

(2009) 10 GAU CK 0002
In the Gauhati High Court
Case No : C.R.P. No's. 279 and 290 of 2009

Braja Kalita and Others

APPELLANT

Vs

Bipin Chandra Kalita

RESPONDENT

Date of Decision : 30-10-2009

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 151, 152, 47
Constitution of India, 1950 — Article 227
Criminal Procedure Code, 1973 (CrPC) — Section 145

Citation : (2009) 5 GLT 610

Hon'ble Judges : B.P. Katakey, J

Bench : Single Bench

Advocate : S. Ali, R. Bhuyan, N. Bharali, M. Alam, J. Begum, A. Ikbal, S. Medhi and Sheeladitya, for the Appellant; P.K. Kalita, for the Respondent

Final Decision : Allowed

Judgement

B.P. Katakey, J.—The judgment-debtors in Title Suit No. 68 of 1986 filed the present petitions invoking the jurisdiction of this Court under Article 227 of the Constitution of India challenging the order dated 22.6.2009 passed by learned executing Court rejecting the applications, which were registered as Misc (J) Case Nos. 37 of 2008 and 38 of 2008, filed u/s 47 read with Section 151 of CPC in Title Execution Case No. 13 of 2007.

2. Since both the petitions arise out of a common order passed in the aforesaid two Misc Cases by learned executing Court, they are taken up together for hearing and disposal, as agreed to by learned Counsel for the parties.

3. The facts relevant for the purpose of disposal of the present petitions are that the opposite party Sri Bipin Ch. Kalita instituted T.S. No. 68 of 1986 in the Court of learned Munsiff No. 2, Kamrup at Guwahati against the present Petitioners as main Defendants and 3 others as proforma Defendants praying for-(i) a decree declaring right, title and interest over the land measuring 10L, out of 1B-1K-3L covered by Dag No. 711 (new), 436 (old) of KP Patta No. 178 (new), 103 (old) in

village - Soalkuchi, Mouza - Pub Bansar, District - Kamrup, with a thatched house thereon and also (ii) for confirmation of possession over the suit land and standing house thereon, with an alternative prayer that in case the Plaintiff is found to be not in possession of the suit land, for delivery of khas possession by evicting the contesting Defendants therefrom.

4. The case of the Plaintiff in the suit was that late Ratan Kalita and late Jurai Kalita, two brothers, owned and possessed the land measuring 1B-1K-3L described in Schedule B to the plaint, in equal shares and in or about the year - 1956, half portion of the said land owned and possessed by Ratan Kalita was acquired by the electricity department of the Govt. of Assam, for which compensation was paid. Out of remaining land, Jurai Kalita, the father of the Defendant Nos. 1 & 2 (Petitioner in CRP No. 290/09 and Petitioner No. 1 in CRP No. 279/09, respectively) and the husband of Smti. Rahan Kalita (Defendant No. 3-since deceased) sold 1K to Ratan Kalita. On the death of Ratan Kalita, his widow Smti. Champa Kalita became the absolute owner in respect of the said 1K of land, being the only heir. On 26.4.1965, Smti. Champa Kalita sold the said 1K of land (described in Schedule A/2 to the plaint) to Smti. Golapi Kalita by a registered deed of sale, who in turn on 1.11.85, sold the said land with a thatched house thereon to the Plaintiff by a registered deed of sale and also delivered possession to her. It has also been pleaded in the plaint that the Defendant No. 1 (Petitioner in CRP No. 290/09) instituted a proceeding u/s 145 Code of Criminal Procedure which was registered and numbered as Misc Case No. 191 m/1968, wherein the possession was declared in favour of the said Defendant, thereby compelling the Plaintiff (opposite party in the revision petitions) to institute the suit for declaration of right, title, interest and confirmation of possession and in the alternative, for passing a decree for delivery of khas possession. The suit was contested by the Defendants denying the claim of the Plaintiff and contending inter alia that the thatched house on the suit land had been constructed by them and that they had been in absolute possession of the suit property. The Defendants also denied the claim that Jurai Kalita during his lifetime sold 1K of land from his share to his brother Ratan Kalita by executing a registered deed of sale. It has further been pleaded in the written statement that the suit land had never been in possession of Ratan Kalita.

5. On the basis of the pleadings of the parties, the learned trial Court framed the following issues for decision:

1. Whether there is a cause of action for the suit?
2. Whether the suit is maintainable in the present form?
3. Whether the suit is bad for non-joinder of necessary parties?
4. Whether the suit is barred by limitation?
5. Whether the title and possession ever passed into the hands of the predecessor-in-interest of the Plaintiff and subsequently to the Plaintiff?

6. Whether the Defendants have been in undisputed and continuous possession of the suit land?

7. Whether the suit is false, frivolous and vexatious?

8. To what relief if any the Plaintiff is entitled to?

6. The learned trial Court, upon appreciation of the evidences on record, both oral and documentary, vide judgment dated 25th September 1991 dismissed the suit. Being aggrieved. Title Appeal No. 24 of 1991 was filed by the Plaintiff (opposite party in the revision petitions) which has also been dismissed by the learned first appellate Court vide judgment dated 4.8.1993 by affirming the judgment and decree passed by learned trial Court. Thereafter, Second Appeal No. 121 of 1993 was filed by the Plaintiff, which was disposed of by this Court vide judgment and order dated 30.11.1999 remanding the case to the learned first appellate court for fresh disposal, by setting aside the judgment and decree passed by it. On remand. Title Appeal No. 24 of 1991 was again dismissed by the learned first appellate court vide judgment and decree dated 23.11.2000 by affirming the judgment and decree passed by the learned trial Court. Second Appeal No. 18 of 2001 was, thereafter, filed by the Plaintiff before this Court, which has been allowed vide judgment and decree dated 19.12.2006 by setting aside the judgment and decree dated 23.11.2000 passed by the learned first appellate Court and decreeing the suit of the Plaintiff in full. A decree was, thereafter drawn by the registry of this Court on 19.12.2006 to the following effect:

The judgment and order dated 23.11.2000 passed by Civil Judge (Sr. Division) No. 2, Guwahati in Title Appeal No. 24/1991 is hereby set aside. The suit is decreed in full.

There is no order as to costs.

7. The decree has been put into execution by the Plaintiff-opposite party by instituting the Title Execution Case No. 13 of 2007 against the present Petitioners. In the execution application filed, the Plaintiff/decreed-holder prayed as follows:

The judgment debtors of the above case have not delivered possession of the decreetal land to the Decree holder so the execution of the decree is necessary. Therefore prayed that the possession of the decreetal land as shown by the D.H. to be delivered to the D.H. by removing all the material of the J.D. & by destroying the houses and premises belonged to the J.D. with the help of Nazir and police.

8. The Petitioners/judgment debtors filed applications u/s 47 read with Section 151 of Code of Civil Procedure, which are registered and numbered as Misc Case Nos. 37 & 38 of 2008, praying for dismissal of the execution proceeding, contending interalia that there being no decree passed for recovery of khas possession by evicting them from the suit land and the decree being for

confirmation of possession of the Plaintiff, it is not executable. The said two applications have been dismissed by learned executing Court vide common order dated 22.6.2009 by holding that since the second appellate Court has decreed the suit in full, it amounts to passing a decree for recovery of khas possession by evicting the Defendants from the suit land, in view of the alternative prayer in the plaint for recovery of khas possession. Hence, the present revision petitions.

9. I have heard Mr. S. Ali, learned Counsel for the Petitioners in CRP No. 279/2009; Mr. S. Medhi, learned Counsel for the Petitioner in CRP No. 290/2009; and Mr. P. K. Kalita, learned Counsel for the caveator-opposite party.

10. Learned Counsel for the Petitioners, referring to the prayer made in the plaint filed by the Plaintiff-opposite party as well as the judgment and decree passed by the second appellate Court in S.A. No. 18 of 2001 has submitted that in the plaint the principal prayer of the Plaintiff, apart from declaration of right, title and interest, was for confirmation of possession, though there was an alternative prayer for recovery of khas possession in the event the Plaintiff was found to be not in possession, but the second appellate Court, as it appears from the judgment dated 19.12.2006 did not specifically state as to whether the claim of the Plaintiff for confirmation of possession or for recovery of khas possession has been decreed, though it decreed the suit in full. According to learned Counsel, the suit having been proceeded on the assumption that the Plaintiff is in possession and the findings of the learned first appellate Court in the judgment dated 23.11.2000 relating to the Issue No. 6, i.e. whether the Defendants have been in undisputed and continuous possession of the suit land, having been set aside, the second appellate Court has only passed the decree confirming the possession of the Plaintiff over the suit land and no decree for khas possession has been passed and as such, the Plaintiff cannot put such decree into execution with the prayer for recovery of khas possession, more so when no decree for permanent injunction has been prayed for and granted. Learned Counsel submits that unless the judgment and decree passed in the second appeal is clarified in exercise of jurisdiction u/s 152 Code of Civil Procedure, the learned executing Court cannot issue a writ of delivery of possession by interpreting the decree to be a decree for recovery of khas possession. Learned Counsel in support of their contention have placed reliance on the decision of the Apex Court in Lakshmi Ram Bhuyan Vs. Hari Prasad Bhuyan and Others, and on Single Bench judgments of this Court in Hemlata Chelleng v. Guna Kanta Saikia (1992) 1 GLR 245 and in Ashutosh Das v. Sushma Rani Das and Ors. (2007) 4 GLR 572. The learned Counsel, therefore, submit that the impugned order dated 22.6.2009 needs to be interfered with by this Court.

11. Mr. P.K. Kalita, learned Counsel for the opposite party/caveator, per contra, has submitted that it is apparent from the prayer made in the plaint that the Plaintiff-opposite party apart from praying for a decree declaring right, title and interest over the suit land has also made an alternative prayer for recovery of khas possession. According to learned Counsel, since it is the stand of the

Defendants-Petitioners all through that the Plaintiff had never been in possession, the second appellate Court vide its judgment and decree dated 19.12.2006 passed the decree for recovery of khas possession as it has decreed the Plaintiffs suit in full. Learned Counsel further submits that whether the decree for recovery of khas possession or for confirmation has been passed, has to be gathered from the tenor of the judgment passed and keeping in view the respective stands of the parties to the suit. According to learned Counsel, the suit being decreed in full by the second appellate Court, the prayer for passing a decree for recovery of khas possession, in view of the stand of the Defendants in the written statement, has been granted and hence the learned executing Court has rightly passed the order dated 22.6.09 which requires no interference by this Court.

12. I have considered the submissions of the learned Counsel for the parties and also perused the materials available on record. As noticed above, the Plaintiff in the suit, apart from praying for a decree for declaration of right, title and interest in respect of the 10L of land, described in Schedule A/1 to the plaint, has also prayed for confirmation of possession and in the alternative, for recovery of khas possession, in the event the Plaintiff is found to be not in possession of the land. Learned trial Court vide judgment and decree dated 25th September. 1991 dismissed the suit of the Plaintiff by answering the Issue Nos. 5 & 6. Issue No. 6 relates to the question as to whether the Defendants have been in undisputed and continuous possession of the suit land. This issue has also been decided by the learned trial Court in favour of the Defendants. The learned first appellate Court, on remand vide judgment and decree dated 23.11.2000 passed in Title Appeal No. 24 of 1991 has also concurred with the finding of the learned trial Court in respect of the said issues, including the issue No. 6. The second appellate Court vide its judgment and decree dated 19.12.2006 passed in RSA No. 18 of 2001, however, has set aside the findings recorded by the learned Courts below in issue Nos. 5 and 6 by holding that the conclusions of the learned lower appellate Court in issue Nos. 5 and 6 are not legally sustainable, being against the weight of the evidence on record and vitiated by perversity and fatal illegalities and decreed the suit of the Plaintiff in full.

13. It appears from the judgment dated 19.12.2006 passed in RSA No. 18 of 2001 that though the Plaintiff in the suit, apart from praying for a decree for right, title and interest, has also prayed for confirmation of possession and in the alternative, for recovery of khas possession in the event the Plaintiff is found to be not in possession of the suit land, the Second Appellate Court though decreed the right, title and interest of the Plaintiff over the suit land, it is not clarified as to whether the decree for confirmation of possession or for recovery of khas possession, as prayed for by the Plaintiff in the suit has been passed. In para-23 of the said judgment, it has been observed that:

...even assuming that they had been in possession of the suit land, mere length thereof, without any open assertion of their right thereto, challenging the

superior title of the Appellant-Plaintiff therein, per se would not divest him, of his title therein, if otherwise legally acquired.

The second appellate Court has also noticed that the Defendants have not raised any plea of adverse possession. The decree, which has been drawn by the registry of this Court, as quoted above, also does not reveal whether the decree is for conformation of possession or for recovery of khas possession, except saying that the suit of the Plaintiff is decreed in full.

14. Order 20 of the CPC provides that the judgment shall contain a concise statement of facts, the points for determination, the decision thereon and the reasons for such decision. Finding or decision on each issue, with reasons therefor, is also to be given, unless the finding upon any one or more of the issue is sufficient for the decision of the suit. It also provides that the decree shall agree with the judgment and shall contain the particulars of the claim and specify clearly the relief granted or other determination of the suit. The Apex Court in *Lakshmi Ram Bhuyan (supra)* has observed that the operative part of judgment should be clear and precise so that in the event objections being raised, it should not be difficult to find out by a bare reading of the judgment and decree whether the latter agrees with the former and is in conformity therewith. It has further been observed that the judgment should clearly indicate the relief or reliefs to which a party has been found entitled to. In para-14 of the judgment, the Apex Court, noticing the provisions contained in Section 152 Code of Civil Procedure, has also observed as follows:

How to solve this riddle? In our opinion, the successful party has no other option but to have recourse to Section 152 CPC which provides for clerical or arithmetical mistakes in judgments, decrees or orders or errors arising therein from any accidental slip or omission being corrected at any time by the Court either on its motion or on the application of any of the parties. A reading of the judgment of the High Court shows that in its opinion the Plaintiffs were found entitled to succeed in the suit. There is an accidental slip or omission in manifesting the intention of the Court by couching the reliefs to which the Plaintiffs were entitled in the event of their succeeding in the suit. Section 152 enables the Court to vary its judgment so as to give effect to its meaning and intention. Power of the Court to amend its orders so as to carry out the intention and express the meaning of the Court at the time when the order was made was upheld by Bowen, L.J. in *Swire, Re, Mellor v. Swire* subject to the only limitation that the amendment can be made without injustice or on terms which preclude injustice. Lindley, L.J. observed that if the order of the Court, though drawn up, did not express the order as intended to be made then.

There is no such magic in passing and entering an order as to deprive the Court of jurisdiction to make its own records true, and if an order as passed and entered does not express the real order of the Court, it would as it appears to me, be shocking to say that the party aggrieved cannot come here to have the record set right, but must go to the House of Lords by way of appeal.

15. A Single Bench of this Court in Hemlata Chelleng (supra) has held that when the decree has been passed on the basis that the decree holder is in possession of the land and in the absence of any decree for recovery of khas possession, the executing Court cannot direct issuance of writ to the bailiff to evict the judgment-debtors. Relying on the decision of the Apex Court in Lakshmi Ram Bhuyan (supra), another Single Bench of this Court in Ashutosh Das (supra) has held that unless the judgment passed by the Court clearly indicates as to what relief it had really granted in favour of the Plaintiff, the decree cannot be put into execution for eviction of the judgment-debtor unless it is clarified by the Court passing the decree about the nature of the decree it had passed.

16. As noticed above, though the Plaintiff-decree holder in the plaint made an alternative prayer for recovery of khas possession besides the main prayer, i.e. for confirmation of possession by declaring their right, title and interest, the judgment passed by the second appellate Court is not clear as to whether the Plaintiff's suit has been decreed for confirmation of possession or for recovery of khas possession. The decree drawn pursuant to such judgment, therefore, naturally does not have the details of the relief granted except saying that the suit of the Plaintiff is decreed in full. Unless the said position is clarified by the second appellate Court in exercise of the jurisdiction u/s 152 CPC as observed by the Apex Court in Lakshmi Ram Bhuyan (supra), the executing Court cannot direct issuance of the writ of delivery of khas possession to the Plaintiff-decree holder by evicting the Defendants-judgment debtors.

17. In view of the aforesaid discussions, the impugned order dated 22.6.2009 passed by learned executing Court is set aside. The Plaintiff/decree-holder (opposite party herein) may approach the second appellate Court for clarification, as observed above, and in case such clarification relating to passing of a decree for khas possession is made, the executing Court shall proceed to deal with the execution proceeding in accordance with law.

18. The revision petitions are accordingly allowed to the extent indicated above. No costs.