

(2012) 05 CAL CK 0009

Calcutta High Court

Case No: F.M.A. No. 1508 of 2000

Arif Mondal

APPELLANT

Vs

Ratnakar @ Subhas Bose

RESPONDENT

Date of Decision: May 10, 2012**Citation:** (2013) 2 CHN 94**Hon'ble Judges:** Tapan Kumar Dutt, J**Bench:** Single Bench**Advocate:** Hiranmay Bhattacharya and Tanmoy Mukherjee, for the Appellant; Anshuman Chakraborty and Shivaji Mitra, for the Respondent

Judgement

Tapan Kumar Dutt, J.

Today the learned Advocate for the appellants has completed his submissions. The learned Advocate for the contesting respondents has made his submissions and completed the same.

2. This Court now proceeds to pass the following judgement:

The plaintiffs-appellants filed a suit for declaration of title, confirmation of possession and for permanent injunction. The plaintiffs' case was that the suit property originally belonged to one Surendra Nath Basu and on the death of said Surendra Nath Basu, his five sons namely Harendra, Narendra, Birendra, Dharendra and Dwijendra inherited the said suit property in equal 1/5th share. The plaintiffs' further case was that their father, Mohammad Mondal, took settlement of the Schedule "ka" and Schedule "kha" property in tenancy right from the said five sons of Surendra Nath Basu at certain annual rent and the said Mohammad Mondal executed and got registered a kabuliyat dated 16.1.1948 in favour of the aforesaid landlords and Mohammad Mondal had been in possession of the Schedule "ka" and Schedule "Kha" property during his life time as a tenant under them. The plaintiffs' case was that said Mohammad Mondal died leaving behind his wife and the plaintiffs as his only legal heirs but subsequently the said wife of Mohammad

Mondal died and the plaintiffs inherited her share. The plaintiffs' case was that said Birendra Nath Basu by taking undue advantage of the plaintiffs' helplessness got the suit property recorded in their names and the R.S. Record of Rights in respect of the suit property is erroneous. It further appears that said Harendra Kumar Basu and his three brothers filed a Title Suit No. 121 of 1966 in the Court of the learned 10th Subordinate Judge, Alipore for partition against said Birendra Nath Basu. It also appears that the plaintiffs and the predecessor-in-interest were parties in the said partition suit as noted in the judgement of the learned Trial Court and the said partition suit was decreed finally. The plaintiffs' case was that on the basis of the R.S. Record of Rights of the suit property the defendant Nos. 1 and 2 threatened the plaintiffs that the plaintiffs will be dispossessed from suit property and hence the plaintiffs filed the said suit. It appears from the judgment passed by the learned Trial Court that the defendant Nos. 1 to 3 contested the said suit by filing written statement denying all the material allegations made in the plaint and they contended that the suit property along with other properties belonged to said Birendra Nath Basu and his four brothers and said Birendra Nath Basu permitted the plaintiffs' father to possess the suit property by way of cultivation and orally delivered the possession of the suit property in favour of said Mohammad Mondal. The case of the aforesaid contesting defendants was that the said Mohammad Mondal possessed the suit land for some years and after the death of said Mohammad Mondal the said Birendra Nath Basu, the predecessor of the said defendants, took the suit property in his khas possession and continued to possess the suit land by way of cultivation ousting the plaintiffs from the suit land and such suit land had been recorded in the R.S. Record of Rights in his name accordingly. The case of the said defendants was that after the death of said Birendra Nath Basu the defendants have been possessing the suit land as his legal heirs and as such the defendants have acquired a good and valid title of the suit land by adverse possession.

3. The aforesaid suit came up for final hearing and the learned Trial Court by its judgement and decree dated 29.3.1993 decreed the said suit by declaring the plaintiffs' title in the suit property and the plaintiffs' possession in the suit property was confirmed. The defendants were permanently restrained from disturbing the plaintiffs' possession in the suit land. The learned Trial Court found that the plaintiffs have examined the P.Ws. 1 to 3 to prove their possession in the suit land and all such witnesses have strongly supported the plaintiffs' possession in the suit land and the learned Trial Court did not find any reason to disbelieve such oral evidence. The learned Trial Court further was of the opinion that the plaintiffs have successfully rebutted the presumption of the R.S. Record of Rights by bringing on record documentary evidence like three Dakhilas, a kabuliyat and the certified copy of the final decree in the aforesaid partition suit being Title Suit No. 121 of 1966. It further appears that an issue with regard to the res judicata was raised in the said Title Suit but after discussing the said issue the learned Trial Court was of the

opinion that the suit was not barred under the principles of res judicata,

4. The said defendants, challenging the judgement and decree passed by the learned Trial Court, filed an appeal being Appeal No. 103 of 1993 which was placed before the learned 2nd Court of the Assistant District Judge, Barasat. The learned Lower Appellate Court allowed the said Appeal by setting aside the judgement and decree passed by the learned Trial Court and by sending the suit back on remand to the learned Trial Court with a direction to deliver a fresh judgement in the light of the directions given in the body of the judgement. It appears from the body of the judgement that the learned Lower Appellate Court observed that it is proper to send the suit in appeal on remand to the learned Trial Court with a direction to give judgement afresh on all the issues adding an issue on the point of res judicata but prior to this, the learned Trial Court shall give an opportunity to the parties to the suit to produce evidence, if necessary, for ascertaining the "legal entity" of the final decree passed in the said Title Suit No. 121 of 1966.

5. The learned Advocate appearing on behalf of the plaintiffs-appellants submitted that all the materials were there before the learned Lower Appellate Court and it should have decided the matter itself instead of sending back on remand to the learned Trial Court. The said learned Advocate further submitted that the learned Lower Appellate Court relied upon a decision, namely, [Bholanath Karmakar and Others Vs. Madanmohan Karmakar and Others](#), while passing the impugned judgement but the judgement in the said report was subsequently overruled by the Hon'ble Supreme Court as will appear from the judgement reported at [Hameed Joharan \(d\) and Others Vs. Abdul Salam \(d\) by L.rs. and Others](#), . It appears from a perusal of the impugned judgement that the learned Lower Appellate Court passed the impugned judgement on the basis that the final decree for partition was not engrossed on the requisite stamp papers and, therefore, the learned Lower Appellate Court should have first ascertained whether or not the final decree was engrossed on the requisite stamp papers before admitting its evidence and subsequently if it is found that the said final partition decree was not engrossed on the requisite stamp papers it could not have been admitted in evidence. The learned Advocate for the appellants submitted that it is true that the said decision reported at [Bholanath Karmakar and Others Vs. Madanmohan Karmakar and Others](#), lends support to the proposition that a decree for partition cannot be admitted in evidence and cannot in any way be acted upon by or in any Court unless the same is duly stamped and, therefore, it does not become enforceable until engrossed on stamp papers. The said learned Advocate referred to paragraphs 38 and 39 of the said reports being [Hameed Joharan \(d\) and Others Vs. Abdul Salam \(d\) by L.rs. and Others](#),

6. On a perusal of the aforesaid paragraphs it appears that the Hon'ble Supreme Court in the said report was pleased to make the following observations:

Time does not stop running at the instance of any individual unless, of course, the same has a statutory sanction being conditional, as more fully noticed hereinbefore: the Special Bench decision of the Calcutta High Court in the case of Bholanath Karmakar vs. Madanmohan Karmakar in our view has completely misread and misapplied the law for the reasons noted above and thus cannot but be said to be not correctly decided and thus stands overruled.

7. Though the facts and circumstances prevailing in the said reports that is the judgment delivered by the Hon"ble Supreme Court and the facts and circumstances of the instant case are not identical, the learned Advocate appearing on behalf of the appellants has laid emphasis on the observations of the Hon"ble Supreme Court that the said reports [Bholanath Karmakar and Others Vs. Madanmohan Karmakar and Others](#), stands overruled. I need not dilate on this point any further at this juncture since the learned Advocate for the appellants has raised another point which requires consideration.

8. The said learned Advocate has submitted that the final decree for partition (Exhibit 4) has been admitted into evidence on formal proof being waived by the parties as recorded in Order No. 37 dated 9.3.1993 passed by the learned Trial Court. That apart, the said learned Advocate submitted that since no objection has been taken with regard to the admissibility of the said document at the time when the said document was being admitted into evidence the defendants respondents are not entitled to take such objection subsequently. The said learned Advocate has cited a decision reported at [Javer Chand and Others Vs. Pukhraj Surana](#), wherein the Hon"ble Supreme Court has been pleased to observe that once a document has been marked as an exhibit in the case and the trial has proceeded all along on the footing that the document was an exhibit in the case and has been used by the parties in examination and cross-examination of their witnesses, it is not open either to the Trial Court itself or to a Court of Appeal or revision to go behind that order. The Hon"ble Supreme Court was further pleased to observe that such an order is not one of those judicial orders which are liable to be reviewed or revised by the same Court or a Court of superior jurisdiction.

9. The learned Advocate for the appellants submitted that the learned Lower Appellate Court should have come to its own conclusion on the basis of the materials on record and not shifted the responsibility of coming to a conclusion to the learned Trial Court particularly when none of the parties ever claimed that they would like to adduce further evidence in the matter. He further submitted that the non-framing of the issue with regard to res judicata also could not have stood in the way of the learned Lower Appellate Court to make its findings on the said issue since the parties knew very well, as would appear from the discussion made in the judgement delivered by the learned Trial Court itself, that the issue of res judicata was being rebutted. The said learned Advocate cited a decision reported at 33 C.W.N. 1211 (Promopha Nath Mazumdar vs. Nagendra Nath Mazumdar) in support

of his contention that the learned Lower Appellate Court should have decided the relevant issue itself instead of shifting the responsibility of deciding such issue to the learned Trial Court. The said learned Advocate also cited a decision reported at [P. Purushottam Reddy and Another Vs. Pratap Steels Ltd.,](#) in support of his submission that the learned Lower Appellate Court could have framed an additional issue and decided the same itself instead of sending the same back on remand for framing an issue by the learned Trial Court. The learned Advocate referred to a judgement reported at [Nedunuri Kameswaramma Vs. Sampati Subba Rao,](#) in support of his contention that mere non-framing of an issue is not always fatal when the parties went to trial fully knowing the rival case and led all the evidence in support of their respective contentions and also in support of refutation of the case made out by the other side.

10. It appears from a perusal of the impugned judgement that the learned Lower Appellate Court relied upon the point that since the final partition decree was not engrossed on a stamp paper, at least it has not been ascertained whether such final decree has been engrossed on a stamp paper or not, the learned Trial Court could not have decreed the suit on the basis of such final partition decree. The learned Lower Appellate Court was also of the view that an additional issue on the point of res judicata is required to be framed and decided afresh.

11. The learned Advocate appearing on behalf of the contesting defendants-respondents submits that the plaintiffs' predecessor claimed to be a tenant and it is not known as to why and how the plaintiffs can now claim the title in the suit property. Even if such question has any substance in it, the learned Lower Appellate Court could have decided such question subject to the condition that there are proper pleadings in this regard.

12. The said learned advocate for the contesting defendants-respondents submitted that the learned Trial Court was wrong in discarding the evidence of the D.W. 1 and relying upon the plaintiffs witnesses as will appear at page 7 of the paper book. It appears that the learned Trial Court has considered the documentary evidence on record, as adduced by the plaintiffs, like the dakhilas, the kabuliyats and the certified copy of the final decree in the said partition suit and other oral evidences while coming to its conclusion that the plaintiffs have successfully rebutted the presumption of R.S. Record of Rights. Against such evidence of the plaintiffs the learned Trial Court observed that the solitary evidence of D.W. 1 cannot be relied upon. Thus, it cannot be said that the learned Trial Court wrongly relied upon the evidence of the plaintiffs, and not relying upon the solitary evidence of D.W. 1 was without any justification.

13. In course of his submissions, the learned Advocate for the contesting defendants-respondents very candidly submitted to this Court that since the scope of the present appeal is very limited to the extent that whether or not it was proper for the learned Lower Appellate Court to remand the matter back to the learned

Trial Court, it will not be proper for this Court to decide the issues in the suit on its merits but cannot be disputed, considering the settled proposition of law, that the learned Lower Appellate Court itself could have decided the matter on the basis of the materials already on record and by framing an additional issue with regard to the res judicata, if so required. The said learned Advocate also submitted that the Kabuliyat adduced in evidence by the plaintiffs cannot be binding upon the defendants but he further submitted that the learned Lower Appellate Court could have also decided this aspect of the matter. Since such stand has been taken by the learned Advocate for the defendants-respondents, this Court is of the view that no further discussion of this matter is required to be made as it appears to this Court, in view of the submissions made by the learned Advocates for the respective parties and the decisions cited by the learned Advocate for the appellants, that the learned Lower Appellate Court could have decided the matter by framing an additional issue, if so required, on the aforesaid point of res judicata instead of sending the suit back on remand to the learned Trial Court for a fresh decision.

14. In view of the discussions made above, the impugned judgement and decree is set aside and the matter is sent back to the learned Lower Appellate Court with a direction upon the learned Lower Appellate Court to frame an additional issue with regard to the question of res judicata, if it is so required, and decide such additional issue along with the other points in the appeal itself in the light of the observations made in the present judgement.

15. After the aforesaid judgement is delivered, the learned Advocate for the respondents submits that the learned Lower Appellate Court should be directed to dispose of the Title Appeal as early as possible but within certain time-frame. The learned Lower Appellate Court shall try to dispose of the Title Appeal on its merits by framing an additional issue, as indicated above, if necessary, after hearing the parties and in the light of the observations made above within six months from the date of communication of this judgement to the learned Lower Appellate Court.

16. The instant appeal is accordingly disposed of.

17. Let the lower Court records be sent back to the learned Court concerned immediately by special messenger and the special messenger cost for such purpose will be put in by the appellants within one week from this date.

18. There shall be however no order as to costs. Urgent certified xerox copy of this judgement, if applied for, shall be given to the parties as expeditiously as possible on compliance of all necessary formalities.