
(2015) 06 GAU CK 0038

Gauhati High Court

Case No: Regular Second Appeal No. 55 of 2004

Jaya Handique and
Others

APPELLANT

Vs

Bimala Dutta

RESPONDENT

Date of Decision: June 26, 2015

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 32 Rule 15

Citation: (2015) 06 GAU CK 0038

Hon'ble Judges: Arup Kumar Goswami, J

Bench: Single Bench

Advocate: B.D. Goswami, for the Appellant; A.C. Sarma, Advocates for the Respondent

Final Decision: Dismissed

Judgement

Arup Kumar Goswami, J

Heard Mr. B.D. Goswami, learned counsel for the appellants. Also heard Mr. A.C. Sarma, learned counsel for the respondent.

2. This appeal is preferred by the successors of the original defendant against the judgment and decree dated 13.11.2003 passed by the learned Civil Judge (Sr. Divn.) No. 2, Guwahati in Title Appeal No. 40/2002 dismissing the appeal and affirming the judgment and decree dated 30.04.2002 passed by the learned Civil Judge (Jr. Divn.) No. 1, Guwahati in Title Suit No. 101/1995.

3. The second appeal was admitted to be heard by an order dated 06.04.2004 on the following substantial questions of law:

"1. Whether power of attorney-holder can depose in the case on behalf of the Principal in the absence of any infirmity of the Principal in view of Section 2 of the Power of Attorney Act and Order XXXII Rule 15 CPC?"

2. Whether in a suit decree of eviction can be passed in absence of proof of right, title over the suit land?

3. Whether a Court can allow an agent of the plaintiff to plead the case of the plaintiff on the basis of an unregistered power of attorney?"

4. The plaintiff filed the suit through her attorney, who is her husband, for right, title and interest in respect of 3 Katha 10 Lecha of land covered by Dag No. 2335, Dag No. 2336, Dag No. 2334 and Dag No. 2341/3685 covered by K.P. Patta No. 2198 of Sahar Sarania, 2nd Khanda, Mouza- Ulubari with a two-storied RCC building, a thatched house, etc. described fully in the Schedule-A of the plaint and for decree of eviction of the defendant from the Schedule-B within the Schedule-A land.

5. The claim of the plaintiff was based on two sale deeds ? Sale Deed No. 5690 dated 03.06.1974 covering an area of 1 Katha 10 Lecha, the vendor being Smti. Banamali Das and another Sale Deed No. 5788 dated 04.06.1974 measuring area of 2 Katha, vendor of which is one Smti Banalata Das. Both the land is under K.P. Patta No. 918 and she was delivered possession. Together, they formed the Schedule-A land. Her name was mutated by an order dated 06.05.1975 and she constructed pucca boundary walls and raised a two-storied building thereon. For construction of the building, a thatched house was raised which was later on used as a shed for the Chowkidar. The defendant was a Mechanic by profession and he was allowed to reside in the thatched house as a permissive occupier in the year 1989-90 for three months while serving as Driver-cum-Chowkidar. He stopped working for the plaintiff and when requested to vacate, he promised that he would do so on arrangement of an alternative accommodation. However, instead of vacating, the defendant, stealthily and surreptitiously, obtained a Holding No. from the Guwahati Municipal Corporation by submitting revenue payment receipts in respect of different patta land and complaint being lodged by the plaintiff, the Holding was cancelled. This prompted the defendant to file a Title Suit being Title Suit No. 59/92 in the Court of Munsiff No. 2 at Guwahati. In the said suit, defendant claimed that the land was covered by Dag No. 2336 of K.P. Patta No. 673. The suit was dismissed by a judgment and decree dated 21.02.1994. On the dismissal of the Title Suit No. 59/1992, the defendant had preferred an appeal being Title Appeal No. 12/1994. Title Appeal No. 12/1994 was allowed remanding the case to the learned Trial Court for fresh disposal and the suit was pending. It is further pleaded that during the re-settlement operation, Schedule-A land was included in Dag No. 2322 of K.P. Patta No. 760 along with 12 pattadars. Subsequently, on her petition, separate K.P. Patta No. 2198 was issued in respect of dags which are mentioned in the Schedule-A.

6. Mr. Goswami has submitted that on remand the learned Trial Court again dismissed the suit. The plaintiff (the defendant herein) did not pursue the matter thereafter.

7. The defendant had filed written statement contending that plaintiff is not the owner of the suit land and that she did not construct the thatched house. The boundary of the wall

was constructed by the plaintiff's husband forcibly. He had denied allegations that he was a permissive occupier and stated that he had filed a suit being Title Suit No. 260/1994, claiming right, title and interest by adverse possession.

8. At this stage, it will be relevant to record that defendant's suit for adverse possession was dismissed by the learned Trial Court as well as by the first Appellate Court holding that he had failed to prove adverse possession.

9. The second appeal preferred, being RSA No. 56/2004, was also dismissed by a judgment and order dated 24.06.2015.

10. The plaintiff in the instant case did not examine herself, but her husband, who was also the Attorney-holder, had proved the documents relating to title, jamabandi etc. to support the case of the plaintiff. Apart from PW-1, the plaintiff examined another witness while the defendant examined 3 witnesses.

11. The learned Trial Court had framed the following issues:

"1. Whether suit is maintainable in its present form?

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

3. Whether the defendant is a permissive occupant under the plaintiff in the schedule A land?

4. Whether the plaintiff has right, title and interest over the Dag No. 2336 of K.P. Patta No. 673?

5. Whether the plaintiff is entitled to get decree as prayed for?

6. To what other relief or reliefs, if any, parties are entitled to?"

12. The learned Trial Court, on consideration of the evidence on record, held that plaintiff had established right, title and interest on the basis of the Exts.1 and 2, which are sale deeds, and that defendant was only a permissive occupier and accordingly, decreed the suit. The learned lower Appellate Court also affirmed the judgment of the learned Trial Court.

13. As the plaintiff had filed the suit for right, title and interest as well as for recovery of possession, Mr. Goswami submits that substantial question of law No. 2 will not arise for consideration in the instant case. Mr. Goswami also submits that Order XXXII Rule 15 CPC is also not applicable as the question of unsound mind is not an issue and he will not be urging substantial question of law No. 1 also.

14. With regard to the substantial question of law No. 3, Mr. Goswami submits that it was incumbent for the plaintiff to have adduced her evidence and she having not adduced any

evidence, adverse presumption ought to be drawn and the evidence given by her husband including documents proved by him on the basis of an unregistered Power of Attorney should not have been taken into consideration. The learned courts below committed gross illegality in decreeing the suit of the plaintiff on the basis of such evidence, he submits.

15. Mr. A.C. Sarma, learned counsel for the respondent has submitted that there is no adverse interest in between the husband and the plaintiff wife and the husband was also taking requisite steps in respect of the property in question, including construction of boundary wall. The building constructed on the plot of land was on the basis of a loan obtained by him. It is submitted that it is not a case where the plaintiff had knowledge about something which the husband, PW1, was not privy to. The defendant was allowed to reside temporarily as the defendant had served as driver-cum-Chowkidar. It is submitted by him that the sale deeds and the patta had been admitted into evidence on being exhibited by PW-1 without any objection and, therefore, the substantial question of law is required to be answered against the appellants. It is further submitted that by the power of attorney executed by the plaintiff, the power of attorney-holder husband was not authorized to dispose of property of the executor of the power of attorney and, therefore, the power of attorney was not required to be compulsorily registered. In support of his submission, Mr. Sarma has cited a decision in the case of [Man Kaur \(dead\) by LRS. Vs. Hartar Singh Sangha](#), (2010) 10 JT 565 : (2011) 161 PLR 744 : (2011) 1 RCR(Civil) 189 : (2010) 10 SCC 512 : (2010) 9 UJ 4569 .

16. I have considered the submissions of the learned counsel for the parties and have also perused the materials on record.

17. At the very outset, it is to be noted that the attorney-holder exhibited the sale deeds as Ext.-1 and Ext.-2. He had also exhibited Exts.-3, 4 and 5, by which the title of the vendors of Exts.-1 and 2 was established. Ext.-12, patta, issued in favour of the plaintiff in respect of the suit Dags, was exhibited and proved by him. None of these documents was objected to at the time when the documents were tendered and admitted into evidence. When the aforesaid documents had been proved in evidence without objection, the plea that such documents could not have been exhibited by the attorney-holder cannot be entertained. The question is not with regard to the admissibility of the documents, but with regard to the mode of proof. Any objection with regard to the mode of proof of a document has to be taken at the first instance, because, in that event, any deficiency in proving such a document can be removed and no prejudice is caused to any of the parties.

18. In *Man Kaur (Dead)* (supra), the Apex Court summarized the position as to who can give evidence in matter involving personal knowledge:

"18. We may now summarise for convenience, the position as to who should give evidence in regard to matters involving personal knowledge:

- (a) An attorney-holder who has signed the plaint and instituted the suit, but has no personal knowledge of the transaction can only give formal evidence about the validity of the power of attorney and the filing of the suit.
- (b) If the attorney-holder has done any act or handled any transactions, in pursuance of the power of attorney granted by the principal, he may be examined as a witness to prove those acts or transactions. If the attorney-holder alone has personal knowledge of such acts and transactions and not the principal, the attorney-holder shall be examined, if those acts and transactions have to be proved.
- (c) The attorney-holder cannot depose or give evidence in place of his principal for the acts done by the principal or transactions or dealings of the principal, of which principal alone has personal knowledge.
- (d) Where the principal at no point of time had personally handled or dealt with or participated in the transaction and has no personal knowledge of the transaction, and where the entire transaction has been handled by an attorney-holder, necessarily the attorney-holder alone can give evidence in regard to the transaction. This frequently happens in case of principals carrying on business through authorized managers/attorney-holders or persons residing abroad managing their affairs through their attorney-holders.
- (e) Where the entire transaction has been conducted through a particular attorney-holder, the principal has to examine that attorney-holder to prove the transaction, and not a different or subsequent attorney-holder.
- (f) Where different attorney-holders had dealt with the matter at different stages of the transaction, if evidence has to be led as to what transpired at those different stages, all the attorney-holders will have to be examined.
- (g) Where the law requires or contemplated the plaintiff or other party to a proceeding, to establish or prove something with reference to his "state of mind" or "conduct", normally the person concerned alone has to give evidence and not an attorney-holder. A landlord who seeks eviction of his tenant, on the ground of his "bona fide" need and a purchaser seeking specific performance who has to show his "readiness and willingness" fall under this category. There is however a recognized exception to this requirement. Where all the affairs of a party are completely managed, transacted and looked after by an attorney (who may happen to be a close family member), it may be possible to accept the evidence of such attorney even with reference to bona fides or "readiness and willingness". Examples of such attorney-holders are a husband/wife exclusively managing the affairs of his/her spouse, a son/daughter exclusively managing the affairs of an old and infirm parent, a father/mother exclusively managing the affairs of a son/daughter living abroad."

19. Thus, an attorney-holder cannot depose or give evidence in place of his principal for the acts done by the principal or transactions or dealings of the principal, in respect of which principal alone has personal knowledge. Conversely, there is no bar for an attorney-holder to depose or give evidence in place of his principal if the attorney has the same knowledge as the principal. Even in cases where it is necessary to establish or prove something in relation to "state of mind" or "conduct", such as, "bonafide requirement" in an eviction suit or "readiness and willingness" in a suit for specific performance, though normally it is the landlord or the purchaser, respectively, who has to give evidence, there is an exception to the requirement. Where all the affairs of a party are completely managed, transacted or looked after by an attorney, who is a close family member, evidence of such an attorney may be acceptable evidence even in cases where "state of mind" or "conduct" has to be proved.

20. In view of the nature of dispute in the instant case, I am of the considered opinion that the evidence of PW1 cannot be rejected as he was competent to adduce evidence as an attorney-holder, he being the husband, who had personal knowledge about the events. I am also in agreement with Mr. Sarma that going by the recitals, the power of attorney was not required to be registered.

21. In the instant case, no plea was taken by the defendant save and except stating that he had filed a suit for adverse possession. The plea of adverse possession was not specifically taken in the present suit. The suit for adverse possession had also been dismissed, as noted earlier.

22. In view of the above, I find no merit in this appeal and the same is, accordingly, dismissed. No cost.

23. Substantial question of Law No. 3 is answered accordingly.

24. Registry will send back the records.