

IN THE HIGH COURT AT CALCUTTA

(Civil Appellate Jurisdiction)

APPELLATE SIDE

Present:

The Hon'ble Justice Rajasekhar Mantha

And

The Hon'ble Justice Supratim Bhattacharya

FA 253 of 2010

Smt. Draupadi Poiria and another

Vs.

Sri Bhagabat Chandra Poiria and others

For the appellants : Mr. Gopal Chandra Ghosh
Mr. Soumen Kumar Dutta
Mr. Sabyasachi Bhattacharjee
For the respondents : Mr. Anit Rakshit
Mr. Amit Baran Dash
Ms. Ankana Sarkar

Heard On : 18.07.2023

Judgement Delivered On : 10.08.2023

Supratim Bhattacharya, J.:-

1. The instant appeal has been preferred by the appellants/plaintiffs being aggrieved by and dissatisfied with the Judgment and order passed by the

Ld. Civil Judge Sr. Divn. Purba Medinipur in the Title Suit 31 of 1993 on 16.06.2010.

- 2.** Through the aforementioned Judgment the Ld. Trial Judge has been pleased to dismiss the said suit.
- 3.** The lis involves declaration and partition along with mandatory injunction.
- 4.** The appellants/plaintiffs namely Draupadi Poirā and Santilata Giri, being the wife and daughter of Ganesh Chandra Poirā, contends that one Narendra Nath Poirā was the father of Ganesh Chandra Poirā and Bhagabat Chandra Poirā.
- 5.** The said Ganesh Chandra Poirā died an unnatural death on 03.01.1993, during the absence of his wife who had gone to her father's house at that point of time.
- 6.** Till 03.01.1993 both Ganesh Chandra Poirā and his elder brother Bhagabat Chandra Poirā were residing in joint mess. Names of both of them were recorded in the record of rights. Bhagabat Chandra Poirā being the elder brother was acting as the head of the family and used to look after all the properties.
- 7.** On 02.01.1993 the appellant no.1 namely Draupadi Poirā went to her paternal house and returned to her matrimonial house on 05.01.1993. After returning she came to know that the said Ganesh Chandra Poirā has expired and the body has already been cremated. On enquiry she

came to know that the death of Ganesh Chandra Poirā was unnatural. The matter was reported to the police.

- 8.** Subsequently after lapse of time the said appellant/plaintiff no.1 requested the defendant no. 1 to have partition of the suit properties when the defendant no. 1 refused to have partition and expressed that Ganesh Chandra Poirā has transferred his share in favour of the respondents no. 2 and 3 namely Bibhutibhusan Poirā and Padmabati Poirā the son and wife respectively of the said Bhagabat Chandra Poirā, in the year 1977 and 1979 by executing a *Deed of Nirupan* and a sale deed.
- 9.** Thereafter the appellant/plaintiff obtained the certified copy of the *Deed of Nirupan* dated 20.9.1977 in respect of the A schedule land and the sale deed dated 05.03.1979 in respect of the B schedule land.
- 10.** The contentions of the respondents/defendants is that the A schedule property originally belonged to Ganesh Chandra Poirā and Bhagabat Chandra Poirā having equal share in respect of the same. On 20.09.1977 Ganesh Chandra Poirā transferred his share through a *Deed of Nirupan* being no. 6152 absolutely in favour of Bibhutibhusan Poirā and also transferred life interest in favour of Padmavati Poirā. Bhagabat Chandra Poirā.
- 11.** It is also the contention of the respondents that on 05.03.1979 Ganesh Chandra Poirā sold the B schedule property by a registered deed

of sale being deed no. 2177 in favour of Bibhutibhusan Poirā to repay the loan taken by Ganesh Chandra Poirā for the marriage of his daughter.

- 12.** The appellants/plaintiffs have alleged that both the deeds have been procured by way of misrepresentation. On the basis of the said allegations the appellants/plaintiffs have sought for declaring both the deeds as illegal and void being vitiated by fraud, undue influence and misrepresentation.
- 13.** As such the appellants /plaintiffs claim share and partition in respect of the scheduled mentioned properties
- 14.** The Ld. Counsel appearing on behalf of the appellants/plaintiffs during his submission has submitted that the appellants and the respondents used to live in a joint mess and the respondent namely Bhagabat Poirā being the elder brother used to look after the properties while the properties were recorded jointly in the name of both the brothers namely Ganesh Chandra Poirā and Bhagabat Chandra Poirā. He has further submitted that the said Ganesh Chandra Poirā could only sign but he was not a literate person.
- 15.** The Ld. Counsel has further submitted that during the subsistence of the life of Ganesh Chandra Poirā no question was raised by the respondents as regards to individual possession of the suit properties on the basis of the *Deed of Nirupan* or on the basis of the deed of sale which now are being claimed to have been executed by the said Ganesh Chandra Poirā during his lifetime.

- 16.** He has further submitted that it is curious to note that after the death of Ganesh Chandra Poirā the *Deed of Nirupan* and the Deed of Sale have come out of the blue which was not heard of to have been executed by Ganesh Chandra Poirā.
- 17.** The Ld. Counsel has further submitted that the said two deeds being *Deed of Nirupan* and the Sale Deed on the basis of which the respondents are seeking the said properties if at all had ever been executed by the said Ganesh Chandra Poirā those have been executed on the basis of misrepresentation and fraud, which has been committed by the respondents upon the said Ganesh Chandra Poirā.
- 18.** The Ld. Counsel has further submitted that the said two deeds are spurious which have been corroborated by the fact that the said Ganesh Chandra Poirā sustained an unnatural death and that too during the absence of his wife. He has further submitted that the last nail on the coffin has been hammered by the respondents by the fact that the body of the said Ganesh Chandra Poirā has been cremated in the absence of his wife and daughter.
- 19.** Relying upon the aforesaid facts and circumstances, the Ld. Counsel has tried to impress upon the Court that the Judgment passed by the Ld. Trial Judge is not in accordance with the facts and law and is to be set aside. The Ld. Counsel appearing on behalf of the appellants has cited the following judgments, which are as follows:
- i) AIR 1975 Madras 333,

- ii) AIR 1975 Madras 88,
- iii) AIR 1962 SC 814,
- iv) AIR 1977 All 36,
- v) AIR 1998 SC 310

20. The Ld. Counsel appearing on behalf of the respondents submitted that the Judgement passed by the Ld. Trial Judge is in accordance with law and is not dehors of the facts and circumstances which circumscribed the instant fact of the lis.

21. He has further submitted that the said Ganesh Chandra Poiria had executed the registered deed of sale in favour of the respondent/defendant no.2 namely Bibhuti Bhusan Poiria that is the son of Bhagabat Chandra Poiria for the purpose of repaying loan which he had obtained for the purpose of his daughter's marriage.

22. The Ld. Counsel has further submitted that the appellant/plaintiff no. 1 namely Draupadi Poiria is not the wife of Ganesh Chandra Poiria instead one Durgamani is the wife of the said Ganesh Chandra Poiria. He has further submitted that the onus of proving misrepresentation lied upon the appellants/plaintiffs who have alleged as regards to the said misrepresentation.

23. In the instant case the appellants have not been able to prove that the two deeds in question which are being alleged to have been executed by way of misrepresentation have been obtained by the respondents after

performing misrepresentation. As such he has prayed for dismissal of the instant appeal.

24. The moot point for consideration is as to whether the Deed of Arpan and the Deed of Sale are genuine or as to whether the said two deeds have been obtained by misrepresentation and undue influence.

25. This Court first takes up the fact as to who have deposed on behalf of the appellants/plaintiffs. On behalf of the appellants/plaintiffs the witnesses are Rabindra Nath Giri, PW1, who is the son-in-law of Ganesh Chandra Poiria, Sri Haricharan Jana, another PW1(as is reflected from the deposition sheets) who is the brother of Draupadi Poiria, Bhaskar Chandra Shee, PW2 a neighbour of the plaintiffs, Adhir Kumar Poiria, PW3, another neighbour of the plaintiffs, Biswanath Shee, PW4 another neighbour of the plaintiffs and Amalendu Sasmal, PW5 an Advocate who conducted local inspection commission.

Thus from the list of witnesses it reveals that neither the wife nor the daughter of Ganesh Chandra Poiria has deposed in this case who might have had the knowledge as because these two persons were the best persons who had been with the said Ganesh Chandra Poiria, instead the son-in-law who has become a part of the family later on and not been in the thick of things since the beginning has been placed to adduce evidence.

26. This fact of withholding the main witnesses that is the wife and the daughter of Ganesh Chandra Poiria since deceased, does not help the

appellants/plaintiffs. Among the appellants/ plaintiffs who could have presented the clear picture before the Court and could have helped the Court, has not come up before the Court to depose. This raises doubt in the mind of this Court and adverse inference is to be taken into consideration as to for what reason best known to them they being the wife and the daughter withheld themselves from deposing.

- 27.** The evidence of Rabindranath Giri is based entirely on the fact of knowledge obtained from others. On going through the evidence of the said PWs it reveals that none of the witnesses appearing on behalf of the appellants/plaintiffs have been able to prove the fact of misrepresentation or undue influence at the time of execution of the said *Deed of Nirupan* and Sale deed.
- 28.** None of the witnesses during cross examination has deposed that he has himself seen or was present at the time of execution of the said two deeds in question or that the appellants/plaintiffs were present at the time of execution of the either the Deed of Nirupan or the Sale deed.
- 29.** In this context this Court relies upon the authority reported in **(2010) 10 SCC 512**, in the case between ***Man Kaur (dead) by LRS Vs. Hartar Singh Sangha***, wherein it has been stated as follows:

“14. In Vidhyadhar v. Manikrao [(1999) 3 SCC 573] this Court reiterated the following well-recognised legal position: (SCC pp. 583-84, para 17)

17. Where a party to the suit does not appear in the witness box and states his own case on oath and does not offer himself to be cross-examined by the other side, a

presumption would arise that the case set up by him is not correct....

17. To succeed in a suit for specific performance, the plaintiff has to prove: (a) that a valid agreement of sale was entered into by the defendant in his favour and the terms thereof; (b) that the defendant committed breach of the contract; and (c) that he was always ready and willing to perform his part of the obligations in terms of the contract. If a plaintiff has to prove that he was always ready and willing to perform his part of the contract, that is, to perform his obligations in terms of the contract, necessarily he should step into the witness box and give evidence that he has all along been ready and willing to perform his part of the contract and subject himself to cross-examination on that issue. A plaintiff cannot obviously examine in his place, his attorney-holder who did not have personal knowledge either of the transaction or of his readiness and willingness. Readiness and willingness refer to the state of mind and conduct of the purchaser, as also his capacity and preparedness on the other. One without the other is not sufficient. Therefore a third party who has no personal knowledge cannot give evidence about such readiness and willingness, even if he is an attorney-holder of the person concerned.

18. ... A landlord who seeks eviction of his tenant, on the ground of his "bona fide" need and a purchaser seeking specific performance who has to show his "readiness and willingness" fall under this category. There is however a recognised exception to this requirement. Where all the affairs of a party are completely managed, transacted and looked after by an attorney (who may happen to be a close family member), it may be possible to accept the evidence of such attorney even with reference to bona fides or "readiness and willingness". Examples of such attorney-holders are a husband/wife exclusively managing the affairs of his/her spouse, a son/daughter exclusively managing the affairs of an old and infirm parent, a father/mother exclusively managing the affairs of a son/daughter living abroad.

21. The plaintiff who ought to have given evidence never appeared and gave evidence. As his attorney-holder PW 1 had no knowledge of the transaction, the plaintiff solely relied on the evidence of the property dealer Balraj Singh (PW 2) to prove the execution of the agreement, the terms of the agreement, his readiness and

willingness to perform the agreement and the alleged breach by the defendant. But Balraj Singh cannot become a substitute for the plaintiff to give evidence about the finances or intentions or the readiness and willingness of the plaintiff which were within the personal knowledge of the plaintiff. Balraj Singh was a property dealer engaged by the plaintiff and supporting the plaintiff. He was not an attorney-holder acting on behalf of the plaintiff. Therefore, neither the evidence of Jagtar Singh (PW 1) nor the evidence of Balraj Singh (PW 2) can be relied upon to prove that plaintiff was always ready and willing to perform his obligations under the contract, in terms of the contract. Therefore, it has to be held that though there were necessary averments in the plaint about the readiness and willingness of the plaintiff, and though PW 1 and PW 2 gave evidence about his readiness and willingness, the suit has to fail for failure to comply with Section 16(c) of the Specific Relief Act, as there was no acceptable or valid evidence of such readiness and willingness of the plaintiff to perform his part of the obligations in terms of the contract.

22. The respondent relied upon the following observation of this Court in *P. D'Souza v. Shondrilo Naidu* [(2004) 6 SCC 649] : (SCC p. 650f-h)

“It is indisputable that in a suit for specific performance of contract the plaintiff must establish his readiness and willingness to perform his part of the contract. The readiness and willingness on the part of the plaintiff to perform his part of contract would also depend upon the question as to whether the defendant did everything which was required of him to be done in terms of the agreement for sale. The question as to whether the onus was discharged by the plaintiff or not will depend upon the facts and circumstances of each case. No straitjacket formula can be laid down in this behalf.

23. The respondent next relied upon the following observations of this Court in *Aniglase Yohannan v. Ramlatha* [(2005) 7 SCC 534] : (SCC p. 540, para 12)

“12. The basic principle behind Section 16(c) read with Explanation (ii) is that any person seeking benefit of the specific performance of contract must manifest that his conduct has been blemishless

throughout entitling him to the specific relief. The provision imposes a personal bar. The court is to grant relief on the basis of the conduct of the person seeking relief. If the pleadings manifest that the conduct of the plaintiff entitles him to get the relief on perusal of the plaint he should not be denied the relief.”

30. Considering the aforementioned facts and circumstances it is apparent that none of the witnesses appearing on behalf of the appellants/ plaintiffs had personal knowledge about the two deeds in question and as such the appellants plaintiffs have not been able to prove the fact that the two deeds that is the deed of Nirupan and the deed of sale which the appellants are seeking to be adjudged as void have been executed by misrepresentation or by committing fraud.
31. It is settled law that the appellants/plaintiffs are to prove their own case and they cannot bank upon the laches on the part of the respondent/defendants. In this instant lis initially the onus of proof lied upon the appellants /plaintiffs to prove the fact that the two deeds that is the Deed of Nirupan and the Deed of Sale were executed under abnormal circumstance and had been executed on the basis of misrepresentation as because the appellants /plaintiffs have prayed for cancellation of the said deeds as such the question of shifting of the burden of proof has not arisen in this instant lis.
32. The judgments cited on behalf of the appellants/plaintiffs have been taken into consideration and have been found to be not applicable in this instant case, as because the citations stress upon the point of shifting of burden of proof.

- 33.** The question of shifting of burden of proof arises when the appellants/plaintiffs proves his contentions. In this instant lis the appellants/plaintiffs have not been able to prove their contentions and have not discharged their responsibility as such the question of shifting of burden of proof upon the respondents/opposite parties does not arise at all.
- 34.** As such this Court finds no reason to interfere with the Judgment and Order passed by the Ld. Trial Court.
- 35.** **FA 253 of 2010** stands accordingly **dismissed**.
- 36.** Parties shall be entitled to act on the basis of the server copy of the judgment and order placed on the official website of the Court.
- 37.** Urgent Xerox certified photo copies of this judgment, if applied for, be given to the parties upon compliance of the requisite formalities.

I agree,

(Supratim Bhattacharya, J.)

(Rajasekhar Mantha, J.)