

(2014) 03 CAL CK 0126

In the Calcutta High Court

Case No : F.M.A.T. No. 797 of 2010 and C.A.N. No. 6381 of 2010

Shrimati Satu Bala Dassi and Others

APPELLANT

Vs

Chaturanandan Saha and Others

RESPONDENT

Date of Decision : 21-03-2014

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 39 Rule 1, Order 39 Rule 2 151
Criminal Procedure Code, 1973 (CrPC) — Section 144

Citation : (2014) 2 CALLT 224 : (2014) 3 CHN 328 : (2014) 3 WBLR 318

Hon'ble Judges : Tarun Kumar Gupta, J; Subhro Kamal Mukherjee, J

Bench : Division Bench

Advocate : Syama Prasanna Roy Chowdhury, Mr. Debasish Roy and Mr. Mujibar Rahman, for the Appellant; Pratik Prakash Banerjee, Mr. Md. Sabir Ahmed for the Respondent No. 2, Mr. Saptangshu Basu, Arindam Banerjee and Mrs. Ananya Das for the Respondent No. 13, for the Respondent

Final Decision : Dismissed

Judgement

Subhro Kamal Mukherjee, J.—This is an appeal against judgment and order dated March 17, 2010 passed by the learned Civil Judge (Senior Division) at Suri, District - Birbhum, in Title Suit No. 42 of 2009. By the order impugned, the learned trial judge rejected an application, filed by the plaintiff, for temporary injunction on contest. Liberty was granted to the defendant No. 2 to raise any construction on her purchased portion subject to the result of the suit clarifying that the defendant No. 2 would not be entitled to claim any equity over such construction in the suit.

2. The appeal arises from Title Suit No. 42 of 2009, which has been a suit for partition.

3. The plaintiff filed this suit on the following allegations:

(a) that the suit property originally belonged to Janada Sundari Dasi, since deceased, Roma Bati Dasi, since deceased, and Radhaballav Mandal, since

deceased, to the extent of 2.58 acres, 5.17 acres and 2.59 acres respectively. They were in joint possession of the same according to their shares. Their names were recorded in R.S. Khatian Nos. 546, 552 and 723 of Mouja - Chhora. The plaintiffs and the defendants have been the successors of the said recorded owners of the suit property and they being the co-sharers were in joint possession of the same.

(b) that aforesaid Janada Sundari Dasi, during her lifetime, out of love and affection, transferred specific 80 decimals of the suit property along with other properties to the predecessor of the plaintiffs and defendant No. 3, namely, Rakshakar Mandal, by executing a registered deed of gift dated February 12, 1962 corresponding to Magh 29, 1368 B.S. Since then Rakshakar Mandal was in possession of the same after accepting the said deed of gift to the knowledge of all concerned. The said Rakshakar Mandal was the eldest grandson of the said Janada Sundari Dasi. After transfer of 80 decimals of the suit property, the said Janada Sundari retained her ownership in 1.78 acres out of 10.34 acres.

(c) that said Janada Sundari Dasi died as widow about 40 years ago leaving her only issue and daughter, namely, Harimoti Dasi, since deceased, the predecessor of the plaintiffs and others. After the death of Janada Sundari, her aforesaid daughter, being the only heiress, inherited all the properties, including the aforesaid undivided share of the suit property left by her mother, namely, Janada Sundari.

(d) that the said Harimoti Dasi died as a widow about 35 years ago leaving six sons and two daughters, namely, Rakshakar Mandal, since deceased, the predecessor of the plaintiffs and the defendant No. 3, Sudhakar Mandal, since deceased, the defendant No. 4, Dinanath Mandal, since deceased, Purna Chandra Mandal, since deceased, Gangadhar Mandal, since deceased, Sumitra Mandal since deceased and the defendant No. 5. After the death of Harimoti Dasi, her aforesaid six sons and two daughters inherited the suit property left by Harimoti Dasi in equal shares, that is, each having 1/8th share and they were in joint possession of the same.

(e) after the death of Harimoti Dasi her son Rakshakar Mandal became the owner of the suit property to the extent of 80 decimals of the land by way of gift from Janada Sundari Dasi and 1/8th share of 1.78 acres by way of inheritance from his mother and as such the share of Rakshakar Mandal, since deceased, was 1 acre 2? decimals.

(f) that said Rakshakar Mandal died in the year 1980 leaving his widow, five sons and a daughter, who are the plaintiff Nos. 1 to 6 and the defendant No. 3 respectively. During the time of L.R. operations only 80 decimals of the suit property has been recorded in the names of the heirs of Rakshakar Mandal in L.R. Khatian No. 471 of Mouja - Chhora. However, the said recording of 80 decimals of land is wrong and erroneous. The plaintiffs and the defendant No. 3 were in possession of 1 acre 2? decimals undivided share of the suit property

jointly with the other co-sharers.

(g) that though the suit property has not, yet, been partitioned by metes and bounds, but for convenience of possession the co-sharers were in possession of the same separately since the time of their R.S. recorded predecessors. Accordingly, these plaintiffs and the defendant No. 3 were in joint possession of the southern side of "Sener Pukur" according to their shares as stated above. The said southern side of "Sener Pukur" was gifted by Janada Sundari to Rakshakar Mandal by the aforesaid deed of gift. Accordingly, the plaintiffs and the defendant No. 3 were in possession of said portion of the suit plot. In an amicable settlement amongst R.S. recorded owners the southern side and its adjacent area of the suit property was allotted to the R.S. recorded owner Janada Sundari and rest portion allotted to the shares of other R.S. recorded owners and as such said Janada Sundari, rightly, transferred 80 decimals of the suit plot in the southern side of "Sener pukur" without objection from any corner or other co-sharers, but still the suit property has been joint, ejmal and undivided property and they have been in joint possession of the same with all the co-sharers.

4. In the suit, therefore, the plaintiff claimed a decree for partition declaring 1 acre 2? decimals share with the defendant No. 3.

5. An application for temporary injunction under Order 39, rules 1 and 2 read with Section 151 of the CPC was moved by the plaintiffs in connection with the said suit. In the said application, the plaintiffs prayed for an order of temporary injunction restraining the defendant Nos. 1 and 2 from making any construction in any portion of the suit property or from changing the nature and character of the suit till the disposal of the suit. It was alleged that the defendant Nos. 1 and 2 were trying to make major constructions in the southern side of "Sener pukur".

6. The defendant No. 2 contested the said application for temporary injunction by filing a written objection. The defendant No. 2 in the said objection stated as follows:

(a) that the suit property previously belonged to Janada Sundari Dasi to the extent of 2.58 acres, Roma Bati Dasi to the extent of 5.17 acres and Radhaballav Mandal to the extent of 2.59 acres and their names were duly recorded in R.S. records-of-rights as a whole and they have been possessing specific areas.

(b) that Janada Sundari Dasi got the southern side of the "Sener Pukur" according to her share and Roma Bati Dasi got eastern side of the plot and Radhaballav Mandal got middle portion of the plot amicably and were possessing separately.

(c) that the successors-in-interest of Janada Sundari Dasi have, still, been possessing specific area since last 47 years and the successors-in-interest of Roma Bati Dasi have, still, been possessing their specific area by constructing Muri Factory thereon since last 47 years.

(d) that Radhaballav Mandal transferred his entire share to one Dipak Kumar Lala

in the year 1978 by executing five sale deeds and since then Dipak Kumar Lala has been possessing the specific area, that is, middle portion of the plot and his name was duly recorded in the finally published L.R. records-of rights.

(e) that the said Dipak Kumar Lala transferred his entire area, that is, the middle portion, to Shrimati Bulbul Chatterjee to the extent of 1.60 acres and to her minor son, Chandra Sekhar Chatterjee, to the extent of 99 decimals with specific demarcated sketch map attached with those deeds and their names have, already, been mutated in the settlement records and they have been possessing the specific area by constructing pucca boundary wall, cement pillars etc., with the knowledge of all concerned including the present plaintiffs.

(f) that, thereafter, Shrimati Bulbul Chatterjee transferred 22 decimals land out of her 1.60 acres land through registered deed of gift to Mithu Saha, that is, the defendant No. 2, with specific demarcated area shown in sketch map attached with the deed and, thereafter, Mithu Saha has been possessing the specific area by constructing brick made boundary wall with the knowledge of all concerned and without any objection from any corner including from the present plaintiffs and the defendants.

(g) that the defendant No. 2 has applied for a L.P.G. dealership from Bharat Petroleum Corporation Limited (B.P.C.L. in short) and for the purpose of construction of L.P.G. godown the area of 22 decimals, as mentioned in the deed of gift of Mithu Saha, has been offered to B.P.C.L. These plaintiffs, in connivance with the other competitors for L.P.G. dealership, have filed this suit to create a doubt.

7. The learned trial judge rejected the said application for injunction with the findings that even from the averments of the plaint itself, it appeared that from the time of preparation of revenue settlement record-of-rights that the co-sharers used to possess the specific portions amicably without any interference from other co-sharers. The plaintiffs and the defendant No. 3, also, possessed specific portions of the suit property, more particularly the southern side of "Sener pukur". Although, it was not alleged by either of the parties that the property has been amicably partitioned by metes and bounds, but it was evident that the property has been possessed by many co-sharers amicably and each co-sharer has been possessing separate portions without interference from the other co-sharers.

8. Mr. Syama Prasanna Roy Chowdhury, learned senior advocate, appearing for the petitioners, submits that when, admittedly, property has not been partitioned amicably by metes and bounds, no co-sharer is entitled to make any construction on the joint undivided property. In support of his contentions he has cited the following decisions in the cases of Dorab Cawasji Warden Vs. Coomi Sorab Warden and others, , Gangubai Bablya Chaudhary and Others Vs. Sitaram Bhalchandra Sukhtankar and Others, , Israil and others versus Samser Rahman and others reported in 19 CLJ 47, Maharwal Khewaji Trust (Regd.), Maharwal

Khewaji Trust (Regd.), Faridkot Vs. Baldev Dass, Sarat Chandra Chattopadhyaya Vs. Ganga Charan Chakravarty , Ram Prosad Mondal Vs. Sm. Snehalata Ghosh,

9. Mr. Pratik Prakash Banerjee, learned advocate appearing for the defendant No. 2, submits, on instructions, that the defendant No. 2 had no intention to make any further construction. Mr. Banerjee submits that the plaintiffs are claiming through Rakshakar Mandal. Janada Sundari gifted specific 80 decimals of land to Rakshakar Mandal and the defendant No. 1 and 2 have not made any construction on the said specific area.

10. Mr. Saptangshu Basu, learned senior advocate appearing for the defendant No. 13, draws our attention to the averments of the application for injunction that no order of injunction has been sought for as against the defendant No. 13. In fact, a proceeding was initiated by the plaintiffs u/s 144 of the Code of Criminal Procedure, 1973, but the proceeding was dropped. Since injunction sought for was against the defendant Nos. 1 and 2 and as the defendant No. 13 has not derived any interest through the defendant Nos. 1 and 2, the plaintiffs are not entitled to any order of injunction against the defendant No. 13. Mr. Basu draws our attention to a decision in the case of Mandali Ranganna and Others etc. Vs. T. Ramachandra and Others,

11. During the course of hearing we appointed a practising advocate of this Court as the Special Officer requesting her to hold local inspection and to report back to us as to the present position of the locale.

12. The learned Special Officer inspected the locale in presence of the representatives of the parties. She found a godown for storing LPG cylinders has been constructed and the construction has been encircled by eight feet complete boundary wall on all the four sides of the godown. She, also, found a school, that is, Levelfield School, at the western side of the "Muri Mill". The said building was unplastered and under construction.

13. Possession by one co-sharer is possession by the others. However, a co-owner is not entitled to an order of injunction restraining another co-sharer from exercising his right in the common property absolutely and simply on the ground of his co-ownership and without reference to the amount of damage sustained or to be sustained by one side or the other from withholding injunction. While a co-sharer is entitled to object another co-sharer's exclusive appropriation of land to the detriment of other co-sharers, the question as to what should be granted to the plaintiffs in the event of invasion of his right will depend the circumstances of each case.

14. In this case, by the order impugned, the defendant co-sharers were allowed to erect structures subject to the ultimate result of the suit.

15. Moreover, it appears that there are existing structures and, therefore, neither the defendant Nos. 1 and 2 nor the defendant No. 13 could be restrained from making construction merely because the said property has not been divided by

metes and bounds.

16. It is pertinent to note here that the parties are possessing their respective demarcated portions from the time of the preparation of revenue settlement record of rights and are exercising their absolute rights in respect of their specific areas. A person, who had kept quiet for a long time and allowed another to deal with the properties exclusively, ordinarily, would not be entitled to an order of injunction.

17. There was no prayer for injunction as against the defendant No. 13. Therefore, in the appeal Court, the plaintiff cannot ask for further injunction as against the defendant No. 13.

18. Mr. Banerjee, learned advocate appearing for the defendant No. 2, has submitted in the Court that the construction of the defendant Nos. 1 and 2 was complete and they have no intention to make further construction.

19. If injunction, as prayed for, is granted to the plaintiffs, the defendants will suffer irreparable loss and injury. The parties are possessing their respective demarcated shares independently at least from time of preparation of revenue settlement records-of-rights prepared under the West Bengal Estates Acquisition Act, 1953. At this stage merely because the suit property was not partitioned formally by metes and bounds, the co-sharers should not be restrained from making constructions within their specific portions. The learned trial judge, rightly, held that, of course, such constructions would be subject to the result of the suit.

20. When the trial court, on a consideration of the respective cases of the parties and the materials produced before it, was of the view that the plaintiff was not entitled to an order of injunction, as the appellate court, we shall not interfere with such exercise of discretion by the trial court when we find that such exercise was not palpably incorrect or untenable.

21. We have carefully considered the findings arrived at by the learned trial judge while disposing of the application for temporary injunction in this suit. We are of the opinion that the reasons weighed with the trial court do not indicate that the view is not a possible view. Merely because there could be a different conclusion, as the appeal court we shall not interfere with such discretionary order. If any citation is necessary for such a well-established proposition, reference may be made to the observations by the Supreme Court of India in the case of Mohd. Mehtab Khan and Others Vs. Khushnuma Ibrahim and Others,

22. In the absence of any illegality, we are not inclined to interfere with the order passed by the trial court in this case.

23. The appeal is, thus, dismissed.

24. In view of the dismissal of this appeal, the application, filed under C.A.N. No. 6381 of 2010, becomes infructuous and the same is, also, dismissed. We make

no order as to costs.

Tarun Kumar Gupta, J.

I agree.