confronted with the deposition in the three eviction suits with regard to his statement made therein in which he has categorically stated that he required the suit premises for his own use and occupation and he has no independent place to stay in Kolkata, apart from the property in Syed Amir Ali Avenue.

Mr. Pathak has drawn our attention to the statements made by Balaram in his evidence and he is staying in the suit premises as a licensee and he may have to leave the suit premises at any point of time. The learned Counsel has also referred to the memo of consideration mentioned in the original deed of conveyance of the suit premises, paragraph 4 of the compromise petition, deposition of Balaram in the surviving partition suit, the money receipt issued by Balaram being Exhibits-15 and 15/1, certificate issued by Sailen being Exhibit-A and submits that on a cumulative reading of the documentary and oral evidence of Balaram, it is clearly established that Balaram never had claimed any right of ownership in respect of the premises in question. It also proves that he has received his entire share towards the compensation and he had no claim in the suit property. Mr. Pathak submits that Paragraph 4 of the Solenama dated 9th September, 1977 has clearly stated that the parties have agreed to partition the joint properties and in future they would have no claim against each other regarding any accounts or property or business or assets and/or liability in respect of joint ejmali properties situated in India and East Pakistan. By this compromise petition, the parties have mutually agreed to divide the properties amongst themselves. There is no reflection of the property in question in the said deed of compromise. The sale deed was executed in the name of the wife and daughter of Sailen on 8th October, 1977 and significantly in the agreement for sale entered on 6th October, 1977, Sailen and Balaram had put their signature as attesting witnesses. The said agreement is admittedly after the parties have settled their disputes over property matters. This property was acquired subsequently. Mr. Pathak submits that the fact that Balaram has received his share towards compensation money is adequately reflected from Exhibits-15 and 15/1 read with Exhibit-A and the counterfoils of the cheque book being Exhibit 16 series.

It is submitted that these documents were marked as exhibits without any objection and this conclusively prove that Balaram had received the entire consideration. Mr. Pathak submits that the attempt made on behalf of the appellants to show that the cheque of Rs.2 lakh could not have been on 10th August, 1976 is untenable as it is a clear typographical mistake which would be evident from the counterfoil of the said cheque appearing at page 267 of the paper book and form part of Exhibit-16 series.

Mr. Pathak further submits that it is immaterial as to how the property was acquired by the plaintiffs – whether it is out of compensation money or the Stridhan of Chaya or from any other source. It is quite clear from the evidence that this property was acquired in the name of Chaya and Arundhuti subsequent to the compromise deed and by that time Sushil had received his share of compensation amount and this property could not have been treated as a joint family property by reason of the compromise entered into by and between the parties prior to such acquisition and payment of compensation. Mr. Pathak, accordingly, submits that the judgment under appeal does not call for any interference.

The issue that emerges for consideration is whether Balaram has any right in the suit property. We pose this issue because of the fact that there is already a deed of sale in favour of Chaya and Arundhuti.

The consideration amount was paid in two parts. Rs.4,90,000/- was paid to the I.T.O for discharging the dues of the erstwhile owner and Rs.10,000/- to the original owner by a cheque. The evidence shows that Chaya collected the amount for acquiring the said property. The said document has come into existence after the parties have agreed to settle their property disputes and compensation money received and distributed. If the parties had ever intended that the suit property would form part of the joint family assets as by that time the compensation money in two tranches have been received and distributed to the brothers, there would not have been a mention of no claim against each other upon settlement of properties in terms of compromise. Balaram cannot have any claim over the suit property. The intention of the parties would be discernible from paragraph 4 of the compromise petition entered into in the partition suit being T.S. No.92 of 1972 by filing a Solenama dated 9th September, 1977. The said paragraph reads:-

*"**4**. That the defendant nos.4 to 9 do hereby admit and declare to have or own no subsisting right, title and interest in any business and moveable and/or immovable, ejmali properties either in India or in East Pakistan now Bangladesh not mentioned in (page4) Annexure "A" of this agreement to partition and shall never claim anything whatsoever in that*

respect and that <u>all the parties hereby further agree and declare that in future there will be no claim against each other regarding any accounts, any moveable and immovable any business and/or any assets or any liabilities in respect of the joint ejmali properties situated in the Indian territory as well as in the territory of East Pakistan now Bangladesh nor the parties will be entitled to in future any account in respect of any account, business or property including any amount of compensation for any ejmali properties in India, or East Pakistan now Bangladesh or Government papers or share and/or any money lying in any account in any form in any office or offices or with the Government of India or Government of Pakistan or Bangladesh on account of ejmali properties and/or any other properties not mentioned in Annexure "A" and the parties considering all their affairs, claims and demands concerning their properties assets and liabilities both in India and East Pakistan now Bangladesh have amicably settled and agreed upon this division and they are fully satisfied with the properties allotted by metes and bounds in their respective favour as mentioned in the Schedules 'B' to 'J' hereunder and admit and declare to have no further claim or demand whatsoever against one another in respect of the same or above.</u>

The parties will enjoy all sorts of necessary and appurtenant easements, attached to their respective allotted share or shares in every respect without any kind of obstruction and will not hinder or obstruct such rights of easements of each other in any way. The properties being premises no.22A, Syed Amir Ali Avenue, 24A syed Amir Ali Avenue, 24B, Syed Amir Ali Avenue and portion of vacant land with garage being southern side of premises no.21A, Jhautolla Road (page-5) and premises no.21A, Jhautolla Road which have been allotted to parties are fully depicted in the plan annexed to this petition of compromise." (emphasis supplied)

The said document was entered into after the compensation money was received and distributed.

The aforesaid clause clearly gives an impression that he had received his due share of the compensation and, he would not have any claim towards the compensation amount.

The money receipts, bank counterfoils and the presence of Balaram as an attesting witness in the agreement for sale speak loud of his knowledge and acceptance that this property is acquired by Chaya and Arundhati for their own use and occupation and belied any claim of an agreement to purchase the said property in the name of the wives of the brothers. Balaram in fact has received his share of compensation between 10th August, 1976 and 4th October, 1976 and he signed the agreement for sale as an attesting witness on 6th October, 1977 along with Sailen. Balaram tried to pretend that he was asked to put his signature on a blank paper which later on was converted into a deed of sale is unacceptable and the absurdity of such claim has been dealt with well by the learned Trial Judge in the following words:-

"The case of the defendant regarding the agreement for sale of the suit property (Exhibit-17) is that a blank document signed by him was converted into an agreement for sale. But, in my view, the said contention of the defendant cannot be accepted because if blank document containing the signature of the defendant was converted into an agreement for sale, then the signature of the defendant would have occurred either at the bottom of the page or at the top right hand corner of the page.

But, in page-5 of the agreement for sale, I find that the signature of the defendant is about 6" inches from the bottom of the page and the signature is towards the left side. A person does not sign any blank papers in such fashion and therefore, the position of the signature of the defendant in page-5 of *the agreement for sale (Exvt-17) clearly rules out any foul play by the plaintiff side.*

In the said agreement for sale, the names of the plaintiffs appeared as intending purchasers and therefore, there is nothing suspicious in their names occurring in the final deed of conveyance also. The agreement for sale clearly rules out the version of the defendant that the time of registration, the 1st page of the deed was changed and the original deed of conveyance contained the names of the mother and the wives of the brothers of the defendant including his own wife."

The aforesaid allegation of Balaram is a clear afterthought. Moreover, Balaram could not disprove the receipt of the money and the several money receipts and bank counterfoils by which the said amount was paid to him. All the said documents were marked as exhibits and the plaintiffs were able to prove the documents by which payments have been made to Balaram. The learned Trial Judge has also taken note of the aforesaid fact.

It is also significant to mention that the T.S. No.80 of 1991 filed by Sushil and Balaram for partition was virtually abandoned as it was dismissed for default and restored only in the year 2009 on the basis of an order passed by this

Court. However, Sushil in his evidence has stated that from the wealth tax return of Sailen he came to know that Sailen had paid the consideration amount of Rs.5 lakhs by a cheque drawn on his bank account. Admittedly, by that time, Sailen had received the compensation amount and he was entitled to a sum of Rs.6,65,000/- towards his share and there is no legal embargo in purchasing the suit property in the name of his wife or daughter. Sushil also in his evidence has stated that Balaram got two house properties in the compromise deed and the subsequent partition suit was filed by him along with Balaram in relation to the property "belonged to my (his) mother". He admitted that neither he nor Balaram or their wives or their mother had contributed for purchasing the suit property. There is no evidence suggesting that their mother made any claim as co-sharer in respect of the suit property.

Balaram wanted to rely upon the wealth tax return of Sushil to prove that the property is joint. However, the inspector of Income Tax in his evidence has stated the said returns could not be traced in its office. In any event Balaram having received his due share compensation money cannot make any claim in respect of the suit property. The deed of compromise also destroys any claim made by Balaram in the suit property.

There is another interesting feature in this matter. Balaram in the eviction suits has stated that he was residing temporarily in the house of his brother, namely, the suit premises. The certified copies of the plaints have been marked as Exhibits-9(1) and 9(2). In those suits, Balaram deposed that he is residing in the suit premises as a licensee. When Balaram was confronted with these documents, the defendant tried to wriggle out of the situation by stating that he made this statement on the advice of his elder brother, Sushil for the purpose of eviction of his tenants. Sushil did not come forward to corroborate the said statements. Moreover, in the partition suit pending between the parties, Balaram in connection with the eviction proceedings had said:-

"I have brought two Eviction Suits against two tenants in the premises at 24A, Syed Amir Ali Avenue before the 2nd Munsif which is being T.S. 436 of 83 and T.S. 438 of 83 which have been decreed in my favour. I deposed in those suits. My evidence was true and correct." (emphasis supplied)

The deposition in the eviction suit is prior in point of time to the deposition in the partition suit. Balaram all throughout had maintained that his evidence in the eviction suit were true and correct and he did not say while deposing in the partition suit that he was advised to make such false statements in order to get a decree for eviction. Balaram cannot approbate and reprobate and in any event the Court cannot accept the evidence of Balaram as it was intended to suit his purpose in the present suit. If he had lied in the eviction proceedings he had to suffer. In fact, Balaram did not produce any document to show that he had ever made any claim towards his alleged unpaid share towards compensation amount or that he had a share in the suit property until a suit was filed by Chaya and her daughter under Section 6 of the Specific Relief Act in the year 1990.

The conduct of the original appellant clearly shows that he was changing his colour as chameleon and is an unreliable witness as he did not hesitate to take different stand at different time to suit his convenience. The credibility of a witness is very important in a trial. If the Court finds that a witness is untruthful and changing his colour too often to suit his purpose and had no regard for truth, his entire evidence is liable to be discarded as being untrustworthy.

Under such circumstances, we do not find any reason to interfere with the order passed by the learned Trial Judge. The learned Trial Judge has meticulously dealt with the facts and law and the issues raised at the trial and on proper appreciation of fact and law has given his finding in favour of the plaintiffs and decreed the suit accordingly.

The appeal, accordingly, fails.

Accordingly, the appeal being FA 376 of 2008 stands dismissed.

In view of the fact that the deed of compromise is already on record, any other pleading relating to the compromise petitioner is inconsequential and not relevant for the present purpose. Other documents in the additional evidence are also not relevant for the present purpose and hence the application being CAN 14 of 2022 stands dismissed.

However, there shall be no order as to costs.

The department is directed to send down the lower court records forthwith.

Urgent Photostat certified copy of this order, if applied for, be given to the parties on usual undertaking.

(Uday Kumar, J.) **(Soumen Sen, J.)**