
(2014) 09 GAU CK 0004
In the Gauhati High Court
Case No : RSA No. 33 of 2003

Nani Bhusan Dey and Others

APPELLANT

Vs

Bijoy Kr. Ganguly

RESPONDENT

Date of Decision : 04-09-2014

Acts Referred:

Specific Relief Act, 1963 — Section 34

Citation : (2015) 1 GLD 401

Hon'ble Judges : Brojendra Prasad Katakey, J

Bench : Single Bench

Advocate : D. Das, Senior Advocate and K. Das, Advocate for the Appellant;
B.R. Dey, Senior Advocate, B. Hazarika and N. Rajkhowa, Advocate for the Respondent;

Final Decision : Dismissed

Judgement

Brojendra Prasad Katakey, J.

1. This appeal by the defendants is directed against the judgment and decree dated 3.7.2002 passed by the learned Civil Judge, (Sr. Div.) No. 1, Kamrup at Guwahati in Title Appeal No. 56/1996 dismissing the appeal preferred by the defendants by affirming the judgment and decree dated 31.8.1996 passed by the learned Sadar Munsiff No. 1, Kamrup at Guwahati in Title Suit No. 285/1987, whereby and whereunder the suit of the plaintiffs has been decreed. The predecessor-in-interest of the present respondents namely, Bijoy Kr. Ganguly, as plaintiff instituted the aforesaid suit for declaration of right, title and interest over the land described in the schedule to the plaint, contending inter alia that the land measuring 18 bighas 3 kathas 2 lechas covered by KP patta No. 217 and 589 comprising various dags, originally belonging to one Bikalal, after whose death it devolved on his three sons Shew Narayan Chetri, Lakhi Narayan Chetri and Narayan Chetri, each of whom got 6 bighas 1 kathas 2-2/3 lechas of land. It has further been pleaded that Shew Narayan Chetri out of his share of land sold 5 bighas 4 kathas 9-2/3 lechas by registered instrument dated 5.4.1950 (Ext.

Gha) in favour of Kailash Sengupta and Snehamoyee Mitra. According to the plaintiff there was partition of the land between Kailash Sengupta and Snehamoyee Mitra in equal proportion and Kailash Sengupta out of his land fell in his share sold 1 kathas 14 lechas vide registered sale deed dated 10.4.1981 (Ext. 1) in favour of the original plaintiff namely Bijoy Kr. Ganguly. It is also the pleaded case of the plaintiff that he is possessing the land having residential houses and since the defendants without having any right, title and interest over the suit land tried to mutate their names, he has filed the suit for declaration as aforesaid. It was also pleaded in the plaint that Kailash Sengupta before transferring the land instituted a suit being Title Suit No. 24/1967 and obtained a decree on 18.9.1967 (Ext. 3) against Bijoy Kumar Ganguly namely the plaintiff and Snehamoyee Mitra, as defendant and proforma defendant, respectively, claiming that the suit land belongs to Kailash Sengupta and in respect of which Bijoy Kr. Ganguly, the plaintiff, was the tenant. According to the plaintiff after the decree was passed the land was sold by Kailash Sengupta vide sale deed dated 10.4.1981.

2. The main defendants, mainly the present appellants, contested the suit by riling written statement contending inter alia that the defendant No. 1 purchased 1 katha 17 lechas of land by registered sale deed dated 15.7.1982 (Ext. Kha) from Snehamoyee Mitra who along with Kailash Sengupta purchased from the original owner Shew Narayan Chetri, According to the defendants the suit land forms part of the land purchased by the defendant No. 1 by the aforesaid sale deed dated 15.7.1987 (Ext. Kha) and by virtue of such purchase the mutation has been granted as they were found to be in possession. The claim of the plaintiff that he is in possession has also been denied in the written statement filed. The defendant also raised the question of maintainability of the suit under Section 34 of the Specific Relief Act.

3. Based on the pleadings of the parties the trial Court framed the following issues for determination:--

- "1. Whether the suit is maintainable?
2. Whether the suit is bad for nonjoinder of necessary parties?
3. Whether there is cause of action for the suit?
4. Whether the suit has been properly valued and proper court-fee has been paid thereon?
5. Whether the plaintiff has right, title, interest and possession over the suit land?
6. Whether the plaintiff is entitled to declare as prayed for?
7. To what relief the parties may be entitled?"

4. The trial Court on the basis of the evidence, both oral and documentary, decreed the suit of the plaintiff declaring the right, title and interest. The appeal preferred by the defendants has also been dismissed by the first appellate Court.

Hence the present appeal.

5. The original plaintiff Bijoy Kr. Ganguly, during pendency of the second appeal died and in his place the legal heirs, namely, the present respondents have been substituted.

6. The appeal was admitted for hearing vide order dated 8.4.2003 on the following substantial questions of law:--

1. Whether the suit for declaration of title without praying for partition of the land is maintainable in law?

2. Whether the learned lower appellate Court erred in law in holding that the suit is maintainable and not barred under Section 34 of the Specific Relief Act?

7. I have heard Mr. D. Das, learned senior counsel for the appellants and Mr. B.R. Dey, learned senior counsel appearing for the respondent Nos. 1(a) to 1(c). The names of respondent Nos. 2 to 8 were struck off from the list of respondents on the prayer made by the appellant vide order dated 31.1.2005.

8. The learned senior counsel appearing for the appellants has submitted that though two substantial questions of law were formulated while admitting the appeal, the substantial question of law No. 2 i.e. whether the suit of the plaintiff is not maintainable being barred under Section 34 of the Specific Relief Act exist in the present appeal and hence the argument is confined to the said substantial question of law only.

9. Referring to the prayer made in the plaint, the learned senior counsel for the appellant has submitted that since the plaintiff has claimed declaration of right, title and interest without praying for consequential relief, i.e. either confirmation of possession or recovery of khas possession, suit of the plaintiff is barred under Section 34 of the Specific Relief Act. The learned senior counsel submits that though the plaintiff in the plaint has claimed that he is in possession of the suit property, it is evident from the evidence of defendants witnesses more particularly DW 2 as well as the report of the Amin Commissioner dated 8.2.1990 and the evidence of the Amin Commissioner, who has been examined as Court witness, that the plaintiff is not in possession of the entire suit land but part of the suit land measuring more or less 15 lechas and hence the suit of the plaintiff, in absence of the prayer for confirmation of possession or recovery of possession, is not maintainable. The learned senior counsel further submits that in fact the land is in possession of the defendants which is evident from the order of mutation granted by the Revenue authority, which has been proved as Ext Jha, as the grant of mutation presupposes the possession of the party in whose favour the mutation is granted, though it may not confer right, title and interest. The learned senior counsel in support of his submission has placed reliance on the decision of the Apex Court in Vinay Krishna Vs. Keshav Chandra and another, and in Dulana Dei alias Dolena Dei Vs. Balaram Sahu and Others, .

10. Mr. Dey, learned senior counsel appearing for the respondents/plaintiffs on

the other hand supporting the judgment and decree passed by the learned Courts below has submitted that when the plaintiff is in possession of the suit land it is not required to pray for consequential relief of confirmation of possession, while praying for a decree declaring the right, title and interest and hence the suit of the plaintiff is not hit by Section 34 of the Specific Relief Act. The learned senior counsel further submits that both the Courts recorded the finding that the plaintiff is in possession of the suit land. Referring to the Amin Commission's report dated 8.2.1996 as well as the evidence of the Court witness i.e. the Amin Commissioner, it has also been submitted that it is apparent therefrom that the plaintiff is in possession of the land including the land which is found to be vacant. The learned senior counsel, therefore, submits that the substantial questions of law as formulated do not exist in the case.

11. The plaintiff in the plaint has made categorical assertion that he is in possession of the land measuring 1 katha 14 lechas which, however, has been denied in the written statement filed by the defendants contending that the plaintiff never possessed the suit land. The plaintiff though has claimed declaration of right, title and interest over the suit land no prayer for passing a decree either for confirmation of possession or recovery of khas possession has been made.

12. Section 34 of the Specific Relief Act provides that 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 made therein a declaration that he is so entitled, and the plaintiff need not in such suit ask for any further relief. The Court, however, shall not make any such declaration where the plaintiff, being able to seek further relief than a mere declaration of title, omits to do so.

Hence the plaintiff, when he claims to be in possession of the suit property, can maintain a suit for declaration of right, title and interest without asking for confirmation of possession, he being already in possession. But while doing so the plaintiff is taking the risk of dismissal of the suit, in view of the proviso to Section 34 of the Act, in the event, on the basis of the evidence adduced by the parties it is found that he is not in possession of the suit property and in that case, he will not be entitled to the declaration of title without claim of further relief of recovery khas possession.

13. In the instant case, the plaintiff has claimed that he is in possession, which, as discussed above, has been denied by the defendant. Both the Courts below have recorded the finding that the plaintiff is in possession. To ascertain the dispute relating to the possession, the trial Court in fact has passed the order for local inspection and accordingly the Circle Officer was appointed as Amin Commissioner who submitted his report dated 8.2.1990, which has been marked as Ext. X. The deposition of the Amin Commissioner was also recorded by the trial Court as Court's witness.

14. It appears from the report of the Amin Commissioner that the suit land has houses which are in possession of the plaintiff and the remaining land is vacant. The Amin Commissioner in his evidence has also stated that the vacant land has been used by the plaintiff and his tenant.

15. From the aforesaid evidence as well as the Amin Commissioner's report it, therefore, appears that the part of the suit land though was vacant, the entire suit land was in possession of the plaintiff. The grant of mutation in favour of the defendant, which according to the learned senior counsel presupposes the possession of the defendant, therefore, would have no bearing on the finding relating to possession.

16. There is no dispute to the proposition of law laid down in *Dulana Dei alias Dolena Dei* by the Orissa High Court that even in the absence of the pleadings in the written statement, relating to the maintainability of the suit on the ground of not seeking the consequential relief as required under Section 34 of the Specific Relief Act, the Court can go into the said question. It has also been held that if the plaintiff is able to seek consequential relief of confirmation or recovery of possession or permanent injunction and such relief is not prayed, the suit is hit by Section 34 of the aforesaid Act. But, as discussed above, if the plaintiff claims to be in possession and his possession is found by the Court, his suit for declaration of right, title and interest cannot be dismissed for not claiming a decree confirming his possession.

17. The Apex Court in *Vinay Krishna* (supra) has held that if the plaintiff instituted the suit for declaration without praying for consequential relief of confirmation of possession contending that he is in possession, he is taking a risk of dismissal of his suit if it is found that he is not in possession of the suit property, as the suit would then be hit by Section 34 of the said Relief Act because of non-seeking the consequential relief.

18. As discussed above, in the instant case there is concurrent finding of fact relating to the possession of the plaintiff. The Amin Commissioner's Report as well as the evidence adduced by the Amin Commissioner also support such finding recorded by the Courts below relating to the possession of the plaintiff over the suit land.

19. That being the position, the plaintiff can maintain the suit for declaration of right, title and interest without praying for confirmation of possession or recovery of khas possession. The Courts below have rightly passed the judgments and decrees which do not require any interference in appeal. Hence the same is dismissed.

20. The parties are directed to bear their own cost throughout. The Registry is directed to send down the records forthwith.