Ratna Kanta Kalita and Others Vs Kanak Chandra Kalita (deceased by L.R.) and Others

Court: Gauhati High Court

Date of Decision: March 26, 2003

Acts Referred: Civil Procedure Code, 1908 (CPC) â€" Order 20 Rule 18
Evidence Act, 1872 â€" Section 101
Limitation Act, 1963 â€" Article 65

Citation: AIR 2004 Guw 31

Hon'ble Judges: S.K. Kar, J

Bench: Single Bench

Advocate: N. Chakraborty and Nabasish Chakraborty, for the Appellant; C.K.S. Baruah, H.M. Phukan, A. Dey, B. Mahanta and G. Mispa, for the Respondent

Final Decision: Allowed

Judgement

S.K. Kar, J.
I have heard learned counsel for the Appellants as well as learned counsel for the respondents and have perused the

connected records. This is a second appeal to challenge Judgment and decree dated 7-11-1997 passed by the Civil Judge, Sr. Div. No. 2 in T.A.

No. 26/96 reversing Judgment and decree dt. 30-4-96 of Civil Judge. Jr. Div. No. 3 made in T.S. No. 267/94.

2. Brief facts giving rise to institution of the suit, (TS 267/94) are as follows. Respondent/plaintiff late Kanak Ch. Kalita (Now Substituted by his

legal heirs) alleged/pleaded that on 1-11-93 appellant/principal-defendant No. 1, Ratna Kanta Kalita along with his wife and sons (defendant No.

2-5) forcibly trespassed unto his land with intent to dispossess him. That this land was inherited by him from his father and he was in separate

possession of the same on the strength of amicable partition amongst the brothers, defendant No. 1 being one of his three brothers, since the year

1966 when amicable partition was effected between the co-sharers. However, the land in his share and possessed by him, although demarcated by

boundary pillars, is the continuous eastern half of the dag which was held jointly after amicable partition with appellant/defendant No. 1. That

proforma-defendants are heirs of his other two brothers who were given land in lieu thereof separately and share of the plaintiff and the defendant

No. 1 is 1B 2K 3L comprising suit dags 2195 and 2198 of K.M. Patta No. 847 as detailed in schedule "A" attached to the plaint, and hereinafter

called the ''Suit land''.

3. The further case of the plaintiff/respondent is that due to an incident of trespass on 1-11-93 he lodged a FIR and a Proceeding u/s 145 Cr.P.C.

followed between them wherein appellant/defendant No. 1 claimed that he was occupying entire land on the understanding that he will relinquish

his interest in property purchased at Guwahati from joint-fund. That such claim of defendant was false as no property was purchased at Guwahati

from any common fund as alleged.

4. On the assertion of facts as aforesaid respondent/plaintiff prayed for a preliminary decree declaring his interest in suit dags 2195 & 2198 to the

extent of 50%, for appointing Amin-Commissioner for demarcating his such share, for final decree in terms of report of Amin-Commissioner and

for the separate possession of his partitioned share and khas possession with costs etc. removing the structures and fixtures that may be found

thereupon the suit land.

5. Principal defendants 1 and 5 only presented the written statement for and on behalf of all of them, (i.e. defendants No. 1 to 5), contending, inter

alia, that suit is wanting in cause of action, not maintainable in law, barred under Articles 65/110 and Section 27 of Limitation Act and on principle

of waiver, estoppel, not valued properly, bad for non-joinders of parties and mis-joinders of causes of action proceeding under Sections 145/146

Cr.P.C. having no nexus with it etc. and pleading that the partition suit cannot be proceeded only with respect of a portion of the joint-property as

the amicable partition of 1966 was not only with respect of land described in Schedule ''A'' to the plaint. That it was correct (refer Para 8 of W.S.)

that each of the four brothers was entitled to 1/4th share in the ancestral properties including the ''A'' schedule land of the plaint but then,

plaintiff/respondent sold out by ''oral amicable sale'' his 1/4th share of the property to the answering defendant/appellant No. 1 by accepting a sum

of Rs. 20,000/- (Rupees twenty thousand) in order to purchase land at Guwahati where Plaintiff/respondent was serving as Govt. employee and

defendant/appellant thereafter was occupying and possessing said 1/4th share by constructing residential house thereupon since then openly and

adversely without an interruption. That on his retirement from service, out of greed, plaintiff/respondent with intention to sell the 1/4th share to

interested person caused proceeding under Sections 145/146 Cr.P.C. instituted on false and concocted allegations but without awaiting for the

final order in the meantime filed this suit. That ''Chitta''-mutation was done by plaintiff/respondent collusively with ''Mondal'' and it is not true that he

exercised act of possession over the suit land as stated in the plaint. They prayed for dismissal of the suit with compensatory costs.

6. Proforma-defendants 8, 10 and 15 of the suit by their written statement supported the averments on the plaint and stated that memorandum of

the amicable partition was registered as deed No. 4231 serial No. 4805 dt. 15-5-67 and all the four brothers were residing upon land of suit dag

No. 2195, although the area of said dag was not written correctly in the deed. That plaintiff and defendant No. 1 were given equal 1/2 share in suit

dags and other two brothers got their lands on separate dags. That plaintiff was having his house upon the suit land and used to come occasionally

to enjoy the usufructs but defendant No. 1 trespassed upon the suit land by erecting a temporary house on 1-11-93 illegally. They admitted that

they conceded to mutation in favour of the plaintiff, pursuant to the amicable partition in question.

7. The Original Court framed and first appellate Court maintained the nine number of issues in the suit. These are as follows :

1. Whether the suit is maintainable in its present form.

2. Whether there is any cause of action for the suit.

3. Whether the suit is properly valued and Court-fee paid.

4. Whether there was any partition of the suit land in 1966.

5. Whether plaintiff sold his 1/4th share to defendant No. 1.

6. Whether defendant No. 1 has been possessing plaintiffs share adversely.

7. Whether the plaintiff has any possession over his share of the suit land.

8. Whether plaintiff is entitled for decree or partition of his share, if any.

9. To what reliefs the parties are entitled to?

8. Three witnesses for the plaintiff including himself and two of the defendants (i.e. defdt. Nos. 1 and 15) examined themselves as D.W. 1 and 2.

Documentary evidence relied upon by plaintiff were certified copy of written statement by 2nd party of proceeding No. 412m/93, u/s 145,

Cr.P.C. (ext. 1) certified copy of Jamanbandi of K.M. Patta No. 847 (ext. 2), certified copy of Chitha (ext. 3), revenue paying receipt (ext. 4).

9. Learned Civil Judge, Jr. Div. No. 3 decided issues 3, 4, 5 in favour of plaintiff/respondent but remaining other issues against him and dismissed

the suit. Learned Civil Judge, Sr. Div. No. 2 recorded his findings without complying with provisions of Order XL1, Rule 31 of C.P.C. and

straightway went ahead to decide the appeal making a general discussion of the evidence on record. However, impugned judgment would show

that the first appellate Court concurred with Court of first instance insofar issue No. 4 is concerned. The pleading on record will also show that this

is an admitted position on facts, which was affirmed by the oral testimonies of PWs. 2/3 and DWs. 1/2 in addition to that of the plaintiff/respondent

PW. 1, that an effective amicable partition was done in the year 1966.

10. It appears from a reading of the impugned judgment that neither the points for determination were settled nor issues were treated by the

learned Civil Judge, Sr. Div. No. 2 under the specific marginal headings. It seems the appellate Court took up the issues 5/6/7 jointly for a

discussion, although not referring to them specifically, and arrived, on the basis of discussion of evidence on record, to a finding that

defendant/appellant has failed to establish that he had purchased the share of the plaintiff in the suit land and was possessing the suit land in

exclusion to the plaintiff. The finding on other issues were also recorded but without dealing with them distinctly. The technicality of such omission

may be overlooked if the findings were otherwise correct and based on actual evidence on record. Learned first appellate Court ruled out any

claim of adverse possession and decided that plaintiff/respondent continued to possess his share in the suit property till the threatened

dispossession on 1-11-93 by defendant No. 1 and finally decreed the suit.

11. At the time of admission of this Second Appeal this Court allowed to formulate the following substantial question of law as per contentions of

the appellant with a further direction that he may raise any other such question during the time of hearing of the appeal. The question formulated

were as below :--

''(i) Whether there can be delivery of possession of a specific portion of land in case when the disputed land is an unpartitioned ancestral land;

(ii) Whether there can be delivery of possession of a specific share to any one in cases of ancestral property without measure and demarcation by

Amin Commissioner;

(iii) Whether the Civil Court can grant partition of unpartitioned land without following the procedure in Regulation 154 (d) of the Assam Land and

Revenue Regulation; and

(iv) Whether the claim of the plaintiff who does not take physical possession of the suit land in respect of his share within 18 years of partition is

barred by the law of Limitation Act.''

12. Question Nos. (i) to (iii) :-- Mr. Chakraborty, learned counsel for the appellant submitted that partition suit cannot be maintained without

covering the entire ancestral property and without appointing a amin-commissioner for the purpose to effect partition by metes and bounds. On a

study of these points I find they relate to the same question of fact although drafted as three different substantial questions of law. In this context the

finding of the first appellate Court with respect to issue No. 4 will be relevant. I quote from the judgment.

While deciding the issue No. 4 the learned trial judge held that amicable partition in respect of the suit land along with other land took place in

1966. It is the case of the plaintiff that partition of their paternal property took place in 1966 and that the suit land was jointly obtained by the

defendant No. 1 and the plaintiff. The plaintiffs unimpeaching evidence that he was possessing the eastern half of the suit land after the said

amicable settlement has been corroborated by Sri Tarini Kalita (P.W. 2), Sri Bisnu Ram Das (P.W. 3) Sri Ananta Kalita (D.W. 2). Even the

defendant No. 1 (D.W. 1) also in his evidence clearly stated that there was mutual partition in 1964. Hence the learned trial judge rightly decided

that there was an amicable partition in respect of the paternal property of the plaintiff and his brothers.

I find nothing on record to defer with these concurrent findings of facts by two Courts below. Learned Counsel for respondent Mr. Sharma Barua

has rightly pointed out to me from the averment on the written statement that there is the specific admission of the contesting defendant, vide Para 8

of the written statement, as follows :--

8) That as regard the statements made in Para 1 of the plaint, although it is correct that each of the 4 brothers (named there) was entitled to 1/4th

share of all the ancestral properties, including the suit lands of Schedule "A" of the plaint, it was a fact, that the plaintiff sold by oral amicable sale,

his said 1/4th share of the property to the answering Defendant No. 1 by taking Rs. 20,000/- (Rupees twenty thousand only) in order to purchase

a plot at Guwahati where the plaintiff has been serving (in the Govt. press) and living with his family since ..... till now. Defendant No. 1 has

been occupying and possessing the said 1/4th share by constructing residential houses on the said lands as of own right, title and interest, openly,

peaceably and adversely and continuously since then, till now.

It will thus be seen from the pleading on written statement that contesting defendant made a definitive and categorical assertion of fact that he

purchased the share of plaintiff/respondent on payment of a consideration of Rs. 20,000/- (Rupees twenty thousand) due to "oral amicable sale"

and thereafter was possessing the share of plaintiff on such purchase. Thus, the question of amicable partition cannot be reopened now. There is no

force in these question of fact or of law and they are not at all substantial .

13. As against the claim of the plaintiff/respondent the present appellant/defendant took a plea of "oral purchase", and as such he is duty bound to

prove any such purchase and the collateral plea of adverse possession claimed by him. Going through the contents of the Impugned judgment I find

that the learned first appellate Court took up this issue in its discussion and held that claim of the defendant/appellant of the transfer by ''oral sale'' is

not tenable in the eye of law and moreover there was no legal evidence of any such transfer, (sic) It was also held on the basis of oral testimony of

PW.s. 2/3 that plaintiff/respondent was in possession of his share till 1-11-93 and even oral evidence of D.W. 2 supported such possession of the

plaintiff. There is nothing to impeach the evidence of these witnesses who testified that they knew the suit land which was adjacent to their

residences. It was also held that defendant himself admitted in his deposition on oath (during cross-examination) that at the time of amicable

settlement the suit land had fallen in the share of plaintiff and defendant No. 1 and they were possessing one-half of share of the land each. There is

no evidence to the contrary and nothing could be pointed out to me to take a different view. The first appellate Court below has held that

defendant No. 1 had failed to adduce any evidence to claim adverse possession. Even it was held that his own witness DW. 2 belied the story of

the defendant No. 1. It was conclusively held that there was no evidence of any case of ouster. Present appellant has not been able to point out

any case of non-reading or misreading of actual evidence on record of any case of taking a perverse view. I find the reversal of finding of the Court

of first instance is based on cogent reasons and logical discussion of actual evidence on record and there is nothing to assail such findings of the first

appellate Court. In the instant suit joint-possession of suit property/land was both admitted and legally established on evidence and hence suit for

partition is maintainable as was held by the first appellate Court indirectly reversing the findings of trial Court to that effect on issues 1 and 2 and as

well as issues 8 and 9.

14. The question of appointing Amin-Commissioner, as submitted by Mr. Sharma Barua, is not relevant at this stage or, even earlier because the

question of amicable partition was a fact admitted on record and learned civil judge, Sr. Div. has passed, in fact, a preliminary decree referring the

matter to collector for effective partition consequent to the declaration of the extent of interest of the plaintiff/respondent. There is nothing to

confuse the position of law and I find that this objection of not appointing Amin-Commissioner is unwarranted and misconceived, under the

particular facts and circumstances of this case as discussed.

15. Question No. (iv) :-- Law is well-settled that a person/party who sets up a title by adverse possession, has to affirmatively prove his or her

possession for over the statutory period of 12 years and to show that such possession was adequate in continuity, publicity and extent. But it was

rightly held that appellant/defendant No. 1 hopelessly failed to show his possession over the suit land not to (sic) of continuous possession. Exts.

2/3, Jamanbandi and "Chitha"-mutation have remained uncontroverted co-lateral evidence of possession of plaintiff/respondent and no infirmity in

acceptance of such evidence by first appellate Court could be shown. It is also another settled proposition of law that in case of co-sharer the

possession of one co-owner is the possession of all the co-owners and, in absence of ouster or something equivalent to ouster, time does not run

against the co-owner not in possession. But in the instant case the plaintiff/respondent could satisfactorily prove his possession over the suit land

with positive and acceptable evidence. As between the co-heirs there must be evidence of open assertion of hostile title, coupled with exclusive

possession and enjoyment by one of them to the knowledge of the other so as to construe ouster AIR 1990 SC 507. The question of adverse

possession was taken for discussion by trial Court with reference to issues Nos. 6 and 7 and commented as follows :--

But as stated by plaintiff and pro forma defendant No. 15 and other PWs. plaintiff cultivating his plot adjacent to residence of defendant No. 1

falls in dag No. 2195 by growing betel nut tree, turmeric and other vegetable by plaintiffs although from Guwahati, but for other plot of land and its

possession there is nothing. As plaintiff prayed for recovery of his possession after partition, that shows that he has at present no possession of

both plots. On the other hand, for a long continuous possession over the suit land cannot be taken trustworthy"".

This observation is neither a proper discussion nor a reasonable appreciation of evidence but an infirm decision on misconception of facts.

Therefore, the opinion of the Court was rightly reversed on a plausible explanation and fair criticism of evidence on record and I find nothing to

assail such finding of the first appellate Court. Trial Court had misconceived the law by shifting onus of proof of adverse possession on the

plaintiff/respondent forgetting its duty to ask from the person taking plea of adverse possession to substantiate it once the plaintiff discharges his

onus by proving title.

16. In the result, the second appeal is without any merit and is dismissed. The decree passed by the first appellate Court is upheld and will be

deemed to be a preliminary decree under Order XX, Rule 18 read with Section 54 of C.P.C. notwithstanding absence of any specific direction to

that effect and the suit will be treated to have been decreed in its entirety, excluding only the part of appointment of Amin-Commissioner by Court.

Decree may be amended accordingly, if occasion arises, for doing complete Justice and removal of doubts in execution of the same, at option of

the respondent/plaintiff.