

(2015) 08 GAU CK 0016

In the Gauhati High Court

Case No : Regular Second Appeal No. 148 of 2009

Nandadulal Nath

APPELLANT

Vs

Pradip Nath and Others

RESPONDENT

Date of Decision : 07-08-2015

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 22 Rule 2, Order 22 Rule 3, Order 8 Rule 1
Evidence Act, 1872 — Section 101

Citation : (2015) 5 GLT 68

Hon'ble Judges : Suman Shyam, J

Bench : Single Bench

Advocate : B. Sarma, for the Appellant; G.P. Bhowmik,, Advocates for the Respondent

Final Decision : Dismissed

Judgement

Suman Shyam, J—This second appeal has been preferred against the judgment and decree dated 17-04-2009 passed by the court of learned Civil Judge, Dhubri in Title Appeal No. 72/2006 reversing the judgment and decree dated 19-09-2006 passed by the Munsiff No. 3, Dhubri in Title Suit No. 585/2003 whereby the suit filed by the respondent/plaintiff was earlier dismissed by the Trial Court.

2. The case of the plaintiff as projected in the plaint is that their predecessor-in-interest Parasuram Nath was the owner-in-possession in respect of a plot of land measuring 2 kathas covered by Khatian No. 100 pertaining to Dag No. 185/628 and 185/633 of village- Bidyapara Part-II Revenue Circle, P.S. Dhubri in the State of Assam, more fully described in schedule-A to the plaint. During his lifetime Parasuram Nath had sold a plot of land measuring 10 lechas covered by Dag No. 633 to the principle defendant whereafter the remaining land covered by the said dag remained in possession of the owner as a vacant land. Although the defendant Nandadulal Nath had purchased only 10 lechas of land from the predecessor of the plaintiff, yet, he had got his name mutated in respect of 15

lechas of land in a fraudulent manner and in collusion with the revenue authorities. Thereafter, a "katcha patta" was issued in favour of the said defendant covering the excess area of 5 lechas of land. Having come to know about the said fraudulent act on the part of the defendant, the plaintiff raised objection before the Asstt. Settlement Officer, Dhubri praying for cancellation of the mutation as well as the "katcha patta" issued in favour of the defendant covering the excess land of 5 lechas belonging to the plaintiff. On the basis of such objection the Asstt. Settlement Officer, Dhubri had passed an order dated 28-11-2003 cancelling the patta issued in favour of the defendant. Thereafter, in the month of December, 2002 the defendant had encroached upon a plot of land measuring 3 lechas belonging to the plaintiff, described in the schedule-D to the plaint and erected a shed with CI sheet roof thereupon. When the plaintiff had asked him to vacate the same on 30-01-2003, the defendant flatly refused to do so, as a result of which the plaintiffs were compelled to institute the present title suit praying for a decree declaring their right, title and interest over the schedule-C land covered by Dag No. 185/633 of Khatian No. 100 which is under the illegal occupation of the defendant.

3. After receipt of summons, the defendant had entered appearance and file his written statement on 21-03-2005 but the same was not taken on record since the written statement had been filed beyond the prescribed period of time under Order VIII Rule 1 of the CPC. Defendant was, however, allowed to participate in the trial by cross-examining the plaintiff's witnesses.

4. During the course of trial the plaintiff side had adduced both oral and documentary evidence. The defendant had also cross-examine the plaintiff's witnesses. After hearing the learned counsel for the parties the Trial Court have passed judgment and order dated 19-09-2006 dismissing the suit filed by the plaintiff, inter alia, on the ground that copy of the Final Khatian No. 100 (Exhibit-1) having been collected on 02-11-1989 was a very old document and hence, no reliance can be placed upon the said document for the purpose of presiding the claim of the plaintiff. The learned Trial Court was also of the opinion that the plaintiff side had failed to prove their case since the sale deed by means of which their predecessor Parasuram Nath had sold 10 lechas of land to the defendant had not been produced by them so as to prove and establish that Parasuram Nath had sold 10 lechas of land to the defendant No. 1 and not 15 lechas.

5. Being aggrieved by the impugned judgment and order passed by the Trial Court dismissing the suit, the plaintiffs as appellants had preferred Title Appeal No. 72/2006 before the Court of Civil Judge, Dhubri. After hearing the learned counsel for the parties and on appraisal of the evidence available on record the learned First Appellate Court had reversed the judgment and decree passed by the Trial Court thereby decreeing the suit filed by the plaintiffs for recovery of possession of the schedule-D land by evicting the defendant No. 1 there from. The learned First Appellate Court was of the view that the plaintiff side has been

able to prove the claim of title over the suit land by producing Exhibit-1 i.e. copy of the Khatian. That apart, during the course of cross-examination of the plaintiff's witnesses the defendant side had neither challenged the testimony of the said witnesses as regards the title and previous possession of the plaintiff in respect of the suit land nor has the fact of illegal encroachment of the D schedule land by the defendant No. 1 been denied by putting any suggestion to that effect to the plaintiff's witnesses. As such, on the basis of evidence available on record the learned First Appellate Court had decreed the suit filed by the plaintiff as appellant.

6. Being aggrieved by the judgment and decree of reversal dated 17-04-2009 passed by the lower Appellate Court in Title Appeal No. 72/2006, the defendant as appellant has preferred the instant second appeal before this Court which was admitted to formal hearing by framing the following two substantial questions of law:

"1. Whether without proving the Sale Deed, admittedly executed by the predecessor-in-interest of the plaintiffs, the plaintiffs acquired the right, title and interest in respect of specified area covered by Exhibit-1?

2. Whether the findings of the lower appellate Court regarding possession without any evidence on record was perverse?"

7. At this stage, it would be pertinent to mention here that after dismissal of the suit and during the period when the Title Appeal No. 72/2006 was pending in the court of Civil Judge, Dhubri the plaintiff No. 4 Parikhith Nath had died on 05-11-2007. However, the aforesaid fact was not brought to the notice of the First Appellate Court, as a result of which the judgment and decree dated 17-04-2009 was passed in favour of a dead person in the form of appellant/plaintiff No. 4. Even when the second appeal was filed before this Court Parikhith Nath was arrayed as respondent No. 4. However, it appears that subsequently when the fact regarding death of respondent No. 4 had come to light the present appellant had filed Misc. Case No. 2473/2010 arising out of RSA No. 148/2009 before this Court praying for amendment of the memo of appeal by deleting the name of respondent No. 4 since his legal heirs had not been brought on record during the pendency of the Title Appeal No. 72/2006.

8. On the basis of the aforesaid application, by the order dated 10-02-2011 passed by this Court in Misc. Case No. 2473/2010, the name of the respondent No. 4 was deleted from the array of parties and the applicant/appellant was permitted to file amended memo of appeal by incorporating a new substantial question of law i.e. "whether in view of non substitution of plaintiff No. 4 who died on 05-11-2007 during the pendency of Title Appeal No. 72/2006, and, having regard to the nature of the relief sought for, the suit as a whole abates due to the fact that the right to sue does not survive to the survival plaintiffs alone?"

9. I have heard Ms. B. Sarma, learned counsel for the appellant and also heard

Mr. G.P. Bhowmik, learned counsel appearing on behalf of the respondents.

10. Ms. B. Sarma, learned counsel for the appellant submits that although the defendant could not submit his written statement and the suit proceeded ex-parte, yet the burden cast upon the plaintiffs to prove their case by leading cogent evidence as per Section 101 of the Evidence Act cannot be dispensed with. In the instant case the plaintiffs side had failed to prove and establish their title and possession over the schedule-D land by producing sufficient evidence. As such, the learned Trial Court had rightly dismissed the suit by holding that the plaintiff had failed to prove and establish their case. Having regard to the basic claim made by the plaintiffs, they ought to have produced cogent evidence so as to show that the predecessor-in-interest of the plaintiffs had acquired right, title and interest over the suit land by virtue of Exhibit-1. She further submits that in the absence of any proof of previous possession by the plaintiff, the finding based on which the suit for recovery of possession had been decreed is vitiated by perversity and complete non-application of mind. She, further, submits that in the absence of any documents of title the learned Lower Appellate Court could not have passed the decree for recovery of possession in favour of the plaintiffs.

11. Ms. B. Sarma further submits that since the plaintiffs have failed to bring on record the legal heirs of plaintiff No. 4 Parikhith Nath by means of substitution during the pendency of Title Appeal No. 72/2006, hence, the decree passed by the Lower Appellate Court has been evidently issued in favour of a dead person being one of the plaintiffs. As such, since the decree prayed for is a composite one covering the entire land, hence, the said decree is a nullity in the eye of law inasmuch as the suit itself has abated due to non-substitution of the legal heirs of plaintiff No. 4. In support of her argument Ms. Sarma has relied upon a decision of this Court rendered in the case of Dewan Alkash Ali and Others Vs. Md. Ali Baksh and Others, (2010) 1 GLD 606 : (2011) 1 GLR 370 : (2009) 5 GLT 132

12. Per contra, Mr. G.P. Bhowmik, learned Sr. counsel appearing for the respondents submits that the plaintiffs have produced Exhibit-1 Khatian to show the title of the predecessor-in-interest of the plaintiff over the suit land. He submits that Khatian is a document of title and would raise a rebuttable presumption of title in favour of the plaintiff. Since the defendant has failed to file his written statement or disprove the case of the plaintiff, hence, the learned First Appellate Court was wholly justified in passing the judgment and decree under appeal thereby decreeing the suit filed by the plaintiffs for recovery of khas possession in respect of the suit land.

13. By relying upon a decision of the Patna High Court reported in Sahdeo Singh and Others Vs. Ramchhabila Singh and Others, AIR 1978 Patna 258 : (1978) 26 BLJR 153 Mr. Bhowmik submits that this is not a case where the right to sue did not survive with the remaining plaintiffs after the death of plaintiff No. 4. Since the property is a joint property and all the plaintiffs inherited the same from their predecessor-in-interest, hence, the suit would not abate as a whole on account

of non substitution of the legal heirs of plaintiff No. 4. He, further, submits that the appellant had also not substituted the plaintiff/respondent No. 4 by bringing on record the legal heirs of the said respondent despite having come to know about his death. Hence, the present appeal itself has abated and is liable to be declared so. He, further, submits that in view of the deliberate omission on the part of the appellant to substitute the legal heirs of respondent No. 4 and the decree passed by the First Appellate Court being a composite one, the appeal is liable to be dismissed as the same has abated against all the respondents. In support of his argument Mr. Bhowmik has relied upon a decision of the Hon''ble Supreme Court reported in Upper India Cable Co. and Others Vs. Bal Kishan, AIR 1984 SC 1381 : (1984) 1 SCALE 606 : (1984) 3 SCC 462 : (1984) 16 UJ 531 .

14. I have considered the rival submissions made by and on behalf of the parties and have also perused the record. From the materials available on record, it appears that the plaintiff side had produced copy of the Khatian (Exhibit-1) which goes to show that the land claimed in the plaint was recorded in the name of their predecessor-in-interest Parasuram Nath. The defendant, although had not filed written statement, did not objected to the said document Exhibit-1 nor has he questioned the legality and validity of the document during the time of cross-examination. From a perusal of Exhibit-3 i.e. the judgment dated 17-03-2006 passed by the Assam Board of Revenue, Guwahati, it is evident that the appeal preferred by the appellant/defendant against the order dated 26-07-2004 passed by the Settlement Officer, Dhubri in Mutation Appeal No. 03/2004 dismissing the appeal preferred against the order dated 28-12-2003 passed by the Asstt. Settlement Officer, Dhubri was rejected by the Board of Revenue holding that the appellant therein i.e. the present appellant had failed to substantiate his claim over the additional 5 lechas of land. It appears from the said judgment that the appellant could only produce document showing purchase of 10 lechas of land from Late Parasuram Nath. The judgment and order dated 17-03-2006 has not been assailed by the appellant as a result of which the same has attained finality.

15. It further appears from the record that the appellant herein had earlier filed Title Suit No. 202/1999 against the present respondents in the court of Civil Judge (Jr. Div.) No. 1, Dhubri praying for a decree for declaration of title in respect of the aforesaid land measuring 15 lechas covered by Dag No. 185/629 and 185/633 of Khatian No. 100 as well as Dag No. 26(old)/298(new) of Patta No. 183 situated at Bidyapara Part-II under Dhubri Revenue Circle. The said title suit was contested by the present respondents by filing written statement. It appears from the record that the apple of discord between the parties in the said title suit was the 15 lechas of land which is the subject matter of the present suit. It also appears that the appellant could not succeed in getting a decree in the said Title Suit No. 202/1999 in his favour. Be that as it may. Having regard to the fact that the defendant had not made any suggestion during the cross-examination of the PWs questioning the title and possession of the plaintiffs over the land claimed by them and in view of the fact that the plaintiffs have been able to lead oral and documentary evidence to prima facie establish their case for

grant of a decree as prayed for, I do not find any illegality or infirmity in the view taken by the learned First Appellate Court finding the plaintiffs entitle for a decree for recovery of possession of the D schedule land, as prayed for.

16. As regards the question of abatement of the suit on the ground of non substitution of the legal heirs of plaintiff No. 4 during the pendency of the title appeal is concerned, it can be seen from the pleadings contained in the plaint that the land described in the schedule to the plaint is their ancestral property inherited by the legal heirs of late Parasuram Nath. Admittedly, the legal heirs of Parasuram Nath are holding the property in ejmali and there is no partition of the landed property amongst the co-sharers. As such it is evident that the co-sharers would have undivided title and interest in respect of every inch of the property described in the schedule to the plaint. Since, it is the case of the plaintiffs that the defendant has illegally encroached upon the D schedule land, hence, any of the plaintiffs could maintain a suit for recovery of possession of the joint property from the illegal encroachment by the tracepasser.

17. Order XXII Rule 2 of the CPC clearly provides that where there are more plaintiffs than one and any of them dies and where the right to sue survives to the surviving plaintiffs the court shall cause an entry to that effect to be made on the record and the suit shall proceed at the instance of the surviving plaintiff or plaintiffs. Order XXII Rule 3 of the CPC on the other hand requires an application to be made for substitution of legal heirs of the deceased plaintiff when the right to sue does not survive with the surviving plaintiff or plaintiffs or in case of sole plaintiff where the right to sue survives. If the application as required under Order XXII Rule 3 CPC is not made within the time limited by law then in that case suit shall abate so far as the deceased plaintiff is concerned.

18. From a perusal of the pleadings contained in the plaint it is apparent that even after the death of plaintiff No. 4 the right to sue survived with the remaining plaintiffs since there is no prayer for declaration of any individual right in the ejmali property. All the plaintiffs have common and joint title and interest over the suit land. Such being the position, it cannot be held that the suit filed by the plaintiff had abated due to non substitution of the legal heirs of respondent No. 4.

19. In the case of Sahadeo Singh (Supra) the learned Single Judge of the Patna High Court has observed as follows in paragraph 6 and 7, which is quoted herein below:

"6. The real question, however, is as to whether on the death of one of the plaintiffs during the trial of the suit, and in the event of his heirs and legal representatives not being substituted and brought on record, the suit will abate? Shri Shiva Kirti Singh relied upon various decisions of the Supreme Court including The State of Punjab Vs. Nathu Ram, AIR 1962 SC 89 : (1962) 2 SCR 636 ; Ram Sarup Vs. Munshi and Others, AIR 1963 SC 553 : (1963) 65 PLR 531 : (1963) 3 SCR 858 ; Rameshwar Prasad and Others Vs. Shyam Beharilal

Jagannath and Others, AIR 1963 SC 1901 : (1964) 3 SCR 549 ; Pandit Sri Chand and Others Vs. Jagdish Parshad Kishan Chand and Others, (1966) 3 SCR 451 ; Ramagya Prasad Gupta and Others Vs. Shri Murli Prasad and Others, AIR 1972 SC 1181 : (1973) 2 SCC 9 : (1973) 1 SCR 63 and Munshi Singh and Others Vs. Babulal Singh and Others, AIR 1977 Patna 29 . All these cases deal with the situation in an appeal where one of the appellants died. The principle which has been laid down is that if in respect of the deceased appellants the appeal has abated and the decree in favour of the respondents had become final against his legal representatives, the appellate court had no power to proceed with the appeal and to reverse and vary the decree. If the decree is a joint one, the whole appeal abates. In the case of the State of Punjab (Supra), it was held that the courts would not proceed with an appeal when the success of the appeal may lead to the courts passing a decree which would be contradictory to the decree which had become final with respect to the same subject matter between the appellants and the deceased respondent; it was further held that when the decree against the surviving respondents (if the appeal succeeds) will be ineffective, the court cannot proceed with the appeal. The situation when a party died when the suit was in the trial court, and the heirs were not substituted, is entirely different. It has been the consistent view of this Court that if a co-owner instituted a suit for recovery of possession of the land held by him along with other persons against a trespasser, who dispossessed the co-owners, he could obtain a decree for recovery of possession of the entire area. Such a suit will be maintainable, even without impleading the other co-sharers. In the case of Ram Nirajan Das and Another Vs. Loknath Mandal and Others, AIR 1970 Patna 1 : (1969) 17 BLJR 176 : (1969) 2 PLJR 96 , it was held that a possessory title when confronted with a better title will yield place to the better title which must prevail over trespassers possessory title pure and simple. A co-sharer having an interest in the property jointly with others is apparently a person with better title than a trespasser. It was well settled that one of the various co-owners of a property, if in possession, will be deemed to be in possession on behalf of all co-owners and his possession would not be regarded as adverse to other co-owners unless there was distinct proof of ouster. The interest of an undivided co-owner or co-sharer must be taken to cover every inch of land which may be the subject matter of the dispute as belonging to the co-owners. In such a situation, a co-sharers suit must be held to be maintainable without impleading other co-sharer. In Johan Uraon (Ekka) and Another Vs. Sitaram Sao (Bhagat) and Others, AIR 1964 Patna 31 a Bench of this Court held that a suit by one of the joint owners to obtain possession by ejecting a trespasser is maintainable even though the other joint owners are not impleaded as parties to the action. When one of the plaintiffs, who were joint owners, dies, the right to sue survives in the other plaintiffs and, in such a case, there was no question of abatement.

7. In the present case, the suit having been filed by the joint owners against a trespasser can surely proceed even when the heirs of one of the joint owners has not been brought on record in the event of the later's death. The contention of

learned Counsel appearing for the petitioners that the suit has abated must, therefore, be overruled."

20. I am in complete agreement with the view expressed by the learned Single Judge of Patna High Court on the aforesaid issue. In the instant case the right to sue survived with the remaining plaintiffs, being co-sharer, even after the death of the plaintiff No. 4. Hence, the suit cannot be said to have abated due to non-substitution of the legal heirs of plaintiff No. 4. It is, therefore, held that though the court was required to make an endorsement as regards the death of plaintiff No. 4 during the pendency of the title appeal, yet, the omission to do so would not be an irregularity leading to abatement of the suit itself.

21. On the contrary, as has been indicated hereinbefore, the appellant despite having come to know about the death of the respondent No. 4, had not taken any steps for substitution of the legal heirs of the said plaintiff/respondent No. 4 notwithstanding the fact that the decree passed in the title appeal was under challenge in the second appeal. In the case of Dewan Alkash Ali (Supra) this Court has held as follows in paragraph 18:

"(18) From the aforesaid decisions of the Apex Court what therefore transpires is that, whether the appeal as a whole abates or not, in view of the abatement of such appeal as against one of the respondents, is to be decided keeping in view the fact of each case. If the decree passed is joint and indivisible and in the event of a lowering the appeal there would be inconsistent or contradictory decrees, the appeal abates as a whole, when the same has abated as against one of the respondents. In the instant case as it appears from the judgment and decree passed by the learned First Appellate Court, which is under challenge, that the suit of the plaintiffs has been decreed in respect of 1/3rd share of the land jointly, without there being any specification of shares or interest to which each of the plaintiffs are entitled to. The plaintiffs in the suit have not claim any specific share or interest out that 1/3rd share. The decree as against the plaintiff No. 2/respondent No. 2 has attained finality as soon as the appeal filed against him has abated. Such decree being declaring the right, title and interest of the plaintiffs jointly in respect of 1/3rd share of the suit property, in the event the appeal is allowed as against the present respondent No. 1 (plaintiff No. 1) there would be two contradictory decrees in the same suit in respect of the same subject matter as both the decrees as incapable of enforcement and the enforcement of one of the decrees would negate the enforcement of the other, as the legal heirs of the plaintiff No. 2/respondent No. 2, in whose favour the decree has become final would be entitled to put the decree as a whole in execution, there being no specification of their shares or interest out of such 1/3rd share of the suit property. The contention of the learned Sr. counsel for the appellants that since one of the heirs being plaintiff No. 1/respondent No. 1 is on record, the appeal as a whole has not abated, also cannot be accepted in view of the aforesaid discussion."

22. In view of the law laid down by this Court in the case of Dewan Alkash Ali

(Supra), I am of the considered opinion that this appeal itself would not be maintainable in the absence of impleadment of the legal heirs of the plaintiff/respondent No. 4 since the appellant is seeking a relief of setting aside of a decree passed by the learned First Appellate Court where in all the legal heirs of Parasuram Nath including the heirs of plaintiff No. 4 have undivided title and interest.

23. In view of what has been observed hereinbefore, I do not find any illegality or infirmity in the impugned judgment and decree dated 17-04-2009 passed by the learned First Appellate Court. The substantial questions of law, therefore, stands answered against the appellant.

Consequently, this appeal is held to be devoid of any merit and same shall stand dismissed. Stay order passed earlier shall stand vacated.

Having regard to the facts and circumstances of the case there would be no order as to cost.

Registry to send back the records at the earliest.