

(2011) 07 CAL CK 0047

Calcutta High Court

Case No: S.A 473 of 2007

Dhirendra Kumar Bhattacharya
and Others

APPELLANT

Vs

Naren Dutta @ Biswanath Dutta.

RESPONDENT

Date of Decision: July 18, 2011

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Section 100, 100(5)
- Specific Relief Act, 1963 - Section 34
- West Bengal Estates Acquisition Act, 1953 - Section 44(2)

Hon'ble Judges: Prabhat Kumar Dey, J

Bench: Single Bench

Advocate: A.S. Roy and Robi Ghosh, for the Appellant; B. Ghosal and Tapan Kumar Mitra, for the Respondent

Judgement

Prabhat Kumar Dey, J.

This Appeal is directed against the judgment and decree dated 30th June, 2006 passed by the Ld. Civil Judge (Senior Division), 2nd Court, Barasat in Title Appeal No. 95 of 1996 whereby affirmed the judgment and decree dated 13.06.1996 passed by Ld. Munsif, 2nd Court Barasat in Title Suit No. 657 of 1982 declaring Plaintiff's title in respect of Plot No. 4227 appertaining to Khatian No. 5608 of Mouza, Halisahar and also granting permanent injunction against the Defendants.

During admission it was decided by the Hon'ble Division Bench that this appeal would be heard on the following substantial questions of law:

1 Whether the Ld. Courts below committed substantial error in law in finding the title of the Plaintiff in the suit property notwithstanding the fact that the said Plaintiff would not produce any valid document to establish the title to the suit property.

2 Whether the Ld. Courts below committed substantial error in law in not properly considering the Exbts. A, B & C for the purpose of deciding the suit.

In order to decide the aforesaid points it is not necessary to make the detailed reference to the checkered history of the litigation between the parties. We may, however, briefly narrate the facts.

2. The Appellants and the Respondent No. 3 to 8 herein were the Defendants and the Respondent No. 1 was the sole Plaintiff before the Trial Court in Title Suit No. 657 of 1982. The Plaintiff Naren @ Biswanath Dutta made out the specific case in the plaint that he took settlement of C.S. Plot No. 4227 measuring 16 Decibels of Halisahar Mouza that suit property from the then Zaminder Khitindra Kumar Dutta of an annual rent of Rs. 2 - 10 Annas and he is in possession of the suit land by enjoying the usufructs from the suit bearing trees standing thereon. During revisional settlement the Plaintiff's name was recorded in R.S. Khatian No. 5608 and he was paying rent initially to the Zamindars and thereafter to the Government of West Bengal. To the contiguous east of the suit land there is home state of Plaintiff's mother and the Plaintiff and his mother live together in the said house in joint mess. To the contiguous east and north-eastern side there is house of the Defendants. The Defendants in spite of having no manner of title and possession in the suit land at any point of time are threatening the Plaintiff to dispossess him from the suit land and also threatened that they would collected fruits from the trees standing thereon which prompted the Plaintiff to file the suit for declaration of title and permanent injunction.

3. The Defendants contested the suit by filing written statement contending inter alia that they have their own home state on the north-eastern side of the alleged suit property, Dag Number, Khatian Number of which have been wrongly described. The Plaintiff and Defendants are residing side by side but there was no demarcation ever. As such, the suit could not be maintained without local investigation. The Defendants further stated that if at all the Plaintiff's name is recorded in the record of rights the same is erroneous. The Plaintiff never owned and possessed the suit property. On the other hand, the suit property is within the purchased land of the Defendant No. 2 since 1958 and they are in possession of the same by plantation of fruit bearing trees as well as enjoying usufructs therefrom.

4. The Defendant's further case is that the Plaintiff filed the criminal case when the Defendants were constructing home but the Plaintiff failed to prove possession in the suit land and criminal case filed. The Defendants are asserting hostile title since then and adversely possessing the suit property. Accordingly, they have prayed for dismissal of the suit.

5. Before the Trial Court, the Plaintiff examined 3 witnesses P.W. Nos. 1 to 3 including himself as P.W.1. As documentary evidence, rent receipts, Parchas were marked as Exbts. 1, (1a), 2, 3, (3a), (3b) and (3c), 4 and 5. On behalf of the

Defendants, Defendant No. 2 examined himself as D.W.1 and one Kalipada Chakraborty as D.W.2. 3 original deeds dated 13.11.1958, 03.02.1952 and 15.03.1951 were marked as Exbts. A, B & C respectively. The Trial Court after hearing both the parties and appreciation of the evidence on record declared Plaintiff's title and believed Plaintiff's possession in the suit property and thereafter decreed the suit and restrained the Defendants permanently from interfering with the Plaintiff's possession in the suit property vide judgment dated 13.06.1996.

6. Feeling aggrieved by the judgment and decree of the Trial Court, Defendants approached the Civil Judge (Senior Division), 2nd Court, Barasat in Title Appeal No. 95 of 1996. The first Appellate Court by its judgment dated 30.06.2006 affirmed the judgment and decree passed by the Ld. Trial Court and thereby dismissed the appeal against which the present appeal being S.A.473 of 2007 has been preferred.

7. In course of hearing of this appeal, at the very outset, it was contended by the Ld. Advocate appearing for the Appellants that the non-consideration or misconstruction of the original purchase deed being Exbt. A executed by Plaintiff's father alleged Zamindar Kshitindra Dutta give rise to a substantial question of law. He referred to the decisions reported in [Madan Lal Vs. Mst. Gopi and Another](#), ; [State of Punjab Vs. Mohinder Singh](#), [Ramlal and Another Vs. Phagua and Others](#), [Hero Vinoth \(minor\) Vs. Seshammal](#), [P. Chandrasekharan and Others Vs. S. Kanakarajan and Others](#), ; [Abdul Raheem Vs. The Karnataka Electricity Board and Others](#), in support of his such contention.

8. Relying upon the decisions reported in [Ladli Prasad Jaiswal Vs. Karnal Distillery Co. Ltd. and Others](#), ; [Makhan Singh \(D\) by Lrs. Vs. Kulwant Singh](#), and [Kashmir Singh Vs. Harnam Singh and Another](#), which based on no evidence, the Ld. Lawyer also submitted that the Ld., Court below arrived at the decision without considering evidence adduced and also overlooked and ignored the material evidence.

9. It is further submitted relying upon a decision reported in [M/s. Dutta Cycle Stores and others Vs. Smt. Gita Devi Sultania and others](#), that the totality of the evidence is to be considered.

10. It is also strenuously urged on behalf of the Appellants by relying upon a decision reported in AIR 1998 SC 427 that the disputed question of facts can also be considered in the Second Appeal which relates to the substantial question of law. He also submitted that core issue regarding the title being not adjudicated resulted substantial question of law. He has drawn my attention to the judgment of the Ld. Trial Court where all the issues were taken up together for the purpose of deciding the suit.

11. It was pointed out by the Ld. Advocate for the Appellants that boundary of the suit property has not been given in the plaint schedule but Dag Number was given whereas in the purchase deed (Exbt. A) description of the property was given resulting which the Court below ought to have dismissed the suit instead of

granting permanent injunction.

12. He further submitted that the Ld. Courts below ought to have held that the suit is barred u/s 34 of the Specific Relief Act as there is no prayer for recovery of possession although the Appellants are in possession of the suit property.

13. On and above, it is urged that document of title could not be produced by the Plaintiff/Respondent in the Trial Court and the alleged record of right is not a document of title. As such the suit should have been dismissed. The Trial Court ought to have held that the suit is barred u/s 34 of the Specific Relief Act for want of prayer for recovery of possession.

14. On the other hand, Ld. Advocate appearing for the Respondent No. 1 opposed the contentions of the Ld. Advocate for the Appellants and submitted that the Plaintiff proved his case before the Trial Court by adducing both oral and documentary evidence and the Defendants admitted the boundary, description as well as the ownership of the property of the Plaintiff in their written statement. He also submitted that suit was filed by the Plaintiff before the Trial Court in 1982 whereas Defendants purchased deed was of 1958 and there is no whisper in the deeds (Exbts. A, B & C) in the written statement. He further submitted that no proceeding was initiated by the Defendants for the alleged erroneous recording in the R.O.R and even no counterclaim was made by the Defendants denying title of the Plaintiff by way of adverse possession. Relying upon the decision reported in [Joseph and Another Vs. Batho Mary and Others](#), [Sheel Chand Vs. Prakash Chand](#), ; [Maniar Ismail Sab and Others Vs. Maniar Fakruddin and Others](#), ; [Smt. Padma Rani Ghosal Vs. Panchkari Ghosal and Another](#), ; [Pandurang Jivaji Apte Vs. Ramchandra Gangadhar Ashtekar \(Dead\) by Lrs. and Others](#), ; [Ramaswamy Kalingaryar Vs. Mathayan Padayachi](#), ; [Vidhyadhar Vs. Manikrao and Another](#), and [Chandrabhagabai and Others Vs. Ramakrishna and Others](#), it is also submitted on behalf of the Respondent No. 1 that re-appreciation of evidence cannot be done in Second Appeal.

15. He lastly submitted that there was no perversity in the concurrence findings of the Courts below and no ambiguity arises and as such the instant appeal be dismissed.

16. It may be mentioned here that on behalf of both sides in addition to above cited rulings a good number of decisions have been placed before me in support of their respective submissions.

17. I have carefully considered the submissions of both sides and also scrutinised the materials on record. I am aware as to the General rule that High Court will not interfere with concurrent findings of the Courts below but at the same time it is also in my mind that such rule is not an absolute rule. First of all, proviso to Sub-Section 5 of Section 100 of the CPC has made it clear that nothing in this Sub-section shall be deemed to take away or abridge the power of the Court to hear, for reasons to be

recorded, the appeal on any other substantial question of law, not formulated by it, if it is satisfied that the case involves such question. Secondly, I am satisfied that in order to strengthen the hands of this Court from the side of the Appellants a voluminous Judicial pronouncements of the Hon"ble Supreme Court were cited during hearing of the Second Appeal reported in [Kashmir Singh Vs. Harnam Singh and Another](#), ; [Jagdish Singh Vs. Natthu Singh](#), [Damadilal and Others Vs. Parashram and Others](#), ; [Hero Vinoth \(minor\) Vs. Seshammal](#), ; [P. Chandrasekharan and Others Vs. S. Kanakarajan and Others](#), [State Bank of India and Others Vs. S.N. Goyal](#), ; [Dinesh Kumar Vs. Yusuf Ali](#), etc.

18. In the case of [State Bank of India and Others Vs. S.N. Goyal](#), , the Hon"ble Court held that there cannot be strait-jacket definition as to when a substantial question of law arises in a case. It was also held that in the context of Section 100 of CPC any question of law which affects the final decision in a case is a substantial question of law as between the parties. In the recent decision reported in [Dinesh Kumar Vs. Yusuf Ali](#), which was relied upon on behalf of the Appellants, the Hon"ble Supreme Court clearly held in Paragraphs 24 and 25 as hereunder:

Paragraph 24:- There is no provision to entertain a Second Appeal even on question of fact provided the Court is satisfied that the findings of the Courts below were vitiated by non-consideration of relevant evidence or by showing erroneous approach to the matter". "Vide [Jagdish Singh Vs. Natthu Singh](#), [Prativa Devi Vs. T.V. Krishnan](#), ; [Smt. Satya Gupta Alias Madhu Gupta Vs. Brijesh Kumar](#), ; [Ragavendra Kumar Vs. Firm Prem Machinery and Co.](#), (AIR 2000 SCW 66); and [Molar Mal \(Dead\) Through L.Rs. Vs. M/s. Kay Iron Works\(P\) Ltd.](#), : (AIR 2000 SCW 950).

Paragraph 25: Thus the law on the subject emerges to the effect that Second Appeal u/s 100 CPC is maintainable basically on a substantial question of law and not on facts. However, if the High Court comes to the conclusion that the evidence on record recorded by the Courts below are perverse being based on no-evidence or based on irrelevant material, the Appeal can be entertain and it is permissible for the Court to re-appreciate the evidence.

19. In the case reported in [Jagdish Singh Vs. Natthu Singh](#), it has been made clear that if the concurrent findings of fact are vitiated by non-consideration of relevant evidence or by essentially wrong approach, High Court will not be precluded from recording proper findings. In the present Appeal I will show how far negligent were both the Courts -- Trial Court and First Appellate Court. The plaint goes to show that the Plaintiff Naren Dutta herein Respondent No. 1 claimed title and possession in respect of Plot No. 4227 measuring 16 Decibels appertaining to Khatian No. 5608 at Mouza Halisahar on the basis of Khajna receipts towards the settlement taken from the alleged Zamindar Kshitindra Kumar Dutta who was father of Plaintiff vide Exbts.1 and (1a) and record-of-rights vide Exbts.2, 4 & 5 and also rent Dakhilas Exbts.3 to (3c). On the other hand Defendants/Appellants claim to be the owner and in possession of the suit land on the basis of purchase deed dated 13.11.1958

executed by Plaintiff/Respondent No. 1 after Kshitindra Kumar Dutta. Alternative case of acquisition of title by adverse possession also has been made out by the Defendants/Appellants. On a plain reading of the Judgments of both the Courts below what I have gathered is that the title of the Plaintiff has been declared only on the basis of the entries of record of rights and rent Dakhilas. Strangely enough, no issue has been framed as to whether the Plaintiff has possession in the suit property although decree for permanent injunction has been granted. It is noteworthy that there is no whisper in the Judgments of both the courts as to the basis or foundation of entry in revenue records. The first Appellate Court in his judgment clearly observed as follows:

Admittedly neither the Plaintiff nor any P. Ws could produce any document including "Patta" & "Kobuloti" to show their title in respect of the suit property. But when the Plaintiff/Respondent stuck to his claim of right only on the basis of the entries of record of rights and revenue receipts, the question of withholding the documents as alleged by the Defendants, cannot arise and no adverse presumption can be drawn.

The first Appellate Court did not keep in mind the well settled principle that an entry in revenue records does not confer title on a person whose name appears in record of rights and such entries have only "Fiscal Purpose" i.e. payment of land revenue and no ownership is conferred on the basis of such entries. So far as title to the property is concerned, it can only be decided by a competent Civil Court [[Suraj Bhan and Others Vs. Financial Commissioner and Others](#), . In our case at hand the trial Court did not discuss even a single line of oral evidence adduced on behalf of either the Plaintiff or the Defendants. The first Appellate Court also altogether remained silent in this regard. Regarding description and boundary of the suit land specific case of Appellants/Defendants is that there is no demarcation. On scrutiny of record I have noticed that although no local investigation was held but local inspection was held twice. Reports were not brought into evidence.

20. We must recapitulate that the Respondent No. 1 claims to be owner of the suit land on the basis of settlement from Zamindar/his father Kshitindra Kumar Dutta. In support of such claim receipts showing payment of rent of Rs. 2 and 10 Annas to Kshitindra Kumar Dutta for the Bengali years 1360-1361 and 1361-1362 were produced which were marked as Exbt.1, 1(a). Description of the land has been noted in Exbt.1 & 1(a) as Dag No. 4227 measuring 16 1/2 decimal, Khatian No. 820. From the side of the Appellants/Defendants 3 registered original deeds dated 13.11.1958, 03.02.1953 and 28.03.1951 were marked as Exbts. A, B and C respectively. In Exbt. C registered deed executed by one Charan Dasi in favour of Parbati Ghosh and in Exbt. B registered sale deed executed by Parbati Ghosh in favour of Plaintiff/Respondents No. 1's father Kshitindra Kumar Dutta. same Dag Number, Khatian Numbers have been mentioned as 4227 appertaining to Khatian No. 820 measuring 16 1/2 decimal of Mouza-Halisahar. Only in the Exbt.A the sale deed dated 13.11.1958 executed by Kshitindra Kumar Dutta in favour of original

Defendant No. 1 Prafulla Bala in addition to Khatian No. 820, Hal Khatian No. 1022/3693 has been mentioned. It is significant to note that neither the C.S. Map nor C.S. Khatian No. 820 has been produced although in the Khajna receipts Khatian number has been clearly mentioned as "820". There is no record-of-rights showing total area of the Plot No. 4227. Only in the schedules of Exbt. A, B and C it has been mentioned " 4227 Dage Uttar Nagendra Bagan 72 Satak Bhumir Madhey 16 1/2 Satak". It is not clear why the then Zamindar Kshitindra Kumar Dutta became owner of a portion of Plot No. 4227 instead of being sole owner of entire plot 4227 because by Exbt.1 and 1(a) Kshitindra Kumar Dutta has been shown as owner of Plot No. 4227 measuring 16 1/2 decimal and Exbt."B" proves that Kshitindra Kumar Dutta purchased 16 1/2 decimal from Plot No. 4227 on 13.11.1958 from Parbati Ghosh.

21. On and above, certified copy of R.S.R.O.R 5608 appears to have been marked as C.S. Parcha vide Exbt.2 by the trial Court. Although cadastral survey was done in the year 1921 but there is clear rubber-stamp of Revenue Department in Exbt. 2 "Certified to be a true copy of part of a record of right finally published u/s 44(2) of the West Bengal Estate Acquisition Act, 1953". Exbt.4 i.e. R.S.R.O.R, Khatian No. 5608 also bears the same rubber stamp. Even instead of the words "Paschimbanga Sarkar" under whom direct tenancy supposed to be created, the name of Superior-landlord has been noted as "Kshitindra Kumar Dutta" in both the alleged R.S. and L.R.R.O.R vide Exbts. 4 and 5. Such being the position Exbts.2, 4 and 5 do not appear to be free from ambiguity. Unfortunately, neither the trial Court nor the first Appellate Court scrutinised those documents. It must not be lost sight of that even in a ex-parte hearing also onus lies upon the Plaintiff to prove his case by cogent evidence. However, I am not coming to the conclusion at this stage without giving opportunity to the Plaintiff/Respondent No. 1 to explain, clarify or remove this ambiguity arising out of those Parchas relying upon which the trial Court declared title of Plaintiff in respect of suit property and which was affirmed by the first Appellate Court. That apart, it seems to me that for effective adjudication local investigation was required because are homesteads of both the parties almost by side by side.

22. From the foregoing discussions I am of the opinion that the interest of justice would be sub-served if the impugned judgments are set aside and the matter is remitted to the trial Court for deciding the suit afresh in the light of observation made in the body of judgment. The trial Judge shall recast issues and the Plaintiff shall amend the schedule of plaint describing the boundaries of suit land. In other words, it would be open to the parties to amend the pleadings and adduce additional evidence, if they so desire. The Ld. Judge may appoint a Survey-Passed Commissioner, if any such prayer is made from either of the party.

23. Before parting with this judgment admittedly there I want to make it clear that since it is open remand the Ld. Court below shall decide the suit independently without being influenced by the observations made by this Court touching merit of

the suit.

24. The Appeal is thus allowed in the light of the aforesaid observations but without cost.

25. Considering the age of the suit the trial Court is requested to take bonafide efforts for disposal of the suit as expeditiously as possible without granting unnecessary adjournment and preferably within a period of 6 (six) months from the date of communication of the Order.

26. Let the L.C.R. be sent down to the Court below at once.

27. Urgent xerox certified copy if applied, be supplied to the party after observing necessary formalities.