(2000) 07 CAL CK 0006

Calcutta High Court

Case No: Second Appeal No. 783 of 1972

Atul Chandra Roy		APPELLANT
	Vs	
Sk. Ramjan Ali		RESPONDENT

Date of Decision: July 27, 2000

Citation: (2000) 2 ILR (Cal) 269

Hon'ble Judges: Basudeva Panigrahi, J

Bench: Single Bench

Advocate: Mrinal Kanti Roy, for the Appellant;

Final Decision: Allowed

Judgement

Basudeva Panigrahi, J.

Undaunted by the successive decrees passed against the Appellant, this appeal has been filed by the Defendant No. 2 Appellant challenging the decrees passed by both the Courts below in Title Suit No. 15/60 in the 3rd Court of Munsif, Midnapore and also Title appeal No. 530/62 passed by the Subordinate Judge, 2nd Court, Midhapore. The Respondents/Plaintiffs filed a suit for declaration of title on the basis of a deed of purchase, confirmation of possession, permanent injunction and means profit and in the alternative for refund of purchase money from the Appellant/ Defendant No. 2.

2. The facts leading to the present appeal are as follows:

The Suit tank was khas dakhali property of the Defendant No. 2. The Appellant claimed to have retained the suit property on submitting ''B'' from after the date of vesting which was duly recorded in his name in R.S. Khatian No. 32/2. Therefore, the Appellant executed a deed of conveyance on April 15, 1958, and sold the tank to the Respondents/Plaintiffs. The Plaintiffs on the strength of the sale deed claimed to have taken possession of the tank. But the Defendant No. 1 obstructed and created disturbance over his possession on the ples that he had obtained an Amalnama and Settlement form the Defendant No. 2 in 1358 B.S. and since then he has been in

possession of the said tank. Thus, the Appellant had no saleable interest ever the property, so that he could be conveyed to the Plaintiffs/Respondents. Several issues had been framed regarding the title of the said tank. The trial Court in its finding held that the Amalnama executed by the Defendant No. 2 in favour of the Defendant No. 1 was valid and genuine by rejecting the plea that it was executed fraudulently. In other words, the trial Court held that the Amalnama was genuine and also the supporting Dakhilas.

3. Since the Defendant No. 1 was in uninterrupted possession, the Appellant, therefore, could not have been in possession from the date of execution of the sale deed, that apart, the Plaintiffs witness also deposed in Court that no possession could be delivered by the Defendant No. 2 by virtue of the sale deed. Therefore, the trial Court in no uncertain term held that the Defendant No. 2 could not deliver possession to the Plaintiffs. Accordingly, the trial Court directed the Defendant ho. 2 to pay the consideration amount to the Plaintiffs/Respondents. Being aggrieved by the judgment of the trial Court, the Defendant No. 2 preferred an appeal being Title appeal No. 530/62, which was dismissed with cost both to the Plaintiffs and the Defendant No. 1.

4. Mr. Roy, learned advocate appearing for the Defendant No. 2 Appellant has strongly contended that from ''B'' from submitted by the Appellant and also from the record of right the Defendant No. 2 has been in possession of the tank. It therefore, could not have been disputed either by the Defendant No. 1 or by the Plaintiffs. In that view of the fact, the Defendant No. 2 has no any other obligation much loss refund of money to the Plaintiffs. It has been further submitted that it is most unfortunate that even the appellate Court had gone to the extent of award of cost not only to the Plaintiffs but also the Defendant No. 1.

5. On a careful consideration of submission of Mr. Roy, I find that since both the Courts had concurrently held that the Defendant No. 1 was in possession, therefore, it is not open to the second appellate Court to change such factual aspect. Since both the Courts had further held that the Defendant No. 2 could not have been in possession after execution of Amalnama and dakhilas in favour of the Defendant No. 1, the Plaintiffs could not have taken delivery of possession by virtue of the deed of conveyance executed by the Appellant.

Since the Plaintiffs could not-get possession under the strength of the sale deed, the Appellant is, therefore, duty bound to refund the consideration amount to the Plaintiffs. But another question is to be considered whether the appellate Court was justified to direct the Appellant to pay the cost to the Defendant No. 1. It is true that the cost of the suit should have been awarded to the Plaintiffs, since he did not get possession on the strength of the deed of conveyance. But since the Defendant No. 2 was the erstwhile owner of the tank, he should not have been directed to pay the cost to the Defendant No. 1.

6. In the result, the appeal is modified to the extent that is so far as the awarded of cost to the Defendant No. 1 is concerned, the Appellant has no obligation to pay the same to him.

7. Accordingly, the appeal succeeds in part and the Plaintiff''s suit is decreed with cost. The Defendant No. 2 Appellant is hereby directed to pay the consideration amount along with the cost of the suit within three months from date, failing which he shall pay not only the consideration amount, but also the interest @ 6% on such consideration amount from that date till realisation.

8. Appeal allowed in part.