

**IN THE HIGH COURT AT CALCUTTA
CIVIL APPELLATE JURISDICTION
APPELLATE SIDE**

Present:

**THE HON'BLE JUSTICE HARISH TANDON
&
THE HON'BLE JUSTICE PRASENJIT BISWAS**

**SAT 190 of 2022
IA No. CAN 1 of 2022**

**Sri Shyamal Kumar Ghosh
Vs.
Sri Nemai Chandra Bag & Ors.**

Appearance:

For the Petitioner : **Mr. Bhaskar Ghosh, Adv.**
Mr. Tanmoy Mukherjee, Adv.
Mr. Nilanjan Adhikari, Adv.
Mr. Rakesh Jana, Adv.

Judgment On : **14.09.2023**

Harish Tandon, J.:

Both the Courts below held that the purported sale-deed dated 17.02.1976 executed by the plaintiff-respondent in favour of the defendant-appellant is an out and out sale but a security given to the loan advanced by

the appellant. It is relevant to record that the suit was decreed ex-parte and the appeal assailing the said ex-parte decree is also dismissed by the First Appellate Court.

The salient facts of the case as appears from the plaint annexed with the application (CAN 1 of 2022) are narrated as under:

The father of the plaintiff no. 1 respondents and the grandfather of the rest of the plaintiffs owned and possessed the suit property described in the schedule appended to the plaint as absolute owner thereof. The said original owner borrowed a sum of Rs. 1000/- from one Kishori Mohan Ghosh of the same village for a period of 3 years at the rate of interest of Rs. 11.2/3 Per cent per annum by executing an ostensible deed of sale dated 13.07.1959 for Rs. 1350/- representing the principal amount of Rs. 1000/- and the interest at Rs. 350/-. Upon payment of the principal as well, the interest the said Kishori Mohan Ghosh re-conveyed the property by executing and registering a deed on 13.07.1959 in favour of the original owner. Subsequently, the plaintiff no. 1 felt dire need of money and took a loan from Satish Chandra Porel, the maternal uncle of the plaintiff no. 1 a sum of Rs. 1500/- on the rate of interest at Rs. 16.2/3 per cent per annum by registering an ostensible deed of sale of Rs. 2000/- representing the principal sum of Rs. 1500/- and Rs. 500/- towards interest. The said Satish Chandra Porel subsequently re-conveyed the suit property by a registered deed of re-conveyance on 12.09.1970 after receiving the loan amount with interest. It is further averred that the plaintiffs faced the economic disaster

and in order to meet the expenses of the necessity of life borrowed a sum of Rs. 1500/- on 17.2.1976 from the defendant being the son of the sister-in-law of the said Kishori Mohan Ghosh for a period of 3 years at the rate of interest at 11.1/9 per cent per annum upon executing an ostensible deed of sale dated 17.2.1976 depicting the total amount of Rs. 2000/- out of which the principal amount was shown as 1500/- and Rs. 500/- towards interest. It is stated in the plaint that the plaintiffs intended to repay the said amount and demanded the execution of the deed of re-conveyance which was refused on one pretext or another. It is further averred that despite the execution and registration of the purported ostensible deed of sale on 17.02.1976, the possession remained with the plaintiffs all along which would indicate that it was an ostensible sale for securing the loan taken by the defendant. It is also indicated in the plaint that taking advantage of the said ostensible sale the defendant-appellant fraudulently executed a deed of sale on 03.12.1979 in favour of one Somnath Mukhopadhyay who, in turn, filed title suit no. 329 of 1982 against the plaintiff no. 1 and the defendant-appellant herein for declaration of right, title and interests as well as the permanent injunction restraining the parties herein from creating any obstruction in the peaceful possession of the said property. The said suit was contested by the plaintiff no. 1/respondent and the Trial Court dismissed the said suit on contest holding that the said Somnath Mukhopadhyay did not acquire any right, title and interests in respect of the subject property nor is found in possession thereof. The judgment and decree passed in Title Suit no. 329 of 1982 was assailed before the First

Appellate Court in Title Appeal no. 184 of 1996 which was dismissed for default on 08.08.1991 and till date no steps have been taken to restore the said appeal. The plaintiffs, therefore, claimed the relief in the form of declaration that the said ostensible deed of sale dated 17.2.1976 is not an out and out sale but a mortgage and also prayed for consequential relief in the form of the accounting and the payment thereof. Although the defendant appeared in the said suit but later on did not participate therein and ultimately the suit was decreed *ex parte*. In paragraph 18 of the written statement it is stated that the said Somnath Mukhopadhyay and the defendant are in fact enjoying the fruits of the schedule property and are in an actual possession thereof.

The Counsel for the appellants submits that an application under Order 41 Rule 27 of the Code of Civil Procedure was taken out before the Appellate Authority for adducing the additional evidence which has been wrongly dismissed by the Trial Court. It is further contended that by virtue of the said application for adducing the additional evidence the defendant-appellant intended to prove the sale-deed dated 17.02.1976 and the different Record of Rights showing that the possession of the scheduled property remained with the defendant-appellant. The Trial Court ought to have allowed the said application so that those documents intended to be produced by an additional evidence may be taken in evidence and have a material bearing on the real issue.

On the basis of the aforesaid arguments advanced before us the core issue involved in the instant appeal is whether the Court of First Appeal below was justified and rejecting the application under Order 41 Rule 27 of the Code.

Both the Courts below have held that the purported sale-deed dated 17.02.1976 does not convey any right, title and interest into the defendant-appellant as it was an ostensible sale for the purpose of securing the loan advanced by the appellant to the plaintiffs-respondents. We are not unmindful of the proposition of law as it stands that even if the defendant-appellant did not appear and adduce evidence before the Trial Court, the application for adducing the additional evidence under Order 41 Rule 27 of the Code of Civil Procedure may be allowed provided the conditions mentioned therein are fulfilled (see AIR 1997 SC 3243).

It is no longer *res integra* that the Appellate Court may permit a party to adduce additional evidence if such evidence was produced before the Trial Court but was not received the same in evidence or on discovery of new and important document which was not within the knowledge of the applicant despite due diligence it could not be produced or for other substantial reasons. The provision of Order 41 Rule 27 of the Code of Civil Procedure is quoted below:

The first two conditions enshrined in the aforementioned provision is conspicuously absent in the present case for the reason that in paragraph 18 of the written statement the defendant-appellant categorically averred

that he would produce the relevant documents at the time of hearing of the suit in support of his contention that his name was duly recorded in the Record of Right and he paid the rents in respect thereof. The application appears to have been filed on the third ground which is understood in the judicial parlance as one of the conditions where the Appellate Court requires such additional evidence for the complete and effective judgment to be pronounced in relation to the issue involved in the said proceedings. The Appellate Court has held that those documents are not relevant for the purpose of pronouncing the judgment which cannot be said to be infirmed or perverted for the reason stated hereinafter. The said ostensible sale-deed dated 17.2.1976 is already received in evidence at the behest of the plaintiff-respondents and marked as Exhibit 1. So far as the entry in the Record of Right in favour of the defendant-appellant is concerned it may have a presumptive value on possession but such presumption is not static but rebuttable in nature. All the documents as mentioned in the judgment of the First Appellate Court apart from the certified copy of the amended written statement and the counter-claim filed in two suits namely Title Suit no. 541 of 2014 and Title Suit no. 542 of 2014 which are primarily a partition suit amongst the co-sharers instituted much after the institution of the present suit. The question of possession is one of the important factor to understand the intention of the parties in relation to the transactions entered into by and between them as parting of the possession simultaneously with the execution of the purported deed of sale is one of the ingredients to gather the intention of the parties in relation to such transactions. It is a specific

stand of the plaintiff-respondent that despite the execution and registration of the ostensible sale-deed the possession all along remained with them. The plaintiff-respondent also produced the certified copy of the judgment and decree passed in connection with the suit instituted by Somnath Mukhopadhyay against the plaintiff no. 1 and the defendant-appellant herein seeking a declaration of right on the basis of a deed of sale executed by the defendant-appellant in his favour and permanent injunction protect in the possession. The said suit was dismissed in contest with the categorical finding that the said Somnath Mukhopadhyay never received possession nor the said sale-deed executed by the defendant-appellant in his favour creates any right, title and interest in him. The judgement of the Court and the finding recorded therein is sacrosanct unless the same is set aside by the Appellate Court. The defendant-appellant was a party to the said suit and obviously was supporting the case of the said Somnath Mukhopadhyay that he acquired right, title and interest by virtue of a deed of sale executed by him in his favour and also parted with the possession therewith. The judgment in which the defendant-appellant is a party is binding upon him and he cannot contradict the findings made therein in a subsequent proceeding. The moment the Court has declared that the possession remained with the respondent, it is not open to the defendant-appellant to contradict the possession remained with him. The entry in the Record of Right may have the presumption of its correctness but the same cannot be said to be sacrosanct if a convincing material and the evidence is produced to disprove it. The entry of Record of Right neither creates any title

nor extinguish it but may sometime have presumptive value of possession which is rebuttable in nature. The findings returned in the judgment delivered by the Court on contest with regard to the possession cannot lose its binding effect on the parties to the said suit and, therefore, the Record of Right in relation to a presumption of possession is sufficiently rebutted and, therefore, the Appellate Court do not require those documents for the purpose of reopening such issue which has attained the finality upon dismissal of the First Appeal. So far as the original sale-deed dated 17.2.1976 is concerned, the same has already been marked exhibit and the Court after considering the recitals therein have arrived at the conclusion that it was an ostensible sale and not an absolute sale. In relation to an issue involved in the instant suit we do not find that the pleadings filed in the partition suit have any bearing more particularly, the aforesaid suits were filed subsequent to the instant suit. The Appellate Court has held that the aforesaid document sought to be produced by way of an additional evidence does not require for pronouncing a better judgment or for any substantial cause of like nature.

We thus do not find the instant case involves in the substantial question of law. The appeal is dismissed under Order 41 Rule 11 of the Code.

No order as to costs.

Urgent Photostat certified copies of this judgment, if applied for, be made available to the parties subject to compliance with requisite formalities.

I agree.

(Prasenjit Biswas, J.)

(Harish Tandon, J.)