

(2004) 12 CAL CK 0002

Calcutta High Court

Case No: S.A. No. 476 of 1990

Bituljan Bibi

APPELLANT

Vs

Abdul Kasem Sahow and Others

RESPONDENT

Date of Decision: Dec. 14, 2004

Citation: (2005) 2 CALLT 89

Hon'ble Judges: Arun Kumar Mitra, J

Bench: Single Bench

Advocate: Partha Pratim Roy and Subhendu Banerjee, for the Appellant; Sankar Prosad Pal-I, for the Respondent

Final Decision: Allowed

Judgement

Arun Kumar Mitra, J.

Challenge in this second appeal is the judgment and decree passed by the learned 11th Additional District Judge at Alipore on 29th May, 1989 in Title Appeal No. 499 of 1987 reversing the judgment and decree dated 28th April, 1987 passed by the learned Munsif, 1st Court at Baruipur in Title Suit No. 155 of 1985. The suit filed by the plaintiff is for a declaration declaring partisan deed dated 07/12/1983 as fraudulent and made by misrepresentation. The case that has been made out by the plaintiff is inter alia as follows:

2. The plaintiff is the owner of the suit property which is described in (ka) schedule by purchase and inherited 2 annas share of the (kha) scheduled property which belonged to her husband. The defendant No. 1 is the eldest son of the plaintiff.

3. The defendant No. 1 thus inherited 2 annas 16 gandas share and other four sons (proforma defendant Nos. 2 to 5) got 11 annas 4 gandas share. The defendant No. 1 being the eldest son used to look after the joint property at (kha) schedule. The defendant No. 1 took the kobala in respect of the "ka" scheduled property from his mother, the plaintiff for the intended purpose of settlement of disputes with the neighbouring land owners whereafter defendant No. 1 disclosed to her that a

partisan between the co-sharers in respect of their inherited "kha" scheduled suit property only was effected and the plaintiff relying on such statement of her eldest son, defendant No. 1 executed such partisan deed which was also registered. Even after the execution of the partisan deed the plaintiff was enjoying share of paddy produced from her purchased land at "kha" scheduled suit property and when the plaintiff did not receive her share of paddy in 1391 B.S. in respect of "ka" scheduled property and asked defendant No. 1 for the reasons the defendant No. 1 disclosed that the plaintiff had no longer any share in "kha" scheduled suit property. On obtaining the certified copy of the partisan deed dated 12.07.1984 it was found that the share of the co-sharers were not written therein according to their legal shares for which the plaintiff and the proforma defendant Nos. 1 to 5 executed the cancellation deed canceling the said partisan deed and as the defendant No. 1 got the said partisan deed fraudulently executed on his representation illegally including the plaintiff's land at "ka" schedule, the present suit was filed for declaring the said partisan deed void.

4. Only the defendant No. 1 being the eldest son of the plaintiff contested the suit by filing written statement alleging, inter alia, that the said partisan deed was effected on consent of all the parties concerned and the defendant No. 3 sold away 99 cents of land out of his share by three kobalas dated 13.03.1984 to Gaji brothers and to proforma defendant Nos. 1 and 2. The plaintiffs claim of purchase on "ka" scheduled property is totally false as she had no money and her husband only purchased "ka" scheduled land in benami of his wife the plaintiff by the Bengali kobala dated 17.06.1972 from one Tinkari Naskar from whom other lands were also purchased subsequently by her husband in her benami by the two kobalas dated 28.03.1983. On the death of their father the parties being in good terms were made to agree to the proposal of partisan advanced by their uncle-Bilat Ali and accordingly, the agreement for partisan dated 03.04.1979 was executed by all the parties and the disputed partisan deed is only the registration of the said agreement for partisan dated 03.04.1979 and taking advantage of the death of the said Bilat Ali, through whom the partisan amongst the parties was effected, the proforma-defendants in collusion with the mother instigated the filing of the present suit by the mother to derive more benefits and advantages through the disputed partisan deed as a bona fide and genuine one executed with the free consent of all the parties and was acted upon by the plaintiff and some of the brothers and that hence the false suit of the plaintiff should be dismissed.

5. On the above pleadings the following issues were framed:

- (1) Is the suit maintainable in its present form?
- (2) Is the deed of partisan valid or prepared by misrepresentation?
- (3) Is the plaintiff entitled to get a decree as prayed for?
- (4) To what other relief if any is the plaintiff entitled?

6. The learned trial Judge on consideration of the evidence on record decreed the suit on contest with costs. The learned trial Judge also ordered that the plaintiff do get a decree of declaration declaring that the partisan deed dated 07.12.1983 is a void document and the plaintiff's title will not be affected by the partisan deed.

7. Challenging the said judgment and decree passed by the learned trial Judge the defendant No. 1 preferred T.A. No. 499 of 1987: The said Title Appeal was contested and on contest the learned Appellate Court below allowed the appeal but without costs. The learned Appellate Court below set aside the impugned judgment and decree passed by the learned trial Judge and dismissed the suit.

8. Hence this second appeal has been preferred by the plaintiff being the appellant.

9. Before taking up the second appeal for final decision it is necessary to formulate the substantial question of law and to decide the appeal on that basis.

10. The only question of law involves in this case which can be termed as substantial is:

(i) Whether the execution of the partisan deed was valid and proper as per the construction of the Appellate Court below as also the trial Court and/or whether the allegation of fraud on execution of the said deed was decided by the Courts below on surmise and conjectures?

11. The learned counsel for the appellant submitted that the plaintiff is an illiterate lady and she put her thumb impression on the partisan deed in question and there was no remark anywhere in the body of the deed that the deed was read over and explained. The deed writer did not come forward or he was not placed as witness to establish that there was no fraud and he read over and explained the deed to the illiterate lady and/or understanding the purport and contents of the partisan deed the illiterate lady signed.

12. The learned counsel submitted that from this fact it can be very well said that the lady executing the partisan deed did not or could not understand the purport and contents of the deed. The compilation of the above facts clearly show that the partisan deed was executed by the lady without understanding as to what she is getting and as to what she is giving.

13. According to the learned counsel for the appellant, the learned trial Judge on appreciation of these facts came to a right conclusion and declared the partisan deed illegal or invalid rightly.

14. The learned counsel for the appellant further submits that the Appellate Court below could not understand the importance of the noting "read over and explained" and the learned Appellate Court below totally proceeded on the basis of surmise and conjectures and wrongly set aside the judgment and decree passed by the learned trial Judge.

15. Defence has been supported by the learned Appellate Court below and the learned Appellate Court below observed that when everything is there the deed of gift was signed by the same illiterate lady and then there is no problem and now the only fact the noting in the body of the deed "read over and explained" cannot make the deed illegal.

16. Heard the learned counsel. Let us come on the observation of the learned Appellate Court below.

17. The learned Appellate Court below observed "she as PW1 deposed that the deed was not "read over and explained" there. Her such claim is supported by Exbt. 1 at the end of which there is no endorsement regarding reading over and explaining the documents to the executions. Such omission in the deed must be considered with caution taking all the circumstances leading to the execution of the document."

18. The learned Appellate Court below further observed "in the case of illiterate executant of a document, it may not always be sacrosanct that any endorsement as to reading out and explaining the contents of the documents as may be put at the end of the document understanding all the contents and merits of the document. Circumstances in the case of execution of a document devoid of all such endorsement at its end may also be there to indicate that the executant executed the document on understanding the contents and merits of the documents."

19. The learned Appellate Court below tried to find out attaining circumstances and observed that after going to the registration office being accompanied with her sons, who were also the executants of the partisan deed she put her L.T.I, understanding the contents and merits thereof.

20. The learned Appellate Court below relied on the probability of the evidence adduced by the parties.

21. The learned Appellate Court below observed that "she willfully executed the partisan deed."

22. The learned Appellate Court below also found that neither the scribe is the witness nor there is making or noting on the deed "read over and explained".

23. The learned Appellate Court below tried to rely on some circumstantial evidence and that is why the learned Appellate Court below observed that when she has gone with her sons, when she has executed the deed of gift, when her husband was present there, it must be a fact that she was well aware about the contents of the partisan deed. These are merely circumstantial evidence on which the Appellate Court below depended.

24. The Appellate Court below did not at all consider that the marking "read over and explained" is a very important term when particularly the executant lady or gentleman is illiterate and in this case in addition the deed writer is not the witness.

25. Very well, he could have been made witness and the deed writer was the best person to say whether the deed was explained to the illiterate lady or not. On the contrary the learned Appellate Court below did not at all consider that the lady himself comes and says that she did not understand the purport and content of the partisan deed. In such circumstances it clearly appears that the learned Appellate Court below acted on surmise and conjectures and proceeded on baseless facts treating them to be omitted evidence. This is per se illegal on behalf of the learned Appellate Court below.

26. On the contrary the learned trial Judge rightly observed that in absence of that noting and in absence of the clarifications of the deed before the executant illiterate lady the deed cannot be said to be properly executed or it must be on the basis of fraud. It was very easy to say at least, if it is taking for granted that the word "read over and explained" was omitted through inadvertence, the deed writer could have been produced as witness. He was the best man or best evidence but that was shut out. That apart in the partisan deed in question shares were not also allotted properly and proportionately.

27. In view of the matter it clearly appears that the judgment and decree passed by the Appellate Court below is illegal and is liable to be set aside.

28. I, therefore, set aside the judgment and decree passed by the Appellate Court below and affirm the judgment and decree passed by the learned trial Judge and declare the deed of partisan as illegal.

Let a decree be drawn up accordingly.

Let the lower Court records be sent down to the Courts below forthwith.

In the facts and circumstances of the case the parties will bear their own costs.

Urgent xerox certified copy, if applied for, will be given to the parties as expeditiously as possible.