

(1992) 03 GAU CK 0002

Gauhati High Court

Case No: Second Appeal No. 36 of 1985

Md Daulat Ali

APPELLANT

Vs

Kohila Khatoon

RESPONDENT

Date of Decision: March 30, 1992

Acts Referred:

- Civil Procedure Code, 1908 - Section 100
- Civil Procedure Code, 1908 (CPC) - Section 100
- Evidence Act, 1872 - Section 102, 102

Citation: (1992) 1 GLJ 305

Hon'ble Judges: D.N.Baruah, J

Bench: Single Bench

Advocate: S.Rahman , S.N.Sharma, N.Dutta, S.Huda, L.P.Sharma, A.Bari, A.A.Mir,
P.K.Goswami, Advocates appearing for Parties

Judgement

1. The substantial questions of law formulated in this second appeal are (i) whether the impugned judgment is a proper judgment of reversal?, (ii) whether the impugned judgment and decree are sustainable in law in view of erroneous application of legal principle by the Court below placing burden not on the plaintiff, but on the defendant to prove plaintiff's case?, and (iii) whether the impugned judgment and decree are vitiated in law inasmuch as the findings are not supported by acceptable evidence and thus are perverse?

2. The respondent in this appeal was the plaintiff in the suit. She filed a suit for cancellation of two registered deed of sale dated 29.5.76. and 22.6.76. Both the deeds were registered before the Registering Authority on the respective dates of the execution of the deeds. The plaintiff's case is that her sister Mustt Gulban Bibi was the absolute owner of the properties described in the Schedule of the said sale deeds. According to the plaintiff, the deeds were executed and registered by making false inducement. So, the execution of the sale deeds were obtained fraudulently,

and, therefore, liable to be set aside and cancelled. The plaintiff further stated that during the life time of her sister Mustt. Gulban Bibi the property was gifted to her. Daulot Ali, defendant No. 3 father of Md Omar AH (defendant No.1) and Md Safor Ali (defendant No. 2), purchased the property fraudulently. The defendants contested the suit challenging the allegations. Witnesses were examined on behalf of the plaintiff as well as on behalf of the defendants. After examination of witnesses the Munsiff No.1, Barpeta, dismissed the suit with cost answering the issues framed therein against the plaintiff.

3. The plaintiff filed appeal (Title Appeal No. 27 of 1983) before the Assistant District Judge, Barpeta, against the judgment and decree passed by the Munsiff. The Assistant District Judge after hearing the parties allowed the appeal setting aside the judgment and decree passed by the Munsiff observing that the sale deed executed by the sister of the appellant was null, void and inoperative in law. While deciding the appeal, the appellate Court found that the execution of the aforesaid sale deed was illegal as the executant Mustt. Gulban Bibi was an illiterate woman and not capable of understanding the legal implications, therefore, it was the burden of the defendants/respondents to prove the aforesaid sale deeds, and that the deed executed by Mustt. Gulban Bibi, was free from any inducement. The appellate Court further held that it was the burden of the purchaser to prove that the deeds were executed in accordance with the law. While passing the judgment the appellate Court also observed that late Mustt. Gulban Bibi was a Pardanashin lady and it was the duty of the Court to look into the matter. In this respect, the appellate Court also cited a decision of the Apex Court to show the manner in which the evidence of Pardanashin ladies are to be taken.

4. I have heard Mr. S. N. Sarma, learned counsel for the appellants. None appears for the respondent. The first submission of Mr. Sarma is that the appellate Court was absolutely wrong in putting the burden of proof of the documents on appellant/respondents. There was no inducement on the part of the appellant/respondents at the time of execution of the aforesaid deed. He has also submitted that in the pleadings nowhere it was stated that the sister of the respondent/appellant was an illiterate lady. Mr. Sarma has further stated that from the evidence also Mustt. Gulban Bibi cannot be said to be an illiterate person and incapable of understanding the implications of the sale deeds. Besides, according to the learned counsel for the appellants, it is the burden of the person who alleges fraud, to prove whether fraud was committed at the time of execution of the sale deed. The learned counsel for the appellants has also submitted that the appellate Court erred in law in decreeing the suit. He has further submitted that the findings of the first appellate Court is perverse and based on no evidence. The perverse finding is one of the grounds of this appeal also. Therefore, I am inclined to look into those portion of the evidence to which Mr. Sarma has drawn my attention. Looking into those portion of the evidence I find that DW 3, Abdul Rahman, husband of the vendor clearly stated that the sale deed was written by the Clerk as per instructions

of Mustt. Gulban Bibi. He further stated that the Clerk wrote the sale deed sitting in varanda and thereafter, he read over the same to him and his wife, Mustt. Gulbau Bibi. An Amount of Rs. 3000.00 was also paid to Mustt. Gulban Bibi and after that she executed the document. The plaintiff's witness also did not categorically state about the commission of fraud at the time of execution of the deed. From the evidence on record I find that there is enough evidence to show that Mustt. Gulban Bibi executed the sale deed fully knowing that it was a deed of sale and, therefore, there is no doubt that the execution of the deed was with her consent. It cannot also be said that the appellants fraudulently obtained the signature on the sale deeds. The evidence on record also do not indicate that Mustt. Gulban Bibi was a Pardanashin woman. Therefore, in my opinion, the finding of the lower appellate Court in this respect is contrary to the records and " cannot be sustained in law.

5. The lower appellate Court held that it was the burden on the appellantsdefendants to prove that the sale deed was executed without undue influence and without committing any fraud. The Court below further held that the appellantsdefendants failed to discharge their burden in proving the execution of the document. The Court also held that the burden of proof in case of an illiterate woman rests on the defendants and such burden was not discharged by the defendants.

6. It is well established principle of law that in case of allegation of fraud it is the duty of the plaintiff to give detail particulars of fraud in the plaint and that fraud must be proved by the plaintiff. In this case, the execution of the deed was admitted by the plaintiff, but the plaintiff alleged that such execution was under undue influence and by practicing fraud. Section 102 of the Evidence Act envisages the burden of proof in case of execution of documents by committing fraud. The test of the burden of proof in such case is on that person who would fail if no evidence at all was given on either side. Illustration (b) of section 102 squarely applies in such a case. The lower appellate Court erred in law by shifting the burden of proof to the defendants, and, therefore his finding cannot be sustained in law.

7. In view of the above discussion, in my opinion that the appellate Court committed illegality in arriving at the conclusion that the sale deed executed by Mustt. Gulban Bibi was inoperative in law. I, therefore, set aside the judgment and decree dated 10.12.84 passed by the Assistant District Judge, Barpeta in Title Appeal No. 27 of 1983 and restore the judgment and decree dated 23.8.83 passed by the Munsiff No. 1, Barpeta in Title Suit No. 25 of 1980.

In the result, the appeal is allowed. No order as to costs.