

(2014) 07 CAL CK 0063

In the Calcutta High Court

Case No : S.A. No. 328 of 1996 and CAN No. 2781 of 2014

Kabiruddin Mallick

APPELLANT

Vs

Abdul Sattar Mallick

RESPONDENT

Date of Decision : 16-07-2014

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 27, 100, 103

Specific Relief Act, 1963 — Section 34

West Bengal Land Reforms and Tenancy Tribunal Act, 1997 — Section 9

Citation : (2014) 5 CHN 65

Hon'ble Judges : Debabrata Mookerjee, J

Bench : Single Bench

**Advocate : D.P. Adhikari and Ratna Ghosh, Advocate for the Appellant;
Sabyasachi Bhattacharya, Sr. Advocate and Supratik Shyamal, Advocate for the Respondent**

Final Decision : Dismissed

Judgement

Debangsu Basak, J.—The second appeal was against a judgment of affirmation. Before the Courts below the respondent established their title in a suit for declaration and injunction. In second appeal, it was contended that the findings of title arrived at by the Courts below were erroneous since the Courts below did not take into consideration evidence filed by way of documents which were marked as exhibits in the suit and as such the judgment impugned warranted interference in second appeal.

2. The second appeal was admitted by an order dated November 16, 1994 on the substantial question of law whether "the court of appeal below committed a substantial error in arriving at a finding about non-production of any documentary evidence on the part of the defendant-appellant in support of his case of surrender and creation of a new tenancy when, in fact, such documents are claimed to have been filed vide, exhibits V, B, D, E, M and N."

3. Mr. D.P. Adhikari learned Advocate appearing on behalf of the appellant

contended that, the suit was for declaration and injunction. The suit was amongst private parties. The respondent was exercising rights as a raiyat in respect of the immovable properties concerned. According to him, the State of West Bengal was a necessary and a proper party since the record of rights maintained by the State of West Bengal was up for consideration in the suit. Since, the State of West Bengal was not a party to the suit, according to him, the suit was bad for non-joinder of necessary and proper party. In support of the proposition that, the State was a necessary a proper party Mr. Adhikari relied upon Jugraj Singh and Another Vs. Jaswant Singh and Others,

4. He contended that, the First Appellate Court did not consider Exhibit "V", "B", "D", "E", "M" and "N" which were documentary evidence when the First Appellate Court came to a finding that no documentary evidence was produced on behalf of the appellant to establish his title. He submitted that, such documentary evidence was required to be apprised by the Courts below. The Courts below not having apprised such evidence on record the suit should be remanded. On remand it should be transferred to the tribunal established under the West Bengal Land Reforms and Tenancy Tribunal Act. In that context, he referred to Section 9 under the West Bengal Land Reforms and Tenancy Tribunal Act.

5. He then went on to contend that, the suit was for declaration. The respondent was entitled to further relief. The respondent did not seek relief with regard to the cancellation of the name of the Appellant No. 1 in the record of rights maintained by the State of West Bengal. Since the respondent did not seek cancellation the name of the Appellant No. 1 from the record of rights the suit was hit u/s 34 of the Specific Relief Act.

6. He submitted that, the second appeal was admitted by the order dated November 16, 1994. At the time of admission, the Second Appeal Court took note of the documentary evidence available on record. Consequently, there should be an order of remand according to him.

7. On merits he submitted that, whether Kochi Bibi was the mother or the wife of Rangulal was an issue which was not conclusively decided by the Courts below. In any event, the decision rendered by the Courts below in that regard was erroneous in view of the documentary evidence available on record. Since the Courts below committed an error of fact which reflected upon the substantial right of the parties in respect of an immovable property, he submitted that a substantial question of law arose warranting interference by the Second Appeal Court either by way of reversing the judgment impugned or by remanding the suit. He relied upon Budhwanti and Another Vs. Gulab Chand Prasad, for the proposition that, where a finding of fact was vitiated by application of wrong tests or on the basis of conjectures and assumptions then a High court was well within its right to set aside such patently erroneous factual finding in order to render justice.

8. He relied on Major Singh Vs. Rattan Singh (Dead) by LRs. and others, for the proposition that, rejection of evidence by lower Court on flimsy grounds involved a substantial question of law. He relied upon Neelakantan and Others Vs. Mallika Begum, for the proposition that, in case where a finding was recorded without any legal evidence on the record or on misreading of evidence or when such finding suffered from any legal infirmity, which materially prejudiced the case of one of the parties or the finding was perverse, it was open for the High Court to set aside the finding and take a different view. He cited Chandrika Misir and Another Vs. Bhaiya Lal, for the proposition that, where the Court was lacking inherent jurisdiction, the plea as to jurisdiction could be raised at any stage, even if it was not raised in Trial Court. He relied upon a Full Bench decision of this Hon''ble Court of Ratanlal Bansilal and others Vs. Kishorilal Goenka and others, for the proposition that, where mixed questions of law were substantial in the sense that, they affected the rights of the parties involved in the case and affected them substantially, the aggrieved party should not be shut out from the second appeal. He cited Volume 92 Calcutta Weekly Notes page 539 (A.K. Mukherji v. Pradip Ranjan Sarbadhikary & Ors.) for the proposition that, once a second appeal was admitted on a substantial question of law, a question of fact was not a prohibited area in the second appeal.

9. Mr. Sabyasachi Bhattacharya learned Senior Advocate for the respondent contended that, no substantial question of law arose in the second appeal. He relied on Sections 103 and 100 of the Code of Civil Procedure, 1908 and submitted that, the Courts below did not apply a wrong law to the facts appreciated nor did the Courts below appreciate any evidence incorrectly. The findings of the Courts below were concurrent. All points raised on behalf of the appellant were discussed elaborately by the Courts below. No material, according to him, was placed by the appellant to substantiate the contention that, the concurrent appreciation of findings by the Courts below was erroneous.

10. He contended that, since the findings were concurrent and there was no material to contend that such findings were erroneous, no substantial question of law arose in the second appeal and as such no interference was called for in the second appeal. He submitted that, the disputes with regard to three Schedules of the suit property, namely, "Ka", "Kha", "Ga". The facts of the instant case according to him, showed that the R.S. Record of Rights were admitted by the parties. The appellant had contended before the Courts below that, there were surrenders made to the landlord and that, such landlord subsequently settled certain portions of land in favour of the appellant. He submitted that, there was no document to establish the surrender by the landlord and the subsequent settlement. In respect of the "Ga" scheduled property he submitted that, the respondent produced the R.S. Record of Rights as well as the registered title deeds with regard thereto. In respect of the "Ka" and "Kha" Schedule R.S. Record of Rights were produced by the appellant. According to him, therefore, the respondents were at a better footing and had established their title in respect of the three scheduled property. On the application under Order 41 Rule 27, he

submitted that, the document sought to be disclosed was suspect. The documents were recordings made in the record of rights. The recording claimed that, Kochi Bibi was the wife of Rangulal while the registered title deeds spoke to the contrary. Even two records of rights spoke differently with regard to the status of Kochi Bibi. Therefore, even if the document under Order 41 Rule 27 was taken up for consideration the same would not alter the title of the parties to the suit property and would not affect any of the findings of title returned by the Courts below with regard to the property in question.

11. He contended that, the disputes between the parties were private in nature. The State of West Bengal was not involved in such disputes. No relief was sought for against the State of West Bengal. The State of West Bengal was, therefore, neither a necessary nor a proper party to the suit.

12. On Section 34 of the Specific Relief Act, he submitted that the suit was for declaration and injunction. The respondent as plaintiff was entitled to and sought a declaration of title.

13. The rival contentions of the parties the impugned judgments as well as the materials on record were considered by me. The suit was for declaration and injunction. The Trial Court framed eight issues with two additional issues for trial. Every aspect of the title in respect of the three scheduled properties was elaborately discussed by the Trial Court. The suit was decreed in favour of the respondent. The appellant preferred an appeal therefrom. Eight grounds were urged on first appeal. Such grounds of appeal were noted by the First Appellate Court in the impugned judgment. All the grounds of appeal were dealt with elaborately by the First Appellate Court.

14. That the suit was bad for non-joinder of the State of West Bengal as a party was not canvassed as a ground before the First Appellate Court. Such ground was taken in the second appeal.

15. The parties to the suit were natural persons. The respondent as the plaintiff was claiming title in respect of the properties mentioned in the "Ka", "Kha" and "Ga" Schedule of the plaint in the manner proposed in the plaint. The appellant as the Defendant No. 1 was denying such claim of the respondents. The disputes, therefore, between the natural persons were both civil and private in nature. The respondent as the plaintiff did not claim any relief as against the State. The declaration of title sought for by the respondent-plaintiffs to establish title in respect of the property involved as against the appellant No. 1. The State of West Bengal had no say in such suit. No relief was sought for against the State of West Bengal. Simpliciter since the record of rights of the State of West Bengal were taken up for consideration in a suit for declaration and injunction without anything more it could not be contended that the State of West Bengal was a necessary and a proper party to such suit.

16. In Jugraj Singh (supra) the Supreme Court was concerned with a suit where the plaintiff was sought for a decree of declaration to the fact that the defendants

were not the owners in terms of orders passed by the Sub-Divisional Officer. During the pendency of the suit dispute arose as to execution of the power of attorney. The question that arose for consideration by the Supreme Court in that case was tabulated in paragraph 4 of the report. In such context, the Supreme Court was of the view that a person was not a necessary party to the suit. The facts of the present case were completely different.

17. Exhibits "V", "B", "D", "E", "M" and "N" were elaborately considered by the Courts below. Nothing was shown on behalf of the appellant that, the findings returned by the Courts below with regard to such exhibits were perverse or erroneous.

18. So far as the question of non-grant of relief u/s 34 of the Specific Relief Act, 1963 was concerned, the plaintiff was seeking adequate and proper remedy with regard to the plots of land and such were granted by the Courts below. Section 34 of the Specific Relief Act, 1963 did not bar the grant of the relief as prayed for by the plaintiff. The plaintiff was seeking declaration as to ownership of the plots of land specified in the plaint. Once the right of ownership was established by a regular Civil Court on the basis of evidence adduced in such civil proceedings it was not necessary for the plaintiff to make the State of West Bengal as a party on the record of rights in terms of decree. The record of right was not a document of title. The decree passed in the instant proceedings can be one of the basis for correction of the record of rights if there was any error in such record of rights. No doubt the second appeal was admitted on the question framed on November 16, 1994. It was for the appellant to substantiate the substantial question of law framed at the bearing of the second appeal. Unfortunately, the appellant had failed to substantiate the substantial question of law at the time of admission on November 16, 1994 at the hearing of the second appeal. In course of the second appeal also no other substantial question of law arose for consideration. Whether Kochi Bibi was the mother or wife of Rangulal was decided conclusively by the Courts below. The appellant contended that, such finding was erroneous. However, the appellant failed to substantiate the error committed by the Courts below in arriving at the finding as to the status of Kochi Bibi. Entries in the record of rights as to the marital status of Kochi Bibi was sought to be relied upon. Records of rights were not documents to establish the marital status of a person. In any event, the entries sought to be relied upon to establish the marriage of Kochi Bibi were contradictory to each other in the two records of rights and one of them was contradictory to statements made in title deeds. In such circumstances, the Courts below rightly went with the recitals in the title deeds.

19. In *Budhwanti & Anr.* (supra) the Supreme Court was concerned with an eviction proceedings. Their Lordships held that though in a second appeal a finding of fact even if erroneous will generally not be disturbed but where it was found that, the finding was vitiated by application of wrong tests or on the basis of conjectures and assumptions then a High court will be well within its right in

setting aside such patently erroneous factual finding in order to render justice on second appeal. In the present facts and circumstances of the instant case there was no erroneous finding let alone application of wrong tests or a finding arrived at on the basis of conjectures and assumptions calling for interference in second appeal.

20. In *Major Singh (supra)* the Supreme Court was of the view that, rejection of evidence by Lower Court on flimsy ground was a substantial question of law empowering the High Court to interfere in the matter. In the present case the Lower Court considered every evidence placed before it.

21. In *Neelkantan & Ors. (supra)* the Supreme Court was concerned with eviction proceedings. The Supreme Court was of the view that, in the event the finding recorded by the Courts below was without any legal evidence on record or on misreading of evidence or suffered from any legal infirmity which materially prejudiced the case of one of the parties or where the findings were prejudiced it was open for the High Court to set aside such findings and take a different view. The facts of the instant case did not warrant a view different to that returned by the Courts below.

22. The plea of lack of jurisdiction raised by the appellant was without any basis. The Civil Court had jurisdiction to try the suit. *Chandrika Misir & Anr. (supra)* did not have any manner of application in the facts of the instant case.

23. In *Ratanlal Bansilal & Ors. (supra)* the Division Bench explained when a question of law would be substantial in a second appeal. In *A.K. Mukherji (supra)* the Supreme Court was of the view that, when a second appeal was admitted on a substantial question of law the question of fact could be entered into by the Second Appellate Court. The present facts and circumstances of the instant case did not warrant a re-appreciation of the entirety of the evidence.

24. In such circumstances I find no merit in the second appeal. S.A. No. 328 of 1996 is dismissed. There will be no order as to costs.

CAN No. 2781 of 2014:

25. CAN No. 2781 of 2014 the application was under Order 41 Rule 27 of the Code of Civil Procedure, 1908. By such application the appellant sought to adduce evidence with regard to the marital status of Kochi Bibi. Such marital status of Kochi Bibi was sought to be established through entries made in the record of rights.

26. The documents sought to be relied upon in the present application were record of rights. The entries in the record of rights with regard to marital status were contradictory to each other. The basis for such entries were also not on record. In any event, the plaintiff proved their title in respect of properties involved by way of documentary evidence of higher evidentiary value than the record of rights. There was no necessity in considering the record of rights and the entries therein sought to be adduced.

27. CAN No. 2781 of 2014 is dismissed. There will be no order as to costs.