

(1984) 03 PAT CK 0017

In the Patna High Court

Case No : Appeal from appellate decree No. 234 of 1979

Bhageloo Sah

APPELLANT

Vs

Sheo Shankar Singh and Others

RESPONDENT

Date of Decision : 26-03-1984

Acts Referred:

Bihar Consolidation of Holdings and Prevention of Fragmentation Act, 1956 — Section 26A, 3

Criminal Procedure Code, 1973 (CrPC) — Section 145

Citation : (1985) PLJR 722

Hon'ble Judges : Ashwini Kumar Sinha, J

Bench : Single Bench

Advocate : Surya Bhushan Prasad Singh, for the Appellant; Binod Kumar Roy, for the Respondent

Judgement

Ashwini Kumar Sinha, J.—This second appeal is by defendant No. 3 against a judgment of modification. The present suit was brought by the plaintiffs in representative capacity on behalf of the people of the village in question and the defendants as well were sued in their representative capacity as Karta of their respective families. The dispute is related to a strip of land over plot No. 288 having an area of 12 decimals as described in Schedule I of the plaint. The plaintiffs put the claim of Easement by customary right and asked for a declaration that the suit land (as described in schedule I of the plaint) was a public rasta over which none of the defendants has any personal interest According to the plaintiffs this rasta having an area of 12 decimals had always been used as a public road for the people of the village Sambhor in the district of Bhojpur. The plaintiff's case was that though the land was recorded under the Khata of defendants No. 1, it was not his personal property. It was a common public road. According to the plaintiffs, the sale deeds executed by defendant No. 1 in favour of other defendants (vide schedule II of the plaint) were null and void, as defendant No. 1 had no right to sell the land. The plaintiffs also prayed for a declaration that the defendants had no right to put any objection to other

persons in the use of the rasta. The plaintiffs further prayed for a permanent injunction against the defendants and further asked for a relief that the defendants' possession over a portion of the disputed land by virtue of the order passed in the proceeding u/s 145 of the Code of Criminal Procedure was void and without jurisdiction.

2. The suit was contested by defendant No. 2 to 4. Defendant No. 1 also filed a written statement. The common defence was that the plaintiffs had no right to sue in the representative capacity for the public. The suit plot No. 288 with an area of 12 decimals was rightly recorded in the name of defendant No. 1 under his khata No. 46. It was his agricultural land but according to the contesting defendants, it had been recorded as rasta in the khatian by mistake. Further defence was that defendant No. 1 had every right to sell the same to anybody he liked. The defence case was that though the land was recorded as rasta, it also remained in possession of other defendants for many years and the other defendants had purchased the plot in parts from defendant No. 1 for valuable consideration through registered sale deeds and since then they were coming in possession over the same. The defence further was that none of the plaintiffs had any right to use this land as a rasta nor had they ever done so.

3. The trial court decreed the suit and held that though the plot in question did not belong to public, the public had perfected their Easementary right. The trial court held that though the title lay with defendant No. 1, the members of the public had perfected Easementary right. It further held that though the sale deeds executed by defendant No. 1 in favour of other defendants were not void, yet the members of the public had perfected their Easementary right.

4. Against the judgment and decree of the trial court defendant No. 3 and 4 preferred an appeal. The lower appellate court dismissed their appeal and held that the entries in the cadastral survey about the plot in question that it was a rasta was perfectly correct. It further held that though plot No. 288 was recorded as rasta under khata No. 46 of defendant No. 1 alone, it was used as rasta by other persons also. It further held that though the order passed in a proceeding u/s 145 of the Code of Criminal Procedure went in favour of the defendants, yet no absolute right vested in them with regard to the suit land which was a rasta.

5. The lower appellate court further held that the defendant No. 1 had no right to sell it in favour of other defendants and as such the sale deeds mentioned in schedule II of the plaint did not confer any title upon the vendees. The lower appellate court further held that the plaintiffs were entitled for an order of permanent injunction against the defendants as prayed for.

6. With these findings the lower appellate court dismissed the appeal preferred by defendant Nos. 3 and 4.

7. The present second appeal has been preferred by defendant No. 3 alone. Before the present second appeal was placed for admission an affidavit on behalf of the appellant was filed in this Court on 1.8.1980 stating therein that a

notification dated 26.11.70 u/s 3 of the Bihar Consolidation of Holdings and Prevention of Fragmentation Act, 1956 (hereinafter to be referred to as the Act) was published by the State of Bihar declaring its intention to make a scheme of consolidation of holding within the entire Dumrao Anchal. By this affidavit it was also stated that the consolidation operation was also initiated in the village in question where the disputed plot was situate, and it was further stated that the consolidation proceedings were still in progress in the village in question which had not concluded u/s 26A of the Act.

8. In view of the statements made in the affidavit it was urged that the suit and the appeal (preferred in the lower appellate court) had abated under the provision of section 4(c) of the Act.

9. The present appeal was posted for admission on 8.10.80 and, it seems, on the basis of the aforesaid affidavit this appeal was admitted and the question of law framed was whether the present second appeal, the appeal before the lower appellate court and the suit stood abated under the provision of section 4(c) of the Act.

10. This appeal came up for hearing on 9.3.84 and it was submitted by the learned counsel appearing for the appellant that the present second appeal, the appeal in the lower appellate court and the suit had abated under the provision of section 4(c) of the Act and in support of his submission learned counsel placed reliance upon the affidavit mentioned above.

11. Learned counsel appearing for respondent No. 1 put a serious objection to the use of the affidavit for the purpose of deciding the point urged by the learned counsel for the appellant on the ground that the copy of the affidavit had not been served upon him, though it was filed even before the stage of admission. This Court found the objection of the learned counsel appearing for the respondent No. 1 to be valid one and directed the learned counsel for the appellant to serve a copy of the same upon the learned counsel for respondent No. 1 by the 12th March, 1984, and it was also ordered that if a reply was to be filed, that must be filed by the 21st March, 1984.

12. Thereafter the case has been listed for hearing again. It is desirable to mention here that the copy of the affidavit was served upon the learned counsel for respondent No. 1 within time granted by the Court, yet no reply has been filed on behalf of respondent No. 1. In other words, the statements of facts made in the affidavit have not been controverted on behalf of the respondent No. 1.

13. Learned counsel appearing for the defendant appellant has advanced two submissions--firstly, that in view of the nature of the land, i.e., as according to the defendants this is a host agricultural land and in view of the fact that the rent, too, has been fixed and the nature of the land itself being in dispute; the consolidation authorities were competent to decide that question also. And for the purpose of deciding whether the provision of section 4(c) of the Act was applicable or not, the plea taken by the defendants in their written statements

must also be looked into and not only the claim as advanced in the plaint. Learned counsel appearing for the appellant, alternatively, submitted that even in view of the reliefs claimed by the plaintiff's in the present case, the suit was covered under the provision of section 4(c) of the Act. Secondly, the learned counsel appearing for the appellant submitted that the finding of the lower appellate court, to the effect that defendant No. 1 had no right to sell and that after the sale no title passed to the vendees, was without any material and hence not binding in the second appeal.

14. On the other hand, learned counsel for the respondent No. 1 submitted that a perusal of the plaint was enough to show that, in fact, substantially the plaintiffs had claimed. the right of Easement by customary right in. the suit land and such a relief could not be granted under the provision of section 4(c) of the Act and the suit was beyond the jurisdiction of the consolidation authorities. Learned counsel appearing for the respondent No. 1 further submitted that the appeal was concluded by findings of fact.

15. The main point for consideration in this appeal was whether in the present case, on the facts pleaded, the provision of section 4(c) of the Act were applicable.

16. Having heard the learned counsel for the parties, I hold that the Act is not at all attracted to the facts of this case. The Act is made to provide for the Consolidation of the Holdings and Prevention of Fragmentation. u/s 3(1) the State Government may issue notification declaring its intention to make a scheme for the consolidation of holdings in any particular area and then section 4(c) of the Act lays down the effect of such notification. It is desirable to quote the provision of section 4(c) of the Act which runs as follows:--

Every proceeding for the correction of record and every suit and proceeding in respect of declaration of rights or interest in any land lying in the area or for declaration or adjudication of any other right in regard to which proceedings can or ought to be taken under this Act, pending before any court or authority whether of the first instance or of appeal, reference or revision, shall, on an order being passed in that behalf by the court or authority before whom such suit or proceeding is pending stand abated:

Provided that if the State Government empowers any other officer appointed under this Act to dispose of any proceeding relating to survey settlement operations under the provisions of chapter X of the Bihar Tenancy Act, 1885 (Bihar Act VIII of 1885), or chapter 12 of the Chotanagpur Tenancy Act, 1908 (Bengal Act 1908) or Santhal Parganas Settlement Manual 1872 (Manual 3, 1872) and transfer such proceeding to such officer for disposal, then the proceeding shall not abate or shall not be considered to have been abated.

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Under section 4(c) of the Act, every proceeding for the correction of records and

every suit and proceeding in respect of declaration of rights or interest in any land if instituted prior to the issuance of notification u/s 3(1) shall stand abated. Thus a perusal of the Act shows that the Act deals with land and other disputes do not fall within the ambit of the Act.

17. In the present case, upon the averments in the plaint it is obvious that the plaintiffs claim Easement by customary. right over the plot in question and the other reliefs were merely ancillary reliefs. Thus, in my opinion, the suit proceeding was neither for correction of records nor the suit was in respect of any right or interest in any land. The plaintiffs only claim a right of Easement by customary right and, in my opinion, such a right is not covered under the provision of section 4(c) of the Act. The plaintiffs have not claimed any interest in the land itself. They have only claimed a right that they have a right to pass over the disputed land, as it was a public rasta. The record-of-rights and preparation of register of lands have to be prepared in terms of sections 8 and 9 respectively of the. Act. The consolidation authorities are also required to take note of and mention the particulars of lease, mortgage and other encumbrances, if any, under the Act. The word "encumbrance" is defined in section 2(8) of the Act. "Encumbrance" includes right of an under-raiyat in a holding or part thereof but it does not include a right of easement. The Easement by its very nature is claimed in regard to specific parcel of land and u/s 18 of the Act the right of Easement does not stand transferred to any land which may be allotted to any of the parties. In that view of the matter the consolidation authorities have no jurisdiction to enter into any adjudication with regard to right of Easement. The right of Easement, in my opinion, does not fall within the ambit of the Act and as such a suit for a declaration of right of Easement by customary right, in my opinion, is not barred under the provision of section 4(c) of the Act.

18. Learned counsel appearing for the appellant submitted that in order to decide as to whether suit/proceeding was hit by provision of section 4(c) of the Act, the pleading of the defendants in the written statement must also be looked into. This submission of the learned counsel for the appellant needs only to be referred to be rejected. The suit filed by the plaintiffs either has to be decreed or dismissed on its own strength and not on the weakness of the defendant's case. To test the submission advanced by the learned counsel for the appellant, assume the defendant does not enter into defence, the question is how it will be decided whether it is hit by section 4(c) of the Act or not. The answer is plain and simple. It is purely on the averment of the plaint having no relationship with the defence. It is the suit or the proceeding which is talked of u/s 4(c) of the Act. If the submission advanced by the learned counsel for the defendant appellant is accepted, many a suits/proceedings which are beyond the purview of the Act shall be brought within the purview of the Act. There is thus no force in the submission advanced by the learned counsel for the defendant appellant. It is the relief/reliefs claimed by the plaintiffs which is/are the guiding factors which determine the applicability or non-applicability of section 4(c) of the Act.

19. The alternative argument of the learned counsel for the defendant appellant is to the effect that the relief, as claimed by the plaintiffs, is covered by section 4(c) of the Act. I have already held above that the suit is really and substantially a suit in which a right of Easement by customary right has been claimed and such a relief does not fall within the purview of the Act. Thus there is no force in the second submission also advanced by the learned counsel for the defendant-appellant.

20. Learned counsel for the defendant appellant in order to support his submission that the suit, appeal in the lower appellate court and the present second appeal were hit by the provisions of section 4(c) of the Act also placed reliance upon clause 2 (serial No. 7) of Rule 6(c) of the Bihar Consolidation of Holding Rules; 1958, framed u/s 40 of the Act. Learned counsel for the defendant appellant submitted that when the statement of principles is prepared in form XXVI u/s 9(A) read with Rule 6(C) by the Assistant Consolidation Officer after considering the opinion of the Village Advisory Committee and after enquiry from as many raiyats of the unit as he may be able to collect, the Assistant Consolidation Officer is entitled to reserve some land according to the needs of the each unit for the purpose of road, village and inter-village road, besides for other public purpose (as mentioned in clause 2 (serial No. 7) of Rules 6(C). Learned counsel for the appellant submitted that in that view of the matter even in the nature of the suit as it is, it fell within the jurisdiction of the consolidation authorities. In my opinion, the submission advanced by the learned counsel for the "appellant is totally a misconceived one. The fact that while preparing the statement of principles in the form prescribed under Rule 6(C) the power with the Assistant Consolidation Officer is to reserve some land for the needs of each unit for a public purpose does not by itself, in my opinion, vests jurisdiction with the consolidation authorities to bring within their jurisdiction a suit of the nature as the present suit is. Hence, in the instant case, the plaintiffs claim the disputed plot to be a public rasta since the time immemorial and the plaintiffs claim the right of Easement by customary right to pass through it. I hold that such a nature of the claim is not embraced within serial No. 7 of clause 2 of Rule 6(C).

21. So far as the second submission advanced by the learned counsel for the appellant is concerned, the learned counsels for the respective parties have taken me through the judgment under appeal in detail. The lower appellate court took into consideration all the material evidences on the record adduced on behalf of the parties and only thereafter held that the defendant's case that the suit land was personal Kast land of defendant No. 1 was not correct. The lower appellate court, on a very proper appraisal of the evidences on the record, held that the suit land was a rasta used by the people of that village who have their houses and land, including the plaintiffs, by the side of this land. Having held that it was a rasta being used by all the people of that place, the lower appellate court held that defendant No. 1 had no right to sell it in favour of other defendants and hence the sale deeds mentioned in schedule II of the plaint did not confer any title upon the evidences, (sic) In my opinion this finding, that the

defendant No. 1 had no right to sell is neither unreasonable nor perverse. The learned counsel for the defendant appellant is not correct to submit that the finding was without any material on the record. Having held that the suit land Was a public rasta, the other finding necessarily flowed from it. Thus, in my opinion, there is no substance in this submission also as advanced by the learned counsel for the appellant. In the result, this appeal is dismissed. However, there will be no order as to costs.

(words in the judgment have been underlined by me for emphasis).