
(2015) 04 GAU CK 0058

In the Gauhati High Court

Case No : Regular Second Appeal No. 159 of 2008

Krishna Chaitanya Mahaprabhu Deity and Others	APPELLANT
Vs	
Arun Kr. Deb and Others	RESPONDENT

Date of Decision : 23-04-2015

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 92, 94
Contract Act, 1872 — Section 10

Citation : (2015) 3 GLT 114

Hon'ble Judges : Arup Kumar Goswami, J

Bench : Single Bench

Advocate : S. Senapati, for the Appellant; B.K. Jain and B.K. Purkayastha, Advocates for the Respondent

Final Decision : Dismissed

Judgement

Arup Kumar Goswami, J—This appeal is preferred by the defendants against the judgment and decree dated 16.6.2008 passed by the learned Civil Judge, No. 1, Cachar, Silchar in Title Appeal No. 31/2006 dismissing the appeal and upholding the judgment and decree dated 19.5.2006 passed by the learned Civil Judge (Junior Division) No. 1, Cachar, Silchar in Title Suit No. 18/1996. However, it is to be noted that in the Memorandum of Appeal, appellants are wrongly described as plaintiffs and the respondents as defendants.

2. The case of the plaintiffs, as projected in the plaint, is that the plaintiffs inherited Schedule-I land from their predecessor Late Kshitish Chandra Deb, and while they were in occupation of the same, the defendant No. 1, with permission from the plaintiffs, on condition to vacate the same as and when required by the plaintiffs, constructed a temporary "Dev Mandir" and established a Deity on the Schedule-III land and started offering Seva Puja. On 5.12.1987, the defendant No. 1, namely, Sri Sri Krishna Chaitanya Maha Prabhu, represented by the Shebait, by a registered deed No. 4210 purchased 15 Kathas of land from the plaintiffs for constructing a permanent Mandir and for establishing the Deity. On

the very same day, defendant No. 1 also executed a registered Ekrarnama in favour of the plaintiffs whereby he promised that within six months from 5.12.1987, he would remove the Mandir and Deity at his own cost and deliver the possession to the plaintiffs. The defendants did not remove the Mandir from the Schedule-III land as promised. Repeated requests were made by the plaintiffs to the defendants to remove the Mandir and deliver the Schedule-III land. They also caused an Advocate's notice dated 22.12.1993 to be served upon the defendant No. 1 to deliver vacant possession of the land to the plaintiffs. Though the notice was received by defendant No. 1, as the Mandir was not removed and he, in collusion with defendant Nos. 2 and 3, started procuring building materials, the plaintiffs filed the suit praying for:

- a. a decree declaring the right, title and interest of the plaintiffs over the land of Schedule-I.
- b. confirmation of plaintiffs' possession over the land of Schedule-II.
- c. recovery of khas possession over the Schedule-III land by removing and demolishing the temporary structure of Dev Mandir and also by removing the Deity therein.
- d. injunction restraining the defendants from constructing any new structure in Schedule-III land and/or changing the nature and feature of the said land.
- e. the cost of the suit and other reliefs.

3. Schedule-I had 1 Bigha 15 Katha 1 Chatak (1B 15K 1Ch) of land representing the interest of the plaintiffs. Scheduled-II represented 1 Bigha 11 Kathas 1 chatak (1B 11K 1Ch) within Schedule-I. Schedule-III comprised of 4 Kathas of land in Dag No. 243/415 within Schedule-I.

4. The defendant No. 1 did not contest the suit. However, defendant Nos. 2 and 3 filed a written statement, also stating that the written statement was filed on behalf of defendant No. 1, Deity. In the written statement, various defences and pleas to the effect that there is no cause of action for filing the suit; that the plaintiffs fraudulently, in collusion with Radha Madhab Misra, showing him to be a Shebait of the Deity, filed the suit; that the suit is not maintainable in view of provisions of Specific Relief Act, Transfer of Property Act, Hindu Religious and Charitable Endowment Act, 1951 and Section 92 and 94 of the CPC; that the suit was bad for defect of parties; that the suit is barred by limitation; that the suit is barred by estoppels, etc. were taken.

5. While denying the averments made in the plaint, the specific case set out by the defendants is that the defendant No. 1 Deity was brought from Bangladesh to Silchar and kept in the house of Biresw Ranjan Misra, who is the elder brother of the father of the defendant Nos. 2 and 3, namely, Radhika Ranjan Misra. Seva Puja was done daily by them and with the assistance of the Government of Assam, the Deity was shifted from Silchar to Srikona. After constructing a temple on khas land as well as on land which is a part of Schedule-III land, the Deity

was installed in the newly constructed temple on 11.11.1977 and the father of the defendant Nos. 2 and 3 continued to offer Seva Puja till his death in 1980 and after his death, the defendant Nos. 2 and 3 and their elder brother, Radha Madhab Misra, used to amicably perform Seva Puja daily. The plaintiff No. 1 took Rs. 20,000/- during the year 1982-1983 from the defendants for executing a registered sale deed in respect of the land of the plaintiffs which was in possession of the defendant No. 1 Deity, where the temple of the Deity is located. The plaintiff No. 1, in collusion with Radha Madhab Misra, misappropriated a huge amount including "gold chura" of the temple and as a result, a committee was formed in the year 1985 for overseeing smooth performance of daily Seva Puja. It is stated that Radha Madhab Misra was not the Shebait of the Deity and from 1985, defendant Nos. 2 and 3 were entrusted with daily Seva Puja of the Deity. The plaintiffs in collusion with Radha Madhab Misra manufactured the Ekrarnama dated 5.12.1987 and set up a separate idol of Sri Sri Gauranga Maha Prabhu to start business in the name of religion. The defendants continuously, peacefully and without interruption, with the knowledge of the plaintiffs and their predecessor, were in occupation of the plot of land for long 19 years and therefore, they had acquired right of adverse possession extinguishing the right, title and interest of the plaintiffs and as the plaintiffs failed to file the suit within 12 years from 11.11.1977, the suit was barred by limitation. It is also pleaded that the Ekrarnama was a collusive and manufactured document and the same being not in the interest of the Deity and as no permission from the court was obtained, the document was void ab-initio. One additional written statement was filed by the defendants stating that the plaintiffs had no right, title and interest over the suit land.

6. On the basis of pleadings, the learned trial court framed the following issues:

"1. Whether there is any cause of action for the plaintiffs" suit?

2. Whether the suit is maintainable in the present form and manner or any other Act?

3. Whether the plaintiffs have filed this suit fraudulently in collusion with Sri Radha Madhab Misra baselessly designating him as Shebait of the Deity, defendant No. 1?

4. Whether the perpetual minor Deity defendant No. 1 has been correctly and properly represented in this suit to look after the interest of Deity?

5. Whether the suit is barred under Section 92 and 94 of the CPC?

6. Whether Radha Madhab Misra has any legal authority/status to execute the so called Ekrarnama dated 5.12.1987 on behalf of the perpetual minor Deity, defendant No. 1?

7. Whether the defendant Deity acquired right, title and interest on the 3rd Schedule land by continuous and peaceful possession since 11.11.1977 with knowledge and acquiescence of the plaintiffs and their predecessor?

8. Whether the plaintiffs have any right, title and interest over entire Schedule-I land?

9. Whether the plaintiffs are entitled to a decree?

10. To what other relief/reliefs the parties are entitled to?"

7. During trial, the plaintiffs examined two witnesses. The defendants also examined two witnesses. Upon consideration of the evidence on record, the learned trial Court decreed the suit of the plaintiffs. An appeal was preferred against the aforesaid judgment and decree. The appeal also was dismissed affirming the judgment and decree of the trial court. Accordingly, this second appeal was filed.

8. By an order dated 26.11.2008, the second appeal was admitted to be heard on the following substantial questions of law:

"1. Whether the findings of the learned courts below are erroneous and illegal for non-framing of any issue on the vital point of limitation, especially in view of the fact that the land described in Schedule-III has been admittedly under the continuous possession of the appellants/defendants for more than 12 years?

2. Whether the learned courts below arrived at an erroneous finding on issue Nos. 3 and 4 in view of the fact that Radha Madhab Misra being the Shebait of a different deity, namely, Sri Sri Gauranga Mahaprabhu could not lawfully represent and/or look after the interests of the defendant No. 1 deity?

3. Whether the learned trial court erred in relying upon Exhibit-3 as proof of the plaintiffs right, title and interest in respect of Schedule-I land and further holding that Schedule-I land includes Schedule-III land?

4. Whether the findings of the learned courts below are liable to be set aside and quashed for failing to consider that the 6 months" period stipulated in Exhibit-2 having expired on 5.5.1998, the suit filed on the basis of the same after a period of more than 3 years was barred by limitation?

5. Whether the learned courts below erred in failing to consider that omission to take leave of the court under Section 92 of the CPC hits the maintainability of the suit against the Defendant No. 1 Deity?"

9. Apparently, the date 5.5.1998 in substantial question of law No. 4 is wrong and it should be "5.6.1988" as Exhibit-2 was executed on 5.12.1987.

10. Heard Ms. S. Senapati, learned counsel for the appellants. Also heard Mr. B.K. Jain, learned counsel for the respondents.

11. Ms. Senapati has submitted that the non-framing of the issue of limitation, especially in the context of plea of adverse possession taken by the defendants, have resulted in miscarriage of justice. Issue of limitation was also relevant from the point of view of the suit not being filed within three years from the expiry of the six months" period stipulated in Exhibit-2. It is also argued by her that on

the basis of Exhibit-3, learned Courts below could not have granted the decree of right, title and interest in favour of the plaintiffs. It is further contended by her that Radha Madhav Misra was not the Shebait of the deity and the learned Courts below recorded an erroneous finding on this score. According to her, absence of leave under Section 92 of the CPC, in the facts and circumstance of the case, makes the suit non-maintainable and the learned Courts below did not consider this aspect of the matter in the correct perspective.

12. Mr. Jain has submitted that both the Courts below had concurrently held that the defendants were permissive occupier of the suit land. Even assuming that the defendants had established a Deity in the year 1977 without any permission from the plaintiffs, then also in view of the fact that Ekrarnama, Exhibit-2, was executed in the year 1977, the suit was instituted within 12 years from 1977 and, therefore, the suit cannot be held to be barred by limitation. Mr. Jain submits that the non-framing of issue of limitation will not in any way vitiate the judgments of the courts below as the question of limitation is intrinsically connected with the issue of adverse possession. The issue of adverse possession was debated at great length by the Courts below. Accordingly, the appellate court also discussed, on the basis of the materials on record, as to whether the suit was otherwise barred by limitation. He has submitted that although a finding was recorded in favour of the plaintiffs, Article 54 of the Limitation Act will not come into the picture and only Article 65 is attracted in the facts and circumstances of the case in view of the fact that the defendants had set up a plea of adverse possession. Mr. Jain submits that by setting up the plea of adverse possession, the defendants had admitted title of the plaintiffs. He emphasizes that it was specifically pleaded in the written statement that because of their possessing the land openly, peacefully and continuously, such possession had extinguished the right, title and interest of the plaintiffs. The suit land was inherited property and entries were made in Jamabandi in that regard. Both the courts below had held Ext. 2, by which the defendants purchased 15 Kathas of land from the plaintiffs from the suit Patta, to be a valid document and, thus, the plaintiffs' right, title and interest is admitted by the defendants, he submits. In the circumstances, vide Exhibit-3, the plaintiffs' right, title and interest stood established and therefore, the arguments advanced by Ms. Senapati that the learned court below committed substantial error of law in declaring right, title and interest on the basis of Jamabandi is not correct, he submits. He has submitted that apart from making submissions, learned counsel for the appellants is unable to show any evidence on record in support of the submission that the findings recorded in Issue Nos. 3 and 4 are perverse. He completes his argument by submitting that application of Section 92 CPC, as contended by the defendants, is misconceived and the conditions thereof requiring leave of the Court is absent.

13. Both the courts below have held that the Deity of Sri Sri Krishna Chaitanya Mahaprabhu is a family Deity of the Misra family and the same is not a public Deity. In a private temple or place of worship, public may also offer prayers. To attract the provision of Section 92 of the CPC, there has to be an alleged breach

of any express or constructive trust created for public purposes of a charitable and religious nature or where the direction of the court is deemed necessary for the purpose of any such trust, the Advocate-General, or two or more persons having an interest in the trust and having obtained the leave of the court, may institute a suit. There is neither any pleading nor any evidence of any trust created and, that apart, the Deity was not installed for a public purpose of a religious kind. There is no merit in the submission that suit is not maintainable under Section 92 of CPC.

14. Both the learned courts below have also held, on the basis of the evidence of record, that Radha Madhav Misra was the Shebait and, therefore, he had the right to execute the Ekrarnama, Exhibit-2, on behalf of the minor Deity. In coming to the aforesaid conclusion, the learned courts below also applied the Law of Primogeniture, which governs Shebaitship. The father of the three Misra brothers had expired in the year 1980. It is an admitted position that Radha Madhav Misra was the eldest brother. The defendant Nos. 2 and 3 had pleaded that they were entrusted to do Seva Puja by the public in the year 1987. None of the witnesses, who were alleged to be present in such meeting, was examined. Defendant No. 2 also alleged in his evidence regarding misappropriation of money of the Deity by Radha Madhav Misra in collusion with plaintiff No. 1 lending support to the conclusion so reached. The Exhibit-1 Sale Deed, exhibited on 05.12.87, whereby 15 Lechas of land was purchased for the Deity also recited Radha Madhav Misra as the Shebait. Ms. Senapati is unable to show any material which may persuade the court to upset the aforesaid findings.

15. Section 10 of the Indian Contract Act, 1872, provides that all agreements are contracts if they are made with free consent of the parties competent to contract with lawful consideration and with lawful object and are not expressly declared to be void. Therefore, agreements are the genus of which contracts are the species. In other words, while all contracts are agreements, the reverse may not always hold good. Exhibit-2, admittedly, does not speak about any consideration. Therefore, the Ekrarnama, Exhibit-2, was not a contract. The learned trial court had not discussed Article 54 of the Limitation Act. The appellate court, nevertheless, dealt with Article 54 of the Limitation Act and recorded a finding against the defendants on the ground that as in the Ekrarnama there was no date fixed for the performance of the contract, limitation will begin to run from the time the plaintiffs had noticed that performance is refused and, accordingly, held that as the suit was filed within three years from the date of service of the legal notice, the suit was filed within the period of limitation. Determination of the issue of limitation from the aforesaid standpoint of Article 54 of the Limitation Act, though rendered in favour of the plaintiffs, is not correct. Section 65 of the Limitation Act gets attracted in the instant case. Assuming that while setting up the Deity in the year 1977 no permission was taken from the plaintiffs and the possession of the defendants was adverse to the interest of the plaintiffs, with the execution of the Ekrarnama, Exhibit-2, in the year 1987, the possession becomes permissive. Even if it is considered that subsequent thereto the

possession had become adverse, then also the suit having been filed in the year 1996, same was not barred by limitation.

16. It was also held by the learned courts below that though the defendants pleaded that the land where the Deity was established was khas land, to support that plea, there was no evidence on record. Both Exhibit-1 and Exhibit-2 were executed on the very same date. In Dag No. 243/415 (entire) of 2nd R.S. Patta No. 95, there were 2 Bighas 10 Kathas and 1 Chatak of land in the name of the plaintiffs. The defendant No. 1 Deity had purchased 15 Kathas out of the aforesaid land and after such sale, the plaintiffs had 1 Bigha 15 Kathas and 1 Chatak of land in the said Dag and Patta. The plaintiffs had claimed that within the aforesaid 1 Bigha 15 Kathas and 1 Chatak of land, the defendants were in occupation of 4 Kathas of land. By purchasing the land, the defendants have virtually admitted the right, title and ownership of the plaintiffs over the land of the plaintiffs in Dag No. 243/415 of R.S. Patta No. 95. The plaintiffs had also exhibited the Jamabandi as Exhibit-3. In *Amiya Bala Dutta and Others Vs. Mukut Adhikari and Others*, (1998) 4 GLT 137 , it was held that records of rights, as provided under Sections 40 and 41 of the Assam Land and Revenue Regulation, 1886, shall always be deemed to be correct unless the contrary is proved and that presumption, which is attached to the records of rights under Sections 40 and 41 , must be given due weightage. In *Bipin Chandra Kalita Vs. Sarama Kalita and Others*, (2007) 2 GLT 399 , it was held that mutation by itself though is not an absolute proof of title, is a corroborative evidence thereof, if preceded by and based on a deed of title. The learned courts below also relied on Jamabandi, Exhibit-3, wherein it was recorded that Schedule-I land is a Patta land of the plaintiffs along with other evidence on record and recorded the finding that the plaintiffs have right, title and interest in Schedule-I land. In the facts and circumstances of the case, the conclusion drawn by the courts below cannot be faulted.

17. In the result, I find no merit in this appeal. The appeal is dismissed. The substantive questions of law are answered as above. No cost.

18. Send back the LCR.