

(2012) 04 CAL CK 0074
In the Calcutta High Court
Case No : S.A. No. 563 of 2012

Fazer Ali Sardar and Others

APPELLANT

Vs

Iman Ali Gazi and Others

RESPONDENT

Date of Decision : 26-04-2012

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 9 Rule 9

Citation : (2013) 1 CHN 65 : (2013) 1 WBLR 317

Hon'ble Judges : Tapan Kumar Dutt, J

Bench : Single Bench

Advocate : Abu Sufian, for the Appellant; Tapas Kumar Mukherjee and Samir Kumar Banerjee, for the Respondent

Judgement

Tapan Kumar Dutt, J.—Today the learned Advocate for the appellants has completed his submissions. Thereafter the learned Advocate for the plaintiff/respondent has made his submissions and has also completed his submissions.

2. Thereafter the learned Advocate for the appellants made his submissions in reply.

3. The hearing is concluded.

4. Now this Court proceeds to pass the following judgment.

5. Facts of the case, briefly, are as follows:

The plaintiff/respondent filed a suit being Title Suit No. 19 of 1990 against the defendants/appellants and the defendant/respondent and such suit was placed before the Court of the learned 1st Munsiff at Basirhat. The plaintiffs case, inter alia, was to the effect that the plaintiffs uncle Jahiruddin Gazi took settlement of the suit land measuring 26 sataks in Plot Nos. 323 and 324 from one Sultan Sardar and the heirs of one Tamijuddin Sardar some time on 23 September, 1939 and thereafter started to reside in the suit property. According to the plaintiff the said Jahiruddin Gazi, by a hebanama dated 9th November, 1974, gifted the suit

property to the plaintiff and thus the plaintiff became the owner of the said 26 sataks of land. The grievance of the plaintiff is that in the L.R. Record of right 13 sataks have been recorded in Plot No. 323 but in Plot No. 324 only 8 sataks of land have been recorded in the name of the plaintiff and taking advantage of such erroneous record of right the defendant no. 1 has been trying to create disturbances in the plaintiffs possession in respect of the suit property and has been trying to dispossess the plaintiff.

6. The said suit has been contested by the defendants/appellants by filing a written statement. The defendants took the stand that the plaintiff had earlier filed a suit in respect of the same cause of action but the said suit was dismissed and, therefore, the present suit is barred under the provisions of Order 9 Rule 9 of the Code of Civil Procedure. The said defendants further took the stand that the suit is bad for non-joinder of necessary parties. The defendants have also taken the stand that said Jahiruddin may have taken oral settlement of the suit property from Sultan Sarder and the heirs of Tamuzuddin but no hebanama was executed in favour of Jahiruddin and even if there is any hebanama, such hebanama has not been acted upon. According to the defendants, Jahiruddin had no right to execute the hebanama in respect of the suit property in favour of the plaintiff and the settlement records in respect of the suit property are not erroneous.

7. The learned Trial Court by its judgment and decree dismissed the said suit. It appears that the issue nos. 1 to 4, which included the issue with regard to non-joinder of necessary parties, were not pressed at the time of trial. The learned Trial Court also found that in the year 1989 a fresh cause of action arose but the plaintiff has failed to prove such cause of action. Therefore, it appears that the provisions of Order 9 Rule 9 of the CPC were not applied to the facts and circumstances of the instant case. However, the learned Trial Court came to the finding that the record of right shows that the defendants possess part of the aforesaid 26 decimals of land and the plaintiff has failed to show any special and particular circumstances due to which the alleged erroneous recording in the record of rights were made. The learned Trial Court found that the plaintiff has failed to prove his cause of action and his possession over the suit property and thus, the learned Trial Court dismissed the suit by judgment and decree dated 6th April, 1992.

8. The plaintiff, being aggrieved by the judgment and decree passed by the learned Trial Court, preferred the Title Appeal No. 121 of 1992 which was placed before the learned 2nd Assistant District Judge, Barasat and the learned lower appellate Court by the impugned judgment and decree dated 20th February, 1996 allowed the said title appeal and decreed the suit by declaring that the plaintiff has right, title and possession in the suit property and the defendants be restrained by way of permanent injunction from creating any disturbance in the plaintiff's peaceful possession of the suit property.

9. Being aggrieved by and dissatisfied, that the impugned judgment and decree

the defendant nos. 1 and 2 have filed the present Second Appeal. In the present Second Appeal the following substantial questions of law were formulated on the basis of which the present Second Appeal has been heard.

1. Whether or not the learned Lower Appellate Court committed a substantial error of law by mis-construing the Kabuliati being Exbt. I while considering the question of title of the plaintiffs in respect of the suit property.

2. Whether or not the learned Lower Appellate Court committed any substantial error of law in coming to a finding that Hebanama has been proved in accordance with law.

10. The learned Advocate appearing on behalf of the defendants/ appellants submitted that it will appear from a perusal of the judgments and decrees passed by both the learned Courts below that none of the said Courts read the Kabuliati (exhibit-1) as a whole i.e the document by which the said Jahiruddin claimed that the suit property has been settled in his favour. The said learned Advocate submitted that it is absolutely necessary in the present case to properly construe the said exhibit-1 as it appears that the plaintiffs claim to title in respect of the suit property is based on the said document. The said learned Advocate submitted that the said Jahiruddin could not have given to the plaintiff anything more than what he had got from the Sultan Sardar and others. The said learned Advocate has referred to the schedule of the said Kabuliati (exhibit-1) wherefrom it appears that a bamboo grove and also a certain path way to reach a certain pond were left out of the settlement made in favour of the said Jahiruddin and such path way and the bamboo grove fall within the area of the said 26 decimals of land. The said learned Advocate for the defendants/appellants submitted that the schedule itself indicates that the entire 26 decimals were not settled in favour of Jahiruddin by the said Sultan Sardar and others. The said learned Advocate further submits that such portion which was not settled in favour of Jahiruddin is the portion of land to which the defendants are claiming title. The said learned Advocate referred to exhibit-3 i.e the R.S. Record of right which shows that Jahiruddin was in possession of 8 decimals in each of the aforesaid two plots of land i.e Dag No. 323 and Dag No. 324 and this is so because Jahiruddin did not have right, title or interest in the said bamboo grove and the path way which leads to the pond, as aforesaid. It may be that the said pond is out-side the suit property but the path way is within the said 26 decimals of land. The learned Advocate for the defendants/appellants submits that the defendants/ appellants have right, title and interest in respect of the 5 decimals in each of the aforesaid two dags and the total comes to 10 decimals of land. It will appear from the exhibit-E(I) i.e. R.S. Record of right filed by the defendants that 5 decimals in each of the aforesaid two dags stand in the name of the heirs of Sultan Sardar. Thus, the learned Advocate for the defendants/appellants submits that from the materials on record it will appear that Jahiruddin did not have right, title and interest in respect of the entire 26 decimals of land and, therefore, the Jahiruddin could not have gifted 26 decimals to the plaintiff. The

learned Advocate for the defendants/appellants submitted that the learned Lower Appellate Court committed a substantial error of law by misconstruing the said kabuliat (exhibit-1). The learned Advocate for the defendants/appellants further submitted that in such circumstances the claim of the plaintiff on the basis of the hebanama (exhibit-4) does not have any basis; at least, to the extent of 10 decimals within the aforesaid two dags, and the plaintiff cannot claim any right, title and/or interest.

11. The learned Advocate appearing on behalf of the plaintiff/ respondent submitted that the defendant Nos. 1 and 2 cannot make a claim in respect of their alleged share of 10 decimals in the aforesaid two dags as there are other co-sharers.

12. He further submitted that the record of right as challenged by the plaintiff is erroneous and the defendants have not proved the basis on which the said record of rights have been prepared. He further submitted that the defendant did not challenge the said hebanama. The learned Advocate for the plaintiff/ respondent has further submitted that the question whether the defendants are entitled to the 10 decimals of land in the aforesaid two dags is a question of fact which should not be decided by this Court in Second Appeal.

13. Having heard the learned Advocates for the respective parties, this Court is of the view that the submissions made by the learned Advocate for the defendants/appellants that the learned lower appellate Court or for that matter even the learned Trial" Court did not properly construe the said hebanama has substance. On perusal of the impugned judgment and also the judgment of the learned Trial Court it appears to this Court that both the learned Courts below did not consider the said exhibit-1 as a whole. The schedule of the said document forms a very vital part of the said document. It appears that the said Jahiruddin did not get in his settlement the said bamboo grove and the pathway which falls within the said 26 decimals of land and such part of the said 26 decimals of land were left out of the settlement and, therefore, the said Jahiruddin could not have gifted such part of the said 26 decimals to the plaintiff. If such exhibit-1 is read along with the exhibit-3 and exhibit-E(i), as already indicated above, it will appear that the plaintiff could not prove his title in respect of the entire 26 decimals of land. It is, however, true as submitted by the learned Advocate for the plaintiff/ respondent that this Court should not go into the question as to how much of land was retained by the said Sultan Sardar and others and how much has been succeeded by the defendants. But the records reveal that the plaintiff could not prove his case of having title to the entire 26 decimals of land. With regard to this aspect of the matter this Court is of the view that the matter should be remanded back to the learned Trial Court for a proper consideration.

14. The argument made by the learned Advocate for the plaintiff/ respondent that the defendant nos. 1 and 2 cannot claim the entire portion which was left out of the settlement made in favour of the said Jahiruddin is not an argument of much substance. The suit was filed by the plaintiff for declaration of his title and

it was not a suit by the defendant Nos. 1 and 2 for declaration of their title and, therefore, such question is not of much importance. The submission made by the learned Advocate for the plaintiff/respondent that the defendants could not prove the basis of the record of right and the record of right is erroneous cannot help the plaintiff to prove his title in respect of the suit property. The defendants/appellants have successfully shown that the plaintiff could not claim title to the entire 26 decimals of land and now the question as to what extent the plaintiff has been able to prove his title in respect of the suit property will have to be decided by the learned Court below after the matter is sent back on remand. It cannot be said at this stage that the defendant has not been able to prove the basis of the record of right or that the record of right is erroneous or otherwise. It is not correct to say that the hebanama has not been challenged by the defendant Nos. 1 and 2 appellants as it has been the case of the defendants/appellants that the said hebanama was not proved in accordance with law and the plaintiff failed to prove his title in respect of the 26 decimals on the basis of the documents upon which the plaintiff relied upon.

15. In view of the discussions made above, the present Second Appeal is disposed of by setting aside the judgments and decrees passed by both the learned Courts below and by sending the suit back on remand to the learned Trial Court for a fresh decision in the suit on the basis of evidence already on record and any evidence which the parties may like to further adduce after remand. For such purpose the learned Trial Court shall give opportunities to both the parties to adduce further evidence, if necessary, in support of their respective cases and thereafter decide the suit afresh in accordance with law keeping in view the observations and/or findings made in this judgment.

16. Let the lower Court records be sent back to the learned Court concerned immediately.

17. There will be, however, no order as to costs. Urgent xerox certified copy of this judgment, if applied for, shall be given to the parties as expeditiously as possible on compliance of all necessary formalities.