

(2018) 03 GAU CK 0163
In the Gauhati High Court
Case No : RSA 14 of 2008

CHAKRAPANI KALITA and ANR.

APPELLANT

Vs

BALENDRA GOSWAMI.

RESPONDENT

Date of Decision : 09-03-2018

Acts Referred:

Code of Civil Procedure, 1908 — Section 146, 151, Order 41 Rule 20
Transfer of Property Act, 1882 — Section 52

Citation : (2018) 03 GAU CK 0163

Hon'ble Judges : PRASANTA KUMAR DEKA

Bench : Single Bench

Final Decision : Dismissed

Judgement

1. Heard Mr.D.Choudhury learned counsel appearing for the appellants and also heard Mr.D.Barua, learned counsel appearing for the respondent.
2. The present appellants are the defendants in the Title Suit No. 65/2003 filed by the plaintiff respondent through his attorney one Sri Atanu Bhuyan, son of Sri Mukul Bhuyan, resident of Santipur Durga Sarovar, Guwahati in the Court of Civil Judge (Sr.Div.) No. 2, Kamrup, Guwahati.
3. Facts of the case of the plaintiff respondent are that on 27.3.1987 by way of registered deed of sale he purchased a plot of land measuring 2 kathas 10 lechas covered by dag No. 34 of No.1 F.S.Grant, village No. 1, Motghoria under Beltola Mauza which forms the suit land . The same was purchased from one Sri Jayanta Madhab whereafter the name of the plaintiff respondent was mutated in the records of right on 23.8.1988. The suit land was demarcated by raising boundary pillars. The plaintiff respondent who is a retired Army Officer used to reside at village Chaygaon and frequently visited the suit land. Due to illness he was unable to visit the suit land

for a considerable period and the Chowkidar staying over the suit land left the place without informing him. The plaintiff respondent authorised one Sri Atanu Bhuyan as his constituent attorney to look after the suit land who raised another temporary house in the suit land and kept his employee therein. On 20.2.2003, the plaintiff respondent alongwith said attorney visited the suit land and found one Sri Barman occupying the thatched house left by the Chowkidar of plaintiff respondent and on being asked the said Sri Barman stated that he would vacate the said house on their demand. On 26.2.2003 and on 2.3.2003 the defendants appellants attempted to dispossess the plaintiff respondent from the suit land but on the intervention of the police the same were foiled .On the request of the plaintiff respondent who is the attorney of the plaintiff respondent. The learned trial court framed the points for determination as follows:

1.Whether the suit is bad for non-joinder of necessary parties ?

2.Whether the plaintiff is entitled to get decree ?

5. The plaintiff respondent through his witness PW 1(the constituent attorney) exhibited the following documents:

Ext.1 General Power of Attorney executed by the plaintiff in favour of P.W 1

Ext.2 Permission for Sale

Ext.3 Agreement for Sale

Ext.4 Certified copy of Deed of Sale

Ext.5 Certified copy of Deed of Correction of Sale Deed

Ext.6 Copy of order of mutation

Ext. 7 Certified copy of Jamabandi

Ext.8 Land Revenue paying receiptâ??

6. The learned trial Court came to the finding that the PW 1 deposed as attorney of the plaintiff and also as caretaker of the suit land. Regarding

possession of the plaintiff respondent, except PW 1 the plaintiff Â respondent failed to examine any other witnesses more particularly the employees

of PW 1. Further it is held that the plaintiff respondent failed to prove any document to show that his vendor Jayanta Madhab had any right, title and

interest over the suit land to transfer the same in favour of the plaintiff respondent and finally holding that the suit land is covered by a joint patta

consisting of various co-pattadars concluded that owing to non-impleadment of said co-pattadars in the suit no effective decree could be passed

declaring the right, title and interest favouring the plaintiff respondent.

7. Being aggrieved the plaintiff respondent alongwith one Mukul Bhuyan as the joint appellant preferred Title Appeal No. 7/2006 in the Court of

learned Addl District Judge(FTC) No. 3, Kamrup at Guwahati. While preferring the said title appeal the co-appellant, Mr.Mukul Bhuyan filed an

application u/s 146 read with Section 151 of Code of Civil Procedure (CPC) supported by an affidavit stating that during pendency of the suit , on

5.4.2004 the plaintiff respondent sold the suit land to him by way of a registered sale deed. The said Mukul Bhuyan who was the appellant No. 2 in

Title Appeal No. 7/2006 being a purchaser pendente-lite and bound by the proceedings sought for leave of the Court to file joint appeal with the

present plaintiff respondent to protect his interest. The said leave was granted thereby permitting the said Mukul Bhuyan to file the appeal jointly with

the plaintiff respondent . The learned first Appellate Court allowed the appeal vide judgment and decree dated 8.8.2007. Thereafter the defendants

appellants preferred this second appeal Â which was admitted on 23.1.2008 on the following substantial questions of law:

1. Whether the suit of the plaintiff can be decreed on the basis of the evidence adduced by the power of attorney holder of the plaintiff ; and

2. Whether the marking of the certified copy of the sale deed as Ext.4 amounts to proof of the contents thereof?

8. On 12.12.2017 after the argument by the learned counsel appearing on behalf of the appellants was completed, the learned counsel appearing for

the plaintiff respondent raised the question of maintainability of the second appeal as the present second appeal is preferred against only one co-

appellant in the first appeal amongst two appellants. Thereafter another substantial question of law was formulated as follows:

3. Whether the non-filing of an appeal against the co-appellant in the first appellate court would act as a res-judicata in the second appeal?

9. It is seen that even after formulation of the substantial question of law No. 3 the present appellant did not file any application for impleadment of the

said co-appellant Sri Mukul Bhuyan though he being a purchaser pendente-lite bound by the outcome of the suit and subsequent appeal/appeals in

view of which maintainability of the second appeal has been raised. Let me examine the question of maintainability of this appeal.

10. Mr.Choudhury the learned counsel for the appellants submits that non impleadment of the co-appellant in the first appeal by the present defendants

appellants in this second appeal cannot be a ground hitting the maintainability of the second appeal. Admittedly the said coappellant purchased the suit

land during the pendency of the suit and that too suppressing the said fact in the trial court when the son of the co-appellant was very much on record

asÂ the attorney holder of the plaintiff respondent. Section 52 of the Transfer of Property Act gives no right to a party to the suit to sell the suit land

during the pendency of the suit. Under such circumstances the principles of res-judicata has no application inasmuch the coappellant is claiming his

interest over the suit land through the present plaintiff respondent. Placing his reliance in Gauri Dutt Maharaj Vs. Sukur Mohammed and others

reported in AIR 1948 PC 147, Mr.Choudhury submits that the purpose of Section 52 of Transfer of Property Act is to maintain the status-quo

unaffected by the act of any party to the litigation pending its determination. The applicability of said Section cannot depend on the matters of proof or

strength or witness of the case on one side or other in bonafide proceedings. Further relying on the case of Premier Tyres Limited Vs.Kerala State

Road Transport Corporation reported in AIR 1993 SC 1202, Mr.Choudhury submits that the question of res-judicata will come only when more than

one suits were filed together and main issues were common and appeals were filed against the judgment and decree in all the suits and one appeal

was dismissed either as barred by time or abated then the order operated as res-judicata in other appeal. In order to attract the principles of res-

judicata there must be a decision in a former suit affecting the subsequent suit. In the present case in hand there is no former judgment in an earlier

suit and as such the applicability of the principles of res-judicata owing to non bringing the co-appellant on record in this appeal does not arise at all.

11. Mr.D.Barua learned counsel for the plaintiff respondent submits that order 41 Rule 20 of the CPC is very specific. The present appellants are fully

aware that the co-appellant Mukul Bhuyan mentioning his interest over the suit property sought for leave to be impleaded as one of the appellants in

the first appeal. Knowing fully well with respect to the interest devolved on the said co-appellant, the present appellants failed to implead him as the

respondent in this appeal. There is no bar in transferring the suit land during the pendency of the suit. The said transfer during the pendency of the suit

has created an interest on the co-appellant Mukul Bhuyan and being holder of such interest, non impleadment of the said Court cannot interfere with the

findings of the First Appellate Court which had attained its finality so far the left out co-appellant is concerned. Mr.Barua relies on the decision of

C.H.Surat Singh(Dead) and others Vs Manohar Lal and others reported in (1971) 3 SCC 889.

12. Considered the submissions of the learned counsels. Section 146 CPC stipulates that save as otherwise provided by the CPC or by any law for the

time being in force where any proceeding be taken or application made by or against any person, then the proceeding may be taken or the application

may be made by or against any person claiming under him. On perusal of the judgment passed by the First Appellate Court it is seen that one Sri

Mukul Bhuyan filed application u/s 146 read with Section 151 CPC supported by an affidavit stating that during the pendency of the title suit the

present plaintiff/respondent (the appellant No.

1 in the first appeal) on 5.4.2004 sold the suit land vide registered sale deed No. 2673/ 2004 for a valuable consideration. The said Sri Mukul Bhuyan

the appellant No. 2 in the first appeal being a purchaser pendente-lite being bound by the proceedings sought for leave of the court to file a joint appeal

with the present plaintiff respondent in order to protect his interest over the suit property. The said leave was granted and the said Sri Mukul Bhuyan

was the appellant No. 2 in the said appeal. The first appeal was contested by the present defendants appellants. The First Appellate court reversed

the findings of the learned Trial Court and decreed the suit of the plaintiff respondent. Thereafter the present defendants appellants preferred this

second appeal.

13. Order 41 Rule 20 of the CPC stipulates that where it appears to the Court at the hearing that any person who was a party to the suit in the court

from whose decree the appeal is preferred, but who has not been made a party to the appeal, is interested in the result of the appeal, the court may

adjourn the hearing to a future day to be fixed by the court and direct that such person be made a respondent. However no respondent shall be added

under the said Order 41 Rule 20 of the CPC after the expiry of the period of

limitation for appeal unless the court for reasons to be recoded allows that to be done on such terms as it thinks fit. In the present case in hand the maintainability of the present second appeal was raised on 12.12.2017 and the third substantial question of law was formulated and thereafter it was ordered that the appeal would be taken up for hearing on 18.1.2018. On the next date there was no such application for impleadment of said Sri Mukul Bhuyan as the other respondents in this appeal. However the learned counsel for the appellants argued to the effect as mentioned hereinabove. In C.H.Surat Singh(dead) Vs.Manohar Lal (supra) the Honâ??ble Apex Court while deciding the appeals a similar preliminary objection was taken to the effect that the appeals were not maintainable as one of the parties to the said case at an earlier stage had not been impleaded. The Honâ??ble Apex Court accepted the said preliminary objection and dismissed the appeals on the ground that the same were not properly instituted. It is not disputed that during the pendency of the suit an interest accrued on the said Sri Mukul Bhuyan, the co-appellant in the first appeal and the said interest was claimed by the left out co-appellant claiming under the original plaintiff respondent. The fact of impleadment of said Mukul Bhuyan is known to the present defendants appellants inasmuch as they contested the first appeal. Any change in the judgment and decree passed by the First Appellate Court will not be binding on the said Mukul Bhuyan inasmuch as judgment and decree passed in the first appeal had already attained finality from the point of view of said co-appellant left out from the present second appeal. In such a situation this court cannot enter into the merits of the judgment and decree passed by the First Appellate Court. The submission of Mr. Choudhury that in order to attract the principles of res-judicata there must be a decision in a former suit affecting the subsequent suit and there being no such former judgment in an earlier suit this court can interfere with the judgment and decree passed by the first appellate court cannot be accepted inasmuch as it is the question of maintainability of this appeal which this Court has entered into. Moreso when the sale transaction took place during the pendency of the suit. As referred hereinabove the Honâ??ble Apex Court in said C.H.Surat Singh(dead) Vs.Manohar Lal (supra) held that the legal heirs brought on record during pendency of the appeal and the legal heirs of the deceased plaintiff respondent substituted during the pendency of

the appeal and subsequently leaving out one of such substituted legal heirs is fatal to the appeal inasmuch as the said left out legal heir of the plaintiff

respondent is a necessary party in the subsequent appeal. Similar is the case in hand inasmuch as the co-appellant, who was granted the leave to

prefer the appeal being the aggrieved party in order to protect his interest devolved and accrued during the pendency of the suit is a necessary party

in the present second appeal.

14. Let me examine the ambit and scope of Section 146 of the Code of Civil Procedure, 1908 as held by the Hon'ble Apex Court in *Sri Saila Bala*

Dassi Vs Nirmala Sundari Dassi and another reported in AIR 1958 SC 394 as follows:

8. It is next contended that S.146 authorises only the initiation of any proceeding, and that though it would have been competent to the appellant to

have preferred an appeal against the judgment of P.B.Mukherji, J, she not having done so was not entitled to continue the appeal preferred by the

second respondent. We are not disposed to construe S.146 narrowly in the manner contended for by counsel for the first respondent. That section was

introduced for the first time in the Civil Procedure Code, 1908 with the object of facilitating the exercise of rights by persons in whom they come to be

vested by devolution or assignment, and being a beneficent provision should be construed liberally and so as to advance justice and not in a

restricted or technical sense. It has been held by a Full Bench of the Madras High Court in *Muthiah Chettiar V Govinddoss Krishnadoss*, ILR 44 Mad

919, AIR 1921 MAD 599)(E) that the assignee of a part of a decree is entitled to continue an execution application filed by the transferor-decree-

holder. Vide also *Moidin Kutty V Doraiswami*, ILR(1952) MAD 622): (AIR 1952 MAD 51)(F). The right to file an appeal must therefore be held to

carry with it the right to continue an appeal which had been filed by the person under whom the applicant claims, and the petition of the appellant to be

brought on record as an appellant in Appeal No. 152 of 1955 must be held to be maintainable under S.146. Thus it is seen that the left out co-

appellant was allowed to be one of the appellants within the parameter of Section 146 of the CPC as he claimed his right under the present

plaintiff/respondent and as such the said left out co-appellant in the first appeal has a right to continue the appeal.

15. This Court cannot enter into the merit of the judgment and decree passed by the First Appellate Court in the absence of said co-appellant. The finding of the first appellate court and the decree passed in favour of both the appellants cannot be interfered with by this Court by leaving one of the co-appellants to his prejudice from the point of view of this Court. The grievances raised by the defendants appellants in this second appeal cannot be considered as the joint decree passed in favour of two appellants had attained its finality so far the left out co-appellant is concerned. The principles of resjudicata will definitely come into play inasmuch as the finding of the First Appellate Court had attained its finality governing the suit filed by the plaintiff respondent and the defendants/appellants cannot file a separate suit on the basis of the same cause of action inasmuch as the sale transaction though falls within the principles of Lis Pendence, the same merges on passing the judgment of the suit and the cause of action on the date of filing the suit ends up with the passing of the judgment. Such being the position this court restrain itself from entering into the substantial questions of law, the appeal itself being not maintainable for non-joinder of necessary parties.

16. The present second appeal is not maintainable and same is accordingly dismissed.

17. Send back the LCR. No cost.