
(2015) 08 GAU CK 0003

In the Gauhati High Court

Case No : Regular Second Appeal No. 113 of 2006

Bina Prava Dutta and Others

APPELLANT

Vs

Biswajit Dutta and Others

RESPONDENT

Date of Decision : 12-08-2015

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 20 Rule 18, Order 41 Rule 31

Citation : (2015) 4 GLT 608

Hon'ble Judges : Arup Kumar Goswami, J

Bench : Single Bench

Advocate : S.K. Ghosh, for the Appellant; R. Choudhury, Advocates for the Respondent

Judgement

Arup Kumar Goswami, J—Heard Mr. S.K. Ghosh, learned counsel for the appellants/defendants and Ms. R. Choudhury, learned counsel for the respondent/plaintiff.

2. This appeal is preferred against the judgment and decree dated 14.12.2005 passed by the learned Civil Judge (Senior Division), Karimganj in Title Appeal No. 64/2003, upholding the judgment and decree dated 09.06.2003 passed by the learned Civil Judge (Junior Division) No. 2, Karimganj in Title Suit No. 27/2001, decreeing the suit.

3. The defendant No. 1 in the suit is the mother of the plaintiff and the defendant Nos. 2 to 5 are brothers and sisters of the plaintiff.

4. The case of the plaintiff, in short, is that Krishna Kr. Dutta, the father of the plaintiff and one Bidyut Prova Dutta had jointly purchased the suit land along with some other land by a registered sale-deed on 30.03.1951 from one Safia Khanam Choudhury and in view of an amicable partition between them, the suit land fell in the share of Late Krishna Kr. Dutta and he constructed a permanent residential building over the suit land of Part-I of Schedule-1 and was possessing the land as described in Part-II of Schedule-1 by digging up a tank for drawal of

water which was later on filled up by the plaintiff at his expense. Krishna Kr. Dutta expired on 13.11.1977 leaving behind the parties to the suit and during the last settlement survey operation, kutchra patta was issued in the name of the plaintiff and defendant Nos. 1 and 2 as well as one Nani Gopal Shome. The plaintiff had demanded for partition of the suit land and the parental residential house. But the request was declined and the defendants illegally constructed a house described in Part-II of Schedule-1. It is pleaded that such actions clouded the ejmali right and title of the plaintiff over 1/6th share of the suit properties.

5. The plaintiff filed the suit praying for the following reliefs:

"(A) For declaration of plaintiff's ejmali title with the defendants in the suit land and Maliki Right in the suit house described in para-1 of the schedule-II in 1/6th share and for confirmation of joint possession of the plaintiff over suit properties.

(B) For passing of both preliminary and Final decree of partition of the suit land, and the houses as situated over the suit land of para-1 of the schedule-I and to a lot and deliver the plot and part of the suit house as said to the plaintiff to the extent of his 1/6th share by appointing survey commissioner through court.

(C) For permanent injunction restraining the defendant Nos. 1, 2 & 3 from changing the present feature of the suit properties by way of proceeding further with the construction work of the suit building as described in para-2 of the schedule-II or otherwise.

(D) For mandatory injunction directing the defendant Nos. 1, 2 & 3 to demolish the suit building (in-complete) construction over the suit land of the para-2 of the schedule-I of the plaint within the time fixed by the court.

(E) For awarding full costs of the suit. A N D

(F) For such other & further relief as may be deemed fit and proper."

6. In the written statement filed by defendant Nos. 1 to 3, it was pleaded that an amicable partition was made between the plaintiffs and the defendants in respect of the suit land as well as residential houses standing on Part-I of Schedule-1 of the plaint. It is stated that defendant No. 2 is taking care of the defendant No. 1, his mother and one physically challenged unmarried sister, i.e. the defendant No. 3. How the aforesaid partition had taken place is described in paragraph 11 of the written statement. It is stated that eastern portion of suit land described in Part-II of Schedule-1 had fallen in the share of defendant No. 3 and a construction for a shop house was started for maintenance and other expenditure of defendant No. 3. It is pleaded that 1/6th share of the plaintiff had fallen in the western portion of suit land of Part-II of Schedule-1 of the plaint. Further case set out by the defendant Nos. 1 to 3 is that suit land was purchased in the name of her husband by the defendant No. 1 by her own income. While the residential house was constructed by the defendants, the plaintiff did not contribute anything towards such construction who was residing elsewhere all throughout.

7. The plaintiffs examined 2(two) witnesses and exhibited certain documents. The defendant only examined himself.

8. The learned Trial Court framed the following issues:

"1. Is there any cause of action for the suit?

2. Whether the suit is maintainable in its present form?

3. Whether the plaintiff is entitled to reliefs as prayed for?

4. Whether the suit land is the emjali property of the plaintiff and the defendants?"

9. The second appeal was admitted to be heard by an order dated 24.07.2006 on the following substantial questions of law:

"1. Whether the suit of the plaintiff for partition is maintainable for failure to implead al the co-sharers of the ejmali patta and whole of the patta within the subject matter of the suit?

2. Whether the Courts below erred in law in not discussing the pleaded case of the defendants in the impugned judgment?

3. Whether the impugned judgments are bad for being violative of Order 20 Rule 18 of the Code of Civil Procedure?"

10. Mr. Ghosh has submitted that in addition to the above questions of law, another substantial question of law may be formulated to the effect as to whether the impugned judgment of the learned Lower Appellate Court is vitiated being not in conformity with Order 41 Rule 31 C.P.C.

11. Upon hearing the learned counsel for the parties, a new substantial question of law is formulated to the following effect:

"Whether the impugned judgment of the learned lower Appellate Court is vitiated, the same being not a judgment in conformity with Order 41 Rule 31 C.P.C.?"

12. Mr. Ghosh submits that in view of the cryptic nature of the order passed by the learned Trial Court, it was all the more essential for the learned lower Appellate Court to have adverted to the evidence on record. But the learned lower Appellate Court, according to Mr. Ghosh, had not discussed the evidence on record. It is submitted that suit for partition could not have been decreed without specifying the shares of the other persons interested in the property. Mr. Ghosh has also submitted that he is not disputing that the plaintiff is not entitled to any share of the properties but his contention is that suit property was amicably partitioned earlier which fact has not been taken into consideration by the courts below. In view of the above, learned counsel submits that even without going to the substantial questions of law framed earlier, on the ground that the learned Lower Appellate Court's decision is not in conformity with the Order 41 Rule 31

CPC, the appeal deserves to be allowed and the case is liable to be remanded to the learned Lower Appellate Court for fresh disposal.

13. Ms. Choudhury, learned counsel appearing for the respondent has also submitted that the learned Trial Court as well as the learned lower Appellate Court did not discuss the evidence on record. She submits that from the plaintiff's point of view, evidence of PW-2 as well as Ext-1 and 2 were not considered at all and, therefore, in order to do justice between the parties, it will be appropriate to remand the case to the learned lower Appellate Court with a direction to consider the evidence on record independently and to pass a fresh judgment in accordance with law after hearing the parties.

14. On going through the judgments of the learned courts below, I am inclined to accept the submission of the learned counsel for the parties as none of the courts below has really discussed the evidence on record. This appeal deserves to be allowed by remanding the case to the learned lower Appellate Court.

15. In view of the above, it is not necessary for this Court to consider the substantial questions of law framed earlier. The impugned judgment of the learned lower Appellate Court is set aside and quashed. It is also made clear that this Court has not expressed any opinion on the merits of the case. The learned lower Appellate Court, on consideration of the evidence on record and after hearing the learned counsel for the parties, shall decide the case afresh within a period of 4 months from 5th of October, 2015. The parties will appear before the learned lower Appellate Court on 5th October, 2015. No cost.

16. Registry will send back the records forthwith.