
(2016) 01 GAU CK 0065
In the Gauhati High Court
Case No : RSA No. 230/2005

Rani Singha and Others

APPELLANT

Vs

Madhu Sudan Koiri and Others

RESPONDENT

Date of Decision : 08-01-2016

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 20 Rule 18, Order 20 Rule 18(1), Order 20 Rule 18(2), Order 21 Rule 21, Section 54

Citation : (2016) AIR(Gauhati) 36 : (2016) 2 GauLJ 350 : (2016) 2 GauLR 769 : (2016) 1 GLD 213

Hon'ble Judges : Suman Shyam, J.

Bench : Single Bench

Advocate : P.K. Roy, Advocate, for the Appellant; G.N. Sahewalla, Sr. Advocate, for the Respondent

Final Decision : Dismissed

Judgement

Suman Shyam, J.—1. This second appeal has been preferred against the judgment and decree dated 02-04-2005 and 07-04-2005 respectively passed by the learned Addl. District Judge, Cachar, Silchar in Title Appeal No. 01/1987 reversing and/or modifying the judgment and decree dated 12-12-1986 and 17-12-1986 respectively passed by the court of learned Asstt. District Judge No. 2, Cachar, Silchar in Title Suit No. 76/1979 partially decreeing the suit filed by the respondent/plaintiff.

2. This second appeal has been admitted by this Court to be heard on the following two substantial questions of law:

"(1) Whether the plaintiff's suit for recovery of "Khas Possession" in respect of Schedule- III & IV land can be decreed in view of the provision of Section 110 of the Assam Land and Revenue Regulation?

(2) Whether the plaintiff's suit is maintainable in respect of the matter of distribution of land on partition, the same being exempted from cognizance of

Civil Court under Section 154(1)(f) of the Assam Land and Revenue Regulation, 1886?"

3. The brief fact of the case, as projected in the plaint, is that the plaintiff is the absolute owner in respect of a plot of land measuring 17B-11K-6C-10G in 2nd R.S. Patta No. 119 of village- Labakpar Part-I, more fully described in the schedule- I to the plaint. The plaintiff had earlier instituted Title Suit No. 62/1971 seeking a decree for declaration of his right, title and interest over the aforementioned plot of land against all the co-sharers who were made parties in the said proceeding. The Title Suit No. 62/1971 was eventually decreed on 25-09-1973 pursuant whereunto a partition case bearing number P.P. Case No. 30/1973-74 was started before the Collector for the purpose of allotment of the share of the plaintiff and for recovery of possession in respect of the land allotted to him as per the decree dated 25-09-1973 passed in Title Suit No. 62/1971. The present defendant No. 2 was the defendant No. 1 whereas the predecessor-in-interest of the defendant No. 3 to 10 i.e. Sarala Bala Roy Choudhury was the defendant No. 9 in the said Title Suit No. 62/1971. The defendant No. 1 viz. Sunil Kumar Dutta was the defendant No. 4 in Title Suit No. 62/1971. The P.P. Case No. 30/1973-74 proceeded in presence of all the co-sharers pursuant whereunto the Collector had delivered Khas Possession of the suit land in Title Suit No. 62/1971, save and except, the plot of land described in schedule-III and IV hereunder, which were found to be in possession of defendant No. 2 to 10 who were having their dwelling houses thereupon. As such, the Collector had only given symbolic possession in respect of schedule- III and IV land to the plaintiff. It is also the case of the plaintiff that although the Khas Possession in respect of the land in 2nd schedule was delivered to the plaintiff in execution of the decree passed in Title Suit No. 62/1971, yet, the plaintiff was subsequently dispossessed from the said plot of land by the defendant No. 1 giving rise to a fresh cause of action. The land described in schedule- II, III and IV forms part of the schedule-I land which was the suit land in Title Suit No. 62/1971. Situated thus, the plaintiff was compelled to approach the civil court for the second time by instituting Title Suit No. 76/1979, inter alia, praying for a decree declaring his right, title and interest over the schedule- I land and for recovery of Khas Possession of the land described in schedule- II, III and IV of the plaint by evicting the defendants their agents and servants therefrom and also for confirmation of possession of the plaintiff over the remaining area of land described in schedule- I of the plaint.

4. Upon receipt of summons in the suit the defendant No. 1, 2, 3 and 5 entered appearance and contested the suit by filing a joint written statement. Besides questioning the maintainability of the suit by taking various formal pleas including the plea of the suit being bad for want of cause of action; for nonjoinder of necessary parties and also being barred by limitation, the defendants have also raised the question of ouster of jurisdiction of the civil court contending that the same was a continuation of P.P. Case No. 30/1973-74. The contesting defendants had further averred in the written statement that the plaintiff had obtained the decree in Title Suit No. 62/1971 by practicing fraud

inasmuch as the plaintiff did not have any right or possession beyond land measuring 12B-17K-10C out of the total land claimed in Title Suit No. 62/1971 on account of the fact that the plaintiff's vendor had already exhausted their right over the remaining part of the suit land in the said title suit measuring about 5B-6K even before the plaintiff could acquire any valid title over the same. Since the decree passed in Title Suit No. 62/1971 has already attained finality in the eye of law and considering the fact that no substantial question of law has been framed in this appeal touching upon the validity of the decree passed in the former suit, I am not inclined to burden this judgment by incorporating elaborate details of the pleadings contained in the written statement questioning the validity of the title of the plaintiff over the schedule-I land.

5. On the basis of pleadings of the parties the learned Trial Court had framed five issues which are as follows:

"1. Is there any cause of action for the suit?

2. Has this court jurisdiction to try the suit?

3. Whether the plaintiff has any right, title and interest over the suit land?

4. Whether the plaintiff has been dispossessed/page 7/by the contesting defendants from the suit land or any part thereof?

5. To what relief, if any, is the plaintiff entitled?"

6. During the course of trial both parties had adduced evidence in support of their respective cases. Upon hearing the learned counsel for the parties and on appraisal of the evidence available on record, the learned Trial Court had recorded findings in respect of issue No. 1 to 4 in favour of the plaintiff by holding that the plaintiff was, in fact, entitled to declaration of his right, title and interest over the entire schedule- I land and also for a decree for recovery of possession in respect of the schedule- II land. However, taking note of the provision contained in Rule 110 of the Assam Land and Revenue Regulation, 1886, the prayer of the plaintiff for recovery of Khas Possession in respect of the land mentioned in schedule- III and IV was declined by the learned Trial Court and on the contrary the defendant No. 3 to 10 were permitted to retain their possession over the dwelling houses standing over schedule- III and IV land on payment of a reasonable ground rent to be fixed by the Collector. By relying upon the decision of this court in the case of Banamali Roy v. Premdayal Choudhury & Ors reported in , AIR 1952 Assam 133, the learned trial court had apparently declined the relief of recovery of possession of the schedule-III and IV land to the plaintiff holding the same to be contrary to the provision of Section 110 of the Assam land and Revenue Regulation 1886.

7. Being aggrieved by the judgment dated 12-12-1986 and decree dated 17-12-1986 passed by the learned Trial Court partly decreeing the Title Suit No. 76/1979, the plaintiff as appellant had approached the court of learned Addl. District Judge, Cachar, Silchar by filing Title Appeal No. 01/1987 primarily being

aggrieved by that part of the decree passed by the Trial Court by means of which the defendant No. 3 to 10 had been permitted to continue in occupation of the land and the dwelling houses standing over schedule-III and IV by paying ground-rent to the plaintiff to be fixed by the Collector. Upon hearing the learned counsel for the parties and on re-appraisal of the evidence available on record the learned lower Appellate Court had reversed the findings of the Trial Court with regard to issue No. 4 and 5 by holding that the law declared by this Court in the case of Banamali Roy (Supra) would be attracted only in respect of a revenue proceeding and the same would not have any application in case of execution of a decree passed by the civil court. On the basis of such observation the learned Appellate Court had modified the judgment and decree passed by the Trial Court by permitting the recovery of Khas Possession of the schedule-III and IV land by the plaintiff. Being highly aggrieved by the aforesaid judgment and decree dated 12-12-1986 and 17-12-1986 respectively the defendants as appellants have approached this Court by filing the instant second appeal.

8. I have heard Mr. P.K. Roy, learned counsel appearing for the appellant. Also heard Mr. G.N. Sahewalla, learned Sr. counsel representing the respondent.

9. By inviting the attention of this Court to the provision of Section 110(1) of the Assam Land and Revenue Regulation, 1886, Mr. Roy submits that the said provision makes it amply clear that while effecting the partition the Collector cannot deliver Khas Possession in respect of the land occupied by a dwelling house or other building in possession of another co-sharer and in such circumstances the only remedy that would be permissible for the claimant/co-sharer would be to accept a reasonable ground-rent in respect of the said property.

10. By referring to an unreported judgment of this Court rendered in connection with Civil Revision Petition No. 118/2009 dated 22-01-2015 (Md. Iman Ali & Ors. v. Md. Abdul Mazid & Ors.), Mr. Roy submits that even in the said decision this Court has held that in view of the provision of Section 110 of the Assam Land Revenue Regulations, law does not permit demolition of a standing building and a co-sharer in possession of such building would be entitled to retain possession in respect thereof by paying a reasonable ground-rent to the other sharer in whose share the land upon which the building is standing may fall. Referring to the decision of this court rendered in the case of Banamali Roy (Supra) Mr. Roy further submits that in the said decision also this Court has delineated the duties to be performed under provision of Section 110 of the Regulation by the concerned authority while making a partition and demolition of a house standing over the land in possession of one of the co-sharer has been clearly held to be contrary to the provision of Section 110.

11. Mr. Roy has further submitted that the Title suit being a continuation of the revenue proceeding started before the Collector in P.P. Case No. 30/1973-74, the same was clearly barred under Section 147 read with Section 154 of the Assam Land and Revenue Regulation, 1886. In support of his aforesaid argument the

learned counsel has relied upon a decision of the Full Bench of this Court rendered in the case of Daulatram Lakhani v. State of Assam & Ors. reported in , [1989] 1 GLR 131.

12. Per contra, Mr. G.N. Sahewalla, learned Senior counsel appearing for the respondent submits that the substantial question of law framed by this Court does not arise for consideration in the facts and circumstances of the present case primarily on account of the fact that the provision of Section 110 of the Assam Land and Revenue Regulation, 1886 would not have any application while carrying out a partition in accordance with a decree passed by the civil court. He submits that there is no dispute in the present case that the decree passed in Title Suit No. 62/1971, whereby the title and share of the plaintiff was declared by the civil court in respect of the entire schedule-I property, has attained finality. Therefore, it was the bounden duty of the Collector to take all steps for execution of the decree passed in Title Suit No. 62/1971 and deliver Khas Possession of the schedule-III and IV land to the plaintiff. Taking note of the said position the learned First Appellate Court has correctly applied the principles of law declared by this Court in the case of Banamali Roy (Supra) and decreed the suit of the plaintiff for recovery of possession of the schedule-III and IV land.

13. Mr. Sahewalla further submits that once the title of the plaintiff has been declared by the civil court law would mandate that the possession should be delivered to the plaintiff in execution of such decree passed by the civil court. He also submits that since the suit is based on title, hence, the bar of Section 154 of the Regulation does not have any application in the facts and circumstances of the present case. In support of aforementioned argument Mr. Sahewalla has relied upon the following citations:

- "1. , AIR 1979 Calcutta 256; Charan Santhal v. Indrajit Sen & Ors.
2. , (2002) 6 SCC 416; Dhruv Green Field Ltd. v. Hukam Singh & Ors.
3. , 2002 (1) GLT 176; Urmila Bala Das v. Bhubaneswar Das & Ors.
4. , 2002 (2) 712; Thanda Bala Choudhury & Anr. v. Birendra Kumar Choudhury
5. , (1984) 2 GLR 8; KA Trily Tariat v. U. Resdrikson Lyngdoh & Ors.
6. , (2004) 3 GLR 641; Tuniram Katoni & Ors. v. Golap Chandra Katoni
7. , AIR 1974 Orissa 173; Jayagopal Mundra v. Gulab Chand Agarwalla & Ors.
8. 1995 (II) GLT 120; Sri Sunil Krishna Paul v. The Assam Board of Revenue at Guwahati, Assam & 2 Ors."

14. I have considered the rival submission made by and on behalf of the parties and have also perused the materials on record. There is no dispute on the factual score of the matter and the findings of fact recorded by both the courts below are more or less of concurrent nature. Since it is not the case of the appellants that such findings of fact is perverse, hence, this Court need not embark on a

discussion of the evidence available on record so as to analyze the correctness of factual finding recorded by the Trial Court in respect of issue Nos. 1 to 4. Suffice it to say that learned court below had found that the suit land was, in fact, involved in the previous suit bearing Title Suit No. 62/1971 by and in between the same parties wherein a decree declaring the right, title and interest as well as a decree for recovery of possession and allotment of share was passed in favour of the plaintiff. The said decree has attained finality and thereafter, in terms of a proceeding bearing P.P. Case No. 30/1973-74 a separate patta bearing No. 147 covering the said plot of land was also issued in favour of the plaintiff. Neither the decree nor the aforesaid patta is under challenge in any proceeding.

15. There is also no dispute regarding the fact that pursuant to the decree passed in Title Suit No. 62/1971 the Collector had delivered Khas Possession to the plaintiff over the entire suit land described in the schedule- I to the plaintiff save and except the area of land covered by schedule-III and IV, in respect of which only symbolic possession was given by the Collector to the plaintiff. Such a recourse had to be allegedly taken by the Collector since the said plot of land, i.e. schedule-III and IV was found to be in possession of the defendant No. 2 to 10 who were occupying the dwelling houses and buildings standing over the said plot of land. In the conspectus of facts as noticed above, let me now answer the substantial questions of law framed by this Court.

16. A scrutiny of the materials available on record goes to show that in terms of the decree passed in Title Suit No. 62 of 1971, the learned Collector had given symbolic possession of the schedule-III and IV land to the plaintiff on account of the bar constituted under Section 110 of the Assam Land and Revenue Regulation, 1886 which prohibits the Collector from demolishing any existing building under occupation of one of the co-sharers. The provision of Section 110 of the Assam Land and Revenue Regulation, 1886 is quoted herein below for ready reference:

"110. Rule when building of one sharer is included in estate assigned to another. - (1) If, in making a partition, it is necessary to include in the estate assigned to one sharer the land occupied by a dwelling house or other building in the possession another co-sharer, that other co-sharer, shall be allowed to retain it with any buildings thereon, on condition of his paying a reasonable ground-rent for it to the sharer into whose portion it may fall.

(2) The limits of the land, and the rent to be paid for it, shall be fixed by the Deputy Commissioner."

17. Order XX Rule 18 CPC provides that in case of an estate assessed to the payment of revenue to the government, where a court passes a decree for the partition of property or for the separate possession of the share therein, the decree shall declare the rights of the several parties interested in the property. Upon such declaration, the court shall direct such partition or separation to be made by the collector or any gazetted officer subordinate to him in accordance

with such declaration of the court and as per the provision of Section 54 of the CPC. From the language employed in Rule 18 of Order XX it is evident that the partition or separation of the share is required to be carried out by the collector or his subordinate in accordance with the declaration made in the decree.

18. By issuing a preliminary decree under Order XX Rule 18 CPC the court at the first stage decides the rights of the several co-sharers interested in the property by declaring their respective shares in the undivided property. Once the preliminary decree has attained finality in the eye of law, the collector is required to give effect to such partition or separation of shares in terms of the decree by dividing the property in metes and bound and making the necessary entries in the revenue records by assigning the new Dags and Patta numbers. Once the process of division of the shares in terms of the decree is completed and new Dags Nos. /Patta Nos. are assigned to the separated shares in the revenue records by the collector, the said particulars are then incorporated in the final decree to be passed by the civil court in the suit declaring the title of the co-sharers in respect of their respective shares in the property in terms of the partition decree. Therefore, it is evident that once a decree of partition has attained finality, the collector would not have the jurisdiction to re-open any question involving the rights or claim of the co-sharers in respect of any part of the property partitioned under a civil court decree but would be obliged to give effect to the decree in its letter and spirit in accordance with Section 54 CPC.

19. While dealing with the purport of a decree passed under Order XX Rule 18 CPC, in the case of Shub Karan Bubna alias Shub Karan Prasad v. Sita Saran Bubna & Ors. reported in , (2009) 9 SCC 689 the Hon"ble Apex Court has observed as follows:--

"In a suit for partition or separation of a share, the prayer is not only for declaration of the plaintiff's share in the suit properties, but also division of his share by metes and bounds. This involves three issues:

- (i) Whether the person seeking division has a share or interest in the suit property/properties;
- (ii) Whether he is entitled to the relief of division and separate possession; and
- (iii) How and in what manner, the property/properties should be divided by metes and bounds?

In a suit for partition or separation of a share, the court at the first stage decides whether the plaintiff has a share in the suit property and whether he is entitled to division and separate possession. The decision on these two issues is exercise of a judicial function and results in first stage decision termed as "decree" under Order 20 Rule 18(1) and termed as "preliminary decree" under Order 20 Rule 18(2) of the Code. The consequential division by metes and bounds, considered to be a ministerial or administrative act requiring the physical inspection, measurements, calculations and considering various permutations/combinations/

alternatives of division is referred to the Collector under Rule 18(1) and is the subject-matter of the final decree under Rule 18(2)."

20. From the aforesaid decision of the Apex court it is thus clear that the exercise undertaken by the collector under Section 54 of the CPC for carrying out a partition of revenue paying estate in terms of a civil court decree is a ministerial or administrative act not involving further determination of rights of the co-sharers in the immovable property. Contentious issues, if any, arising between the parties while executing a decree would, however, have to be dealt with by the executing court in accordance with the provisions of the CPC.

21. Sections 96 to 116A contained in Chapter-VI of the Assam Land and Revenue Regulation, 1886, on the other hand, deals with the procedure for carrying out partition of a revenue paying estate based on an application to be presented before the Deputy Commissioner in accordance with Section 98 of the Regulations of 1886. A reading of the provisions contained in Chapter VI of the said Regulations goes to show that Section 110 would be applicable in cases where the Deputy Commissioner is required to carry out "perfect partition" or "imperfect partition" by making division of a revenue paying estate into two or more such estates, each separately liable for revenue assessment. Sub Section 2 of Section 110 clearly provides that in the cases covered under Section 110(1), the limit of the land and the ground rent would be fixed by the Deputy Commissioner.

22. Section 100 of the Regulation of 1886 provides that if a question as regards title to the property is raised then the Deputy Commissioner/Collector would be guided by orders that would be passed by the civil court in a suit instituted for the purpose of resolution of such question of title. The provisions contained in Chapter-VI therefore, lays down guidelines to be followed by the Collector at the time of effecting revenue partition of a property where no dispute involving the right or title of the co-sharers over the immovable property or any part thereof is involved.

23. From an examination of the aforesaid legal provisions what follows is that Section 110 of the Assam land and Revenue Regulation, 1886 would be attracted when partition of a revenue paying estate is being made by the Deputy Commissioner as per the provisions contained in Chapter-VI of the Regulations. The said provision contained in the Assam land and Revenue Regulations, however, cannot put fetters on the jurisdiction of the civil court to pass a decree declaring the rights of the co-sharers over undivided property including any dwelling house nor can the same negate the mandate of a decree of partition passed by the civil court under Order XX Rule 18 CPC. Moreover, the Assam Land and Revenue Regulations, 1886 having been framed prior to the enactment of the Code of Civil Procedure, the same cannot have overriding effect on Order XX Rule 18 CPC. As such, while implementing a partition decree passed by the civil court, the Collector, acting under Section 54 of the CPC cannot go behind the decree nor can the Collector entertain a claim to a dwelling house by the

judgment debtor by invoking jurisdiction under Section 110 of the Regulations of 1886.

24. While answering a reference as regards the scope of Section 54 of the CPC in relation to executability of a civil court decree for partition of undivided estate by the collector, a Five Judges Bench of this Court had opined in the case of Amar Nath Kumar & Ors. v. Mrinal Kanti Khullar & Ors. reported in , 2012 (1) GLT (FB) 716 that partition is to be effected by the Collector in accordance with the decree of the civil court. The observations made by the Full Bench in paragraphs 13 and 14 are quoted herein below:--

"13. A plain reading of Section 54 read with Order 20 Rule 18 leaves no scope for doubt that it refers to decree of the Civil Court of the nature specified therein. This view has been consistently taken in precedents referred to above. No contrary view has been brought to our notice. We are not concerned with the ryotwary holdings dealt with the Madras High Court in Muttu Chidambara v. Karuppa : 1884 ILR 7 Mad 382 and other judgments referred to in the order of reference. We are only concerned with partition decree covered by scope of Section 54 CPC.

14. We accordingly decide the question referred against the appellant and in favour of the respondent by holding that Section 54 CPC contemplates Civil Court decree in respect of nature of property described therein and in respect thereof partition is to be effected by the Collector or officer deputed by him in accordance with decree of the Court. Order 21 CPC has to be read harmoniously with Section 54 CPC."

25. For the foregoing reasons, I am of the considered opinion that the learned First Appellate Court was correct in holding that Section 110 of the Land Revenue Regulations will not have any application in carrying out a partition in terms of a decree of the civil court. As such, the learned lower appellate court was justified in reversing the finding of the Trial Court in respect of issue No. 3 and 4 and decreeing the suit for recovery of Khas Possession of the land included in schedule-III and IV in favour of the plaintiff.

26. The decision in the case of Banamali Roy (Supra) does not deal with partition under Section 54 of the CPC as per declaration made by a civil court decree but merely focuses on the duties to be performed by the revenue authorities under Section 110 of the Regulations while making perfect partition of a revenue paying estate. As has been mentioned herein above, the scope and ambit of power exercised by the Deputy Commissioner while making a revenue partition under Chapter-VI of the Assam Land and Revenue Regulation, 1886, operates in a different field as compared to exercise of power under Section 54 CPC. As such, the submissions made by the learned counsel for the appellants does not merit acceptance by this court. Consequently, the substantial question of law No. 1 stands answered against the appellant and in favour of the respondent.

27. As regards the second substantial question of law, the materials available on

record leaves no manner of doubt that the plaintiff's claim over the land is one based on title that flows from the decree passed in Title Suit No. 62/1971. The present is evidently a suit for declaration involving complicated issues pertaining to title of the plaintiff and therefore, the plaintiff's case would be covered by the condition prescribed under paragraph 22(3) of the Full Bench decision rendered in the case of Daulatram Lakhani (Supra). Hence, suit would not be barred under Section 147 read with Section 154 of the Assam Land and Revenue Regulations, 1886. Accordingly, the said question of law is also answered against the appellant and in favour of the respondent.

28. In view of the discussions and observations made in the foregoing paragraphs, I am of the considered opinion that the second appeal is devoid of merit and accordingly the same shall stand dismissed.

However, there would be no order as to cost.

Office to send back the records.