
(1999) 03 GAU CK 0004

In the Gauhati High Court

Case No : Second Appeal No. 81 of 1992 in T.A. No. 3 of 1990

Lepa Ram Boro and Others

APPELLANT

Vs

Nabin Chandra Boro and Others

RESPONDENT

Date of Decision : 31-03-1999

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 8 Rule 2, Order 8 Rule 6A, 100
Specific Relief Act, 1963 — Section 38

Citation : (2000) 1 GLT 237

Hon'ble Judges : D.N. Chowdhury, J

Bench : Single Bench

Advocate : B.K. Goswami and B.M. Sarma, for the Appellant; A.S. Bhattacharjee, N. Dhar, B.K. Ghosh, M.K. Mazumdar, N. Chakravarty and A.K. Mazumdar, for the Respondent

Final Decision : Dismissed

Judgement

D.N. Chowdhury, J.—This Second Appeal preferred by the Defendants/Appellants has arisen in the following circumstances:

The Respondents as Plaintiffs being the President, Secretary and Members of Uttar Bagaribari Krishak Santha, instituted a title suit before the Munsiff No. 1 Mangaldoi, for permanent injunction restraining the Defendants from dispossessing the Plaintiffs from the suit land, which is a Tank. It was pleaded inter-alia that the Uttar Bagaribari Krishak Santha was formed in the year 1970 and registered under the provisions of the Societies Registration Act. The Tank-in-question in the suit land was formerly an abandoned tank covered with grass, plants, weeds etc. which was in due course cleared by the members of the Plaintiffs' association on incurring huge expenditure and started therein a Fishery and also grew paddy on the banks of the said Tank. The land comprising the Tank though was a touzi land the Revenue Authority erroneously mutated the names of the Plaintiffs Nos. 3, 4, 5 and 6 in respect of the said suit land. The Plaintiffs all along were exclusively possessing the Tank by rearing fishes and on

payment of TB revenue to the Government. That the Defendants who came from villages Sukuliapara and Chenialpara, with the view to grab the suit Tank for their personal benefits, were trying to dispossess the Plaintiffs from the suit Tank and on 6.6.80, the Defendants carrying some weapons and implements of fishing, entered into the suit Tank and took possession over the suit Tank and started fishing therein. The Plaintiffs resisted the Defendants in their move to acquire possession thereon, and finally, drove the Defendants away. The Defendants then falsely lodged an FIR before the Officer-in-charge, Khoirabari Police Station, but the officer-in-charge on investigation, found that the suit Tank was in possession of the Plaintiffs. That the Defendants thereafter again tried to dispossess the Plaintiffs and caused some damage to the suit Tank. That the Plaintiffs apprehending further such endeavours/attempts from the Defendants to dispossess the Plaintiffs from the suit Tank, instituted the above suit seeking permanent injunction restraining the Defendants from dispossessing the Plaintiffs from the suit Tank. The Defendants contested the Suit and filed written statement pleading that they were in exclusive possession of the suit Tank since last twenty years. The Defendants also raised the plea of counter-claim to the effect that the Defendants and some others by forming a committee known as Sukuliapara Chenialpara Rajahua Krishak Silpa Samabai Samity, have been possessing die suit Tank since fifty years and accordingly sought for permanent injunction restrinining the Plaintiffs from dispossessing them. On the pleadings of the parties, the trial Court initially framed the following issues.

1. Whether the Plaintiffs have any cause of action to sue the Defendants.
2. Whether the suit is bad for non-joinder of any necessary parties.
3. Whether the Plaintiffs have right, title or possession over the suit Tank.
4. Whether the suit Tank was possessed peacefully for last 20/21 years by the Defendants and since 15.4.75, it is under the possession of the Sukuliapara Chenialpara Rajahua Krishak Min Samabai Samity constituted by about fifty members.
5. Whether the Plaintiffs have filed this suit being unsuccessful in taking possession of the suit Tank and the adjoining land.
6. To what relief if any, the parties are entitled.

The trial court thereafter decreed the suit in favour of the Plaintiffs. The Defendants preferred an appeal and the High Court by its judgment and order dated 10.8.87, on appeal, remanded the suit for fresh trial, ordering the trial court to treat the written statement of the Defendants as a counter-claim in accordance with the provisions of Order VIII Rules 6A to 6C Code of Civil Procedure. The learned Munsiff on remission of the case, also framed two more issues, which were:

1. Whether there is cause of action for the counter-claim of the Defendants.

2. Whether the counter claim of the Defendants is maintainable and the relief sought there in can be granted. The learned trial court after conclusion of the trial decided the suit in favour of the Plaintiffs and decreed the suit accordingly. The additional issues Nos. 1 and 2 pertaining to the counter-claim of the Defendants were decided together and the counter-claim of the Defendants was dismissed. The learned trial court, accordingly, ordered for issuance of permanent injunction restraining the Defendants from dispossessing the Plaintiffs" Sangha from the land described in the schedule of the plaint and the suit Tank therein.

2. The Defendants in their written statement had alleged that there were other members of the Defendants" Samity who ought to have been impleaded as parties in the suit and on their absence the suit was liable to be dismissed for non-joinder of necessary parties. The learned trial Court, as indicated earlier, framed a definite issue on the aforesaid plea, being issue No. 2 which was framed before remission of the case by the High Court for fresh trial. The learned trial court, on consideration of the materials on record and the evidence adduced, came to the following conclusion:

The Defendants in their w/s have alleged that as the other members of the Defendants" Samity have not been impleaded in the suit as Defendants therefore the suit of the Plaintiffs suffers for non-joinder of necessary parties. The above contention of the Defendants does not hold water because the PWs have corroboratives stated that the Defendants attempted to dispossess the Plaintiffs from the suit Tank and the Defendants did so in their personal capacity and not in their capacity as members of their Sukuliapara Chenialpara Rajahua Krishak Min Samabai Samity. The Defendants have failed to rebut the above part of evidence of the PWs by cross-examining them and also by leading any other evidence. The Defendants have failed to show that they were the members of Sukuliapara Chenialpara Rajahua Min Samabai Samity. The defendant No. 1 who has deposed as D.W. 1 in his evidence has admittedly said that other members of his samity knew about the filing of this suit but none of them have filed any petition praying for impleading them as parties to the suit even the presidents and the secretary of the Defendants Samity have not been examined as witnesses. So the above facts go to show without much saying that the Defendants on the material day did not act as members of Sukuliapara Chenialpara Rajahua Min Samabai Samity rather they acted in their personal capacity. If the Defendants acted in their personal capacity in attempting to dispossess the Plaintiffs from the suit tank on the material day therefore question of impleading other members of the Defendants Samity as Defendant in the suit does not arise and it is so there is nothing to hold that the suit of the Plaintiffs suffers for non-joinder of other members of the Defendants" Samity as Defendants of the suit...

The learned trial court considering the pleadings as well as the evidence on record, found that the Plaintiffs" Sangha reclaimed the suit land in the year 1970

and thereafter were possessing the suit Tank in it and also grew paddy on its banks. The trial court found that the Plaintiffs used to possess the suit Tank since 1970 which was included in the touzi patta issued in the names of some of the Plaintiffs and that they were regularly paying touzi revenue to the Government and in fact, the Govt. of Assam sanctioned a sum of Rs. 6000/- (Rupees six thousand) only to the Plaintiffs' Sangha for improvement of the suit Tank vide the communication proved and exhibited as exhibit 6. That taking into consideration, exhibits 3, 4, 5 and 6 the trial Court found that the Plaintiffs were possessing the suit land since 1970.

3. As regards issue No. 4, the learned trial court considering the evidence on record, more particularly the evidence of DWs 1 and 2 and exhibits Kha (1) and Ga, rejected the claim of the Defendants that the suit Tank was peacefully possessed by the Defendants since 15.4.75. The issues in the counterclaim were contradicted by the trial court as mentioned earlier. The learned trial court in the light of the decisions in issues Nos. 1, 2, 3 and 4, accepted the claim of the Plaintiffs' Sangha and accordingly held that the Plaintiffs were entitled to a decree of permanent injunction as sought for.

On appeal, the learned appellate court affirmed the judgment and decree of the learned trial court. Hence this second appeal before this Court.

4. This Court entertained the appeal and formulated the following three substantial questions of law:

1. Whether the learned Courts below acted illegally in passing the decree without the state being a party to the suit, as the land is alleged to be Government khas land?

2. Whether the learned Courts below acted illegally in passing the decree for permanent injunction without considering the provisions of Section 38 of the Specific Relief Act?

3. Whether the learned courts below committed error in law in equating the receipts for payment of Touzi Bahira revenue with patta for the land?

5. Mr B K Goswami, learned senior counsel appearing on behalf of the Appellants, submitted that the title of the land at all the relevant time, vested with the State Government and, therefore, in the absence of the State Government as a party-Respondent, the trial court could not have passed the decree. The State being the owner of the land, no effective decree could have been passed in the absence of the State as a party to the suit as the State was necessary party. Mr. Goswami, the learned senior counsel submitted that it was not a question of mere procedure or technicality, but it pertained to the jurisdiction.

Mr. B K Ghosh, the learned senior counsel appearing on behalf of the Respondents, on the other hand, submitted that no new question can be raised in a Second Appeal which involves adjudication of facts. Mr. Ghosh, the learned senior counsel, submitted that at no point of time did the Appellants/Defendants

raise any specific plea on this issue. In the written statement, the issue taken by the Defendants, the Appellants herein, was that all the members of the Defendants' Samity were not made parties and the learned trial court decided that issue along with others.

6. Under the scheme of the Code of Civil Procedure, a duty is cast on the Defendants) to raise by his/their pleading all matters in support of the specific plea as to the maintainability of the suit(s) and all such grounds of defence as, if not raised, would be likely to take the opposite party/parties by surprise, or would raise issues of fact not arising out of the plaint. An evasive statement will not tantamount to compliance of Order VIII Rule 2 Code of Civil Procedure. A Single Bench decision of this Court in the case of Jagneswar Nath Vs. Jatra Mohan Sarkar, interpreting Section 100 and order VIII Rule 2 Code of Civil Procedure, made the following observations:

...Order 8 Rule 2. Imposes an obligation on the Defendant to raise in his pleading all matters which show the suit to be not maintainable. They should be specifically pleaded. If not taken specifically the other party would be likely to be taken by surprise. A vague statement that the suit is not maintainable for non-joinder of necessary parties does not tantamount to taking up a specific plea that a particular necessary party had not been added as a party for which the suit must fail.

A necessary party is one without whom no order can be made effectively. A proper party on the other hand is one in absence of which party an effective order can be passed though it may be necessary for complete adjudication of the issues involved. A suit cannot be decreed in the absence of a necessary party.

In the suit in question, the issue revolved round adjudication of the rights between the Plaintiffs and the Defendants. The Plaintiffs as well as the Defendants of that suit claimed their respective rights over the suit land on the strength of the length of possession, therefore, presence of the state in the aforesaid case (suit) as a party to the said case, was not necessary for making an effective order.

The other two questions those were raised in this appeal, do not involve any substantial question of law. The learned courts below considered the respective evidence and on evaluation of the evidence on record, came to their own conclusion. The trial court on evaluation of the facts, found that the Defendants invaded or threatened to invade the Plaintiffs' right to enjoyment of the suit property and accordingly, decreed the suit.

7. Jurisdiction of the court for granting perpetual injunction is a discretionary jurisdiction of the court. The trial court took into consideration all the facts and circumstances, weighed upon each circumstance and came to a decision in accordance with the accepted principles of law in facts situations. The first appellate court on its own analysed the evidence on record and concurred with the findings of facts, which cannot now be disturbed in the second Appeal.

Section 100 CPC has defined the scope and parameters of the power of interference by the High Court in a Second Appeal. Under the scheme indicated in Section 100 Code of Civil Procedure, a second Appeal can be entertained only on existence of substantial question(s) of law and not on mere question(s) of law. When both the courts below decide a case on questions of fact, there is no scope for the High Court to differ from conclusion of facts reached by the courts below in terms of the accepted principles of law. In a second Appeal, this Court is not competent to go into the factual issues and reach a contrary conclusion on appreciation of the evidence on record.

As mentioned above, both the courts below decided the case on evaluation of the facts. The trial court took into consideration the Touzi Bahira revenue paying receipts only for the purpose of deciding the length of the period of possession. It did not give the receipts the status of revenue paying receipt.

8. For the foregoing reasons, the second Appeal is liable to be dismissed and accordingly, the same is dismissed.

There shall, however, be no order as to costs.