

(1967) 05 GAU CK 0009
In the Gauhati High Court
Case No : Second Appeal No. 129 of 1963

Mt. Fatema Khatun and Others	Vs	APPELLANT
Md. Jainuddin, his heir Golapjan Bewa and Others		RESPONDENT

Date of Decision : 05-05-1967

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 100, Order 21 Rule 101, Order 21 Rule 103, Order 21 Rule 98, Order 21 Rule 99

Citation : AIR 1967 Guw 101

Hon'ble Judges : C. Sanjeevarao Naidu, C.J

Bench : Single Bench

Advocate : B.S. Guha, for the Appellant; P. Chaudhuri and S.K. Sen, for the Respondent

Final Decision : Dismissed

Judgement

C.S. Nayudu, C.J.—This second appeal is by the Defendants The Plaintiff brought the suit out of which this appeal has arisen, for a declaration of title and for recovery of possession of about 7 bighas and odd of land described in schedules to the plaint. It would appear that the Defendants Nos. 1 to 3 had obtained a decree against one Gani Mamud and in execution of that decree brought his properties to sale and purchased the same. Continuing the execution the Defendants Nos. 1 to 3 took delivery of possession of the land purchased and according to the Plaintiff's case this included some of the lands belonging to the Plaintiff himself The Plaintiff brought the suit, as already pointed out, for a declaration of title and restoration of possession, his application for restoration of possession under Order 21, Rule 100. CPC having been dismissed by the executing court.

2. The Defendants raised a number of defences and as many as ten issues had been framed in the case. the important ones being the bar by res judicata, limitation and regarding the description and disposition of the land in dispute.

3. The suit was tried by the Subordinate Judge, who was the trial Judge and in

the course of the trial it would appear that the Plaintiff gave up his claim in respect of the land described In schedule Ga mad dags Nos. 28 and 29 of schedule Kha in block No. 9 as indicated in map Ex. 1 and contented himself agreeing to take a decree in regard to lands described in schedule Ka and Kha in block No. 1 covered by dags Nos. 5 to 13, the total area being 5 bighas 11 dhurs. The Plaintiff gave up his claim in respect of the remaining suit land a fact which was very clearly recorded by the trial judge The defence concluded to this stand taken by the Plaintiff The learned trial Judge accordingly found the issues Nos. 7 to 9 in favour of the Plaintiff The other issues apparently were not pressed and no evidence was led on those Issues. It is clear from the record made by the learned trial judge that there was a settlement between the parties the Plaintiff restricting his claim to only a portion of the properties claimed by him in the suit and the Defendants giving up their claim in respect of the property claimed by the Plaintiff. This record made by the trial judge has to be accepted in the absence of any affidavit by the counsel appearing in the case to the contrary The other issues were accordingly not pressed in accordance with the apparent settlement reached between the parties the trial judge decreed the suit in favour of the Plaintiff for 5 bighas 11 dhurs comprised in dag Nos. 5 to 13 in block No. 1 as per map Ext. 1, which was adopted as part of the decree The Plaintiff's claim in respect of the remaining land was dismissed, and no costs were awarded.

4. The Defendants took up the matter in appeal to the Additional District Judge, who observed as follows:

It appears that the Defendant did not intend to resist the claim of the Plaintiff when he subsequently gave up his claim over the entire lands in suit described in schedule "gha". His witnesses were present in court and he did not examine any other witness and it is not his case that he would not allow to examine the witnesses by the court, He definitely did not intend to resist the claim of the Plaintiff and now he comes forward and raised all these objections.

The learned appellate court further observed as follows:

The formal proof of the present possession over the land has been established, by the Plaintiff and there is nothing to show that he was not in possession of the suit land. The defence did not adduce any evidence nor cross-examined him on that point. Therefore I find that the Plaintiff has proved his present possession over the suit land and when there is no resistance to his claim I do not see any reason why a formal compromise decree should have been recorded in this case.

Accordingly the learned Additional District Judge saw no reason to interfere with the judgment and decree of the learned Subordinate Judge, which he affirmed.

5. It is contended by Mr. Guha, the learned Counsel for the Appellants that a compromise between the parties should have been in writing and filed into the court and the court should have recorded the same and passed the decree In terms of the compromise The decree of the trial judge, he contends, cannot be regarded as a compromise decree as no such record has been made Order 23,

Rule 3, Code of Civil Procedure, which deals with the compromise, of a suit, reads as follows:

Where it is proved to the satisfaction of the Court that a suit has been adjusted wholly or in part by any lawful agreement or compromise, or where the Defendant satisfies the Plaintiff in respect of the whole or any part of the subject-matter of the suit, the Court shall order such agreement, compromise or satisfaction to be recorded, and shall pass a decree, in accordance therewith so far as it relates to the suit.

In the instant case the Defendants conceded to the proposal made by the Plaintiff according to the record made by the trial judge. The only meaning that can be attributed to this is that the Plaintiff made a proposal giving up his claim over the lands described in schedule Gha and restricted his claim to the land described in "schedules Ka and Kha as set out in the judgment of the trial judge. To this stand of the Plaintiff the Defendants conceded and it is for this reason that Defendants never cross-examined the Plaintiff nor did they adduce any evidence. The other issues were not pressed by the parties. It is true that it would have been undoubtedly much better and more free from doubt or comment if the trial judge had asked for a compromise in writing, so that parties may be pinned down to whatever is contained in it. But it is common knowledge that parties appearing before the trial courts by counsel do come to settlements one party-giving up part of his claim and the other party agreeing to the same and very often such settlements, which take place in the presence of the court are recorded by the trial judge, and, there is nothing wrong in doing so. In fact on the original side such recording goes on and a decree follows in term of the settlement so recorded. This is exactly-what happened in the case and, therefore, there can be no question of any complaint by the Appellants against the procedure followed by the court, below.

6. It is argued by Mr. Guha further in dealing with his argument that in a suit under Order 21, Rule 103, CPC it is the title that is to be examined by the courts and not merely possession. This argument is not substantiated by the language of the rule which clearly lays down as follows:

Any party not being a judgment-debtor against whom an order is made under Rule 98, Rule 99 or Rule 101 may institute a suit to establish the right which he claims to the present possession of the property; but, subject to the result of such suit (if any). the order shall be conclusive.

So what is to be decided in a suit that is brought in regard to Order 21, Rule 103. CPC is the determination of the right to the present possession of the property as claimed by the Plaintiff. No question of title, therefore, arises under this rule, although it would certainly be proper to adjudicate upon title as well when it is raised before the court for decision.

7. In the light of the foregoing discussions I dismiss the appeal but I do not wish to make any order for costs.