

(1988) 02 GAU CK 0015

In the Gauhati High Court

Case No : Second Appeal No. 42 of 1979

Azgor Ali and Others

APPELLANT

Vs

Reazuddin Miah and Others

RESPONDENT

Date of Decision : 18-02-1988

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 1 Rule 10, Order 8 Rule 3

Citation : AIR 1989 Guw 74

Hon'ble Judges : S.N. Phukan, J

Bench : Single Bench

Advocate : T.C. Majumdar, A.K. Bhattacharyya, G. Ahmed and A.K. Das, for the Appellant; B.K. Das and P.K. Mushahary, for the Respondent

Judgement

S.N. Phukan, J.—This Second Appeal is directed against the judgment and decree dt. 14-7-1978 passed by the learned Assistant District Judge, Goalpara, Dhubri in Title Appeal No. 15 of 1978. By the impugned judgment and decree the learned lower Appellate Court set aside the judgment and decree dt. 27-1-78 passed by the learned Munsiff No. 2, Dhubri, in Title Suit No. 169 of 1976.

2. The present appellants as plaintiffs filed the suit against the present respondents for declaration that the decree obtained in a previous Title Suit No. 736 of 1969 in which the present appellants were not parties is inoperative. The appellants also prayed for a decree for declaration of their right, title and interest and joint possession over the suit land and also for permanent injunction.

3. Late Pasan Sk, the predecessor of the appellants and the pro forma defendants of the Title Suit was the owner of 30 Bighas and odd land which includes the suit land measuring about 20 Bighas and odd. It is alleged that appellants and pro forma defendants continued to possess the land after the death of Late Pasan Sk as his heirs. The land was duly recorded in the revenue record in the name of Late Pasan Sk. It is further alleged that present appellants became the owners of the suit land and are in possession of the land. On 15-1-76, the respondents got the suit land surveyed and on enquiry appellants

came to know that the respondents obtained an ex parte decree on 15-9-1972 in Title Suit-No. 736-of-1969. It is stated that the earlier suit was filed by the Respondents for correction of the records of right as according to respondents the name of Late Pasan Sk was wrongly recorded in the revenue record. There is no dispute that in the earlier suit present appellants were not made parties though they were also heirs of Late Pasan Sk and that the suit was decreed ex parte. According to respondents. Late Meser Ali, who was the predecessor-in-interest of the respondents was the owner of the part of the present suit land measuring about 15 Bighas and as such the respondents had to file the suit for correction of revenue records in respect of the said 15 Bighas of land. There is no dispute, as stated earlier, that the present appellants who are the heirs to Late Pasan Sk were not made parties in the earlier suit though the decree was for correction of records in respect of the part of the suit land and that the suit was decreed ex parte.

4. The learned trial Court framed four (4) issues and after considering the evidence on record decreed the suit. However, the learned lower Appellate Court set aside the decree on the ground that the present appellants though not made parties had constructive knowledge of the earlier suit as they were co-villagers, and as such, the exparte decree was binding on the appellants. The learned lower Appellate Court also took note of the fact that there was an amicable partition among the heirs of Late Pasan Sk and as the appellants failed to show that the suit land fell in their share the appellants had no right, title and interest over the suit land. At the trial stage there was local investigation and the Amin Commissioner found the present appellants in possession of the entire suit land. But the learned lower Appellate Court did not accept the report of the Amin Commissioner as the said Commissioner was not examined. Accordingly, the appeal was allowed and decree was set aside.

5. The main point urged by Mr. Bhattacharyya, learned counsel for the appellant is that the finding of the learned lower Appellate Court that the appellants had knowledge of the earlier suit as they were co-villagers is erroneous and illegal. Mr. Das, learned counsel for the Respondents urged that the knowledge of the decree of the earlier suit being a question of fact which was duly considered by the learned lower Court cannot be interfered with in this Second Appeal. In this connection, Mr. Das has placed reliance in *Dudh Nath Pandey (Dead) by Lrs Vs. Suresh Chandra Bhattasali (Dead) by Lrs*, wherein their Lordships held that High Court in exercise of its power R/s. 100 of the Civil P.C. cannot make a fresh appraisal of evidence and come to a different finding contrary to the finding recorded by the First Appellate Court.

6. The law laid down by the Apex Court in *Dudh nath Pandey (supra)* is well established. In my opinion, the main question of law is whether a decree is binding on a person who was not a party to the earlier suit though his presence is necessary for final adjudication of the dispute. In the instant case, the land in dispute including the land claimed by Respondents was recorded in the revenue

records in the name of Late Pasan Sk. Appellants and the pro forma defendants of the present suit are the legal heirs of Pasan Sk. The earlier suit, namely, title Suit No. 436 of 1969 was for deletion of the name of Late Pasan Sk from the revenue record and substitution of the name of predecessor of the present respondents. Pasan Sk was not made a party in the earlier suit and so also the present appellants. Only the present pro forma defendants who are some of the heirs of Late Pasan Sk were made parties. As the present appellants were not made parties the decree obtained by the present Respondents cannot bind the present appellants. As the relief prayed for was against all the heirs of Pasan Sk. I, therefore, hold that the finding of the learned lower Appellate Court that the present appellants had knowledge of the suit, and as such, the decree cannot be declared as null and void, is illegal and erroneous.

7. Regarding the prayer of the present appellants for a decree for right, title and possession over the suit land, the learned lower Appellate Court set aside the judgment and decree of the learned trial Court mainly on the ground that the Amin Commissioner was not examined. Mr. Bhattacharyya has rightly drawn my attention to the fact that against the report of the Amin Commissioner objection was filed before the learned trial Court which was duly rejected. In my opinion, if the learned trial Court (Lower Appellate Court) was of the view that it was necessary to examine the Amin Commissioner he should have examined the Amin Commissioner himself or remanded the case to the learned trial Court. I am, therefore, of the opinion that this is a fit case for remand to the learned lower Appellate Court with a direction to examine the Amin Commissioner and thereafter consider the evidence on record for coming to a finding regarding right, title and possession of the appellant.

8. Mr. Das, learned counsel for the Respondents has submitted that the suit is barred by limitation. I am unable to accept his contention in view of the fact that in the plaint there is a specific statement that the appellants came to know about the earlier ex parte decree only when the officials went to the place for survey and this fact was not disputed and no issue was framed.

9. Another submission of Mr. Das is that in the plaint there is an admission regarding title of the Respondents and this is binding on the appellants and in support Mr. Das has placed reliance on Mahendra Manilal Nanavati Vs. Sushila Mahendra Nanavati, Chaudhury Sahu v. State of Bihar AIR (1982) SCC 232) and Nagindas Ramdas Vs. Dalpatram Ichharam alias Brijram and Others, The law laid down by the Appex Court in the above decisions that admissions in pleadings is binding, is not disputed. In Mahindra Nanavati (supra) their Lordships have held that an admission in pleading must be taken as a whole. From the entire plaint taking it as a whole I do not find any admission by the appellants regarding right, title and possession of the Respondents and accordingly I reject the contention of Mr. Das.

10. From what has been stated above, I hold that the impugned judgment is liable to be set aside, which I hereby do. I remand the case to the learned lower

Appellate Court to decide from the evidence already on record and after examining the Amin Commissioner as to whether the appellants/plaintiffs have right, title and possession over the suit land.

11. I direct both the parties, to appear before the learned lower Appellate Court on 28th of March, 1988 for obtaining further orders. As this dispute is pending for a long time I direct the lower Appellate Court to dispose of the appeal within a period of 6 (six) months.

12. In the result, the appeal is partly allowed as stated above. In the facts and circumstances of the case, parties are left to bear their own cost.