
(2005) 01 GAU CK 0047

In the Gauhati High Court

Case No : Regular Second Appeal No. 34 of 2001

Gita Rani Nandi and Others

APPELLANT

Vs

Prasanna Kr. Choudhury

RESPONDENT

Date of Decision : 07-01-2005

Acts Referred:

Transfer of Property Act, 1882 — Section 43

Citation : (2005) 4 GLT 98

Hon'ble Judges : A.B. Pal, J

Bench : Single Bench

Advocate : K.N. Bhattacharjee, S. Chakraborty and R. Debnath, for the Appellant; A.C. Bhowmik, R. Datta and M.K. Roy, for the Respondent

Judgement

A.B. Pal, J.—This Second Appeal has a chequered career. The Appellant Monoranjan Nandy (now deceased and substituted by his legal heirs) filed Title Suit No. 12 of 1966 in the Court of Munsiff (now Civil Judge, Junior Division), Belonia, South Tripura against the Respondent Prasanna Kr. Choudhury for declaration of title, confirmation of possession and permanent injunction in respect of the suit lands. His case is that one Satish Ch. Sarkar had taken jote settlement of 8 kanis 10 gandas of land appertaining to kayemi taluk No. 25 from the Talukdar one Shri Bireswar Podder, who was made proforma-Defendant. Satish sold 6 1/2 kanis of the said land to the Plaintiff Appellant. In 1953 survey operation, the land was measured and recorded as 6 kanis 9 gandas under C.S. plot No. 738 of Jote No. 117. The entire land of this plot and jote was sold by Plaintiff to the Respondent by registered sale deed dated 25.3.1958. Thereafter, on 14.8.1958, the Plaintiff-Appellant took settlement of 4 kanis of land of same taluk from same talukdar by registered patta on payment of rent and this land appertained to plot No. 1290 of jote No. 71/132. With the coming into force of the TLR and LR Act, 1960, the taluki right (intermediary right) was vested in the Government and by virtue of the relevant provision of that Act, the Appellant became raiyat directly under the Government in respect of the said land measuring 4 kanis appertaining to plot No. 1290 of jote No. 71/132. The

Appellant continued to pay revenue to the State Government as raiyat and he was in possession since 14.8.1958 when he got the land settled on rent from the talukdar. He cleared jungle, reclaimed land and raised crops on the said land.

2. On 17.4.1966, the Defendant-Respondent threatened to dispossess him from a part of the aforesaid land measuring 15 gandas, which compelled him to file a suit with prayer for temporary injunction. His prayer was allowed by the learned trial Court granting temporary injunction restraining the Respondent from disturbing his peaceful possession, but that order was later vacated. On 19.6.1966, the Respondent dispossessed the Appellant from the remaining 3 kanis 5 gandas of land and thus the Appellant remained in possession of 15 gandas of land. As he was dispossessed, the Plaintiff-Appellant amended his plaint seeking confirmation of possession in respect of 15 gandas of land, which was in this possession and recovery of possession in respect of 3 kanis 5 gandas of land from which he was dispossessed by the Defendant Respondent.

3. The Defendant-Respondent contested the suit contending that the suit lands were covered by plot No. 738 of jote No. 117, which were sold to him by the Appellant by specific boundaries, which were tillas on north, south and west and Tailaichara (a small stream) on the east. Within this boundary the lands of jote No. 117 only existed and, therefore, the suit lands measuring 4 kanis, which the Appellant later claimed to have got from the talukdar were covered by his jote only. He denied that the lands in suit appertained to any other plot or any other jote.

4. On 29.5.1971, the suit was dismissed by the learned trial Court (Munsiff) against which the Appellant filed Title Appeal No. 3 of 1972 in the Court of Additional District Judge. The appeal was allowed on 20.5.1974 and remanded back to the trial Court, but again on 31.5.1982, the suit was dismissed by the learned trial Court, which was followed by Title Appeal No. 30 of 1982 preferred by the Appellant. This appeal was allowed on 11.01.1984 and remanded back of the trial Court. On 15.3.1993, the suit was decreed in favour of the Appellant forcing the Defendant-Respondent to file Title Appeal No. 2 of 1993 in the Court of learned District Judge, South Tripura. On 8.9.1994, the learned District Judge allowed the appeal holding that the suit land appertained to jote No. 117, which was the land sold by the Appellant to the Respondent by the sale deed marked Exbt. B/5. Having lost the appeal, the Appellant brought Second Appeal No. 29 of 1999, which was allowed on 31.5.2001 by this Court setting aside the judgment and decree of the first appellate Court on the ground of non consideration of the Survey Commissioner's report dated 30.3.1992 on the basis of which the trial Court decreed the suit on 15.3.1993. This Court while remanding the case back to this first appellate Court observed that there was absolutely no discussion on the survey commissioner's report, which clearly found that the suit lands did not belong to jote No. 117, but on the contrary, it belonged to a distinctly separate jote No. 71/132. The clear indication was that the first appellate Court should take into consideration the report of the survey commissioner while disposing of

the appeal. On 21.7.2001, the first appellate Court allowed the appeal setting aside the judgment and decree of the trial Court on the ground that the suit lands fell within the boundaries of the lands of Exbt. B/5 by which the Appellant sold the lands to the Respondents by registered sale deed relying on the principle that when there is conflict between the boundaries and area of the land, the boundary shall always prevail. The first appellate Court derived support from the decision of the Calcutta High Court in Roy and Co. and Another Vs. Sm. Nani Bala Dey and Others, and of this High Court in Tronglaobi Pisciculture Cooperative Society Ltd. v. Chief Commissioner (Administrator) of Manipur and Ors. reported in AIR 1969 Man 84. The second ground taken by the first appellate Court was that the entire lands of plot No. 738 and jote No. 117 were sold by the Appellant to the Respondent on 25.3.1958 and, therefore, whatever land found in excess within the said boundaries should go to the ownership of the Defendant-respondent only. The learned first appellate Court, however, discussed the survey commissioner's report and held that the survey commissioner had complied with the direction given on 11.1.1984 by the learned first appellate Court, which were (1) whether 4 kanis of land of plot No. 1290 situated on the north-west of jote No. 117 and (2) whether the said land appertained to jote No. 117 on 30.3.1992. The Survey Commissioner submitted the report, which, according to the first appellate Court, was rightly accepted by the trial Court as enough opportunities were given to the parties to submit objections. According to the said report, the lands measuring 4 kanis, which were found within the boundaries of the lands of Exbt. B/5, appertained to plot No. 1290 and jote No. 17/132, not to jote No. 117 of the Defendant Respondent. In other words, within the boundaries mentioned in Exbt. B/5, there were lands of two distinct jotes and to distinct plots. The lands sold by the Appellant to the Respondent appertained to jote No. 117 while the suit lands measuring 4 kanis appertained to jote No. 71/132. Learned first appellate Court accepted this report in order to comply with a direction of this Court in RSA 29 of 1999 but then completely skipped over the survey commissioner's report taking a new turn on the basis of the provision contained in Section 43 of the Transfer of Property Act, 1882. In para 8 of the impugned judgment, the learned first appellate Court observed that the Plaintiff-Appellant had sold the lands of jote No. 117 to the Defendant-Respondent erroneously representing that the suit land was covered by land of jote No. 117 by specifying a boundary which included the lands of jote No 71/132, which at the time of sale belonged to the talukdar, proforma-Defendant No. 2 and believing this erroneous representation, the Defendant-Respondent purchased the suit land in good faith without notice of the fact that the suit land was not owned by the Appellant. Therefore, invoking the provision of Section 43 of the Transfer of Property Act, the learned first appellate Court found that when the land did later come to the ownership of the Appellant, it automatically had gone to the ownership of the Defendant-Respondent and the Plaintiff-Appellant was exstopped to claim the ownership of the said land. The present second appeal is against this finding of the learned first appellate Court given in the impugned judgment.

5. The substantial questions of law formulated at the time of admission on 15.9.2003 are:

1. Whether the findings of the learned first appellate Court are contrary to the evidence on record i.e. the report of the Survey Commissioner ?

2. Whether the principle of law that the boundary prevails has been misapplied by the learned first appellate Court in reversing the decree passed by the learned trial Court?

6. I have heard Mr. K.N. Bhattacharjee, learned senior Counsel for the Appellants and Mr. A.C. Bhowmik, learned Counsel for the Respondent.

7. Mr. Bhattacharjee submitted that though the direction of this Court to take into consideration the survey commissioner's report given in judgment and order dated 31.5.2001 in R.S.A. No. 29 of 1999 was complied with by the learned first appellate Court in the impugned judgment by discussing the report and upholding the same, it would appear that after accepting the findings contained in the report, the learned first appellate Court side tracked the same and took a different route by invoking the provision of Section 43 of the T.P. Act, which was actually nobody's case. Therefore, in effect the directions were not complied with substantially as no reason was shown for not placing reliance on the same after accepting it in its entirety. The first appellate Court also did not record any reason why the judgment and decree of the trial Court, which were based on the report of the survey commissioner, were to be set aside. Mr. Bhattacharjee further submits that concurrent findings of the two Courts below on the survey commissioner's report cannot be disturbed or rejected by way of placing no reliance on it. As regards the conflict between the boundaries and the areas, he submits that the lands in suit along with the lands sold by the Appellant to the Respondent may be within the same boundaries but did appertain to separate jote and separate plot and as such the ratio of the two decisions in M/s Roy and Co. (supra) and Tronglaobi Pisciculture Coop. (supra) relied on by the first appellate Court had no application in the present case.

8. Mr. Bhowmik, on the other hand, advanced his argument submitting that survey commissioner's report can never be a conclusive evidence for deciding the title and for that reason the learned first appellate Court decided the title in favour of the Defendant-Respondent on the basis of other evidence on record, independent of the survey commissioner's report. His further submission is that Section 43 of the T.P. Act is the appropriate remedy in a case in hand where by wrong and erroneous representation of boundaries, the Defendant-Respondent was motivated by the Plaintiff-Appellant to buy the entire lands within that boundary. In support of his contention, he placed reliance on the decisions, reported in Desh Raj and Others Vs. Lal Sahai Singh and Others, and Khurshed Banoo (deceased by LRs) Vs. Vasant Mallikarjun Manthalkar (deceased by LRs.),

9. The dispute, therefore, is limited to the two substantial questions as formulated on 15.9.2003. As regards the first question whether the findings of

the first appellate Court are contrary to the report of the survey commissioner, it is seen that the entire report has been accepted by the first appellate Court holding that the lands measuring 4 kanis appertained to plot No. 1290 of jote No. 71/132, not of plot No. 738 of Jote No. 117. The specific case of the Defendant-Respondent is that he purchased 6 kanis 19 gandas of land appertaining to C.S. plot No. 738 of jote No. 117 and that these lands only were within the boundaries given in the sale deed marked Exbt. B/5. So nowhere he claimed the lands of other plot or jote, that is to say, plot No. 1290 of jote No. 71/132 to which the suit lands were found to belong in the report of the survey commissioner. It is admitted fact that the Defendant-Respondent purchased 6 kanis 19 gandas of land of jote No. 117 from the Plaintiff-Appellant on 25.3.1958. Thereafter, on 14.8.1958, the Plaintiff-Appellant took settlement of another 4 kanis of land from the then talukdar by registered patta on payment of rent and this 4 kanis of land admittedly appertained to a separate plot No. 1290 of a separate jote No. 71/132. There is, therefore, a time gap of about 5 months between the date of sale by him to the Defendant-Respondent and the date of his taking the suit land measuring 4 kanis from the erstwhile talukdar. The first appellate Court correctly held that as the Plaintiff-Appellant was not the owner of the suit land at the time of sale on 25.3.1958, he had no right to transfer the suit land, which he took over as tenant only on 14.8.1958. Once it is accepted that within the boundaries of the sale deed (Exbt. B/5) there were lands appertaining to two separate plots and two separate jotes belonging to two separate owners, namely the Plaintiff-Appellant and the proforma Defendant No. 2 (erstwhile talukdar), the owner of either of the plots could not sell the lands of the other by erroneously mentioning the boundaries. The principle of conflict between boundaries and areas shall come into play only when the lands within the boundaries were owned by the owner and while transferring the same he mentioned only a part of its though the area was much more than what was mentioned in the sale deed. In this case, the factual situation is completely different inasmuch as the lands sold to the Respondent and the suit lands appertained to two different plots of two different jotes owned by two different persons. Therefore, wrong mentioning of the boundaries cannot be an incident in favour of the purchaser who purchased only a definite area measuring 6 kanis 19 gandas of C.S. Plot No. 738 of jote No. 117 it is not the case of Defendant-Respondent that by Exbt. B/5, the entire lands within the boundaries were sold to him. His definite and specific case is that he purchased only 6 kanis 19 gandas of land appertaining to C.S. plot No. 738 and jote No. 117 within the boundaries given in Exbt. B/5. As later the suit lands measuring 4 kanis were found within the same boundaries, the raised a claim taking the plea that not the area, but the boundaries will prevail and, therefore, the excess lands of 4 kanis came within his ownership. But the learned first appellate Court fell into error when he ignored the factual situation that the suit lands belonged to a separate jote and separate plot owned by a separate person, when lands of Exbt. B/5 were only sold to the Defendant Respondent. Situated thus, the ratio of the decisions in *M/s. Roy and Co.* (supra) and *Tronglaobi Pisciculture Co-Op.* (supra) have no

application in the instant case.

10. It is surprising that after accepting the survey commissioner's report and holding that the trial Court had correctly relied on that report while decreeing the suit, the first appellate Court ran into another error by resorting to Section 43 of the T.P. Act for the purpose of setting aside the judgment and decree of the trial Court. Section 43 of the said Act reads:

43. Where a person [fraudulently or] erroneously represents that he is authorized to transfer certain Immovable property and professes to transfer such property for consideration, such transfer shall, at the option of the transferee, operate on any interest which the transferor may acquire in such property at any time during which the contract of transfer subsists.

In the case in hand, no contract of transfer at all subsists and the factual situation is completely different inasmuch as a definite parcel of land measuring 6 kanis 19 gandas of C.S. plot No. 738 of jote No. 117 were sold by the Appellant to the Respondent for valuable consideration. The transaction ended there and there was no stipulation that all other lands even if found outside the said jote No. 117 but within the boundaries of exbt. B/5, would be transferred to the Defendant-Respondent. When the definite case of the Defendant-Respondent is that he claimed the suit land only because he believed it belonged to jote No. 117, he first appellate Court should not have woven a new case for him that there subsisted a contract of transfer for all the lands within the boundaries of Exbt. B/5 even though the suit lands found within the same boundaries did actually belong to other person. It is, therefore, evident that the learned first appellate Court after accepting the report of the Survey Commissioner recorded findings contrary to the said report without recording the reason why the report did not deserve reliance.

11. As I have already discussed the principles of law that the boundary would prevail has been misapplied by the first appellate Court, as the facts situation is completely different which does not call for application of this principle. Mere wrong mentioning of the boundaries in the sale deed cannot give a handle to the purchaser to claim lands of other person found within the same boundary when the purchased a definite plot of land measuring a definite area and paying a definite price for that area only. The question of misrepresentation about the area of the land has no relevance in the present case.

12. As has been seen in the above discussion, the principle of boundaries and areas as well as application of Section 43 of the T.P. Act were misconstrued and misplaced by the learned first appellate Court. Consequently, this second appeal is allowed setting aside the impugned judgment and decree of the learned first appellate Court delivered on 21.7.2001 in Title Appeal No. 2 of 1993. There shall be no order as to costs.