

(2012) 05 CAL CK 0068

Calcutta High Court

Case No: F.M.A. No. 1136 of 2007 with C.A.N. No. 4583 of 2008

Manoj Kumar Dey and Others

APPELLANT

Vs

Smt. Lily De and Others

RESPONDENT

Date of Decision: May 9, 2012**Acts Referred:**

- Specific Relief Act, 1963 - Section 34

Citation: (2012) 3 CALLT 532 : (2012) 5 CHN 447**Hon'ble Judges:** Prasenjit Mandal, J**Bench:** Single Bench**Advocate:** Amitava Pain, for the Appellant; Pratik Prakash Banerjee, for the Respondent**Final Decision:** Dismissed

Judgement

Prasenjit Mandal, J.

This appeal is at the instance of the plaintiffs/ appellants and is directed against the judgment and decree dated December 21, 2006 passed by the learned Additional District Judge, 1st Court, Howrah in Title Appeal No. 18 of 2006 thereby remanding the suit being Title Suit No. 23 of 2000 for fresh trial upon certain directions. The question is if the impugned judgment and decree should be sustained.

2. The following facts are not in dispute:-

(i) One Sukhodamoyee Dey had two sons viz. Atul Krishna Dey and Gostlalal Dey. Atul Krishna Dey had five sons and out of them Rameswar and Baneswar died as bachelors and out of the remaining three sons. Gadadhar and Bisweswar died leaving behind their respective heirs and another son, namely. Gopeswar left India and he has been residing in England since 1967.

(ii) The plaintiffs are the widow and sons of Bisweswar Dey. Apart from the plaintiffs. Bisweswar has one daughter viz. Dr. Lini Srinibasan who has been living in U.S.A. for a considerable period. She has not been made a party in the suit being Title Suit No.

23 of 2000.

(iii) Gostlal Dey died before 1956 leaving behind his widow, one son Baidyanath and three daughters, namely, Sarala, Sushila and Shitala. The widow of Gostlal Dey died after 1956. Out of the three daughters two were married and they are living in their respective in-laws' house and Shitala is an unmarried old lady and is now living at Brindaban for some time past.

(iv) Previously, Bisweswar Dey filed a suit being Title Suit No. 269 of 1985 before the learned Munsif, 2nd Court, Howrah against Baidyanath Dey and the present defendants praying for their eviction as licensees in respect of the same suit property as mentioned in the schedule of the present plaint. His claim was to the effect that the suit property was the self acquired property of Atul Krishna Dey who purchased the suit property in the benam of his mother Sukhodamoyee Dey and Atul Krishna Dey as 16 anna owner of the concerned property made construction on the land after mutating his name with the Howrah Municipality. The said suit was subsequently transferred to the then learned Munsif, 6th Court, Howrah as renumbered as Title Suit No. 230 of 1988.

(v) The present defendants as well as Baidyanath Dey contended in the said suit that the said property was purchased by Sukhodamoyee and on her demise the property had devolved upon those two sons Atul and Gosta.

(vi) The suit was dismissed. The Title Appeal being Title Appeal No. 21 of 1995 preferred against the order of dismissal was also dismissed. Then the plaintiffs who were substituted in the suit preferred a second appeal before this Hon'ble Court and that second appeal was also dismissed on January 11, 2000.

(vii) Thereafter, the plaintiffs/appellants filed a SLP before the Hon'ble Apex Court and that application too was dismissed thereby affirming the order of the learned Trial Judge.

(viii) Several other proceedings, criminal cases were held between the parties. The plaintiffs contended that the defendants tried to take forcibly possession of the suit property and as such, the present suit bearing Title Suit No. 23 of 2000 for permanent injunction and other reliefs was filed over the selfsame property.

(ix) The defendants/opposite parties herein are contesting the said suit by filing a written statement denying the material allegations raised in the plaint. They have contended that the suit is not maintainable, barred by the doctrine of res judicata, estoppel of judgment, section 34 of the Special Relief Act and for non-joinder of necessary parties, namely, Smt. Lini Srinivasan. The relief sought for in the present suit has already decided in the earlier suit being Title Suit No. 230 of 1988. Accordingly the suit is not maintainable.

(x) The suit was decreed on contests without costs.

(xi) The Title Appeal being Title Appeal No. 18 of 2006 filed by the defendants/appellants was allowed on contests without costs. The suit was remanded back for fresh trial.

3. Now in order to understand the bone of contention, the plaint is to be looked into.

4. In the instant suit, the plaintiffs have sought for the following reliefs :-

(a) A decree for permanent injunction against the defendants from dispossessing the plaintiffs from the suit property without taking recourse of law:

(b) A decree for all cost of the suit;

(c) A decree which the plaintiffs are entitled to both in law and equity.

5. Therefore, the main relief sought for is for a decree of permanent injunction against the defendants from dispossessing the plaintiffs from the suit property as described in Schedule "A" to the plaint.

6. For convenience, the suit properly as described in the schedule to the plaint are reproduced below:-

SCHEDULE - "A"

ALL THAT the property measuring about more or less 5 cottah 3 chittak 40 sq.ft. including all pucca structures including R.T.S., privy etc. except the "B" Schedule property, comprised within holding No. 21, Dharmadas Kundu Lane, P.S. Shibpur, District Howrah.

SCHEDULE - "B"

ALL THAT the pucca rooms one in the ground floor and one in the 1st floor with attached dalan situated within holding No. 21. Dharmadas Kundu Lane, P.S. Shibpur, District Howrah with common user of stair. bath and Southern side privy.

7. As per materials-on-record as well as the admitted position, the earlier suit being Title Suit No. 269 of 1985 (subsequently renumbered as Title Suit No. 230 of 1988) was for declaration of title and recovery of possession from the licensees in respect of the suit property and in that suit, after the death of the original plaintiff, the present plaintiffs/appellants were substituted. Similarly the present defendants also contested the said suit over the self-same property. In that suit, it was held that the plaintiffs/appellants have 1/6th share in the suit property and the defendants have half share in the said suit property as described in Schedule "A" of the present suit. Therefore, the right, title and interest over the suit property as described in Schedule "A" to the plaint have already been decided in the earlier suit being Title Suit No. 269 of 1985 and it was decided that the defendants were not residing thereon as licensees but as owners. The contention of the plaintiff that Atul Krishna Dey purchased the suit property in the benam of his mother namely. Sukhodamoyee Dey was negatived in the earlier suit and that is why the prayer for a

decree of eviction against the licensees was rejected and the defendants share of the suit property had been declared to the extent of 50 per cent thereon.

8. As per admission of the P.W. 1, the plaintiffs are in possession of more than their 1/6th share in the suit property and they have contended that the defendants are trying to disturb their possession and for that reason the present suit for permanent injunction was filed subsequently over the selfsame suit property.

9. The contention of the plaintiffs that they are in possession of their excess share is apparent from Schedule "A" and "B" to the plaint of the present suit. The plaintiffs/appellants have contended that the defendants are in possession of "B" Schedule property as indicated above mainly one room at the ground floor and one room at the first floor beside the common user of stair, etc.

10. It may be noted herein that the entire suit property as described in Schedule "A" to the plaint comprises 5 cottahs 3 chittaks and 40 sq.ft. including all pucca structures including R.T.S., privy etc. except Schedule "B" property just indicated above. So, on comparison of Schedule "A" and "B" and the extent of shares of the plaintiffs and the defendants as indicated above, it is obvious that the plaintiffs are in possession of more than their 1/6th share in the suit property. The plaintiffs have prayed for relief of permanent injunction and if such relief as granted by the learned Trial Judge is maintained, the effect will be that the rightful owner, that is, the defendants would be deprived of their legitimate claim of their share in the suit property. Therefore, the judgment and decree passed by the learned Trial Judge cannot be supported.

11. On realizing the facts as stated in the earlier paragraph, the learned First Appellate Court set aside the decree and he has concluded that the remedy of the plaintiffs lies on filing a suit for partition and to pray for appropriate reliefs. For that reason, an investigation is to be made over the suit property, So, a commissioner should be appointed for holding local investigation of the suit property to remove the dispute of possession of the respective parties in the suit property, etc. Accordingly, the learned First Appellate Court directed that fresh trial should be held and the parties should be given an opportunity to adduce evidence in the light of the judgment.

12. The above decision of the First Appellate Court, I am of the view, cannot be supported because of the fact that the plaintiffs cannot be directed to proceed in the manner as directed by the learned First Appellate Court. The plaintiffs cannot be compelled to file a suit for partition. It is upto them. Similarly, suo motu direction for holding local investigation. I think, cannot be supported. It is upto the parties what steps they would take with regard to the matter in dispute. But. I find from the materials on record, that several litigations/proceedings are pending between the parties over the suit property and the plaintiffs are in possession of the suit property in excess of their 1/6th share therein and they have prayed for the relief of

permanent injunction contending, inter alia, that they cannot be evicted from their present possession save and except due to process of law.

13. The plaintiffs by way of a relief of permanent injunction have wanted to maintain their possession for unlimited period and as such, I am of the view that they have not come to the Court with clean hands. So, the question that a person in possession can be evicted only in due process of law becomes irrelevant in the circumstances. This is obvious when the plaintiffs have specifically stated that in spite of having 50 per cent share in the suit property, the defendants have possession over the "B" Schedule property only. If the prayer of the plaintiffs for permanent injunction is granted, it is the defendants who would suffer irreparable loss. The balance of granting injunction is not in favour of the plaintiffs. On the other hand, if injunction is granted, it is the defendants who would face inconvenience. Every co-sharer has the right to possess every inch of the joint property.

14. Mr. Amitava Pain, learned Counsel appearing for the appellants has submitted that the judgment and decree under appeal cannot be supported and I agree with such submission. But at the same time, the judgment and decree passed by the learned Trial Judge cannot be supported for the reasons stated earlier. So the said findings should be set aside and I am of the opinion that the suit should be dismissed.

15. On the other hand, Mr. Pratik Prakash Banerjee, learned Counsel appearing for the defendants/respondents submitted that as per previous suit, the present suit is barred by res judicata and in fact, the defendants have filed an application for amendment of the written statement and that application should be allowed and necessary directions should be passed.

16. With due respect to Mr. Banerjee. I am of the view that the present suit cannot be stated to be barred by the principles of res judicata on the ground that the issues, namely. Issue Nos. 3 & 4 were not decided in the earlier suit between the same parties. Since I have decided that the suit is liable to be dismissed, the question of entertaining the application for amendment of the written statement cannot be considered now. So, the said application should also be rejected.

17. In that view of the matter, I am of the opinion that the findings of the First Appellate Court cannot be supported, the impugned judgment and decree under appeal should, therefore, be set aside.

18. Similarly, the findings of the learned Trial Judge to the effect that the plaintiffs are entitled to get decree and reliefs cannot be supported. The plaintiffs cannot get at all the decree and reliefs as prayed for in the suit. So the Issue Nos. 3 and 4 (that is are the plaintiffs entitled to get the decree as prayed for? What other relief or reliefs, if any, are the plaintiffs entitled to are decided against the plaintiffs.

19. Accordingly, this First Misc. Appeal is allowed. The judgment and decree of the First Appellate Court is hereby set aside.

20. Similarly, the judgment and decree dated December 16, 2005 passed by the learned Civil Judge (Junior Division). 2nd Court, Howrah in Title Suit No. 23 of 2000 is hereby set aside. The said suit be and the same is dismissed on contest with costs to the defendants.

21. Considering the circumstances, there will be no order as to costs.

C.A.N. No. 4583 of 2008

In view of the observations made above, this application for amendment of the written statement of the defendants/respondents stands rejected.

Urgent xerox certified copy of this order, if applied for, be supplied to the learned Advocates for the parties on their usual undertaking.