

MANU/BH/0162/1986

Equivalent Citation: 1987(35)BJR172, 1987PLJR73

**IN THE HIGH COURT OF PATNA
FULL BENCH**

S.A. No. 927 of 1974

Decided On: 14.11.1986

Appellants:**Ashutosh Saha and Ors.**
Vs.

Respondent:**Mohammad Yusuf Ali and Ors.**

Hon'ble Judges/Coram:

S.S. Sandhawalia , C.J., L.M. Sharma and S.K. Jha , JJ.

JUDGMENT

S.S. Sandhawalia, C.J.

1. The significant issue that has now come to the fore in this reference to the Full Bench is whether an unregistered document regarding an agreement to exchange immovable properties (one of them being in dispute as an evacuee property) would pass any title in the suit properties or affect the same ?

2. It is unnecessary to recount the somewhat tangled facts in any great detail in this Second Appeal, where the issues of fact admittedly stand concluded by the concurrent findings of both the courts below. It suffices to mention that the plaintiff-appellants had instituted the suit for a declaration of title and recovery of possession of 6 quarters standing in Plot No. 700, in Ward No. 5 of Chakradharpur Municipality in the District of Singbhum. The case set up was that the plot aforesaid originally belonged to one Kedar Nath Tiwary, but was purchased by Shaikh Mahboob Ali in the name of his three sons by a registered sale-deed way back on the 28th July, 1942. Shaikh Mahboob Ali, alias Nabu Mian, and his sons were also owners of properties in Village Kolchakra. In the wake of the partition, the said Shaikh Mahboob Ali and his sons, designing to leave India for Pakistan, arranged with the plaintiffs to exchange the aforementioned properties with the properties of the plaintiffs in Mauzas Tabaria, Sharkhandi and Batikamari in the District of Nadia, which became part of East Pakistan and later on of Bangla Desh. Accordingly, an unregistered agreement of exchange dated the 6th January, 1951, between the plaintiffs on one hand and the sons of Shaikh Mahboob Ali on the other was executed and the exchanges were sought to be effectuated by actual delivery of possession of the properties by one party to the other. The plaintiffs paid in cash a sum of Rs. 5,000 also, being the difference of the respective valuation of the properties of both the parties. More than two months later, on the 28th March, 1951, Shaikh Mahboob Ali and his sons executed a registered Power of Attorney in favour of one Dr. Satish Chandra Saha, to execute and register a sale-deed on their behalf in terms of the agreement for exchange. The plaintiffs consequently claimed to have come in possession of the above exchanged properties, including the suit properties.

3. It is then the case that defendants Nos. 1 and 2 forcibly broke open the locks and trespassed on the suit properties on the 5th May, 1951, despite protestations on

behalf of the plaintiffs. A criminal case, Under Section 48 of the Indian Penal Code, was instituted against them' and they were convicted in that case, and, their appeal too was dismissed on the 31st October, 1952, by the Additional Sessions Judge. Thereafter, the said defendants Nos. 1 and 2 agreed to give up possession, but, retracted therefrom and a fresh case Under Section 448 of the Indian Penal Code was instituted, in which also they were convicted by the trial Court, but, apparently acquitted later on appeal. In the interregnum, the aforesaid two defendants inducted defendants Nos. 3 to 7 as tenants on some portions of the suit properties.

4. On or about the 15th February, 1955, the Assistant Custodian, Chaibassa, acting under the Administration of Evacuee Properties Act, initiated proceedings to declare the suit properties and other properties of Shaikh Mahboob Ali and his sons to be evacuee properties and took possession thereof. Aggrieved against the said order, the plaintiffs preferred an appeal, which, however, was allowed a decade later on the 6th August, 1965. Therein, it was held that the declaration of the suit properties as evacuee property by the Assistant Custodian was erroneous in view of the fact that a valid and bonafide transfer in favour of the plaintiffs for good consideration and actual delivery of possession had already taken place. It was thereafter that by virtue of the Power of Attorney, Dr. Satish Chandra Saha executed a registered sale-deed in favour of the plaintiffs on the 17th June, 1969, thereby transferring the title to them in the suit properties. The plaintiffs thereafter instituted Title Suit No. 30 of 1970, which gives rise to the present proceedings.

5. In contesting the suit, defendants Nos. 1 and 2 took up a wide variety of defences, including the one that the registered deed of sale executed on the 17th of June, 1965, also did not confer any title on the plaintiffs over the suit properties, because they had, allegedly long before that sale, acquired valid title to the suit properties by virtue of an alleged oral transaction of gift by Mohammad Yasin, in favour of his sister, defendant No. 2, and, further by adverse possession for more than 12 years. It was alleged that the criminal cases instituted against them were on the basis of false allegations and in spite of the convictions in the said cases, they had continued to remain in possession of the suit premises adversely to the plaintiffs and the world at large. According to the defendants, the plaintiffs had no title to the suit properties and had no cause of action whatsoever.

6. On the pleadings of the parties, as many as 9 issues were framed, but, only the relevant ones call for express notice:

3. Whether the suit is barred by limitation.?

7. Whether defendants Nos. 1 and 2 have acquired title to the suit property by adverse possession ?

7. In an exhaustive judgment the trial Court decided all the nine issues in favour of the plaintiffs and in terms on issue No. 2 held that the suit was not barred by limitation and on issue No. 7 that defendant No. 2 did not acquire any title to the suit property by adverse possession. As a necessary consequence, the plaintiff appellants' suit was decreed with costs.

8. On appeal, the first appellate Court affirmed all the findings of the trial Court barring the one on issue No. 2. Thereon it took the view that the order by which the property was taken in possession by the Assistant Custodian under the Administration of Evacuee Property Act cannot be described as an order of injunction within the meaning of Section 15(1) of the Limitation Act, precluding the plaintiffs from

enforcing their right in time and consequently the plaintiffs were not entitled to any deduction in computing the period of limitation and, therefore, it was held that the suit was barred by limitation. On this ground the appeal was allowed and the suit was dismissed.

9. When this appeal originally came up before the Division Bench, the learned Counsel for the appellants inevitably frontally assailed the above finding of the first appellate Court. Relying on Sections 7, 8 and 46 of the Administration of Evacuee Properties Act, he had contended that the period betwixt the declaration of the property as an evacuee property and its subsequent order of release by the Custodian must be excluded Under Section 15(1) of the Limitation Act for the purpose of computing the period of limitation for filing the suit for possession. With equal force he projected his stand in the alternative that indeed the very cause of action for the appellants arose only on the execution of the registered sale-deed in their favour on the 17th of June, 1969 and, consequently, the suit having been preferred in 1970 was squarely within limitation. Noticing some difficulty on the first question and the absence of any direct authority with regard to the relevant provisions of the Administration of Evacuee Property Act, the case was referred to a larger Bench for authoritative decision.

10. To clear the cobwebs, it may be noticed that the concurrent finding of the two courts below and indeed the virtually undisputed position is that (vide Ext. 4) a mere agreement to exchange the properties was executed on the (th of January, 1951. Admittedly even this agreement to exchange was an unregistered document. This agreement was to be effectuated later and it was merely three months thereafter that on the 28th of March, 1951 Ext. 6, a power of attorney, was executed by Sk. Mahboob Ali and his three sons in favour of Dr. Satish Chandra Saha authorising him to execute a registered sale-deed for them and on their behalf. It is common ground that the aforesaid Dr. Satish Chandra Saha only executed a sale-deed in favour of the plaintiffs long thereafter on the 17th of June, 1969 (vide Ext. 7). Plainly enough it would be only on that date that the title in the immovable properties could and did pass to the plaintiffs.

11. Now a perusal of the judgments of the two courts below would indicate that on the issue of limitation the matter was not well projected and the basic aspect as to when the right to sue accrued to the plaintiffs was not adequately canvassed. However, the learned Counsel for the appellants both before the Division Bench and before us placed in the forefront his forceful argument that the foundational issue herein is as to when a right to sue accrued to the plaintiffs and the consequential cause of action arose. Mr. S.C. Ghose rightly contended that the mere agreement to exchange recorded by an unregistered document did not in the least confer any title in the immovable properties referred to therein and, indeed, could not even remotely affect the same. Therefore, the plaintiffs, even if they were so inclined, did not have a vestige of legal title on the basis of which they could sustain a suit for declaration of title and possession. It was only when the registered sale-deed was executed in the plaintiffs' favour that title in the property passed to them and the right to sue accrued. Prior to that it was a mere contingent agreement which could not possibly be enforced against the contesting defendants. The submission aforesaid is plainly meritorious. Admittedly the property in the suit was of a valuation which required registration of the document for transfer of title or rights therein.

Reference in this connection may be made to Section 17(1)(b) of the Registration Act, 1908 which is in the following terms:

17. Documents of which registration is compulsory. (I) The following documents shall be registered, if the property to which they relate is situate in a district in which, and if they have been executed on or after the date on which, Act No. XVI of 1864, or the Indian Registration Act, 1866 (20 of 1866), or the Indian Registration Act, 1871 (8 of 1871; or the Indian Registration Act, 1877 (3 of 1877), or this Act came or comes into force, namely;

(a)....

(b) other non-testamentary instruments which purport or operate to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest, whether vested or contingent, of the value of one hundred rupees and upwards, to or in immovable property;

* * * * *

It is plain from the aforesaid provision that the agreement to exchange would clearly come within the ambit of the aforesaid provision. This indeed could not even be disputed by the learned Counsel for the respondents. Therefore, to vest even any contingent legal right in the immovable suit property the agreement of exchange required compulsory registration. This admittedly was not so done. That being so, the provision of Section 49 would come into play. It is in the following terms:

49. Effect of non-registration of documents required to be registered. No document required by Section 17 or by any provision of the Transfer of Property Act, 1882 (4 of 1882) to be registered shall-

(a) affect any immovable property comprised therein, or

(b) confer any power to adopt, or

(c) be received as evidence of any transaction affecting such property or conferring such power.

unless it has been registered;

* * * * *

By virtue of Clause (1) the effect of the non-registration of the agreement to exchange would be that far from vesting any title in the immovable property such a document cannot even affect such property. Indeed because of Clause (c) such a document cannot be received as evidence of any transaction affecting such property and it is common ground that the proviso to the Section is not attracted. This position is somewhat axiomatic and perhaps needs no great elaboration. If authority is needed for so plain a proposition, then reference, may be made to the following authoritative words of Sir George Lowndes in *James R.R. Skinner v. Robert Hercules Skinner*

and Ors. A.I.R. 1929 Privy Council 26 J.

If an instrument which comes within Section 17 as purporting to create by transfer an interest in immovable property is not registered, it cannot be used in any legal proceedings to bring about indirectly the effect which it would have had if registered. It is not to affect the property and it is not to be received as evidence of any transaction 'affecting' the property." and

Their Lordships are clearly of opinion that this is within the prohibition of the Section. They think that an agreement for the sale of immovable property is a transaction 'affecting' the property within the meaning of the Section, inasmuch as, if carried out, it will bring about a change of ownership. The intention of the Act is shown by the provisions of Section 17(2)(v), which exempts from registration and therefore frees from the restriction of Section 45, a document which does not itself create an interest in immovable property, but merely creates a right to obtain another document which will do so.

In the face of this provision to allow a document which does itself create such an interest to be used as the foundation of a suit for specific performance appears to their Lordships to be little more than an evasion of the Act.

The aforesaid view has inevitably been followed thereafter and has not been deviated from.

12. In view of the aforesaid enunciation and the earlier discussion; the answer to the question posed at the outset is rendered in the negative; and it is held that an unregistered document agreeing to exchange immovable property (which otherwise requires compulsory registration Under Section 17 of the Registration Act) would not vest any title or affect the same in the said property.

13. Now once it is held as above, it necessarily follows that the unregistered agreement of exchange (Ext. 4) dated the 6th of January, 1969 did not confer any title or vested right on the plaintiffs on the basis of which they could possibly sustain a suit. It was only when the sale-deed (Ext. 7) was duly executed in the plaintiffs favour on the 17th of June, 1969 that the title passed to the plaintiffs and the right to sue accrued and the cause of action arose to them. Undoubtedly, if the terminus a quo is the date above said, the finding of the first appellate Court on issue No. 3 on the point of limitation is unsustainable and has consequently to be and is hereby reversed. It is held in affirmance of the trial Court that the suit was not barred by limitation.

14. Once it is held as above, the ancillary question that in case Section 15(1) of the Limitation Act was at all attracted the period betwixt the declaration of the property as evacuee property and the subsequent order of release by the Custodian could be excluded for the purpose of computing the period of limitation, is rendered purely academic and we, therefore, do not propose to go into the same.

15. The appeal, therefore, succeeds the judgment of the first appellate Court is

hereby set aside and that of the trial Court restored. There will, however, be no order as to cost.

L.M. Sharma, J.

16. I agree

S.K. Jha, J.

17. I entirely concur in the judgment of the learned Chief Justice. Nonetheless, I wish to highlight the point that in view of the fact that the cause of action accrued within the period of limitation the bar of limitation to the maintainability of the suit does not arise at all. It follows as a necessary corollary that the discussion by the lower appellate Court regarding the applicability of Section 15(i) of the Limitation Act was wholly unwarranted and misconceived.

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