

(2019) 11 CAL CK 0107

In the Calcutta High Court

Case No : Civil Order/Misc.Cas (CO) No. 3694 Of 2019

Asit Kumar Patwari

APPELLANT

Vs

Shrimati Lipika Roy & Ors

RESPONDENT

Date of Decision : 14-11-2019

Acts Referred:

Specific Relief Act, 1963 — Section 26, 31

Code Of Civil Procedure, 1908 — Order 41 Rule 27(b), Order 41 Rule 33

Citation : (2019) 11 CAL CK 0107

Hon'ble Judges : Sabyasachi Bhattacharyya, J

Bench : Single Bench

Advocate : R.N. Mahato, Aritra Shankar Roy, Sourav Sen, Susenjit Banik

Final Decision : Dismissed

Judgement

Sabyasachi Bhattacharyya, J

The present challenge is taken out by the plaintiff in a suit for declaration of the plaintiff's 16 annas title and ownership in the suit property together with another declaration that the present defendants have no title in the suit property, as described in the schedule to the plaint, and for consequential reliefs.

In the schedule of the plaint, as well as the connected injunction application, the suit property was described as "All that piece and parcel of bastu land measuring about 5 Cottahs 14 Chittaks 30 Square feet recorded in C.S. Dag No. 706 under C.S. Khatin No. 10, Under R.S. Dag No. 804/2102 in R.S. Khatian No. 991 Khanda Khatian from 14, at Mouza-Santoshpur, J.L. No. 22 within Kolkata Municipal Corporation Ward No. 109, under Assessee No. 31-109-13-1754-4 under Kolkata Municipal Corporation Premises No. 1132, Survey Park, Kolkata-700075, under the then Police Station-Kasba, then Purba Jadavpur, now Survey Park, Kolkata-700075, Dist: South 24 Parganas."

The boundaries of the suit property were also given in the said schedule. Although the trial court granted an ad interim injunction restraining the

defendant nos. 1 and 2 from creating any disturbance in the peaceful possession of the plaintiff over the suit property, the appellate court reversed the said order primarily on the premise that the plaintiff had failed to prove prima facie that the title deed of the plaintiff and the previous deeds showing the chain of title of the plaintiff related to the R.S. Dag No. 804/2102, which is the subject-matter of the suit.

Learned counsel for the petitioner argues that even in the schedule of the plaint as well as in the injunction application, R.S. Dag No. 804/2102 had been described to be within C.S. Dag No. 706, which, in turn, was mentioned in all the deeds produced before the courts below. It is further argued that the boundaries of the suit property were specifically given in the plaint and the injunction application, which would tally with the boundaries given in the title deeds produced by the petitioner in support of his claim of title to the suit property. Learned counsel for the petitioner argues that a comparative study of the title deeds and their boundaries, with those of the schedule of the suit property as given in the plaint and injunction application, would suffice to show the identity of the said properties. As such, it is argued that the appellate court acted without jurisdiction in setting aside the order of ad interim injunction granted by the trial court.

Learned counsel for the petitioner next argues that, under Section 31 of the Specific Relief Act, 1963, the cancellation of an instrument may only be asked if there was reasonable apprehension that such instrument, if left outstanding, may cause serious injury to the plaintiff. In the present case, it is submitted, the instrument-in-question does not cause any injury to the petitioner but rather is in favour of the petitioner. As such, no cancellation of the said deed was required to be prayed for in the plaint.

In this context, learned counsel for the petitioner cites a Division Bench judgment of this Court, reported at (2010) 4 CHN 43 (Cal), (Srimati Nirodanandini Mondal & Ors. Vs. Smtt. Sandhya Rani Mondal & Ors.), wherein it was held, inter alia, that when the plaintiff seeks to establish his title to the property, which cannot be established without avoiding the decree or an instrument, that stands as an insurmountable obstacle in his way which otherwise binds him, though not a party, the plaintiff necessarily has to seek a declaration and have that decree, instrument or contract cancelled or set aside or rescinded. Section 31 of the Specific Relief Act, 1963, it was held, that regulate suits for cancellation of an instrument, lays down that any person against whom a written instrument is void or voidable and who has a reasonable apprehension that such instrument, if left outstanding, may cause him serious injury, can sue to have it adjudged void or voidable and the Court may in its discretion so adjudge it and order it to be delivered or cancelled. It would, thus, be clear that the word 'person' in Section 31 of the Specific Relief Act is wide enough to encompass a person seeking derivative title from his seller.

Learned counsel for the petitioner further argues that the defendants/opposite

parties, without filing any written objection to the injunction application, could not urge their independent point either in the courts below or before this Court, contrary to the case made out by the petitioner in the plaint and the injunction application.

It is argued that it is well-settled that the pleadings of the plaint and injunction application have to be taken as sacrosanct, unless rebutted by way of written objection.

Learned counsel for the opposite parties, on the other hand, submits that the last-mentioned principle has been diluted and it is now well-settled that even the appellate court, by exercising its power under Order XLI Rule 33 of the Code of Civil Procedure as well as Order XLI Rule 27(b) of the Code can look into further materials, if necessary, for proper adjudication of an appeal even against an interlocutory order.

It is further submitted that the petitioner has not prayed for any rectification of the deeds-in-question and as such, could not argue that the suit property, as mentioned in the plaint, tallies with the deeds-in-question, which described the suit property differently.

Upon hearing both sides and perusing the materials-on-record, it is evident from the plaint and the injunction application, particularly from paragraph 6 of the plaint, that it is admitted by the plaintiff that the location and situation of the suit property is in C.S. Dag No. 706 and corresponding in R.S. Dag No. 804/2102. But unfortunately, due to the mistake on the part of the deed writers and/or scribe of the deed in checking the corresponding R.S. dag of main C.S. Dag No. 706 at the time of writing of the aforesaid deed to different purchasers, the corresponding R.S. dag number of the said main/original C.S. Dag No. 706, had been wrongly written in some deeds as R.S. Dag No. 834 instead of R.S. Dag No. 804/2102. Thereafter, it was pleaded in the said paragraph of the plaint that by a deed of declaration dated September 21, 1994 by and between Anup Kumar Mukhopadhyay and Alope Kumar Mukhopadhyay it was again wrongly stated that the corresponding R.S. dag number of the said two scheme plot nos. P-33 and P-35 was in R.S. Dag No. 804 and not in R.S. Dag No. 804/2102, though actually the said two scheme plots were and are lying in corresponding R.S. Dag No. 804/2102 and, accordingly, the mutation of the name of the plaintiff had been wrongly made in respect of the said plot no. 804 instead of 804/2102 in the office of the B.L. & L.R.O., Kasba.

Taking into consideration such plea of the plaintiff himself, it is evident that, even as per the plaint case, the plot numbers mentioned in the title deeds, which is produced by the plaintiff, do not tally with the suit property insofar as R.S. Dag No. 804/2102 is concerned. Undoubtedly, the plaintiff has sought to make out a case that all the previous deeds and the deed of the plaintiff as well were erroneously transcribed.

However, no effort was made to rectify such deeds and the suit has been filed

simpliciter for a decree declaring the plaintiff's title in the suit property and the negative declaration that the principal defendants have no title in the suit property, despite the principal defendants having in their favour a title deed in respect of the suit property, that is R.S. Dag No. 804/2102.

Moreover, the judgment cited as well as the section referred to by learned counsel for the petitioner, that is, Section 31 of the Specific Relief Act, 1963, are irrelevant for the purpose of deciding the present suit, since there is no case made out by either of the parties that any deed stands against the plaintiff and ought to be cancelled or rescinded.

Rather, the present case is one covered by Section 26 of the 1963 Act, which provides for the situations where an instrument is to be rectified. Section 26 provides that when, through fraud or a mutual mistake of the parties, a contract or other instrument in writing does not express their real intention, then either party or his representative in interest may institute a suit to have the instrument rectified or the plaintiff may, in any suit in which any right arising under the instrument in issue, claims in his pleading that the instrument be rectified or a defendant in any such suit as is referred to in clause (b), may, in addition to any other defence open to him, ask for rectification of the instrument.

In this case, the plaintiff did not claim any relief for rectification of the deed-in-question, despite the admitted position that the description of the suit property was wrong in the said deeds. Even taking into consideration the plaint case and the case made out in the injunction application without any extraneous material, it is palpably clear that no document was forthcoming, either issued by the corporation or any other competent authority, to show that the bata plot, being R.S. Dag No. 804/2102, pertained to the suit property and was identical to the sale deeds-in-question.

Undoubtedly, it would be open to the petitioner to attempt to prove the identity of the properties mentioned in the deeds as well the suit property by seeking local investigation or by producing other documentary or oral evidence, if necessary.

However, as the matter now stands at the ad interim stage, no document is forthcoming to prove the identity of the properties referred to in the sale deeds and the suit property, despite the admission in the plaint that the description of the suit property did not tally with those title deeds.

In such view of the matter, the appellate court was justified in reversing the ad interim order of injunction of the trial court, upon taking into account all the materials in detail. As such, no jurisdictional error can be attributed to the order of the appellate court, which is impugned herein.

Since the principal contesting opposite parties, being the opposite party nos. 1 and 2, are represented, no service is directed on the proforma opposite party no. 3.

C.O. NO. 3694 of 2019 is dismissed, thereby affirming the order of the appellate court, reversing the ad interim order of injunction passed by the trial court.

It is, however, made clear that the observations rendered herein are only for the purpose of deciding the appeal in connection with the ad interim order of injunction passed by the trial court and shall not affect the trial court at any further stage of the proceeding, either in connection with the injunction application or the main suit and the trial court will be free to proceed with the adjudication of the injunction application and the suit itself without being unduly influenced by any observation made herein.

There will be no order as to costs.

Urgent photostat certified copies of this order, if applied for, be made available to the parties upon compliance of necessary formalities.