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TUESDAY

Court : 04
Item : 01
Matter : SA
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IN THE HIGH COURT AT CALCUTTA
CIVIL APPELLATE JURISDICTION
APPELLATE SIDE

SA 96 of 2023
(SAT 67 of 2023)
with
CAN 1 of 2023

Goutam Naskar & Anr.
Vs.
Minati Sarkar & Ors.

Mr. Deb Dutta Basu, Advocate
Mr. Rabindra Kumar Jaiswal, Advocate
Mr. Partha Shankar Kundu, Advocate

.....for the Appellants

Mr. Sourav Sen, Advocate
Mr. Anath Nath Naskar, Advocate
Ms. Saptaparni Raha, Advocate
Ms. Sinjini Chakraborty, Advocate
Ms. Adrisanata Chakraborty, Advocate

.....for the Respondents

1. Both the Courts have concurrently found that the plaintiffs have miserably failed to prove their right, title, and interest in respect of the subject property and proceeded to dismiss the suit for partition and separation of shares.
2. The plaintiffs claimed right, title and interest through one Sudhanya Naskar who was one of the sons of Kanailal Naskar, an admitted owner of the property. It is averred that the said Kanailal Naskar died intestate on 28.10.1962 leaving behind him surviving Dhirubala Naskar, the widow of Naba Kumar Naskar who is the other son of Sudhanya Naskar and Bhanumoti Kayal, the daughter of Sudhanya Naskar.
3. It is a specific case of the plaintiffs that upon the death of the admitted owner, the heirs inherited the property in equal share and, therefore, the plaintiffs

acquired right, title and interest on the death of his father namely Sudhannya Naskar and despite the request having made to the defendants barring Bhanumoti Kayal, who is the heir and legal representative of Naba Kumar Naskar. Admittedly, Bhanumoti Kayal did not appear nor contested the said suit. The suit was contested by the heirs of Naba Kumar Naskar with the specific plea that after the death of Kanailal Naskar, his heirs and successors i.e. the widow, two sons, sold, transferred, and conveyed the said property in favour of one Becuhuram Mondal by executing a deed of sale dated 08.11.1963. It is further averred that the said Becuhuram Mondal subsequently sold, transferred and conveyed the said property to Naba Kumar Naskar by executing and registering a deed of sale dated 06.01.1968 and, therefore, the plaintiffs cannot claim any right, title and interest through Sudhanya Naskar as he has divested all his right, title and interest in favour of Becuhuram Mondal in the year 1963.

4. Becuhuram Mondal was cited as a witness in the said suit who took a diametrical opposite stand to the stand of the contesting defendants that he neither purchased the suit premises from the heirs of the said Kanailal Naskar nor sold the same to Naba Kumar Naskar as alleged by the contesting defendants. Both the Courts below disbelieved the credibility of the deposition of Becuhuram Mondal as the documents which are produced by the contesting defendants and marked exhibits, runs counter to such stand.
5. Learned Counsel for the appellants vigorously

submits that Sudhanya Naskar never executed any sale deed in his lifetime divesting his undivided right, title and interest in respect of the suit premises in favour of Becuhuram Mondal and, therefore, the alleged deed cannot be construed in such manner. Furthermore, an argument is sought to be advanced that the daughter Bhanumoti Kayal, was not a party to the sale deed and her share remain unaffected. It is further submitted that subsequently the said Bhanumoti Kayal executed a deed of gift in favour of the plaintiffs and, therefore, the plaintiffs acquired right, title and interest in respect of the suit property. Therefore, the findings of both the Court below are perverse and liable to be interfered with.

6. The first and foremost point which emerged in course of hearing is whether the said Bhanumoti Kayal was the daughter of the Kanailal Naskar which required to be ascertained first. It is sought to be contended by the Counsel for the appellant that the said Bhanumoti Kayal is arraigned as the defendant no. 2 in the said suit which leads to an unescapable conclusion that she is one of the co-owners of the property. Mere impleading a party in a proceeding does not *ipso facto* create a right into such party unless it proved by cogent evidence that she had a semblance of right, title and interest in respect of the property. Furthermore, the plaintiff being a *dominus litis* can implead any person as a party to the proceeding but it cannot be construed that such impleament creates a right into such person if the other contesting defendants are disputing the existence of such party and/or

acquiring any right, title and interest in respect of the suit property, more particularly, in a suit for partition and separation of shares.

7. Though the contesting defendants in the written-statement have dealt with the averments made in the plaint, where the plaintiffs/appellants have stated that the Bhanumoti Kayal was the daughter of Kanailal Naskar as a matter of record but subsequently, the contesting defendants have clarified that upon the death of Kanailal Naskar, the widow and two sons were the successors who executed and registered a deed of sale in favour of Becuhuram Mondal on 08.11.1963.
8. We have gone into the examination-in-chief of the first witness who is appellant no. 1 herein, to ascertain the veracity and legality of the stand taken before the Court below as well as before us. We find that a stand was sought to be taken that Sudhanya Naskar never executed a deed of sale nor entered into any agreement for sale with Becuhuram Mondal and, therefore, his share remain unalienated. We have seen the deed of sale dated 08.11.1963 where the widow and the two sons including the Sudhanya Naskar was shown as vendors and Becuhuram Mondal as the purchaser therein.
9. The said deed is executed and registered more than thirty years back and the moment it came from a proper custody; it raises a presumption of due execution and the existence of the documents unless the same is rebutted by a convincing evidence. It is trite law that in the event of contradiction between the oral statement made on

oath and the documentary evidence, the latter will prevail unless there is strong evidence produced by the party which would lead to an impeccable conclusion that the said document cannot be believed to have been in existence or executed by the persons named therein.

10. Interestingly, the said Becuhuram Mondal has filed an affidavit and deposed that he neither purchased the suit property nor sold the same to Naba Kumar Naskar at any given point of time. Taking clue from such stand of the Becuhuram Mondal it is sought to be contended by the learned Counsel for the appellant that the contesting defendants cannot rely upon the sale deed dated 08.11.1963 nor the sale deed dated 06.01.1968. Such stand appears to be contrary to the stand of the plaintiffs/appellants themselves which can be seen from the examination-in-chief. The said Goutam Naskar while deposing in-chief on 12.08.2004, proceeded to file an agreement for sale which according to him, was executed by Dhirubala Naskar and Naba Kuma Naskar in favour of Becuhuram Mondal. Even thereafter a deed dated 19.10.1963 was sought to be produced but since it could not be proved properly, it was kept 'X' for identification.
11. The moment Becuhuram Mondal took a firm stand that he neither purchased the property nor sold it to Naba Kumar Naskar, the question of agreement for sale executed in favour of Becuhuram Mondal cannot come into existence. The tenet of the evidence of the first witness appears to us is to the effect that their predecessor was not a party to the agreement for sale nor a party to the purported

deed dated 08.11.1963 and, therefore, his undivided share remain unaltered and/or unaffected. If the parties have not taken any stand and, in fact, proceeded on a specific premise that Sudhanya Naskar never executed a sale deed in favour to Becuhuram Mondal, the statement of Becuhuram Mondal that he neither purchased nor sold the suit premises, is not a reliable piece of evidence.

12. The aforesaid sale deeds are registered documents and executed more than thirty years before the same is produced before the Court of law. The presumption of its due execution cannot be ruled out. Merely, because Becuhuram Mondal took a stand that he neither purchased nor sold the suit premises, cannot discharge the onus nor can we construe the presumption raised under Section 90 of the Evidence Act having rebutted. Furthermore, the learned Counsel cannot take a stand at the Bar which has not been taken by his client in the Court below nor in the pleading.
13. If the stand of the plaintiffs/appellants that there was an agreement for sale in favour of Becuhuram Mondal and the documents to that effect have been filed, it is too late in a day to take a contrary stand that the statement of Becuhuram Mondal is sacrosanct and, therefore, the Court should believe his statement and should discard the aforesaid sale deeds. Apart from the same, the aforesaid sale deeds were disclosed in the written-statement by the contesting defendants yet the plaintiffs did not amend the plaint assailing the aforesaid deeds to be void or illegal and required to be cancelled and delivered up.

14. The period of limitation has intervened, and the plaintiffs/appellants are precluded from taking such plea at the second appellant stage. A plea is sought to be urged that an application under Order XLI Rule 27 of the Code of Civil Procedure as well as application for appointment of a hand-writing expert was taken out before the First Appellate Court which is rejected by passing the impugned order and, therefore, the Court should admit the appeal as the veracity and the genuinity of the aforesaid sale deeds is required to be established.
15. At the first blush, it appears to us a convincing argument but after perusal of the documents and the findings returned by the First Appellate Court, we do not think that it would enure to any benefit of the plaintiffs/appellants. The said Becuhuram Mondal has not denied the signature appended on the aforesaid sale deed to be forged.
16. Interestingly, the said witness took the stand that he neither purchased nor sold the same to the Naba Kumar Naskar and even then, he further went on to depose that any land revenue deposited in his name has, in fact, not deposited by him. Since the aforesaid sale deeds have not been challenged within the period of limitation provided therefor, the appointment of the handwriting expert in order to verify the signature of the said Becuhuram Mondal shall be of no consequences and, therefore, we do not find any infirmity and/or illegality in the judgment of the Appellate Court in rejecting the aforesaid applications.
17. From whatever angle, we looked at, we do not find any involvement of substantial questions of law in

the instant appeal.

18. Thus, the appeal being **SA 96 of 2023** stands **dismissed** at the admission stage. No order as to costs.

(Harish Tandon, J.)

(Madhuresh Prasad, J.)