

(2013) 04 CAL CK 0062

Calcutta High Court

Case No: S.A. No. 66 of 2009

Monotosh Paul

APPELLANT

Vs

Gopal Chandra Mondal and
Others

RESPONDENT

Date of Decision: April 2, 2013

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 41 Rule 27

Citation: (2013) 3 WBLR 223

Hon'ble Judges: Tapan Kumar Dutt, J

Bench: Single Bench

Advocate: Sabyasachi Bhattacharyya, Chandraday Roy and A. Raha, for the Appellant; Bidyut Kr. Banerjee and Shila Sarkar, for the Respondent

Judgement

Tapan Kumar Dutt, J.

This Court has heard the learned Advocates for the respective parties and has considered the relevant materials on record. The facts of the case, briefly, are as follows:

The plaintiff-respondent filed a suit being Title Suit No. 18 of 1998 against the defendant-appellant and one Kalipada Paul praying inter alia for declaration of title, confirmation of possession and permanent injunction. On the death of the said Kalipada Paul, his heirs and legal representatives have been substituted in the proceedings. The said suit was contested by the defendants who filed written statements. The case of the plaintiff-respondent was that the suit land originally belonged to Hazarilal Sarkar and on the death of Hazarilal Sarkar, his widow, daughter and son inherited the said property and sold the same to the plaintiff-respondent by a registered deed of sale dated 14.4.1975. It appears that the suit property is a part of plot No. 11387 measuring about 66 decimals under Khatian No. 3413, Mouza-Bilballi, P.S. Swarupnagar. The plaintiffs case was that the

defendant-appellant and the pro-forma respondents have no right, title and interest or possession over such property but since the defendants were threatening with dispossession, the plaintiff had to file the suit. The defendants contested the suit by filing a written statement and it was the case of the defendants that Jhayamoni was a Korfa tenant in the property under the said Hazarilal Sarkar and the defendant had purchased the said property from Jhayamoni on 30.12.1975 for valuable consideration by two registered deeds of sale. According to the defendant, the defendant's father and the defendant were in possession of the suit property but since the plaintiff threatened with dispossession, the defendant in the present suit along the said Kalipada Paul filed a Title Suit No. 167 of 1976 and prayed for declaration of title, confirmation of possession but subsequently the prayer was amended to recovery of khas possession as the original defendants in the present suit were dispossessed during the pendency of Title Suit No. 167 of 1976. The said Title Suit No. 167 of 1976 was contested by the present plaintiff and the suit was decreed in favour of the original defendants in the present suit. The decree was eventually executed through Court and the present defendants recovered the possession of the suit property and since then the original defendant in the present suit has been in peaceful possession of the suit property. According to the present defendants, the present plaintiff has suppressed the material facts.

2. The said Title Suit No. 18 of 1998 came up for final hearing when the parties adduced evidence and the learned trial Court by its judgment and decree dated 26.7.2005 dismissed the said suit with the finding that the present suit is barred by law of limitation and it is also hit by the principles of res judicata. According to the learned trial Court the parties in the previous litigation (Title Suit. No. 167 of 1976) and the present suit are the same, the subject matter is identical and the dispute has been finally decided by a competent Court of law in the previous litigation.

3. Challenging such judgment and decree of the learned trial Court [learned 1st Court of Civil Judge (Junior Division), Basirhat], the plaintiff filed a Title Appeal No. 38 of 2006 which was placed before the learned Civil Judge (Senior Division), Basirhat. The learned First Appellate Court allowed the said Title Appeal and set aside the judgment and decree passed by the learned trial Court upon the finding that the property involved in the previous Suit i.e. Title Suit No. 167 of 1976 was different from the property involved in the present Title Suit No. 18 of 1998. The learned First Appellate Court took note of the fact that the Khatian number concerning the property in dispute in the two cases are different and that the plaintiff purchased the property mention in Khatian No. 3413 and the defendants purchased the property mentioned in Khatian No. 7672 and, thus, the learned First Appellate Court found that since the properties were different in the two suits, the principles of res judicata cannot be applied.

4. The defendant/appellant has filed the present second appeal challenging the judgment and decree passed by the learned 1st Appellate Court. By an order.

5. The learned Advocate appearing on behalf of the defendant-appellant submitted that the learned trial Court had also noted such minor discrepancy but came to the finding that the property involved in the two litigations are the same. The learned Advocate for the appellant also submitted that even if the learned First Appellate Court had come to the conclusion that the suit is not hit by the principles of res judicata, the learned First Appellate Court did not go any further beyond such finding and did not at all decide the question if the plaintiff had any merit in his case otherwise. Thus, according to the said learned Advocate, the suit has not been decided on merits at all. The said learned Advocate further submitted that since the learned trial Court found that the suit is hit by the principles of res judicata, the learned trial Court was justified in not proceeding any further but since the learned First Appellate Court had come to the conclusion that the suit is not hit by the principles of res judicata, the learned First Appellate Court should have either remanded the matter back to the learned trial Court for a decision on merits or at least decided the matter on merits itself. The said learned Advocate submitted that since none of the two courses were adopted by the learned First Appellate Court, this Court should remand the matter back to the learned trial Court for proper decision. The learned Advocate for the appellant further submitted that the appellant has filed an application under Order 41 Rule 27 of the CPC for adducing additional evidence with regard to the record of rights in which both the Khatian numbers appear in respect of the same Dag number. Even though the original application is not before this Court today, the learned Advocate for the appellant has submitted a true copy of the application along with a xerox copy of the receipt granted by the Computer Section. The said learned Advocate submitted that in absence of the original application the Court may proceed on the basis of the true copy of such application.

6. The learned Senior Advocate appearing on behalf of the plaintiff-respondent does not have any objection in the Court relying upon the true copy of the application.

7. Let the true copy of the application under Order 41 Rule 27 of the CPC as filed by the learned Advocate for the appellant in Court today be kept on record.

8. The learned Senior Advocate appearing on behalf of the plaintiff-respondent submitted that since the learned First Appellate Court has already found that the suit property and the property claimed to have been purchased by the defendant are different, there is no illegality in the judgment challenged in the present appeal. The said learned Advocate submitted that the Title Suit No. 167 of 1976 related to the property in Khatain No. 7672 but in the present suit it is Khatian No. 3413 and, thus, there cannot be any substance in the submission that the matter should be remanded back to the learned Court below. The said learned Senior Advocate for the plaintiff-respondent further submitted that that the plaintiff-respondent is in an advanced stage of life, i.e. about 95 years of age and, therefore, the suit should not be remanded back to the learned Court below. The said Senior Advocate for the

plaintiff-respondent also submitted that since it is a question of fact as decided by the learned First Appellate Court, this Court should not interfere with the impugned judgment on such question of fact. The said learned Senior Advocate also submitted that the vendors of the parties are different and, therefore, there cannot be any confusion whatsoever.

9. Having heard the learned Advocates for the respective parties, it appears to this Court that the Khatian numbers of the property in dispute in the two suits are different but the plot numbers, the police station concerned, the Mouza are the same. It also appears that the learned trial Court had taken into consideration such fact and came to the conclusion that the Touzi Number and the Khatian Number are different but otherwise the schedules in the two suits are the same. The learned trial Court came to the finding that the property involved in the Title Suit No. 167 of 1976 is the same as that which is involved in Title Suit No. 18 of 1998 and the Court should overlook such minor discrepancy and uphold that the properties in the two suits are the same but the learned First Appellate Court considered such discrepancy and came to the conclusion that the properties are different.

10. Be that as it may, it appears from the copy of the record of rights annexed to the application under Order 41 Rule 27 of the CPC that both the Khatian numbers have been mentioned in the said record of rights and it further appears that the Dag number appearing in such record of rights remains to be the same. The Police Station within whose jurisdiction the land is situated is also the same.

11. The learned Advocate appearing on behalf of the defendant-appellant submitted that it may very well be that the Khatian number has been renumbered at some point of time but the parties are litigating over the same property as it was involved in the Title Suit No. 167 of 1976.

12. This Court is of the view that in the interest of justice such confusion should be eliminated and proper adjudication is necessary by an appropriate investigation as to whether or not the property involved in the aforesaid Title Suit No. 167 of 1976 is the same as the one involved in the aforesaid Title Suit No. 18 of 1998.

13. This Court is further of the view that even if the learned First Appellate Court had come to a finding that the present suit is not hit by the principles of res judicata, the learned First Appellate Court could not have decreed the suit automatically without compelling the plaintiff-respondent having prayed his case.

14. This Court is also of the view that it will not be proper at this stage in the present state of affairs to come to any positive finding as to whether or not the suit property in the present suit was involved in the said Title Suit No. 167 of 1976. This Court is of the opinion that for doing justice between the parties it is necessary that the matter should be sent back on remand to the learned trial Court for fresh adjudication after allowing the defendant-appellant to adduce in evidence the record of rights, a copy of which has been annexed to the application under Order 41 Rule 27 of the Code of

Civil Procedure. This Court is also of the view that the parties should be allowed to adduce further evidence, if necessary, to establish the identity of the suit property. The learned First Appellate Court did not consider the possibility of Khatian number being renumbered at some point of time.

15. In view of the discussions made above, the present second appeal is disposed of by setting aside the judgments and decrees passed by the learned Courts below and sending the suit back on remand to the learned trial Court for a fresh adjudication of the issues involved in the suit and also the question as to whether or not the principles of *res judicata* can be applied to the present case after giving an opportunity hearing to the defendant-appellant to adduce in evidence the record of rights, a copy of which has been annexed to the application under Order 41 Rule 27 of the Code of Civil Procedure, and also allowing the parties to adduce further evidence, if necessary, for the purpose of establishing the identity of the suit property in the present suit. After taking such evidence, the learned trial Court shall give an opportunity hearing to the parties and decide the suit afresh and make an endeavour to dispose of the suit as early as possible but preferably within a period of three months from the date of communication of this order to the learned trial Court.

16. The appeal is thus disposed of.

17. Lower Court records be sent back to the learned Court concerned immediately and also a copy of this judgment be sent to the learned trial Court by special messenger and such special messenger cost shall be put in by the appellant within one week as prayed for by the learned Advocate for the appellant.

18. The application being C.A.N. 11310 of 2012 under Order 41 Rule 27 of the CPC also stands disposed of and it has been treated as on day's list as prayed for by the learned Advocates for the respective parties.

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