
(2016) 01 GAU CK 0034
In the Gauhati High Court
Case No : CRP No. 280 of 2014

Md. Asab Uddin Mazumdar

APPELLANT

Vs

Abdul Jalil Ahmed

RESPONDENT

Date of Decision : 27-01-2016

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 39 Rule 1, Order 39 Rule 2, Section 115
Constitution of India, 1950 — Article 227

Citation : (2016) 3 NEJ 8

Hon'ble Judges : N. Chaudhury, J.

Bench : Single Bench

Advocate : P. Roy, Advocate, for the Petitioners; None Appears, for the Opposite Party

Final Decision : Dismissed

Judgement

N. Chaudhury, J.(Oral) - This revision petition has been preferred under section 115 of the Code of Civil Procedure read with Article 227 of the Constitution of India challenging the concurrent findings of the learned courts below whereby the prayer for injunction of the plaintiffs was rejected. Petitioners herein, as plaintiffs, instituted Title Suit No. 50/2010 in the court of learned Civil Judge No. 1, Cachar at Silchar stating that their grand-father Ahmed Ali was sole pattadar of entire land of 2nd R.S. Patta No. 114 of Mouza ? Ambikapur Part-6, Ph. Barakpar, in the district of Cachar. He first married Rohoman Bibi and got two sons, namely, Asaddar Ali, who is the predecessor of the plaintiffs and one Asaid Ali, who is the proforma defendant No. 2 herein. They had three sisters, namely, Boronenu Bibi (the predecessor of the proforma defendants No. 5 and 6), Harunenu Bibi (the predecessor of the proforma defendants No. 7 to 9) and Lalu Bibi (proforma defendant No. 10). Rohoman Bibi having died, Ahmed Ali married one Solia Bibi and got two more sons, namely, Ajab Ali and Najab Ali and two daughters, namely, Azarun Bibi and Acharun Bibi. These two daughters died unmarried during the life time of their parents. It is further stated that Ahmed Ali, grand-father of the plaintiffs, never married Mayajan Bibi and Mayajan Bibi

was really married to one Sanuhar Ali. Abdul Jalil Ahmed, Nur Uddin and Ali Ahmed are sons of late Mayajan Bibi through Sanuhar Ali only. But in the year 1981, 16 years after Ahmed Ali had died, Abdul Jalil Ahmed and Mayajan Bibi instituted Title Suit No. 72/1981 against all legal heirs of Ahmed Ali praying for declaration of title as well as for preliminary decree of imperfect partition. Asaddar Ali, the predecessor of the plaintiffs, was defendant No. 9 in the suit and he contested the same by filing written statement. The suit was dismissed by the learned trial court against which plaintiffs of that suit preferred Title Appeal No. 3/1988 in the Court of learned District Judge, Cachar and during pendency of the appeal, Asaddar Ali died. Accordingly, names of the plaintiffs were substituted in place of Asaddar Ali and thereafter on 09.02.1993, the learned District Judge allowed the appeal remanding the matter to the trial court for fresh decision. After remand, the suit was transferred to the court of learned Civil Judge No. 2, Silchar who decreed the suit again on 09.05.1995. The legal heirs of Asaddar Ali (plaintiffs in the present suit) preferred Title Appeal No. 8/1995 before learned Additional District Judge No. 2, Silchar and that appeal was also ultimately dismissed. The plaintiffs of the present suit thereafter preferred RSA No. 13/1997 before this High Court and the second appeal was dismissed.

2. After dismissal of the second appeal, the preliminary decree was sent to the Collectorate for preparing Saham/allotment. But while preparing the Saham no notice was issued to the plaintiffs. Even after the Saham was prepared and final decree was made the plaintiffs were not summoned. According to the plaintiffs, the preliminary decree passed in T.S. No. 72/1981 and final decree dated 04.03.2003 passed in them are not binding on them and accordingly the plaintiffs prayed for a declaration to that effect along with other prayer for declaration and for permanent and temporary injunction so that Title Execution Case No. 7/2003 instituted by the decree holder of T.S. No. 72/1981 is restrained.

3. Plaintiffs also filed a miscellaneous case under Order 39, Rule 1 and 2 read with section 151 of the Code of Civil Procedure in the said suit praying for temporary injunction restraining the defendant No. 1 from anyway proceeding with Title Execution Case No. 07/2003 so as to dismantle the dwelling house of the plaintiffs/petitioners etc. This miscellaneous case was registered as Misc. Case No. 47/2010. On being summoned, the opposite parties appeared in the miscellaneous case and submitted written statement. The opposite parties claimed that T.S. No. 72/1981 was instituted by making Asaddar Ali a party. Plaintiffs being legal heirs of Asaddar Ali, were impleaded after death of Asaddar Ali at the appellate stage and ultimately after the suit was remanded to the trial court the suit was decreed again on 27.04.1995 in favour of the plaintiffs. Thereafter final decree was made on 04.03.2003. According to the opposite parties, the plaintiffs of the present suit instituted first appeal and second appeal challenging the trial court decree in T.S. No. 72/1981 and both the appeals were dismissed and the issues were finally decided by the High Court. Under such circumstances, the prayers of the plaintiffs were barred under the principle of res judicata. Title Execution No. 7/2003, instituted on the basis of the final decree,

therefore, cannot be injunctioned. It was also mentioned that the plaintiffs of the suit had already filed application under section 47 of the Code of Civil Procedure in the execution case and the same stood dismissed on 11.06.2007. The Title Execution case was amended by impleading the legal heirs of Asaddar Ali way back in 2007 and the plaintiffs had full knowledge of such fact of amendment due to which they did not prefer any revision petition against dismissal of their application under section 47 of the Code of Civil Procedure. The opposite parties prayed that ad-interim injunction granted against them be vacated and the miscellaneous case be dismissed. The learned trial court having noticed such statements and counter statements of the parties supported by affidavit, dismissed the miscellaneous case holding that the plaintiffs/petitioners are not entitled to temporary injunction as prayed for. In so doing, the learned trial court considered three principles of prima facie case, balance of convenience and irreparable loss and injury and held that plaintiffs do not have any prima facie case. This judgment and order passed by the learned trial court was challenged in Misc. Appeal No. 10/2010 by the plaintiffs. The learned first appellate court after hearing the parties observed that the opposite parties of the injunction case obtained decree in a fully contested suit and the present injunction petitioners had contested the decree by filing second appeal before the High Court. The second appeal having been dismissed, they filed an application under section 47 of the Code of Civil Procedure before the executing court and the same application was also dismissed in course of time. Under such circumstances, balance of convenience is in favour of the opposite parties and not in favour of the injunction petitioners. The learned first appellate court held that all the three golden principles of passing injunction order being against the appellants, learned trial court did not commit any error in rejecting the injunction petition. Accordingly, the order passed by the learned trial court was upheld. These two sets of concurrent findings have been challenged by the plaintiffs by presenting the revision petition.

4. I have heard Mr. P Roy, learned counsel for the petitioners. No one has entered appearance on behalf of the opposite parties although names of learned counsel have been duly shown in the cause list.

5. Mr. P. Roy, learned counsel for the petitioners, would argue that the initial suit was instituted against their predecessor and he had contested the suit. Once the suit was decreed by the trial court, they preferred first appeal and second appeal which were also dismissed. But subsequent to passing of the decree by the second appellate court when Saham was prepared by the Collectorate, names of plaintiffs were not disclosed and they were not served with any notice whatsoever. Drawing attention of this court to paragraph 8 and 9 of the plaint, Mr. P Roy would argue that the earlier preliminary decree as well as final decree is not binding on him and this is why the plaintiffs have instituted the suit on the allegation of fraud. On being pointed out that the plaintiffs being party to the Title Suit No. 72/1981 and they having contested the suit till the second appellate stage, the plaintiffs were at liberty to prefer a regular first appeal

against the final decree. Mr. P Roy submits that preferring of appeal is optional and that there being prima facie fraud perpetrated on the petitioners, the option of instituting fresh suit was taken.

6. Having heard the learned counsel for the petitioners and having perused the materials available on record what is conspicuous is that the principal defendants of the present suit had instituted T.S. No. 72/1981 claiming to be son of Ahmed Ali and this is how he claimed inheritance of Ahmed Ali. Asaddar Ali, the father of the present petitioners being defendant No. 9 submitted written statement and contested the same till second appellate stage. All the while it was the plea of the predecessor of the present plaintiffs and after his death the present plaintiffs that Abdul Jalil Ahmed was not son of Ahmed Ali and he was the son of Sanuhar Ali only. Such a dispute has been considered by the learned courts below and thereupon it has been concurrently held that the plaintiffs do not have a prima facie case. The maintainability of a suit may be a question in determining prima facie case. Hon"ble Supreme Court has held in the case of Shiv Kumar Chadha v. Municipal Corporation of Delhi reported in (1993) 3 SCC 161 that question of maintainability of suit can be considered at the time of granting injunction for determining a prima facie case. Here if the plaintiffs were party to the T.S. No. 72/1981, there is no reason as to why they could not prefer appeal when the final decree was passed. Language of section 97 of the Code of Civil Procedure shows that a party who has not challenged a preliminary decree cannot prefer an appeal after final decree has been passed. In the instant case, the present plaintiffs had preferred appeal against preliminary decree and so they were not prohibited by section 97 of the Code of Civil Procedure from preferring an appeal against the final decree. Having allowed the decree to attain finality, the plaintiffs appear to have instituted the suit for declaration that the earlier decree was obtained by fraud. Such an approach is not only contrary to the doctrine of finality but it also contradicts the established maxim that if law prescribes something to be done in a particular manner, the same thing is to be done in that manner and not otherwise. The present plaintiffs ought to have preferred an appeal against the final decree and the same not having been done, the final decree has attained finality.

7. If maintainability of the present suit appears to be at stake in view of such factual and legal circumstances, in that event it cannot be said that plaintiffs have a prima facie case for getting injunction. Moreover, even after institution of a suit the plaintiffs could have approached the executing court under Order 21, Rule 26 of the Code of Civil Procedure. Perhaps the plaintiffs did not do so because they had already tried their luck by filing application under section 47 of the Code of Civil Procedure in the execution case. The order passed under section 47 of the Code of Civil Procedure also has not been challenged before this court and thus findings in that order have also attained finality. Considering such totality of circumstances, I am constrained to hold that learned courts below have not committed any error in holding that the petitioners do not have a prima facie case to get injunction. The revision petition does not have any merit. It is,

accordingly, dismissed.

8. No order as to costs.