

(2012) 05 GAU CK 0033

Gauhati High Court (Agartala Bench)

Case No: Regular Second Appeal No. 12 of 2012

Sri Anjan Barman Choudhury

APPELLANT

Vs

Sri Ranjan Barman Choudhury

RESPONDENT

and Sri Sunil Ch. Sarkar

Date of Decision: May 9, 2012

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Section 100
- Transfer of Property Act, 1882 - Section 44

Hon'ble Judges: Subhasis Talapatra, J

Bench: Single Bench

Advocate: K.N. Bhattacharjee and Mr. S. Acharjee, for the Appellant; D. Chakraborty and Mr. H. Laskar, for the Respondent

Final Decision: Dismissed

Judgement

@JUDGMENTTAG-ORDER

S. Talapatra, J.

This appeal filed u/s 100 of the CPC (in short CPC) which is slated for consideration of admission is directed against the judgment and decree dated 01.03.2012 as passed by the learned Additional District Judge, West Tripura, Sonamura in Title Appeal No. 02 of 2011 affirming the judgment and decree dated 07.05.2011 passed by the learned Civil Judge, Senior Division, Court No. 1, Agartala, West Tripura in Title Suit No. 68 of 2007 whereby the suit was dismissed. The suit was instituted by the appellant for specific performance of contract and injunction. Later on, another relief by way of amendment was incorporated for cancellation of the sale deed No. 1-101843 dated 14.11.2005 as executed by the respondent No. 1, namely, Sri Ranjan Barman Choudhury, in favour of the respondent No. 2, namely, Sri Sunil Ch. Sarkar.

2. The appellant and the respondent No. 1 are the joint owners of the suit land as described in the Schedule-A of the plaint. The suit land was purchased by the father

of the appellant and the respondent No. 1 measuring 0.21 acre which devolved to the appellant and the respondent No. 1 after death of their father.

3. The appellant pleaded that the respondent No. 1 promised to sell his share in the suit land and stated that whenever the appellant could manage money the respondent No. 1 would sell the suit land to him. On 08.08.1996 the respondent No. 1 informed the appellant suddenly that he was in dire need of money and he would be selling off his share. Since the appellant have no money for payment of the consideration of the share, the defendant entered into an agreement to sale with the respondent No. 2 on 09.08.1996. The appellant attested the said written agreement to sale as the witness. Before the sale could be materialised in terms of the said agreement, the respondent No. 1 had filed a suit for partition being TS(P) 185 of 1996 in the Court of the learned Civil Judge, Sr. Division, West Tripura, Agartala seeking partition of their joint property as described in Schedule-A which comprised of the inherited property minus the acquired land. In that suit an ex parte preliminary decree was passed on 18.07.1998 against which the appellant filed an appeal being Title Appeal No. 24 of 2006 and the said appeal was also dismissed. Thereafter, the matter was before this Court by filing an appeal u/s 100, CPC. The High Court also dismissed the said second appeal. Thereafter, the appellant filed an application for appointment of a Survey Commissioner to determine the shares of both the parties. That proceeding as stated in the bar, is still pending.

4. In the year 2002, the respondent No. 2 filed one suit for specific performance being Title Suit No. 78 of 2002. The agreement to sale was not performed despite his readiness. In that suit, the appellant was the defendant No. 2 as he was the co-sharer of the property covered by the agreement to sale. The suit was decreed on 18.07.1998 and against the said decree an appeal was filed by the respondent No. 1 being Title Appeal No. 24 of 2006 which was also dismissed. Thereafter, a second appeal was filed in which this Court remanded the case to the court of the learned Addl. District Judge, Sonamura. In that appeal the respondent No. 2 and the respondent No. 1 settled the matter by way of compromise and the appeal ended up by a compromise decree. In the petition for recording the compromise etc. the appellant was not a signatory. In the compromise petition, the price of the land was fixed at Rs. 2,25,000/- instead of what was earlier settled at Rs. 1,25,000/- and the earlier agreement as the plaintiff, the appellant herein, pleaded had become inoperative by efflux of time. The plaintiff pleaded further that the sale should have taken place after the partition suit is decided finally. It appears that by the compromise the previous agreement was sought to be made novated.

5. On 06.06.2006, the respondent No. 1 and the plaintiff as pleaded in the plaint entered into an oral agreement with the appellant to the effect that the respondent No. 1 would sell his share to the appellant on consideration of Rs. 3,00,000/-. As such, the compromise as struck on 19.05.2007 was not a legally valid compromise as the said oral agreement to sale had superseded the agreement between the

plaintiff and the defendant (the respondent No. 2) dated 06.08.2006. The plaintiff further pleaded that he was ready and willing to perform his part of the contract. Subsequent thereto when the appellant knew that a sale deed was going to be executed in favour of the respondent No. 2 by the respondent No. 1, he filed an objection on 21.06.2007 to the Sub-Registrar and as a result, though the deed of sale was presented but the same was not registered. For the said action of the District Sub-Registrar, Sonamura, the respondents filed a writ petition being W.P. (C) No. 187 of 2007 and the said writ petition was disposed of by the judgment and order dated 03.12.2007 with a direction to the Sub-Registrar to register the sale deed dated 04.06.2007 as per law forthwith. In the said writ petition, however, the appellant was not a party and he was not also otherwise informed about the writ petition. On 14.12.2007 the District Sub-Registrar registered the sale deed. The plaintiff pleaded that the order dated 03.12.2007 was obtained by suppression of material facts. Moreover, it was pleaded that the sale deed as executed had transferred a land with specific boundary. Unless a joint property is partitioned, a co-sharer cannot transfer his share with specific boundary. The plaintiff, therefore, pleaded that the said sale deed is liable to be cancelled. The respondents filed a joint written statement in the Court of the learned Civil Judge, Sr. Division No. 2, West Tripura, Agartala wholly denying the existence of any oral agreement and stating that the said story was absolutely false. It was also denied that the sale deed was executed with specific boundary. It was stated in the written statement that it was agreed that the respondent No. 1 would sell the said property to the defendant No. 2 at a consideration of Rs. 2,25,000/- and the transfer was agreed to be completed within 15 days from the date of disposal of Title Appeal No. 24 of 2005. The appeal was disposed of on a compromise and the respondent No. 1 was under obligation to oblige that decree. He made all preparation for execution of the sale deed but for objection raised by the appellant herein that could not be registered in time despite the presentation after due execution. Ultimately, both the respondents had to invoke the jurisdiction of this High Court for a direction to the District Sub-Registrar to act in accordance with the law. When the said direction was issued by this Court, the District Sub-Registrar registered the sale deed as executed by the respondent No. 1 in favour of the respondent No. 2 to satisfy the compromise decree dated 23.05.2007.

6. On consideration of the evidence as led the suit being Suit No. 68 of 2007 was dismissed by the judgment and decree dated 07.05.2011 holding that the appellant had failed to prove the existence of any oral agreement dated 06.08.2006. Apart that, the sale deed dated 14.12.2007 as was registered as per the direction of this Court was not held to be illegal. Against that judgment and order, an appeal was filed by the present appellant in the Court of the learned Addl. District Judge, West Tripura, Sonamura, being Title Appeal No. 02 of 2011 which the learned Addl. District Judge after due consideration of all the issues and re-appreciation of the evidence held that the appeal was devoid of merit and accordingly the said appeal

was dismissed.

7. Being aggrieved, the present appeal has been filed and the following substantial questions of law have been suggested in the Memorandum of Appeal for consideration at the admission.

- (a) Whether there was non-consideration of material fact of lapse of the agreement dated 09.08.1996 has made the findings perverse?
- (b) Whether by disbelieving the oral agreement between the respondent No. 1 and the appellant the trial Court committed serious illegality or not?
- (c) Whether the learned Courts below failed to consider the compromise decree made behind the back of one of the respondents is illegal?
- (d) Whether the registration of the sale deed as per the direction of the High Court has invalidated the deed itself?
- (e) Whether non-consideration of the core issue and material facts on records and the observations made in the judgment by the trial Court as rendered by the first appellate Court perverse?
- (f) Whether the learned Courts below failed to consider that the impugned sale deed has not been executed in terms of the compromise decree?
- (g) Whether by compromise decree the respondent Nos.1 and 2 accepted that the earlier agreement had lapsed by elapse of time is a substantial question of law?

Apart the suggested substantial questions of law, this Court also proposed to consider that whether transfer of a share of the unpartitioned property by one of the co-sharers is valid if it is found the said transfer has been made giving the specific boundaries against his share.

8. Mr. K.N. Bhattacharjee, learned Senior Counsel assisted by Mr. S. Acharjee, learned counsel appearing for the appellant strenuously urged before this Court to re-appreciate the concurrent finding of fact without pointing out how the findings have been rendered perverse or that how and what part of the evidence has not been considered.

9. It is well settled that the question what has not been raised in the trial Court or in the first appellate Court, the said question of fact cannot be raised in the second appeal.

10. There is no substance in the suggested substantial questions (a), (b), (d), (e) and (f) for being absolutely vague. For the concurrent findings of the trial Court and the appellate Court that the oral agreement has not been proved, the substantial questions at (b) and (g) cannot be sustained in as much as the agreement to sale is concerned with the respondents in absence of lien. In discharging the obligation as accepted and mandated by the said compromise decree, when the sale deed has

been executed and registered for transfer of share the same cannot in ordinary course be stated in conflict with law or any right or terms of the compromise decree. The findings of the courts below cannot be faulted with. The suggested question that whether the compromise decree, that has been passed in Title Appeal No. 01 of 2007 can be held to be valid as the appellant did not sign that deed of compromise. It is not in dispute that the appellant was a party in the said appeal and the compromise decree as passed by the learned Court of the Addl. District Judge, West Tripura, Sonamura, had come to the knowledge of the appellant but he did not challenge the said decree in the appropriate forum and as such the said decree has reached its finality and that decree on reaching its finality is also and equally binding upon the appellant. As such, this suggested substantial question of law is held devoid of any substance.

11. On the other hand, Mr. D. Chakraborty, learned counsel appearing for the respondents stated that by the concurrent finding of the learned trial Court and the first appellate Court, the existence of the oral agreement between the respondent No. 1 and the appellant has been held as not proved. Now, this court shall not re-appreciate the evidence by making a roving inquiry since the same is not permissible within the narrow campus of an appeal filed u/s 100 of the CPC. Apart that, he also responded to the question that was taken for consideration by this Court that whether in view of Section 44 of the Transfer of Property Act which stipulates that "Where one of two or more co-owners of immovable property legally competent in that behalf transfers his share of such property or any interest therein, the transferee acquires as to such share or interest, and so far as is necessary to give, effect to the transfer, the transferor's right to joint possession or other common or part enjoyment of the property and to enforce a partition of the same, but subject to the conditions and liabilities affecting at the date of the transfer, the share or interest so transferred.

Where the transferee of a share of a dwelling house belonging to an undivided family is not a member of the family, nothing in this section shall be deemed to entitle him to joint possession or other common or part enjoyment of the house", the sale deed in question does suffer from the legal disability calling for cancellation.

12. The sale deed that has been executed by the respondent No. 1 cannot be said invalid for the reason that the fact in this regard has not been correctly reflected in the pleadings. From a plain reading of the sale deed it would transpire that it has been categorically mentioned that the sale was for transfer of "half share of the joint property land" measuring 10 gandas 2 kara 1 kranta 1 dhur i.e. the suit land. Mr. Chakraborty, learned counsel for the respondents further submitted that the condition of sale shall all the time over shadow the other description. If it is found, in any manner, those descriptions poised in contravention to the condition of sale, those would eclipse by the statutory implication. He referred a decision of the apex

Court as rendered in Gajara Vishnu Gosavi Vs. Prakash Nanasahed Kamble and Others, where it has been held that:

9. In Kartar Singh Vs. Harjinder Singh and others, this Court held that where the shares are separable and a party enters into an agreement even for sale of share belonging to other co-sharer, a suit for specific performance was maintainable at least for the share of the executor of the agreement, if not for the share of other co-sharers. It was further observed:

As regards the difficulty pointed out by the High Court, namely, that the decree of specific performance cannot be granted since the property will have to be partitioned, we are of the view that this is not a legal difficulty. Whenever a share in the property is sold, the vendee has a right to apply for the partition of the property and get the share demarcated.

In recent judgment in Ramdas Vs. Sitabai and Others, to which one of us (Dr. B.S. Chauhan J.) was a party placing reliance upon two earlier judgments of this Court in Mamidi Venkata Satyanarayana Manikyala Rao and Another Vs. Mandela Narasimhaswami and Others; and Sidheshwar Mukherjee Vs. Bhubneshwar Prasad Narain Singh and Others, this Court came to the conclusion that a purchaser of a co-parcener's undivided interest in the joint family property is not entitled to possession of what he had purchased. He has a right only to sue for partition of the property and ask for allotment of his share in the suit property.

10. There is another aspect of the matter. An agricultural land belonging to the coparceners/co-sharers may be in their joint possession. The sale of undivided share by one co-sharer may be unlawful/illegal as various statutes put an embargo on fragmentation of holdings below the prescribed extent.

11. Thus, in view of the above, the law emerges to the effect that in a given case an undivided share of a co-parcener can be a subject matter of sale/transfer, but possession cannot be handed over to the vendee unless the property is partitioned by metes and bounds, either by the decree of a Court in a partition suit, or by settlement among the co-sharers.

12. In the instant case, all the three courts below have recorded the finding of fact that there had been no partition of the suit property. Such concurrent finding does not require interference as there is nothing on record to show that it was perverse, being based on no evidence or contrary to the evidence on record.

13. Relying on the said decision of the apex Court, Mr. Chakraborty, learned counsel for the respondents emphatically submitted that the right of the person to whom the share has been transferred to, has been quite succinctly delineated by the apex Court and there is no space for interpreting the law contrary thereto.

14. Another point though faintly sought to be projected by the appellant that by way of the deed of compromise the earlier agreement to sale was relegated and as such

right of the appellant to seek specific performance of the oral agreement which was claimed to have entered into much prior to the said decree of compromise surfaced dominantly but when it is the concurrent finding of both the Courts below that there is no evidence as to the existence of any oral agreement between the appellant and the respondent No. 1, this question would definitely cave in without leaving any impact. It is well settled that the concurrent finding of facts unless of course it is pleaded by definite illustrations that those are perverse or there had been a total nonconsideration of a very important aspect relevant to the adjudication, the Court should not re-appreciate the evidence in a second appeal.

15. The apex Court in Jai Singh Vs. Shakuntala, held that:

...The submissions undoubtedly at the first blush seem to be rather attractive and it is on this particular issue which prompted this Court to have the matter argued in detail irrespective of the technicality as raised before this Court pertaining to the maintainability issue vis-a-vis the appeal. While scrutiny of evidence does not stand out to be totally prohibited in the matter of exercise of jurisdiction in the second appeal and that would in our view be too broad a proposition and too rigid an interpretation of law not worthy of acceptance but that does not also clothe the superior courts within jurisdiction to intervene and interfere in any and every matter. It is only in very exceptional cases and on extreme perversity that the authority to examine the same in extenso stands permissible. It is a rarity rather than a regularity and thus in fine it can thus be safely concluded that while there is no prohibition as such, but the power to scrutiny can only be had in very exceptional circumstances and upon proper circumspection.

16. In another decision as rendered in R.V.E. Venkatachala Gounder Vs. Arulmigu Viswesaraswami and V.P. Temple and Another, it is held:

33. The offshoot of the above discussion is that no question of law much less a substantial question of law arose in the case worth being gone into by the High Court in exercise of its second appellate jurisdiction u/s 100 of the CPC. The High Court was bound by the findings of fact arrived at by the two courts below and should not have entered into the exercise of re-appreciating and evaluating the evidence. The findings of facts arrived at by the courts below did not suffer from any perversity. There was no non-reading or misreading of the evidence. A high degree of preponderance of probability proving title to the suit property was raised in favour of the appellant and the courts below rightly concluded the burden of proof raised on the plaintiff having been discharged while the onus shifting on the defendant remaining undischarged. The judgment of the High Court cannot be sustained and has to be set aside.

17. In Hero Vinoth (minor) Vs. Seshammal, the apex Court enunciated the law as follows:

13. Though as rightly contended by learned Counsel for the appellant the scope for interference with concurrent findings of fact while exercising jurisdiction u/s 100 CPC is very limited, and re-appreciation of evidence is not permissible where the trial Court and/or the first Appellate Court misdirected themselves in appreciating the question of law or placed the onus on the wrong party certainly there is a scope for interference u/s 100 CPC after formulating a substantial question of law.

19. It is not within the domain of the High Court to investigate the grounds on which the findings were arrived at, by the last court of fact, being the first appellate court. It is true that the lower appellate court should not ordinarily reject witnesses accepted by the trial court in respect of credibility but even where it has rejected the witnesses accepted by the trial court, the same is no ground for interference in second appeal when it is found that the appellate court has given satisfactory reasons for doing so. In a case where from a given set of circumstances two inferences of fact are possible, one drawn by the lower appellate court will not be interfered by the High Court in second appeal. Adopting any other approach is not permissible. The High Court will, however, interfere where it is found that the conclusions drawn by the lower appellate court were erroneous being contrary to the mandatory provisions of law applicable or its settled position on the basis of pronouncements made by the Apex Court, or was based upon inadmissible evidence or arrived at by ignoring material evidence.

24(iii) The general rule is that High Court will not interfere with concurrent findings of the Courts below. But it is not an absolute rule. Some of the well recognized exceptions are where (i) the courts below have ignored material evidence or acted on no evidence; (ii) the courts have drawn wrong inferences from proved facts by applying the law erroneously; or (iii) the courts have wrongly cast the burden of proof. When we refer to "decision based on no evidence", it not only refers to cases where there is a total dearth of evidence, but also refers to any case, where the evidence, taken as a whole, is not reasonably capable of supporting the findings.

18. In many other decisions the apex Court propounded that the evidence should not be re-appreciated except in the exceptional cases where the findings are found *ex facie* perverse. In Thiagarajan and Others Vs. Sri Venugopalaswamy B. Koil and Others, the apex Court criticized the High Court in the terms as reproduced below:

In our opinion, the High Court has erred in holding that the appellants have failed to establish their title to the suit property evidently without appreciating the evidence on record in its proper perspective by making only reference to portions of evidence having once decided to reappreciate the evidence. The High Court, in our opinion, ought to have examined the entire evidence both oral and documentary instead of only a portion thereof especially while deciding to look into and reappreciate the evidence despite the limited scope u/s 100 CPC. In our view, the learned single Judge of the High Court has exceeded his jurisdiction in reassessing, reappreciating and making a roving enquiry by entering into the factual arena of the case which is not

the one contemplated under the limited scope of jurisdiction of a second appeal u/s 100 CPC.

19. On the face of the concurrent finding, not coloured by perversity this Court is not authorized to make any inquiry for the purpose of reappreciating the evidence and as such the proposed substantial questions of law primarily based on appreciation of fact cannot be accepted as projecting any substantial question of law. In absence of definite illustration of perversity this Court is bound to hold this at the threshold. The question that has been projected by this court has been adequately replied by Mr. Chakraborty, learned counsel for the respondents that the condition of sale clearly contains that the vendor was parting with his share of the land and not otherwise by the said deed of sale. This Court holds that even if boundaries are given in view of this condition of sale those are to be the insignificant part of the covenant of sale. Even the question of possession as recited in the said covenant of sale would have no value if it is found that the property relates to the dwelling house belonging to an unpartitioned joint property for the reason that provisions of Section 44 of the Transfer of Property Act shall govern the said transfer in supersession of anything contrary thereto. In view of this, this appeal cannot be admitted as it has already been held that no substantial question of law is involved in it. Accordingly, the same is dismissed.