
(1989) 03 CAL CK 0047
In the Calcutta High Court
Case No : F.M.A. No. 72 of 1985

Dilip Kumar Roy and others APPELLANT
Vs
Panchkari Sinha and others RESPONDENT

Date of Decision : 30-03-1989

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 23

Citation : AIR 1990 Cal 32

Hon'ble Judges : S.P. Rajkhowa, J

Bench : Single Bench

Advocate : Bhabesh Ch. Roy and Miss S. Parmar, for the Appellant; Chandi Charan De, for the Respondent

Judgement

1. This appeal is directed against the judgment and order dated 11th May, 1984 passed by Sri B. B. Sarkar, learned Additional District Judge, Rampurhat, Birbhum in Title Appeal No. 64 of 1980 setting aside the judgment and decree dated 27th February, 1980 passed by Sri T. Mukherjee, learned Munsif, second court, Rampurhat in Title Suit No. 74 of 1968 and remanding the suit with the direction to afford the plaintiffs opportunity to substitute the legal representatives of deceased defendant No. 2 and to decide the suit according to law keeping in view the findings and observations made in the body of the judgment.

2. From the records it appears that the suit has a chequered history. In 1968 the plaintiff filed the Title Suit No. 74 of 1968 for declaration of right, title and interest in "Ka" and "Kha" schedule of lands of the plaintiff and for a declaration for recovery of khas possession in "Ga" schedule of land. The plaintiff case was that the suit property belonged to the plaintiff No. 3 who made a deed of gift to the plaintiffs 1 and 2 in respect of some of his properties. One Sarat Kumar Dutta was the recorded owner of "Kha" schedule of land and he disposed of 7 decimals of land to the plaintiffs by 3 different deeds and since then the plaintiffs are in possession thereof. Plots Nos 847 and 848 are two tanks belonging to the

plaintiffs. Plot No. 846 is bastu of the plaintiffs and plot No. 930 partly belongs to the plaintiffs. Plots Nos. 844 and 845 which are tanks and plot No. 931 which is a bastu belong to the defendants. -The plaintiffs alleged that the defendants had encroached upon the "Ga" schedule of land. Defendants 1 and 2 contested the suit averring inter alia that there was no encroachment on the plaintiff's land. "Ga" schedule of land had been possessed by them and their predecessor-in-interest for more than 50 years raising walls. Referring to a standing tamarind tree and a neem tree in plot No. 844 defendants showed that this plot also was under their possession and that to the south of that dag they had no claim and they have never encroached any other land in "Ga" schedule.

3. The learned Munsif, Sri K. K. Kundu decreed the suit in part declaring the plaintiff's right, title, and interest over the "Ka" and "Kha" schedule of lands and dismissing the prayer for recovery of khas possession in "Ga" schedule of land and for mesne profits. The learned Munsif further found that the defendants have been possessing the green hatched portions for more than 12 years before the institution of the suit and as such the defendants acquired "the good adverse possession" over this green hatched portions.

4. Being aggrieved by the aforesaid judgment and decree, the plaintiffs filed Title Appeal No. 190 of 1976 in the court of the learned Additional District Judge. Ram-purhat, Birhum mainly on the ground that the learned Munsif ought to have decreed the whole suit.

5. There was also a cross appeal preferred by the defendants 1 and 2 on the ground that the learned Munsif ought not to have declared the plaintiff's right, title and interest over the "Ka" and "Kha" schedule of lands also.

6. Sri D. K. Biswas, the learned Additional District Judge after hearing both sides allowed the appeal, set aside the judgment and decree of the learned Munsif and sent back the case on remand for fresh decision in the light of his observations. He also directed that the "Pleader Commissioner's" report, map, field book etc. may be made part of the decree which will follow after it is considered in the fresh findings of the learned Munsif. For proper appreciation I quote hereunder the findings of the learned Additional District Judge:--

"Findings

It will appear from the written statement submitted by the defendants from paras 2 and 4 that they are claiming the wall of dag No. 931 and "Panipattam Ansho" to the east of the wall as a part and parcel of dag No. 931. It further appears from para 4 that the defendants are claiming dag No. 844, a tank and to the south of that tank, up to the tamarind tree and neem tree along with 2" to 2 1/2" of land to the south of that tamarind tree and neem tree. Beyond that, the defendants have no claim and they never claimed that they are adversely possessing any land beyond that limit mentioned in paras 2 and 4 of that written statement. But the green coloured portions in that Pleader Commissioner's map show that the defendants have no claim on the green coloured portions. The

learned Munsif in his order did not make the report of the Pleader Commissioner as a part and parcel of the decree although he has discussed the Pleader Commissioner's map and report in his judgment, Now, let us come to the report of the Commissioner. In the Commissioner's map, wall with green colour is shown within dag No. 930, whereas, in the report at page 5, it is stated that the east wall of the defendants on plot No. 931 appeared old. The wall appertains to 930 dag has been mentioned by the Commissioner in the same page 5 and the wall is shown in the map of dag No. 930 and therefore, the eastern wall of the defendants cannot be of plot No. 931. This appears to be a clerical mistake. But the fact remains that on the green label portions, the defendants have no claim for adverse possession as it appears from paras 2 and 4, but the learned Munsif in the concluding portions of his judgment finds that it is clear that the defendants have been possessing the green hatched portions for more than 12 years before institution of the suit although the defendants themselves did not claim that they are possessing the green hatched portions for more than 12 years from the date of dispossession and acquired a good adverse possession over the green hatched portions. What they claim, I have mentioned above and beyond that limit they have no claim as it appears from paras 2 and 4 of the written statement and they have no case of adverse possession also in respect of the green hatched portions of the Commissioner's map. If the green hatched portions are not adversely claimed by the defendants, then after the findings of the learned Munsif about the plaintiffs' right, title and interest over the "Ka" and "Kha" schedule of lands, there is no bar to allow them to restore the green hatched portions.

7. In these circumstances the learned Munsif was not correct in decreeing the suit in part. It further appears that the other defendants did not turn up and contest and therefore the learned Munsif should have also decreed the suit for recovery of possession against the non-appearing defendants. But the material question is whether the learned Munsif was correct in his findings that the green hatched portions should have been restored to the plaintiffs or not. This fact has not been discussed by the learned Munsif at all".

(Underlines are mine).

8. After such observations the learned Additional District Judge made the order of remand as aforesaid..

9. On remand the "suit came" for disposal before Sri T. Mukherjee, the learned Munsif who succeeded Sri Kundu in office.

10. The learned Munsif Sri Mukherjee felt that it was not an open remand and the scope for decision of this Suit was very limited after remand. Therefore he discussed the evidence as per observations and directions of the learned Additional District Judge (Sri Biswas) and held that the plaintiffs had title to "the "Ka" and "Kha" schedule of lands of the plaint and that the defendants had not acquired title by way of adverse possession to "Ga" schedule of land and that the

plaintiffs were "entitled to a decree for recovery of khas possession of the green hatched portion shown in the sketch map and in the report of the Pleader Commissioner, by evicting the defendants therefrom and decreed the suit in full.

11. The defendants then preferred Title Appeal No. 64 of 1980 against the judgment and decree passed by the learned Munsif Sri T. Mukherjee. This appeal was heard by Sri B.B. Sarkar, the learned Additional District Judge, Rampurhat, Birbhum. After hearing the appeal he allowed it, and set aside the judgment and decree passed by Sri Mukherjee and sent back the suit on remand with a direction to afford the plaintiff's opportunity to substitute the legal representatives of deceased defendant No. 2 and to proceed to decide the suit according to law keeping in view the findings and observations made in the body of the judgment. It transpires that during the pendency of the appeal No. 190 of 1976 taken from the judgment passed by, the learned Munsif Sri Kundu, defendant No. 2 Balaram Sinha had died and so the legal heirs of deceased defendant had been substituted in the appeal. But after remand, when the suit was heard by Sri Mukherjee, no substitution was effected. So the decree to be passed in 1980 against defendant No. 2 who was already dead, and so defendant No. 1 filed the Title Appeal No. 64 of 1980 assailing this decree on this among other grounds. The learned Additional District Judge Sri Sarkar found substance in this contention and he felt that "the instant appeal was to be allowed on this score alone and the suit was liable to be sent back on remand to the trial court on setting aside the judgment and decree appealed against with a direction to afford the plaintiffs opportunity to substitute the legal representatives of the deceased defendant No. 2." In my opinion, the learned Additional District Judge took a correct position in this regard. He then proceeded to survey the entire gamut of the evidence on record and referring to the "real dispute" over Item No. 2 in plaint "Ga" schedule he concluded that "on merits, the plaintiffs" claim to Item No. 2 in plaint schedule "Ga" is therefore liable to be rejected" and allowed the appeal, set aside the judgment and decree appealed against and remanded the suit with a direction already referred to above.

12. Being aggrieved by the aforesaid judgment and order the plaintiffs have come up before this court.

13. The point for determination before me is whether matters finally disposed of by the order of remand by the lower appellate court can be reopened when the case comes back from the lower court by way of appeal to the same appellate court.

14. Mr, B. C. Roy, the learned counsel for the appellants assisted by his junior Miss. S. Parmar has submitted that the successor judge exercising coordinate jurisdiction can not reopen the points decided by his predecessor in office. In support of this submission the learned counsel has relied on:

Bandhu Kunjra Vs. Rahman Kunjra and Another, ; Sarjug Rai and Others Vs. Sri Bhagwan Rai, ; Konappa Mudaliar Vs. Kusalaru alias Munuswami Pillai and

Others, and Cherian Vs. Kochuvareed and Another, .

15. The facts of the case of Bandhu Kunjra (supra) are somewhat different from the case before me. Anyway, in that case the plaintiffs suit was dismissed by the trial court. But it was decreed by the court of first appeal. In second appeal filed by the defendants, a judge of the High Court allowed the appeal, set aside the decree of the court of first appeal and remanded the case to that court for consideration. On remand, the plaintiff's Suit stood dismissed. The plaintiff then filed an appeal to the High Court. It came before a single Judge who placed it before a Division Bench which in its turn referred it to the Full Bench. It was held that the Full Bench, as constituted, was also a court of coordinate jurisdiction and therefore the Full Bench could not question the validity of the order of the prior single Judge.

16. The case of Sarjug Rai and Others Vs. Sri Bhagwan Rai, bears some resemblance to the case in hand. In that case, the trial court dismissed the suit. The lower appellate court reversed the said finding and decreed the suit in favour of the plaintiff. The defendant/ appellants came up before the High Court in second appeal and the single Judge hearing the appeal remanded the same to the court of first appeal with certain directions. The learned Judge, at the same time, affirmed some of the findings in favour of the plaintiffs. The learned Judge directed the lower appellate court to come to a fresh finding on the question of possession as put forward by the respective parties on the materials already on the record. The learned Additional Sub ordinate Judge, in pursuance of the directions of the High Court, reheard the appeal and again decreed the plaintiff's suit on recording a clear finding as regards the possession in favour of the plaintiff. The plea of adverse possession set up by the defendants was negatived. The defendants thereafter again came up before the High Court in second appeal. The learned counsel appearing for the appellants contended that in spite of the order of confirmation in respect of some of the findings by the High Court in the earlier appeal, the Court of appeal below should have proceeded to hear the entire appeal and that the direction of the High Court to hear the appeal on a limited question was not a valid order as according to the learned counsel the limited remand was not supported by any of the Rules of O.41 of the C.P.C.T his submission by the learned counsel for the appellants was not accepted by the High Court. While rejecting the submission the High Court further observed that if the appellants were actually aggrieved by an order of a limited remand, it was open to them to have challenged the same judgment in appeal under the Letters Patent or in the Supreme Court.

17. In Konappa Mudaliar Vs. Kusalaru alias Munuswami Pillai and Others, it was held that "it is not open to the lower Court, when an appellate Court remands the case to it, to do anything but to carry out the terms of the remand, even if it considers that the order of remand was not in accordance with law. It cannot apply what it might consider the correct position of law. It was further held that the decision, of the High Court in the order of remand operates as constructive

res judicata."

18. In *Cherian Vs. Kochuvareed and Another*, it was held that if a High Court remands a case to the lower Court, none of the matters finally disposed of by the order of remand can be reopened, when the case comes back from the lower Court; but if at the time of remand no final decision is given on a point, though some observations only are made in respect of it, it is open to another Bench, a Court of coordinate jurisdiction, when finally determining the case, to come to its own conclusion on it; and even in a case, decided by the High Court, if a judge of appeal decides certain points and remands the case, his decision is binding on his successor before whom the case comes up again from the judgment after remand, because such a court is a court of coordinate jurisdiction, and therefore, he cannot go beyond the earlier final decision of his predecessor before remand." By making such observations, the High Court discussed the test to be applied in such a contingency. The test is to find out, if by the order of remand the judge of appeal has remanded the suit for determination of all the points at issue or it has determined some points in controversy, and remanded the suit for determination of the remaining points.

19. Bearing in mind the aforesaid decisions I propose to approach the finding of both the courts below. Normally this court would not interfere with the concurrent findings. But even if there be a concurrent finding, it may so happen that a wrong approach had been made to the facts before arriving at a finding and in such a case the High Court cannot allow an injustice to perpetuate. In the case before me I find that there is no question of concurrent findings, but the findings are at variance with each other. The First Trial Court (Sri K. K. Kundu), relying on the Pleader Commissioner's report (Ext. 6) and the sketch map (Ext. 8), held that the green hatched portions of both the red coloured disputed A, B, C, D, E, F, G, H, I and the house marked "Ga" schedule of lands appertained to C. S. plot Nos. 846, 847, 848 and 930 respectively and that the green hatched portions in the sketch map belong to the plaintiffs while the red coloured portions belong to the defendants" and declared the plaintiffs' title over "Ka" and "Kha" schedule of lands only. The First Appeal Court (D. K. Biswas) referred to the averments in paras 2 and 4 of the joint written statement of defendants Nos. 1 and 2 and on perusal it appeared to him that they had no case of adverse possession in respect of the green hatched portions of the Commissioner's map and therefore he observed that if the green hatched portion is not adversely claimed by the defendants then after the findings of the learned Munsif about the plaintiffs' right, title and interest over the "Ka" and "Kha" schedule of lands, there was no bar to allow them to restore the green hatched portions. From a perusal of the entire written statement, it would appear that the First Appeal Court had made a wrong approach. It is not understood as to why he had referred to only paras 2 and 4 of the written statement. A little patience to read the entire written statement would have satisfied him that his finding was not correct. Moreover, a careful perusal of the averments made in para 2 itself of the written statement will show that the defendants have set up a plea of adverse

possession in respect of that parcel of land measuring 1875 sft. indicated by M. N. O. P. of the sketch by hand (Vernacular Matter) filed by the plaintiffs along with the the plaint. This M. N. O. P. parcel of land has been shown in the sketch map (Ext. 8) and has been shown by the Commissioner in two parts -- one part red coloured and the other part green hatched. In para 2 of the written statement the defendants have asserted in unambiguous terms that within 12 years since before the date of filing of the suit the "Ga" schedule of land indicated by M. N. O. P. had been adversely possessed by them against any right, title and interest of others and that they have perfected good title by adverse possession. The same assertion has been repealed in paras 7, 10, 11 etc. From a perusal of the judgment of the First Appellate Court I have no doubt in my mind that he had not come to any definite finding. He made observations only. Any way, the suit came back on remand to the trial court and the learned Munsif Sri T. Mukherjee decreed the plaintiffs' suit in full holding that the plaintiffs have title to the "Ka" and "Kha" schedule of lands of the plaint and that the defendants have not acquired title by way of adverse possession to the "Ga" schedule of land and the plaintiffs are entitled to decree for recovery of khas possession of green hatched portions shown in the sketch map of the Pleader Commissioner and also mentioned in his report. The Title Appeal No, 64 of 1980 arising out of the decisions of Sri Mukherjee filed by the defendant came to be heard and disposed of by Sri Sarkar, learned Additional District Judge. Sri Sarkar has made thorough discussion of the evidence on record and came to two definite findings --(i) that the defendants have not claimed that the green hatched plot indicated by A, B, C, D, E, F, G, H, I and therefore there was no harm in declaring the plaintiffs' title to the plaint "ka" schedule of land including this green hatched parcel of land; and (ii) that the defendants including their predecessors-in-interest had been possessing the green hatched portions in the M. N. O. P. (Ext. 8) adversely to the owners of suit plot No. 930 for much more than the statutory period of 12 years and held that the suit for recovery of the said slice of land is barred by limitation. On a careful perusal of the records of the case I concur with the findings of the learned Additional District Judge Sri Sarkar. Further I find that though the successor District Judge had exercised coordinate jurisdiction with his predecessor in office yet he has not committed any illegality by remanding the suit for disposal indicating his findings as it is seen that the predecessor in office did not give any finality to his so-called findings.

20. In the result, I find no substance in this appeal which is dismissed. The judgment and order appealed against are upheld.

21. There is no order as to costs. There need not be any preparations of formal decree.

22. It pains me to observe that the suit which was instituted in 1968 has been oscillating like a pendulum from one court to the other court for the last 20 years and the final disposal is yet a distant cry. I hope the trial court would expedite the disposal of the case.

23. Appeal dismissed.