(1869) 06 CAL CK 0013

Calcutta High Court

Case No: Special Appeal No. 3233 of 1868

Srimati Amina Khatun		APPELLANT
	Vs	
Girish Chandra Roy Chowdhry		RESPONDENT

Date of Decision: June 4, 1869

Judgement

Bayley, J.

Plaintiff sues for possession of a miras tenure, and for a declaration that a mooktearnama and a kabala of Magh 1269, set up by defendant, were so set up falsely and collusively. Plaintiff''s allegations are that she never executed such a conveyance or the power of attorney set up by defendant as her acts and deeds; that the whole was a deceitful arrangement by defendant No. 1, Kedar Meah, who prevailed on one Sheikh Haradhan, father of defendants Nos. 4, 5 and 6, and a servant of plaintiff, to get the above deeds executed; that the mooktearnama was in the name of Mooktarooddin, defendant No. 2, but was false; that the deed of sale which purported to make Abdul Hamid, defendant No. 3, the vendee was not executed by plaintiff; that plaintiff sold one-half and leased one-half to Wise, who sued for possession u/s 15, Act XIV of 1859, bat abandoned the purchase; and that special appellant, defendant No. 8, Girish Chandra, purchased from defendant Abdul Hamid, and plaintiff was dispossessed. The answer of defendants substantially was that the power of attorney and conveyance were true; that legal possession passed under them; that as plaintiff admitted she had sold half to Wise and farmed half before the suit under Act XIV of 1859, and that plaintiff never showed how she was revested with her proprietary right, she could not sue.

2. The first Court gave plaintiff a decree considering on the evidence that the plaintiff''s allegations were proved. The lower appellate Court affirmed the decision of the first Court.

3. Some of the grounds of special appeal recorded in the petition, are as follows:

1. That inasmuch as the plaintiff had disposed of the property in dispute by sale and izara to Mr. Wise before the institution of this suit, the learned Judge is wrong to

hold that plaintiff had any longer a right to bring this action.

2. That even if it be conceded for the sake of argument that the aforesaid cancellation had the effect of creating a title in favour of the plaintiff, it is submitted that the said cancellation not being registered was not admissible in evidence. The learned Judge was wrong to rely upon the said cancellation.

3. That the learned Judge''s decision is erroneous in not making the plaintiff to start her case first by giving evidence of the false nature of the mooktearnama.

4. On the first plea I would observe that plaintiff''s case is that Wise never completed the purchase, having returned the deed with an endorsement in English "returned, no claim, signed J.P. Wise," and a corresponding entry in Bengali; that, consequently there was nothing but an inchoate transaction, and nothing complete and final so as to require a reconveyance.

5. On the other hand it is urged that as this endorsement is not registered, it cannot be taken as evidence. Now there was no such objection: taken below. There was, it is true, the general plea that as Wise has purchased half and farmed half from plaintiff, the latter could not sue without showing how she became revested with the property. But I do not think that a mere general plea of this kind, which no Court, or opposite party, could understand to mean that there was no reconveyance, because there was no registration, can be taken as the equivalent of the specific) plea as to non-registration now put forward.

6. It is then urged in connection with this matter that the endorsement not being independently proved, oral evidence cannot suffice to prove that writing. Sheik Rahmatulla v. Sheikh Sariatulla Kagchi 1 B.L.R. (F.B.) 58 and Roopa Koonwur v. Juggoolall Opadhya 11 W.R. 280 are cited in support of this plea.

7. Now the lower appellate Court has not decided the case solely on the endorsement but on all the facts of the case, based on the entire evidence, as showing that plaintiff''s allegations are true, that she never executed the power of attorney and the deed of sale of Magh 1269 set up by defendants. When the endorsement was admitted as evidence by the Courts below, no objection was taken to its admissibility. Had there been, plaintiff might have given other evidence. I think then that this plea is too late.

* * * *

8. The last plea is that plaintiff alleging fraud should prove it, and did not. Plaintiff''s real case was that she has been dispossessed by the defendants who set up a title from her, whereas she denied ever granting them such title, and accordingly if they produced the power and deeds of sale, they were false and not given by her. Thus it was for defendants to prove their title, it being their affirmative plea that they had title.

9. On the whole then I think that there is no reason to interfere with the decision of the lower appellate Court, in this case, on the ground of its being erroneous in law. I would therefore dismiss this special appeal with costs.

Hobhouse, J.

10. I agree in dismissing this special appeal with costs.

11. One objection raised is in regard to plaintiff''s status by reason of the conveyance to Wise, the other as to the burden of proof being on plaintiff and not having been discharged by her.

12. The first is really an objection which was much more in the mouth of Wise than of defendants, and when we have the title-deeds given to Wise in plaintiff''s hands, and Wise''s agent admitting that Wise had returned those deeds, and when the plaintiff has thus fulfilled prima facie what defendants called on her to fulfil, viz., has accounted for her being still the proprietor, the alleged conveyance to Wise notwithstanding, I think we have an answer to the issue which defendants raised in the Courts below, and sufficient to allow the case to proceed. And on the second point I think that to what extent the burden of proof was on plaintiff, she has discharged that burden.