

(1985) 07 GAU CK 0010
In the Gauhati High Court
Case No : Second Appeal No. 8 of 1979

Laisram Aber Singh

APPELLANT

Vs

Smt. Yumnam Ningol Khangembam, Ongbi Tingong Devi

RESPONDENT

Date of Decision : 22-07-1985

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 39 Rule 1
Hindu Succession Act, 1956 — Section 10, 8
Hindu Succession Rules, 1956 — Rule 1, 2
Specific Relief Act, 1963 — Section 34

Citation : AIR 1986 Guw 66

Hon'ble Judges : K.N. Saikia, J

Bench : Single Bench

Advocate : W. Kulabidhu Singh, for the Appellant; Th. Priyananda Singh, for the Respondent

Judgement

K.N. Saikia, J.—This plaintiff's second appeal is from the judgment and decree of the Additional District Judge, Manipur allowing the appeal of the defendant and dismissing the plaintiff's suit.

2. The plaintiff instituted O.S. No. 22 of 1976 for declaration of his title to the suit land measuring 2 (two) Sangams of agricultural land under Patta No. 64/1213 (N) B.T. on purchase from the defendant-respondent at a consideration of Rs. 1000/-by a registered sale deed dt. 12-5-71" with delivery of possession and for a permanent injunction restraining the defendant from interfering with his rightful possession thereof. He averred that since the purchase he had been in possession of the suit land paying its land revenue and he applied for mutation which was refused on objection by the defendant who thus asserted hostile title and interfered with his possession.

3. The defendant in her written statement denied the averments of the plaintiff that she sold the land with delivery of possession and that the plaintiff paid the revenue, but she admitted that she objected to the plaintiff's application for

mutation. She also stated, inter alia, that her husband, late Khangembam Baikul Singh, was the original owner and pattadar of a lou under Patta No. 64/1213 B.T. measuring about 7 Sangams of which the suit land was a part; that she and her daughter, Inakhunbi Devi, had been possessing the whole lou including the suit land through their tenant since the death of her husband about 15/16 years ago; that being in need of money she mortgaged the suit land to the plaintiff in 1971 for Rs. 1000/-agreeing to pay 9 pots of paddy per year as interest; and that when she wanted to redeem the mortgage the plaintiff did not agree.

4. On the pleadings the trial Court framed as many as 13 issues including whether the registered deed was of sale or of mortgage; whether the plaintiff acquired right by purchase; whether the plaintiff or the defendant was in possession of the suit land; whether the suit land was inherited by the defendant and her daughter from the defendant's husband; and whether the suit was hit by Section 34 of the Specific Relief Act

5. The trial Court found, inter alia, that the defendant sold the suit land to the plaintiff by executing a registered sale deed, and that the defendant was in possession of the suit land and she had salable right over the suit land at the time of the sale, and the plaintiff acquired right of ownership over the suit land by purchase; the suit did not suffer from defect of parties though the daughter, Inakhunbi Devi was not impleaded; and that the suit was not hit by Section 34 of the Specific Relief Act as the plaintiff prayed for permanent injunction as a consequential relief. The trial Court accordingly decreed the suit declaring the title and for recovery of possession. On appeal, the learned Additional Judge found that on the death of Baikul Singh, the defendant and her daughter, Inakhunbi Devi jointly inherited the suit land; that without partition the defendant alone would not be competent to sell the suit land to the plaintiff even though her name alone appeared in the record of rights, and consequently the plaintiff acquired no right and title over the suit land by purchase; that the defendant, and not the plaintiff, having been in possession of the suit land the trial Court erred in decreeing recovery of possession which the plaintiff did not ask for; and that the suit was hit by Section 34 of the Specific Relief Act as the plaintiff who was not in possession did not seek further relief of recovery of possession. The suit was accordingly dismissed. Hence this second appeal.

6. Mr. W. Kulabidhu Singh, the learned counsel for the appellant, submits : Both the Courts held that it was a sale and not a mortgage; that the learned lower appellate Court erred in holding that the suit land was jointly inherited by the defendant and her daughter overlooking the fact that in the record of rights only the defendant's name appeared in the patta; that even if the defendant and her daughter inherited the suit land, under the Hindu Succession Act they inherited not jointly but in separate shares and the defendant was competent to dispose of her share and the lower appellate Court erred in holding that the defendant was not competent and consequently the plaintiff did not acquire any right by purchase; the plaintiff did not admit that the defendant was in possession of the

suit land and so he prayed for the further relief of permanent injunction and the suit was not barred u/s 34 of the Specific Relief Act.

7. Mr. Th. Priyananda Singh, the learned counsel for the respondent, submits : Even if the defendant is held to have been competent to transfer her share, she could not have done so without a prior partition and the defendant having been in possession and the plaintiff being not in possession he having failed to ask for the further relief of recovery of possession the suit is hit by Section 34 of the Specific Relief Act and it has been rightly dismissed,

8. The precise questions to be decided, therefore, are whether the suit land was inherited jointly by the defendant and her daughter; whether the defendant was competent to sell her share; whether the plaintiff acquired right and title by purchase; whether the plaintiff was in possession and whether the suit was hit by Section 34 of the Specific Relief Act.

9. As regards the suit land being inherited, both the learned Courts below held that the patta comprising 7 Sangams of agricultural land stood in the name of late Baikul Singh. This appeared from the record of rights. Though mutation by itself would not indicate title of Baikul Singh, in the absence of any evidence to the contrary, the finding that the suit land was inherited by the defendant and her daughter, is reasonable. The suit was instituted in 1976 and Baikul Singh was stated to have died about 15/16 years earlier, which means that he died after the Hindu Succession Act, 1956, came into force. Admittedly the defendant is a Manipuri Hindu belonging to the Dayabhaga School. u/s 8 of the Hindu Succession Act, the property of a male Hindu dying intestate shall devolve firstly, upon the heirs, being the relatives specified in Class I of the Schedule. Daughter and widow belong to Class I of the Schedule. Among the heirs specified in the Schedule, those in Class I shall take simultaneously and to the exclusion of all other heirs. As regards distribution of property among heirs in Class I of the Schedule, under Rule 1 the intestate's widow shall take one share and under Rule 2 to surviving daughter shall take one share. Counsel for both sides agree that the defendant and her daughter thus inherited in equal shares. This being the position it would not be correct to say that they inherited jointly, if thereby it is meant that either of them shall not obtain the title to her own share independently. Mr. Priyananda now agrees that the defendant was competent to sell her share but could not deliver possession to the purchaser without a prior partition. It can, therefore, safely be held that the defendant was competent to sell 2 Sangams of land from her share of 3 1/2 Sangams and the sale deed which has not been otherwise assailed conveyed good title on that land to the plaintiff. The finding of the trial Court to this extent is upheld and that of the appellate Court set aside.

10. The next question is that of possession. While the plaintiff claimed to have been in possession, both the Courts below found the defendant to have been in possession. However, the defendant herself stated that she and her daughter were possessing through their tenant. Both the Courts below having concurrently

held the defendant to have been in possession, this finding is not liable to be interfered with in this second appeal.

11. The next question is that of the suit being hit by Section 34 of the Specific Relief Act. The plaintiff sued for declaration of his title and for permanent injunction restraining the defendant from interfering with his possession. Possession having been found to have been with the defendant and not with the plaintiff the relief of injunction cannot be granted. The relief of recovery of possession was not asked for. Would the suit consequently be barred under the proviso to Section 34 of the Specific Relief Act? u/s 34 of the Act any person entitled to any legal character, or to any right as to any property, may institute a suit against any person denying, or interested to deny, his title to such character or right, and the Court may in its discretion make therein a declaration that he is so entitled, and the plaintiff need not in such suit ask for any further relief: Provided that no Court shall make any such declaration where the plaintiff, being able to seek further relief than a mere declaration of title omits to do so. The plaintiff claimed his right over the suit land against the defendant who was denying or interested to deny his title and, therefore, the plaintiff sued for declaration of his title and the Court may in its discretion make therein a declaration that the plaintiff is so entitled. However, the plaintiff was able to seek further relief than a mere declaration and he prayed for injunction and he did not omit to do so. The possession having been found to be with the defendant, this relief is not available.

12. While Mr. Priyananda submits that the suit would be hit by the proviso as the plaintiff's suit has been rendered one for mere declaration, Mr. Kulabidhu submits that the plaintiff prayed for further relief of permanent injunction and still he does not admit to have been out of possession. Therefore, the suit would not be hit by the proviso and at any rate the Court has the discretion to give the plaintiff appropriate relief under Order 7, Rule 7, C.P.C. and the relief of recovery of possession may be given to the plaintiff.

13. It is common knowledge that the object of the proviso to Section 34 of the Specific Relief Act is to prevent multiplicity of suits by preventing a person from getting a mere declaration of right in one suit and then seeking the remedy, without which the declaration would be useless and which could have been obtained in the same suit, in another. However, the answer to the question whether it is incumbent upon the plaintiff to ask for further relief must depend on the facts of each case and such relief must also be appropriate to and necessarily consequent on the right or title asserted. It should be noted that the expression used in the proviso is not "other relief but "further relief. As was held in AIR 1943 94 (Privy Council) the further relief must be a relief flowing directly and necessarily from the declaration sought and the relief appropriate to and necessarily consequent upon the right or title asserted. It does not mean every kind of relief that may possibly be prayed for, but only a relief arising from the cause of action on which the plaintiff based his suit. The relief should not only be

capable of being granted but of being enforced by the Court and the relief should be necessary to make the declaratory relief fruitful and should be available to the plaintiff at the time of filing of the suit and not some relief to which the plaintiff may become entitled during the pendency of the suit. Such relief should also be one which is available against the defendant and not against a third party. In the instant case on the frame of his suit the plaintiff asked for further relief of injunction which was available against the defendant at the time of institution of the suit but may not be so after the finding as to possession.

14. In *Anila Bala Devi Vs. Madhabendu Narain Roy and Another*, where the plaintiff, whose title was denied by the defendant, and the defendant was in possession, it was held that the "further relief was recovery of possession and a suit for declaration of title would not be maintainable unless the plaintiff prayed for possession also. If, however, the plaintiff was out of possession and the defendant was not in possession or was not in a position to deliver possession to the successful plaintiff injunction would be the further relief within the meaning of the proviso to Section 42. In AIR 1938 73 (Privy Council) where the plaintiff claimed to be a trustee and administrator of certain institution of which neither he nor defendant was in possession or control of the management, a suit for mere declaration u/s 42 was held to be maintainable; and where it was not open to the plaintiff to pray for possession also as against the defendant, injunction against the defendant was held to be further relief within the meaning of the proviso to Section 42. In AIR 1943 94 (Privy Council) it was held that the further relief which plaintiff is bound to seek by reason is relief which he can obtain against the defendant and not against a third party. In AIR 1933 517 (Oudh) it was held that when the defendant was not in possession it was not necessary for the plaintiff to sue for possession but it may be necessary to seek further relief of injunction. Thus, when the property is not in possession of the defendant and so possession cannot be decreed against him a relief of recovery of possession need not be asked for. It was held in *Chinnamal v. Varadarajulu* ILR (1892) 15 Mad 307 , that when the property is in the hands of tenants claiming neither under plaintiff nor under the defendant, possession need not be prayed for. Similar is the case when the property is in the hands of Receiver, as was held in *T. Devarajulu Naidu Vs. Kondammal and Another*, Similarly in *Robert Fisher v. Secretary of State* ILR (1899) 22 Mad 270, the Privy Council held that where possession can be recovered only in other proceedings, for example, before the Revenue authorities, recovery of possession need not be asked for. In *N. Bira Singh v. W. Leirenjao Singh* AIR 1958 Manipur 38 , it was held that where the plaintiff, whose title is denied by the defendant, is out of possession and the defendant is in possession, the further relief would be recovery of possession and a suit for declaration of title would not be maintainable unless the plaintiff prayed for possession also. Otherwise it would lead to multiplicity of litigation, for a declaratory suit would have to follow up with an ejectment case for recovery of possession. In *C. Mohammed Yunus Vs. Syed Unissa and Others*, where the plaintiffs claimed as heirs of F and sued to obtain a declaration of their rights in a

certain institution which was in the management of trustees with an injunction restraining the defendants (other claimants) from interfering with their rights, it was held that whether the further relief claimed in a particular case as consequential upon a declaration is adequate must always depend upon the facts and circumstances of each case. A suit for declaration with a consequential relief for injunction is not a suit for declaration simpliciter; it is a suit for declaration with further relief.

15. Mr. Priyananda relies on Ram Saran and Another Vs. Smt. Ganga Devi, wherein it was held that where the defendant is in possession of some of the suit properties and the plaintiff in the suit does not seek possession of those properties but merely claims a declaration that he is the owner of the suit properties, the suit is not maintainable. However, in that case there was no prayer for the relief of injunction and the possession, as found by the Courts, was with the defendant. In Mst. Rukhmabai Vs. Lala Laxminarayan and Others, it was ruled that the plea that the further relief though available not asked, should be raised at earliest time so that the plaintiff could ask for necessary amendment to comply with the provision of Section 42 of the Specific Relief Act In 1971 Gau LR 106, it was held that where the plaintiff is not in need of further relief, a suit for declaratory decree ought to be dismissed on the ground that it is barred under the proviso to Section 42 unless it is quite clear that the plaintiff ought to seek further relief which he had failed to seek.

16. Mr. Kulabidhu relies on Jagabandhu Naik and Another Vs. Gouri Bandha and Others, where in a suit praying for declaration of title and confirmation of possession it was held that the Court could order recovery of possession under Order 7, Rule 7, C.P.C. though there was no specific prayer for recovery of possession if necessary court-fee on the plaint had been paid.

17. In Chitui Naga Vs. Onhen Kuki, (Imphal Bench) it was pointed out that: ".....the provision of Section 34 of the Specific Relief Act has its origin in the fact that it was not a practice in England for Courts to make declarations of rights except as introductory to other relief which they proceeded to administer. Mere declaratory decrees were innovations which first obtained authoritative sanction by Section 50 of the Chancery Procedure Act, 1852 which ran thus :

"No suit shall be open to objection on the ground that a merely declaratory decree or order is sought thereby and it shall be lawful for the civil Court to make binding declarations of right without granting consequential relief This section was judicially interpreted to mean that declaratory decree could be granted only in cases where there was some consequential relief which could be had if it had been sought. However, it has been realised that judgments and orders are usually determinations of rights in the actual circumstances of which the Court has cognizance and gives some particular relief capable of being enforced. It is, however, sometimes convenient to obtain a judicial decision upon a state of facts which has not yet arisen, or a declaration of the rights of a party without any reference to their enforcement. Such merely declaratory judgments may in

appropriate cases be given, and the Court is authorised to make binding declarations of rights whether any consequential relief is or could be claimed or not. There is a general power to make a declaration whether there be a cause of action or not, and at the instance of any party who is interested in the subject matter of the declaration, and although a claim to consequential relief has not been made, or has been abandoned or refused, but it is essential that some relief should be sought, or that a right to some substantive relief should be established. A person moulds his relief according to his need. The type of further or consequential relief required to be granted will also depend on the facts and circumstances of a case."

18. Applying the above principles to the facts of the instant case, I am inclined to hold that the plaintiff is entitled to a declaration of his right over the suit land as acquired by purchase. Since he also prayed for the relief of injunction his suit is not for a declaration simpliciter, but with further relief of injunction. As the Courts have found the possession to have been with the defendant jointly with her daughter and both possessing through their tenant, the relief of recovery of possession could not have been asked for against the defendant only, and for not asking for recovery of possession the suit would not be hit by the proviso to Section 34 of the Specific Relief Act. For enabling the plaintiff to obtain a partition of the suit land a declaration of his title to the suit land would be helpful. The decree of the trial Court declaring title of the plaintiff over the suit land is, therefore, upheld. The defendant is restrained from interfering with the plaintiff's rights and title over the suit land.

19. In the result, this appeal stands allowed to the extent indicated above. Though equity frowns at vendors who try to get rid of their obligations on technical grounds, under the facts and circumstances of the case I leave the parties to bear their own costs in this appeal.