Sk. Abdul Bari and Others Vs Momena Bibi and Others

Court: Calcutta High Court

Date of Decision: March 28, 2006

Acts Referred: Civil Procedure Code, 1988 â€" Section 2(2), 47
Constitution of India, 1950 â€" Article 227
Transfer of Property Act, 1882 â€" Section 52

Citation: (2006) 2 ILR (Cal) 90

Hon'ble Judges: Tapen Sen, J

Bench: Single Bench

Advocate: Jiban Ratan Chatterjee, for the Appellant; Sabyasachi Bhattacherjee, for the Respondent

Final Decision: Dismissed

Judgement

Tapen Sen, J.
This revision application is directed against the order dated August 30, 2004 passed in Judicial Misc. Case No. 18 of 1996

by the learned IIIrd Civil Judge (Junior Division), Tamluk as well as against the order dated March 24, 2005 passed in Misc. Appeal No. 16 of

2005/Misc. Appeal No. 366 of 2004 by the Additional District Judge, Tamluk, 2nd Court.

2. By reason of the order August 30, 2004 the Learned IIIrd Civil Judge (Junior Division), Tamluk held that the Application u/s 47 of the CPC

was devoid of any merit and observed that there was no material on record to restrict the progress of the Execution Proceedings which would take

its own course in accordance with law until the decree was satisfied. Accordingly, he dismissed the said Judicial Misc. Case No. 18 of 1996 on

contest, but without costs.

3. By reason of the order dated November 24, 2005 the Learned llnd Additional District Judge, Tamluk, District-Purba Midnapore, held that the

appeal filed by the Appellants/Petitioners was not maintainable and therefore, there was no scope for interference with the order August 30, 2004.

Consequently, he dismissed the Appeal.

4. Being aggrieved by the aforementioned two Orders, the Petitioners have filed this Revision under Article 227 of the Constitution of India. From

the records it appears that the Plaintiffs/Respondents filed a Suit for declaration and Injunction as against the predecessors-in-interest of the

Petitioners and of the proforma Respondent Nos. 7, 8(a), 8(b). The said Suit was numbered as Title Suit No. 134 of 1986 in the Court of the

Munsif at Tamluk. In the said Suit, the Respondents prayed for a Decree Declaring that they had a right of passage through Schedules ""Ka"" and

Kha"" along with the right of possession. They also prayed for a mandatory injunction for demolition of the structures standing upon schedule ""Ka

and for permanent injunction restraining the Defendant No. 1 (father of the petitoners herein who died on November 5, 1994) from interfering with

their easementary rights upon the existing passage on Schedules ""Ka"" and ""Kha"".

5. On September 20, 1994 the said Suit was decreed. Thereafter the Decree Holders filed Title Execution Case No. 7 of 1995. It is apparent that

Title Suit No. 134 of 1986 was decreed on contest against the Defendant No. 1 and ex party as against the reamining Defendants. It is further

evident that while decreeing Title Suit No. 134 of 1986, it was Declared that the Plaintiffs had easementary rights over the scheduled properties

and accordingly, the Defendants were directed to remove the construction.nade by them within a period of two weeks. In default, the Plaintiffs

were given liberty to get the the same demolished at the cost of the Defendants but, in accordance with law. The Defendant No. 1 was

permanently injuncted from creating any obstruction on the pathway over which the Plaintiffs had their right of easement. It appears that the

Defendants did not remove the structures and this prompted the decree Holders/ Plaintiffs to initiate Execution Proceedings.

6. During the pendency of those proceedings, the judgment Debtors filed an Application u/s 47 of the CPC which was registered as a separate

Judicial Misc. Case No. 18 of 1996 (subject matter of the 1st impugned Order) and during the pendency thereof, the main Execution Proceeding,

being Title Execution Case No. 7 of 1995, came to be stayed.

7. In the application u/s 47, a stand was taken that on Augut 15, 1996 (i.e. after almost two years from the date of the Decree passed September

20, 1994), these Petitioners came to learn about the initiation of the Execution Proceedings. They further took a stand that on January, 21, 1993

i.e. even prior to the judgment and Decree dated September 20, 1994, the suit Plot being Plot No. 1151 along with other non-Suit Plots, had been

transferred by a registered ""Hebanama"" in favour of these Petitioners namely Sk. Abdul Bari, Sk. Ansar Ali, Sk. Jafar Ali and Sk. Mujibar

Rahman. They also took a stand that after subsequent to the judgment and Decree passed in Title Suit No. 134 of 1986, there was a mutual

Agreement on January 1, 1995 wherein it was decided that these Petitioners would give up/surrender their rights in respect of the 360 square links

of land on Plot No. 1151 in favour of those persons who were living on Plot No. 1153 and also in favour of the common people for their use as

pathway. It was also said that it had been further decided that a portion of the land situated on Plot No. 1153 and which was a pond, was to be

constructed by the Decree Holders at their own cost.

8. The Petitioners also stated that after such mutual agreement, the Execution Proceeding became illegal and mala fide. They also took a stand that

since the original judgment Debtor, namely the father of these Petitioners, had died on November 5, 1994, and since the Execution Proceedings

had been initiated as against the said deceased person, the Execution Proceeding was therefore, misconceived and not maintainable. The

Petitioners also took a stand that it was within the knowledge of the Decree Holders that the property in question had already been transferred and

alienated and that the Decree had been satisfied to the desire of the Decree Holders which had been acted upon. These facts had been suppressed

in the Execution Proceedings and therefore, the Execution Proceedings were totally misconceived.

9. The Decree Holders, on the other hand, contested the Application by stating that the judgment and Decree had not at all been satisfied nor

acted upon. They also stated that they did not have any knowledge about the execution of an alleged ""Hebanama"". They also stated that since the

Hebanam"" had not been executed during the pendency of the Suit, the same was not at all bindin upon them.

10. It is to be noted that these Petitioners filed an amendment wherein they talked of a ""Salishnama"" stating that this amounted to satisfaction of the

Decree inasmuch as January, 1995, the said ""Salishnama"" had been executed in the presence of various persons and among the parties. The

Salish Patra"" was sought to be incorporated in the said Amendment Application and it was made part of the Application u/s 47 of the Code of

Civil Procedure.

11. The Decree Holders denied this ""Salish Patra"" (Mimangsa Patra) and submitted that the story was concocted and fabricated. This ""Salish

Patra"" / ""Mimangsa Patra"" was brought on record as Exhibit A.

12. The Learned lllrd Civil Judge (Junior Division), Tamluk, proceeded to decide the matter after observing that the main controversy was as to

whether the Decree passed in Title suit No. 134 of 1986 had been satisfied and adjusted and consequently, whether there was any scope by way

of ""Salish"" for the satisfaction of the Decree by the legal heirs of the judgment Debtor and as to whether, such adjustment of the Decree by way of

Salish"" was binding upon the Decree Holders.

13. Upon a perusal of the Order passed by the Learned lllrd Civil Judge (Junior Division), at Tamluk, it is evident that the foundation upon which

the Petitioners attempted to build up their case was the alleged ""Salishnama"" and which was marked Exhibit A. In the said ""Salishnama"", it was

alleged by these Petitioners ihat the Decree Holders had admitted that they would give up the Decretal property in lieu of the property situated on

Plot No. 1153.

14. The Decree Holders took the plea that no ""Saiish"" had ever taken place nor any ""Salishnama"" had been exocuted/prepared in respect of the

property for which the Decree was passed.

15, The Learned Trial Court did not attach any credence/weight to the aforementioned ""Mimangsa Patra"" / ""Salishnama"" and, in the opinion of this

Court, rightly so. In this context, the observations of the Trial Court with regard to the ""Salishnama"" are worth reproducing. The same reads as

follows:

From the above cited decisions, a natural corollary can be drawn about the admissibility of the document and it''s requirement in evidence, to the

extent that a document may be marked as an exhibit without objection, but the contents cannot be relied upon unless the contents are put to the

person connected with them either in chief or in cross examination, it is also well settled that if the author of the document is alive mere proof of his

signature is insufficient. The contents of document may be best proved by the author himself.

Here P. W. 3 is stated to be the author of the instrument. Now. P. W. 3 in his examination in chief admits that he cannot recollect the facts for

which the dispute was taken place. Again in the cross examination P. W. 3 stated that he did not take any written statement of the parties before

writing of the Abichalnama neither any of the copies of Mimangsha Patra were supplied to the parties. Most curious enough P. W. 3 though has

claimed to be the scribe of the mimangsha patra but he has no knowledge as to who has written in the back side of teh impugned instrument (ext.

1). He also failed to deliver on dock by whom the heading in the first page was written. P. W. 3 also remained unperturbed on the question as to

why the persons names were written in the first page which was circled by red ink. The further admission of P. W. 3 was that he did not put his

signature in page 3 & 4 of the said Mimangsha Patra. Therefore, from the very evidence of the P. W. 3 it is crystal clear that the said Mimangsha

Patra has been written by number of persons and moreover the contents of the said document are not entirely related to the dispute involved

amongst the parties."" (SIC) (emphasis by this Court)

16. Other observations which weighed with the mind of the Learned Trial Court in rejecting the contention of these Petitioners are based on

discussions Which indicate that-the ""Salishnama"" was at the behest of others and at the instance of these Petitioners and was not as a result of free

expression of will by the decree Holders. The observations of the Learned Trial Court in this regard are quoted as under:

P. W. 2 another witness of the Petitioners stated on dock that no written complaint was submitted to the salishans. Therefore, a presumption can

be drawn that the salish about the decreetal land was made not at the instance of the decree holders but on its own motion of the salishnans and the

Petitioners as it has been admitted by the P. W., 1 that the salishans were not legally empowered to hold salish. He also states that there is no such

permanent committee for holding salish. Thus, a general perception can b,e drawn in the view that decree holders were subjected to come to

compromise at the behest of the local peole in respect of the decreetal land, at the instance of the Petitioners, as it comes out from the cross

examination of P. W. 2 that he could only remember the decision of the instant salish through he was remained as salishan in two occasions and

thus it can safely be said that P. W. 2 is an interested and partition witness from the side of the Petitioners, in whose evidence less credence can be

given. In the salishnama there is a statement about the assault and other facts but as a salishan P. W. 2 did not have any knowledge or recollect

whether there was any such statement regarding assault was stated in ext. 1. P. W. 2-also admits in cross examination that the name of the scribe

has also not been written in the said salishnama. The name of the scribe or other has not been divulged by P. W. 2 as to who has written page 2 of

Mimangsha Patra. P. W. 2 ignores about the other particulars and statement made in that salish though it has been alleged that he is a witness.

P. W. 4 ""another witness of the Petitioners" side also the witness of salish stated in cross examination that he did not remember what was written in

the complaint. He averred that statement of the parties were recorded in the salishnama though the same was contrary to the real fact since in ext.

1 there was no such record of statement of the parties. P. W. 4 states that salishans did not take decisions beyond the statements of the parties but

the same was repugnant to the true facts as revealed from mere perusal of document (ext. 1).

Therefore, upon scrutiny of the evidence of Petitioners'' witnesses on the point of contents on the statement made in the salish, there are major

discrepancies, inconsistency and embezzlement and, thus, it can be said that the evidences of the material witnesses are not remained, is perfect

harmony, from which it can be reduced to form an opinion that the contents of ext. 1 are true and genuine and does not suffer from any vices.

Therefore in respect of adjustment of the decree or satisfaction of the same ext. 1 has no role to play."" (SIC) (emphasis by this Court)

17. The allegation of the judgment Debtors to the effect that prior to the judgment on January 29, 1993, their father Sk. Umed Ali had executed a

deed of gift in favour''of these Petitioners was correctly rejected as being misconceived because the initial judgment Debtor (i.e. Sk. Umed Ali) had

ample opportunity to bring these facts to the notice of the court before the Decree Was passed. The observation of the Trial Court in this regard

are as follows:

It has been alleged that Umed Ali judgment debtor executed deed of gift in favour of the present Petitioners on 29.1.93 in respect of the disputed

property whereas the judgment about the suit property was delivered on 20.9.94 and decree was drawn up on 30.9.94. therefore, the erstwile

judgment debtor would have got ample opportunity to raise the facts before the court who has passed the decree and any deviation of that is

estopped the judgment debtor or his legal representative to take the plea that at the time of passing of the judgment and decree""the judgment

debtor had no right, title, interest in respect of the suit property. Moreover the principle of lispendence as provided u/s 52 of the Transfer of

Property Act is quite made applicable where during pendency of the suit if any transfer be made that to be deemed and it is to be presumed that

property which is to be subject matter of the suit remains to be the property of transferor. Therefore, the plea that the before passing of the

judgment and decree in T. S. 134/1986, the property has been alienated to the present Petitioners, by the judgment debtor, is of no manner of

application since it is to be viewed that the impugned transfer would suffer from malafide and the clandestine manner of transfer was made to avoid

the execution of the decree."" (SIC) (emphasis by this Court)

18. Upon perusal of the aforementioned observations, this Court is of the view that the Learned II Ird Civil Judge (Junior Division), Tamluk

correctly dismissed the Application u/s 47 of the Code of Civil Procedure. 19. this Court therefore, does not find any error in the Order passed by

the said Court in Judicial Misc. Case No. 18 of 1996 passed on August 30, 2004.

19. So far as the Order dated November 24, 2005 passed in Misc. appeal No. 16 of 2005/Misc. Appeal No. 366 of 2004 is concerned, it is

evident that the said Appellate Court, while dealing with the aforementioned Order dated August 30, 2004, correctly held that the Order passed

by the Trial Court on August 30, 2004 was on an Application u/s 47 of the CPC which was not appealable. The observations of the Learned

Appellate Court in this context, and which are correct, are as follows:

The Ld. Lawyer of the Respondents at the very outset of his submission, pointed out before this Court that as per CPC of 1988, which

amendment came into force with effect from 2nd February, 1976 and by subsequent, Act 104 of 1976 and as per Section 2 of the CPC definition

thereof and Sub-section (2) ''decree'' where it has been clearly stated that any order passed on an application u/s 47 has been omitted and as such

the instant appeal arises out of an application u/s 47 of Code of Civil Procedure, disposed by the Court below cannot be the subject matter of

appeal as the present appeal out of an order of the court below passed on 30.8.2004 in J. Misc case No. 18 of 1996 in disposing the application

u/s 47 of the CPC of the judgment debtor on a contested hearing by the court below. It is also contended by the Ld. Lawyer of the contesting

Respondents, by that amendment of the Code of Civil Procedure, Section 2(2) thereof determination of any question out of Section 47 of CPC by

the executing the decree has been excluded from the definition of decree, so that an appeal and second appeal don''t lie against such determination

and as such, it is finally argued by the Ld. lawyer of the Respondents side of this appeal after such amendment of the C.''P.C. which came info

force with effect from 2nd February, 1976, the order of the court below so passed vide order No. 91 dt. 30. 8. 2004 in disposing the J. Misc.

case No. 18 of 1986 which arouse out of an application by the representative of the Judgment-debtor in connection with the title Execution case

No. 7 of 1985, as the determination of any question out of Section 47 of the CPC by the court below as excluded from the definition of ''decree'',

this appeal filed by the representative of the judgment-debtors against the dismissal of their application u/s 47 CPC by the court below, is not

maintainable.

In this context the Id. lawyer of the contesting Respondents side draws my attention to reported decision of Allahabad High Court being the full

bench decision so reported in Pratap Narain Agarwal Vs. Ram Narain Agarwal and Others, and the said judgment was delivered by Satish

Chandra the Hon''ble Chief Justice sitting with Yashoda Nandan and K.C. Agarwal-versus-Ramnarayan Agarwal and Ors.) and the said judgment

was delivered by Satish Chandra the Hon''ble Chif Justice sitting with Yashoda nandan and K.C. Agarwal, JJ and on going through the said

judgment of the Hon''ble A Mahabad High Court with due respect, I find the Hon''ble court has been clearly held after amendment of the CPC by

the amendment Act 104 of 1976 the appeal against the determination of any question as referred in Section 47 of the CPC and as the order

passed by the court on an application u/s 47 of the CPC and by amendment Section 2(2) of the CPC and that order would not amount to a

decree and as such, against the order passed by the court below on an application u/s 47 of the Code of Civil Procedure, is not appealable order.

(SIC) (emphasis by this Court)

20. Upon a perusal of the aforementioned reasons given by the Appellate Court, this Court is of the opinion that the same are neither erroneous

nor irregular. No interference is called for.

21. For the foregoing reasons, this Court is of the view that neither the Order dated August 30, 2004 nor the Order dated November 24, 2005

suffer from any illegality. There is no merit is this Application. It is accordingly dismissed. No Order as to costs.

Urgent xerox certified copy of this Order, if applied for, the same will be supplied expeditiously.