

Present:

Mr. Justice Md. Ruhul Quddus

Civil Revision No. 678 of 1999

Sree Nitta Nando Dey being dead his heirs  
Rabindra Chandra Dey and others

...Petitioners

-Versus-

Nogendra Krishna Kundu and another

...Opposite Parties

Mr. Md. Amirul Islam with Md. Rezaul Kabir  
Khan Advocates

...for the petitioners

No one appears for the opposite parties

Judgment on 15-16.11.2011

This Rule at the instance of plaintiff-respondents was issued on an application under section 115 (1) of the Code of Civil Procedure to examine the legality of judgment and decree dated 28.9.1998 (decree signed on 5.10.1998) passed by the Subordinate Judge (now Joint District Judge), Second Court, Munshiganj in Title Appeal No.119 of 1994 allowing the same and remanding the suit for trial afresh on setting aside those dated 31.8.1994 passed by the Senior Assistant Judge, Munshiganj in Title Suit No.40 of 1991.

Plaintiff's case, in brief, is that he had entered into an agreement with defendant No.1 Nogendra Krishna Kundu (herein opposite party No.1) on 2.4.1990 for purchasing the property as described in the

schedule of plaint. The consideration was fixed at Taka 61,000/= (sixty-one thousand) out of which he paid Taka 56,000/= (fifty-six thousand) only as advance at the time of execution of the sale agreement. It was stipulated that after collecting necessary papers and documents within three months and receiving the balance consideration money, defendant No.1 would execute and register a sale deed in his favour. The plaintiff on several occasions offered to defendant No.1 the balance consideration money and requested him to execute and register a sale deed, which he avoided on different pleas. Lastly defendant No.1 refused to execute and register the sale deed on 25<sup>th</sup> Chaitra 1397 B.S, thus the cause of action for filing the suit arose.

Defendant No.1 entered into appearance and contested the suit by filling a written statement denying the material allegations of plaint contending, *inter alia*, that the suit land and other lands originally belonged to Pachquori Pal and Joghobandu Pal in equal share. After their death, some of their heirs transferred the land to Prano Ballab Datto, who subsequently transferred the same to Ram Krishno Pal and Parul Rani Pal on 6.7.1969 by two separate sale deeds. Thereafter, the said Ram Krishno Pal and Parul Rani Pal transferred it to him and his brother Kartik Chandra Kundu, defendant No.2 by a registered sale deed dated 25.5.1983. Later on, Kartik Chnadra Kundu transferred his share to him (denendant No.1) and in this way he became the absolute owner of the suit land.

The defendant's further case is that he did not execute any sale agreement in favour of the plaintiff. The signature as shown on the sale agreement is not of him and he did never receive any earnest money. Earlier the plaintiff exerted undue pressure on him to sell the suit land, which he denied. Initially the plaintiff was a tenant under his vendor, Ram Krishna Pal. After he had purchased the suit land, he attorned the plaintiff as his tenant in a portion of the suit land.

On the aforesaid pleadings, trial Court framed issues namely, whether the suit was maintainable in its present form and manner; whether it was barred by limitation; whether it was correctly valued and court fees paid thereon were adequate; whether the plaintiff was entitled to get an out and out sale deed on the basis of the *bainapatra* dated 2.4.1990; whether the plaintiff was entitled to get a decree as prayed for, and what other relief he was entitled to.

The plaintiff, in order to prove his case, examined six witnesses and adduced in evidence the alleged sale agreement as exhibit-1. On the other hand, defendant No.1 examined three witnesses including him and adduced in evidence some of his title documents.

After conclusion of trial, learned Senior Assistant Judge, Munshigonj decreed the suit by his judgment and decree dated 31.8.1994 challenging which defendant No.1 preferred Title Appeal No.119 of 1999 before the District Judge, Munshigonj. During pendency of the appeal, the plaintiff died and the present petitioners as his legal heirs and successors were substituted. Learned



the agreement at Munshiganj, where the suit land situates at Tongibari and why the plaintiff gave evidence through his constituted attorney in spite of being fully well.

It further appears that the trial Court framed the issues and after taking evidence of both the sides, disposed of the suit on merit. In course of trial, the agreement for sale was proved by an attesting witness named Kalipada Pal (P.W.5), who supported the plaintiff's case and corroborated the other P.Ws. The scribe of the agreement Md. Munir Hossain (P.W.6) also supported the plaintiff's case stating that under instructions of both the vendor and vendee he had written the agreement with his pen and saw passing of consideration money at the time of execution. The trial Court in decreeing the suit considered and relied on the evidence of P.W.5 and therefore, it was not correct to say that the evidence of P.W.5 was not considered.

Learned Judge of the appellate Court missed that the defendant denied the execution of sale agreement and obtained an opinion of hand-writing expert, against which the plaintiff filed an objection, but he (defendant) did not take any step to examine the expert and prove the opinion formally. When the plaintiff raised objection against the opinion of hand-writing expert, the trial Court was not supposed to consider the opinion in absence of any formal proof and without examining the expert. Moreover, in the judgment of the trial Court there is a finding that defendant No.1 after execution of the sale agreement changed his style of signature to deny its execution in future litigation.

The defendant also did not take any ground in the memo of appeal to that effect or take any step in appellate stage for adducing any additional evidence. In such a position, I do not think that the lower appellate Court was justified in sending the suit on remand on the ground of non-consideration of the expert's opinion.

The appellate Court also missed that the sale agreement was an unregistered one, which could be executed anywhere at the parties' convenience. The plaintiff by a power of attorney appointed his son Ram Chandra Dey, who deposed on his behalf as P.W.1. This is not the case of defendant that the power of attorney was not genuine, therefore, I do not find anything wrong in deposing through a constituted attorney, even if the plaintiff was fully well.

The trial Court took up issue Nos.4, 5 and 6 together and decided the same against the defendant. Therefore, the appellate Court is also not correct to say that the trial Court passed its judgment without adjudicating issue No.4.

For the reasons stated above, I find substance in the Rule. The impugned judgment and decree of the appellate Court do not appear to be legally sustainable.

In the result, the Rule is made absolute. The impugned judgment and decree dated 28.9.1998 passed by the Subordinate Judge, Second Court, Munshiganj in Title Appeal No. 119 of 1994 are hereby set aside and those of the trial Court are restored.

Send down the lower Court's records.