Shakil Ahmed Vs Haroon Rashid

Court: Calcutta High Court

Date of Decision: July 26, 2013

Citation: (2013) 4 CHN 509

Hon'ble Judges: Tarun Kumar Gupta, J

Bench: Single Bench

Advocate: Jahirul Islam, for the Appellant;Asit Kumar Banerjee, for the Respondent No. 1, for the Respondent

Final Decision: Dismissed

Judgement

Tarun Kumar Gupta, J.
The plaintiffs are the appellants against the judgment of affirmation. The original plaintiffs were mother and her

children. It is a specific case of the plaintiffs that plaintiff No. 1 Khursida Bogam purchased the land of the suit premises No. 10 B Anjuman Road

as described in the schedule of the plaint from its owners by a registered kobala dated 1st of February, 1971. She mutated her name in the record

of Calcutta Municipal Corporation. At the time of purchase her husband Aktar Ali, his brother Haroon Rashid, and his sister Khairunnessa were

the three thika tenants of said property. Aktar Ali and his brother and sister had other joint properties which they partitioned amicably through the

deed of partition dated 20th December, 1979. On the said deed of partition Khairunnessa got premises No. 18 Shamsul Huda Road and her two

brothers namely Aktar Ali and Haroon Rashid were allotted suit premises at 10B Anjuman Road, 16 Shamsul Huda Road, 9/H/4 Anjuman Road

and 9/H/2 Anjuman Road jointly. The premises at 16 Shamsul Huda Road was sold out jointly by Aktar Ali and Haroon Rashid. Aktar Ali and her

wife Khursida Begam (plaintiff No. 1) were dependent upon Aktar''s younger brother Haroon Rashid (defendant No. 1). Haroon Rashid

(defendant No. 1) proposed to plaintiff No. 1 Khursida Begam through her husband to execute a general power of attorney in favour of defendant

No. 1 for managing and looking after the suit property at premises No. 10 B belonging to plaintiff No. 1. plaintiff No. 1 in good faith executed

document on 27.11.1982 believing the same to be a general power of attorney but said document was not read over to the plaintiff. Plaintiffs three

sons namely plaintiff Nos. 2, 3 and 4 also put their respective signatures in said document as witness. Aktar Ali died on 15th of November, 1985

and after his death the defendant No. 1 claimed himself to be the owner of half of the suit property by virtue of a purported Heba-Bil-Ewaz dated

27.11.1982 and further claimed exclusive ownership of premises No. 9/H/4 Anjuman Road which is a thika tenanted land under the commissioner

of Wakfs of West Bengal. The defendant No. 1 is claiming exclusive ownership of 9/H/4 by virtue of a purported deed of partition dated 31st of

October, 1983. On 16th of October, 1986 the defendant No. 1 asserted his title through said alleged Heba Bill Ewaz dated 27.11.1982 and the

purported partition deed dated 31.10.1983 and tendered xerox copies of the same. The plaintiffs for the first time came to know about fraud

practised by defendant No. 1 in obtaining said documents by representing that a power of attorney was executed by the plaintiff No. 1 in favour of

the defendant No. 1. There was never alleged oral Heba of the property in 1975. As plaintiff No. 1 had ten children, there was no question of

gifting away the suit property to her husband and her "Debar" by said alleged deed of gift dated 27.11.1982. The alleged deed of partition dated

31.10.1983 was an unjust document whereby defendant No. 1 got the better portions of the properties and that the same was obtained by

defendant No. 1 by practising fraud upon the plaintiffs husband Aktar Ali. The defendant No. 1 started to put pressure upon the plaintiffs for

partition by metes and bounds on the strength of said fraudulently obtained deed dated 31.10.1983 though there cannot be partition of thika

tenancy land. The defendant was also putting pressure upon the plaintiffs for handing over possession of the half share of suit property. Under these

circumstances the plaintiffs were compelled to file the suit praying for declaring the purported Heba Bill Ewaz dated 27.11.1982 and purported

deed of partition dated 31.10.1983 being illegal, inoperative, invalid and not binding upon the plaintiffs in respect of the suit premises and for

injunction and other consequential reliefs.

2. The defendant No. 1 contested the suit by filing written statement followed by an additional written statement. Denying material allegations of the

plaint he contended inter alia that defendant No. 1 purchased the landlord"s interest of 10B Anjuman Road in Benam of plaintiff No. 1 as the suit

was pending between defendant No. 1 and the other co-sharers. To avoid controversy in future he made said Benami purchase as per advice of

his elder brother Aktar Ali being husband of plaintiff No. 1. At the relevant time defendant No. 1 being unmarried was living under the care and

custody of his elder brother Aktar Ali and his wife plaintiff No. 1. The plaintiff No. 1 knowing the contents of the document and under her free will

executed the deed of Heba Bill Ewaz dated 27.11.1982 in favour of her husband and the defendant No. 1 who accepted said gift and exercised

the right of possession. Some of the plaintiffs sons also knew the contents of said deed of gift and put their signatures as witnesses of the same. As

series of disputes and differences cropped up between the defendant No. 1 and his family in one hand and the plaintiff No. 1 and her family

members in the other, the partition deed of 1983 was executed between the co-sharers after knowing its contents. Several deeds namely partition

deed, deed of dissolution of partnership in respect of SH-N-SHAH Tailors at 9 A Madg Lane, Kolkata-16, deed of dissolution of partnership in

respect of M/s. Feroza Tailors 10 A, 9 A Madg Lane, Kolkata -16 were registered on 31st of October, 1983 on the stamp papers purchased on

22nd of August, 1983. In the partition deed defendant No. 1 and plaintiff No. 1''s husband Aktar Ali were parties whereas in the deed of

dissolution of partnership relating to SH-N-SHAH plaintiff No. 1 Khurshida Begam, plaintiff No. 2 Shakil Ahmed, the defendant No. 1 and his

wife were parties whereas in the deed of dissolution of partnership relating to M/s. Feroza Tailors plaintiff No. 1 Khurshida Begam and wife of

defendant No. 1 Quarasna Bano were parties. Javed Ahmed was an advocate in all said three deeds. In the partition deed plaintiff No. 2 Shakil

Ahmed was one of the attesting witnesses. There are also other attesting witnesses in the deeds of dissolution. All these documents go to show that

plaintiff No. 1 Khurshida Begam was never a "Pardanosan" lady and that she executed those documents in presence of her husband and some of

the sons knowing contents of the same. In terms of the partition deed of 1983 plaintiff No. 1''s husband Aktar Ali got properties covering two

cottahs, 10 chittacks and 5 square feet and this defendant No. 1 got two cottahs, 1 chittack and 26 square feet of property. As such, it cannot be

said that the partition was inequitable in favour of plaintiffs predecessor-in-interest Aktar Ali or was effected by practising fraud by the defendant

No. 1. The plaintiffs were well-aware of the contents of the Heba-Bil-Ewaz dated 27.11.1982 as well as partition deed of 1983 from the very

inception and falsely filed this case just to obstruct the defendant No. 1 from obtaining his lawful possession in the suit property. The suit was liable

to be dismissed with cost.

3. On the basis of the pleadings of the parties the following issues were framed by the learned Trial Court:

(1) Is the suit maintainable in the present form and in law?

(2) Is the Heba Bill Ewaz dated 27.11.1982 legal and valid?

(3) Was there any oral Heba in respect of the suit properties in 1975?

(4) Is the deed of partition executed in 1979, legal and valid?

(5) Was the deed of partition dated 31.10.1983 obtained by practising fraud, undue influence and misrepresentation as alleged in the plaint?

(6) Are the plaintiffs entitled to get a decree as prayed for?

(7) To what relief, if any, are the plaintiffs entitled?

4. After contested hearing the learned Trial Court dismissed the suit by observing that neither the Heba Bill dated 27.11.1982 nor the deed of

partition dated 31.10.1983 were vitiated by fraud, undue influence or misrepresentation and that both the documents were legal and valid. The

appeal preferred by the plaintiffs was also dismissed by the learned lower Appellate Court confirming said findings of learned Trial Court. Hence is

this second appeal. This second appeal is heard on the following substantial questions of law:

(1) Whether learned Courts below substantially erred in law by accepting the defence version that the suit property at 10B Anjuman Road was

purchased by the defendant No. 1 Haroon Rashid in the benam of Khurshida Begam, the original plaintiff No. 1 when said defence of benami

purchase was prohibited under Benami Transactions (Prohibition of the Right to Recover Property) Act, 1988.

(2) Whether the learned Courts below substantially erred in law by overlooking the fact that after coming into force of the Calcutta Thika Tenancy

(Acquisition and Regulation) Act, 1981, the original plaintiff No. 1 Khurshida Begam being the owner of the land of the suit premises No. 10B

Anjuman Road had no transferable right on 27th of November, 1982 as her interest already vested to the State.

(3) Whether learned Courts below substantially erred in law in not holding that the alleged deed of partition dated 31.10.1983 between Aktar Ali,

husband of the original plaintiff No. 1 and the defendant No. 1 could not have amicably been partitioned the thika tenancy right in respect of the

disputed premises since tenancy right is a matter of contract between the landlord and thika tenant and such right is only heritable and not at all

transferable.

(4) Whether learned Courts below substantially erred in law by not considering the special protection extended to the ''Pardanosan'' lady by the

statute inasmuch as there is no tangible evidence in the record to show that the gift deed was read over and explained to the executant lady i.e.,

plaintiff No. 1 since deceased.

(5) Whether learned lower Appellate Court substantially erred in law by declaring the judgment of appeal without disposing the pending application

under Order 41 Rule 27 of the CPC and thereby making the judgement invalid.

5. Mr. Jahirul Islam, learned counsel for the plaintiff/appellants, submits that the present plaintiff/appellants filed an application under Order 41 Rule

27 of the CPC (hereinafter to be referred as CPC) on 17th May, 1997 praying for adducing further evidence in the learned lower Appellate

Court. According to him, though learned lower Appellate Court passed an order for hearing of said application alongwith the pending appeal but

he disposed of the appeal without passing any order regarding said application under Order 41 Rule 27 of the Code of Civil Procedure. He next

submits that as said application under Order 41 Rule 27 of the CPC is still pending the impugned judgment of learned lower Appellate. Court is

required to be set aside and the matter should be remanded back to the lower Appellate Court with a direction for disposing of said pending

application under Order 41 Rule 27 of the CPC together with the appeal as per law. In this connection he refers a case law reported in Smt.

Jamna and Others Vs. Bhuwana, wherein it was held that the order of Appellate Court dismissing the appeal without passing any order regarding

the application under Order 41 Rule 27 of the CPC was illegal and without jurisdiction.

6. In this connection he also refers a case law reported in Assam Hindu Mission Upper Nawprem Vs. Smt. Elaboris Tron, wherein it was held that

First Appellate Court did not commit any mistake by permitting documents to be produced under Order 41 Rule 27 of the CPC when those

documents were important and essential for determination of real points in controversy. Mr. Asit Kumar Banerjee, appearing for the private

defendant, on the other hand, submits that there is nothing in the judgment of learned lower Appellate Court to show that at the time of hearing of

said appeal learned counsel for the plaintiff appellants pressed said application under Order 41 Rule 27 of the CPC and hence said application

stood rejected being not pressed. He further submits that as it was not pressed during hearing of the appeal, there was no discussion over that

application in the lower Appellate Court judgment and that the plaintiff appellants at the time of filing of this second appeal also did not take any

ground alleging that the application under Order 41 Rule 27 of the CPC remained undisposed in the lower Appellate Court. In this connection he

refers a case law reported in Chotalal Shaw Vs. Ram Golam Shaw and Others, wherein it was held that even if there is any mandatory provision

which confers any right or privilege or advantage to any of the parties to the litigation, such right, privilege or advantage may be waived by the

party in whose favour the provision of law stands.

7. It was further held therein that waiver may be express or implied. It may be intentional or due to inaction or gross carelessness or absence of

diligence on the part of the party having the right or advantage in his favour. The party having such right or privilege has a discretion to exercise the

same.

8. In this connection he also refers a case law reported in Arjun Singh alias Puran Vs. Kartar Singh and others, wherein it was held as follows:--

The legitimate occasion for the application of O. 41, R. 27 is when, on examining the evidence as it stands, some inherent lacuna or defect

becomes apparent, not where a discovery is made, outside the Court, of fresh evidence and the application is made to import it. The true test,

therefore, is whether the Appellate Court is able to pronounce judgment on the materials before it without taking into consideration the additional

evidence sought to be adduced.

9. He also refers a case law reported in AIR 2001 SC 134 (Mahavir Singh and others v. Naresh Chandra and another) para 5 which runs as

follows:--

Section 107, CPC enables an Appellate Court to take additional evidence or to require such other evidence to be taken subject to such conditions

and limitations as are prescribed under Order 41, Rule 27, CPC. The Court is not, however, bound under the circumstances mentioned under the

rule to permit additional evidence and the parties are not entitled, as of right, to the admission of such evidence and the matter is entirely in the

discretion of the Court, which is, of course, to be exercised judiciously and sparingly. Order 41, Rule 27, CPC envisages certain circumstances

when additional evidence can be adduced. They are: (i) the Court from whose decree the appeal is preferred has refused to admit evidence which

ought to have been admitted, or (ii) the party seeking to produce additional evidence, establishes that notwithstanding the exercise of due diligence,

such evidence was not within his knowledge or could not, after the exercise of due diligence, be produced by him at the time when the decree

appealed against was passed, or (iii) the Appellate Court requires any document to be produced or any witness to be examined to enable it to

pronounce judgment, or for any other substantial cause. The expression ""to enable it to pronounce judgment"" contemplates a situation when the

appellate Court finds itself unable to pronounce judgment owing to a lacuna or defect in the evidence as it stands. The ability to pronounce a

judgment is to be understood as the ability to pronounce a judgement satisfactory to the mind of Court delivering it. It is only a lacuna in the

evidence that will empower the Court to admit additional evidence. But a mere difficulty in coming to a decision is not sufficient for admission of

evidence under this rule. The words ""or for any other substantial cause"" must be read with the word ""requires"", which is set out at the

commencement of the provision, so that it is only where, for any other substantial cause, the Appellate Court requires additional evidence, that this

rule would apply.

10. Admittedly, the plaintiff appellants filed an application dated 17th of May 1997 in the learned lower Appellate Court praying for adducing

additional evidence under Order 41 Rule 27 of the CPC on the grounds stated therein and there was an order for hearing of said application along

with hearing of the pending appeal. It is also an admitted fact that learned lower Appellate Court did not make any comment in the impugned

judgment regarding said application under Order 41 Rule 27 of the Code of Civil Procedure. From the four corners of the judgment it cannot be

said whether said application was pressed by learned counsel for the plaintiff appellants during hearing of said appeal. If an application is not

pressed during hearing it stands rejected being not pressed. It is true that it was always better and prudent on the part of the Court concerned to

add at least one line in the judgment that the pending application is rejected being not pressed to avoid future complicity as to whether the appeal

was disposed of keeping the application pending. If learned counsel for the plaintiff appellants really moved the application under Order 41 Rule

27 of the CPC during hearing of the appeal in the learned lower Appellate Court and it is found that there was no whisper about said application in

the judgment then the plaintiff appellants could have filed an application of review in the same Court as the mistake or omission to mention

observations regarding said on the face of the record and was reviewable. However, this case no such application of review was filed in the lower

Appellate Court. Even in the memo of appeal filed in this Court for presenting the second appeal no ground was taken alleging that learned lower

Appellate Court substantially erred in law by disposing of the pending appeal Though a ground to that effect was taken and was also formulated at

the instance of learned counsel for the plaintiff appellants at the time of hearing of the appeal but no such ground was taken at the initial stage. From

the aforesaid conduct of the plaintiff appellants I find much force in the submission of learned counsel for the contesting private respondent that said

application was not pressed during hearing of the appeal in the lower Appellate Court for which there was no discussion regarding said application

in the impugned judgment.

11. However, I have perused said application dated 17th of May, 1997 under Order 41 Rule 27 of the Code of Civil Procedure. It was alleged

therein that Shakil Ahmed was the eldest among the appellants and was conversant of the facts of the case but due to his serious illness he could

not attend Court and depose as a witness. It was alleged that on account of his illness he could not trace out and produce the documents which

they intend to produce later on in the lower Appellate Court through said application Said application was not supported with any medical paper to

show that Shakil Ahmed was suffering from serious illness for a long period for which he could not depose or could not produce the documents.

The grounds of the application do not seem to be convincing to me for allowing the same in the stage of appeal. Under these circumstances I find

little merit in the submission of learned counsel for the plaintiff appellants that said application under Order 41 Rule 27 of the CPC remained

undisposed or that judgment impugned is required to be set aside for remanding back the case to the lower Appellate Court for disposing of the

application under Order 41 Rule 27 of the CPC and for rewriting the judgment.

12. Learned counsel for the plaintiff appellants next submits that Khursida Begam, mother of the present appellants, was a "pardanosin" lady and

that there was no endorsement of reading over and explaining the deed of gift of 1982 to her in her mother tongue and hence on that score alone

the alleged deed of gift of 1982 should be treated as an invalid document. He next submits that Khursida Begam had 8 (eight) sons and two

daughters and that it is not believable that such a lady took "Sanyas" by gifting her properly to her husband and husband"s brother. According to

him, this is against the normal human conduct. He further submits that though some of the adult sons of Khursida Begam were attesting witnesses in

said deed of gift of 1982 but that does not mean that they had knowledge about the contents of the document. In this connection he refers a case

law reported in 21 CWN page 225 (Privy Council) wherein it was held that attestation by itself neither creates estoppel nor implies consent and

that it proves no more than that the signature of an executant party has been attached to a document in the presence of a witness.

13. Learned counsel for the private defendant respondent, on the other hand, submits that it was nowhere pleaded in the plaint that Khursida

Begam was a "Pardanosin" lady. According to him, when a person claiming to be a "pardanosin" lady, requires protection on that score it has to

be specifically pleaded in the pleadings and to be proved according to law. According to him, there was no pleading to that effect and as such

there is no scope of making any submission on that issue at this stage.

14. Admittedly, there is no pleading in the plaint that Khursida Begam, the mother of the present appellants, was a "pardanosin" lady. Rather it

came out from the judgments of learned Courts below that Khursida Begam had gone to the registry office more than one occasion for executing

and registration of documents executed by her. It also came out from the evidence on record that as per endorsement of the deed of gift of 1982

(Heba-Bil-Ewaz dated 27.11.1982) one Abdul Khuddus read over and explained the contents of the same to the executant Khurshida Begam.

Appellant Shakil Ahmed being plaintiff No. 2 was the sole witness (P.W. 1) on the side of the plaintiff appellants regarding Heba-Bil-Ewaz dated

27.11.1982. He deposed that it seemed to him that the said person (Abdul Kuddus)was not so educated to have the capacity to read over. It

further appears that he did not go to the registry office when said deed of gift dated 27.11.1982 was registered. As such, it is palpable that said

sole witness had no direct or personal knowledge to deny the endorsement of the deed of gift dated 27.11.1982 that the contents thereof were

read over and explained by Abdul Khuddus to the executant Khurshida Begam. Learned Courts below took note of said evidence and made

elaborate discussions on that score.

15. Learned counsel for the plaintiff appellant next submits that learned Courts below erred in law by accepting defence version that the suit

property at 10B Anjuman Road was purchased by the defendant No. 1 Haroon Rashid in the ''Benam'' of Khursida Begam as said defence of

''Benami'' purchase was prohibited under ""Benami'' Transactions (Prohibition of Right to Recover Property) Act, 1988.

16. Learned counsel for the private respondent, on the other hand, submits that prohibitory section 4 of the Act of 1988 came into force with

effect from 19th May, 1988 whereas the transaction was held in 1982 and the suit was filed in 1986. According to him, said Act of 1988 having

no retrospective effect is not a bar to take defence on that score.

17. I find much force in the aforesaid submission of learned counsel for the private respondent. Apart from that it appears from the judgments of

learned Courts below that defendant No. 1/private respondent was able to establish that he had capacity to purchase the same and why he

purchased the same in the ''Benam'' of Khursida Begam. It also came out from the evidence that P.W. 1 admitted that Khurshida Begam was a

mere housewife. There was also no whisper within the four corners of the plaint that Khurshida Begam purchased said property namely 10 B

Anjuman Road with her own money.

18. Learned counsel for the plaintiff appellants submits that the Calcutta Thika Tenancy (Acquisition and Regulation) Act, 1981 came into force

with effect from 18th January, 1982 and that interest of the landlord vested to the State and the thika tenants became direct tenants under the State

and that said tenancy right was heritable and not transferable. As such, neither Khurshida Begam being the owner of the thika land of premises No.

10B Anjuman Road had any transferable right on 27th November, 1982 the date of execution of gift deed nor the parties could have partitioned

said tenancy right through a partition deed dated 31st of October, 1983 as the tenancy right is heritable and not transferable.

19. Learned counsel appearing for the defendant No. 1 private respondent submits that the interest of thika tenants or tenants of other lands

holding directly under the State was heritable and not transferable except inter so among the heirs and existing co-sharers'' interest or to the

prospective heirs.

20. It appears from the materials on record that the contesting defendant No. 1/private respondent was able to establish that the tenancy interest in

premises No. 10/2 vested to Khursida Begam in 1975 through oral gift of the same by defendant No. 1 and plaintiff No. 1''s husband. As such, at

the time of coming into force of Thika Tenancy Act, 1981 with effect from 18.01.1982 Khursida Begam being the recorded land owner having

acquiring rights of thika tenants, retained the property. As such, there was no legal bar to execute the deed of gift dated 27.11.1982 relating to said

property in favour of Haroon Rashid (defendant No. 1) and thereafter inclusion of the same in the partition deed of 1983. There were

overwhelming evidence on record to show that the partition deed along with other deeds of dissolution of partnership business between the parties

were registered on 31st October, 1983 on the stamp papers purchased on 22nd August, 1983 and that Khursida Begam and some of his family

members in one hand and this appellant defendant and his wife on the other hand were parties to those deeds all of which were duly registered in

the registry office. From all these discussions and materials on record it is clear that both the deed of gift dated 27.11.1982 and the partition deed

dated 31.10.1983 were executed and registered within full knowledge of the executants of those deeds and that the appellant plaintiffs were not

entitled to get any relief as claimed in the plaint and that impugned judgment do not call for any interference by this Court.

21. As a result, this appeal is hereby dismissed on contest but without costs.

22. Send down Lower Court record along with a copy of this judgment to the lower Court at the earliest. Urgent photostat certified copy of this

judgment be supplied to the learned counsels of the parties, if applied for.