

IN THE HIGH COURT OF TRIPURA
AGARTALA

RSA NO.25 OF 2010

Sri Safiq Miah,
son of late Dilu Miah,
resident of Vill. Kalamkhet,
P.S. Sonamura, District : West Tripura.
..... Plaintiff-appellant

- Vs -

- 1. Sri Gouranga Bhowmik,
- 2. Sri Santosh Bhowmik,
- 3. Sri Prantosh Bhowmik,
- 4. Sri Ashutosh Bhowmik,
- all are sons of late Jogesh Ch. Bhowmik,

- 5. Smt. Sipra Sarkar,
wife of Bali Sarkar,
daughter of late Jogesh Chandra Bhowmik,
- 6. Smt. Gouri Datta,
wife of Haridas Sarkar,
daughter of late Jogesh Chandra Bhowmik,

- All are residents of Vill. Kalamkhet,
P.S. Sonamura, District : West Tripura.

.....Defendant-respondents

B E F O R E
THE HON'BLE MR. JUSTICE S. TALAPATRA

For the plaintiff-appellant : Mr. K.N. Bhattacharji,
Sr. Advocate
Mr. S. Acharji, Advocate

For the defendant-respondents : Mr. S.C. Das, Advocate

Date of hearing & order : 26.03.2015

Whether fit for reporting :

Yes	No
	√

JUDGMENT & ORDER (ORAL)

Heard Mr. K.N. Bhattacharji, learned senior counsel, assisted by Mr. S. Acharji, learned counsel appearing for the appellant as well as Mr. S.C. Das, learned counsel appearing for the respondents.

2. This is an appeal under Section 100 of the CPC against the judgment dated 03.02.2010 delivered in Title Appeal No.7/2009 by the Addl. District Judge, West Tripura, Sonamura, reversing the judgment dated 28.07.2009 delivered in Title Suit No.24/2007 by the Civil Judge, Junior Division, Sonamura, West Tripura.

3. The appellant instituted the suit, being Title Suit No.24/2007 for declaration of possession and perpetual injunction in the court of the Civil Judge, Jr. Division, Sonamura, West Tripura. The respondents herein are the defendants in that suit. There is no dispute that the suit has been decreed based on the judgment dated 28.07.2009. Being aggrieved, the defendants filed an appeal under Section 96 of the CPC in the court of the Addl. District Judge, West Tripura, Sonamura, being Title Appeal No.07/2009. By the impugned judgment dated 03.02.2010 delivered in the said appeal, being Title Appeal No.07/2009, the judgment of the trial court has been reversed, holding primarily that :

"No court has any right and power to declare the possessory right of the plaintiff-respondent against the interest of the real owner i.e. appellants.

It further appears from the impugned judgment of the Ld. Court below that Ld. Civil Judge (Jr. Div.), Sonamura, restrained the appellants by issuing a perpetual injunction from entering into the suit land and from disturbing the peaceful possession for the same by the plaintiff-respondent.

The Ld. Court below committed a serious error by issuing an injunction order against the real owner. Perhaps inadvertently, the Ld. Court below overlooked and issued the injunction order in favour of the permissive possessor against the real owner of the suit land.

Thus the discussion made above, I am left with no choice but to opine that the impugned judgment and decree passed by the Ld. Court below in T.S.24/07 has no leg to stand upon and hence, it is liable to be set aside."

4. At the time of admission of this appeal filed under Section 100 of the CPC against the said judgment of the first appellate court dated 03.02.2010, this court formulated the following substantial questions of law :

- (1) Whether the findings of the learned Trial Court that without raising an issue as to whether the plaintiff is a son of Dilu Miah and without taking this stand specifically in the written statement, it can be held that the plaintiff is not a son of Dilu Miah and accordingly the plaintiff is not a cosharer with other successors of Dilu Miah over the suit land after his death?**
- (2) Whether the decree of the Trial Court restraining by perpetual injunction in the decree of injunction passed in T.S.No.08 of 1968 by the Munsiff and affirmed by the High Court in 2nd Appeal No.49 of 1971 can be set aside by the Appellate Court on the ground that a co-sharer cannot restrain another co-sharer in the facts and circumstances of the case?**

Even though the appellant was given liberty to raise any other substantial question of law, but Mr. Bhattacharji, learned senior counsel, has not pressed for any additional substantial question of law.

5. Mr. Bhattacharji, learned senior counsel appearing for the appellant, has submitted that by the judgment and order dated 30.04.1970 delivered in the title suit, being Title Suit No.8/1968, the declaration was made in the manner as under :

"In view of the above findings, the plaintiff is entitled to order of permanent injunction against the defendants 2 & 3 restraining alienation of the suit land. He cannot get injunction against the defendant No.6 since the said defendant No.6 is also entitled to 1/5th share in the suit land. But the defendant No.6, being a stranger, should not get possession of the suit land unless by partition excepting the plot No.385 which has already come into his possession."

6. Mr. Bhattacharji, learned senior counsel, in view of that, has submitted that the appellant being the son of the plaintiff of the former suit, has been continuing the possession, but on the face of dispossession from the place, comprised in the share of the predecessor of the defendant, namely Jogesh Chandra Bhowmik, who was the defendant No.6 in the former suit, he had to file the suit. The trial court, on consideration of the materials on record, has observed that entries in the finally published khatian has to be presumed correct unless it is rebutted. The genuinity of the khatian is under challenge by the plaintiff in a separate proceeding instituted by him under Section 95 of the TLR & LR Act, 1960,

where he has prayed for correction of the record of rights relating to the suit land 2/3 years back. At the same time, it goes without saying that, only khatian cannot be the source of the title. There must be the primary source of title for any property. Here the plea of the defendant falls miserably as the trial court finds no convincing explanation as to the incorporation of the defendant No.1 in the khatian No.279/4, relating to plot No.152. Having held so, the following declaration and the consequential relief has been granted :

“In the result the possessory right of the plaintiff over the suit land is confirmed and the defendants are restrained from disturbing the possession of the plaintiff over the suit land till the suit land is partitioned by metes and bounds among the cosharers including the parties of the present suit.”

7. Thus, Mr. Bhattacharji, learned senior counsel, has submitted that while passing the impugned judgment, the first appellate court has completely misread the judgment and decree passed in the former suit, being Title Suit No.8/1968 and, as a result, the said court has committed serious illegality in holding that no injunction can be passed against the co-sharers. According to Mr. Bhattacharji, learned senior counsel, the decree of perpetual injunction against the predecessor of the defendants is already on record and what the trial court has passed, has reiterated the said order, inasmuch as the judgment and decree dated 30.04.1970 has reached its finality as there had been no interference either by the first appellate court when the said judgment and order was

challenged nor by the second appellate court when it was considered by the Hon'ble High Court.

8. While refuting such submission, Mr. S.C. Das, learned counsel appearing for the respondents, has submitted that the trial court, on the contrary, has read the judgment wrongly. Mr. Das, learned counsel, has taken this court to the paragraph 13 of the judgment dated 30.04.1970 (Exbt.3 series) delivered in Title Suit No.8/1968, which provides as under :

"In the result, it is hereby ordered that the suit be decreed in part on contest against the defendant no.3 on admission against the defendants 1, 2 & 5 and exparte against the defendant no.4. The plaintiff's claim of title against the defendant no.6 in respect of the suit land is hereby dismissed. The plaintiff's right, title and interest in the suit land is hereby declared to the extent of 4/5th (four-fifth) share. The defendants 2 & 3 are hereby permanently restrained from alienating any part of the suit land. The defendant no.6 is entitled to 1/5th (one-fifth) share in the suit land; but excepting plot No.385 of mouja Uрмаi under khatian no.98, he will not be entitled to possess any other plot of the suit land till partition on the basis of his share. The defendant No.6's possession in the said plot No.385 is subject to confirmation by partition on the basis of his share. In view of the circumstances of the case, I make no order as to costs."

9. On the basis of the above, Mr. Das, learned counsel appearing for the respondents, has endeavoured to show that the suit was dismissed against the defendant No.6, who was the predecessor of the present defendant-respondents. He has further sought to construct his argument that there was no other order against the defendant No.6.

10. But, from a keen reading, it appears that the defendant No.6 even though has been declared to be the owner of 1/5th share in the suit land, except the plot No.385 and subject to the partition in the manner as declared by the judgment dated 30.04.1970. Simultaneously, he has been declared not to be entitled to possess any other plot of the suit land till partition on the basis of his share. This is in conformity with the observation made in the judgment of the former suit in paragraph 11, which is gainfully reproduced hereunder :

"In view of the above findings, the plaintiff is entitled to order of permanent injunction against the defendants 2 & 3 restraining alienation of the suit land. He cannot get injunction against the defendant no.6 since the said defendant no.6 is also entitled to 1/5th share in the suit land. But the defendant no.6, being a stranger, should not get possession of the suit land unless by partition excepting the plot no.385 which has already come into his possession."

11. Therefore, the defendant No.6, the predecessor of the defendant-respondents be deemed to have been enjoined from taking possession of the other plots of the suit land except plot No.385, which is already under his possession. Even the said finding has been maintained by the Gauhati High Court in the second appeal, being Second Appeal No.49/1971 by holding that :

"The burden was on the plaintiff to establish that the names of defendants nos.1 to 5 had been entered in the revenue records without any legal basis, and this having not been done there is no escape from the conclusion that the entries in the revenue records had been validly made. If so, then

the present appeal must fail on the sole point that the plaintiff has failed to prove as against defendant no.6 that defendant no.4 was not the owner of one-fifth share in the suit land and that the transfer by exchange made by defendant no.4 in favour of defendant no.6 is not valid in law. In view of this conclusion I am not inclined to examine whether the plaintiff is stopped from maintaining the suit."

Finally, it has been observed that :

"Despite certain observations here and there made by the learned Additional Subordinate Judge the decree made in favour of the plaintiff against defendants nos. 1 to 3 and 5 respecting four-fifth share in the land holds the ground. These observations I have made lest any difficulties may crop up in the future between the parties about interpretation of the decree made by the learned Additional Subordinate Judge."

12. It can be had from those observations that no decree has been passed against the defendant No.4, who executed the exchange deed in favour of the defendant No.6. Therefore, the Hon'ble High Court has not disturbed the status of the defendant No.6 in that suit as the co-owner of the 1/5th share in the suit land. That finding has also reached to its finality. Now, the question is that whether the present suit has been filed regarding the same suit land or not.

13. There is no dispute that the suit land as described in the plaint is equal to the suit land as described in the former suit. Having regard to that, the judgment of the trial court cannot be held suffering from any infirmity, inasmuch as in view of the judgment dated 24.05.1974 delivered in Second Appeal

No.49/1971, the decree of the contingent injunction as passed against the predecessor of the defendants has reached to its finality unless the condition is met. The condition is the partition of the joint property by metes and bounds. The injunction therefore, as passed by the trial court has to be the contingent injunction, not a perpetual injunction against the defendants who are claiming interest over the 1/5th share of the suit property qua the defendant No.6 in the former suit. The perpetual injunction means that the injunction will never come to an end. It is clarified that if the suit land is partitioned amongst the lawful co-sharer and in terms of the declaration made by the High Court in the judgment dated 24.05.1974 delivered in Second Appeal No.49/1971, the injunction will have no force whatsoever against the defendants. As such, the judgment passed by the trial court, declaring the possessory right in favour of the plaintiff suffers from serious vice. There cannot be any possessory right against the co-sharer, even though that co-sharer may not be permitted to hold the possession under certain circumstances.

14. In this case, the co-sharer, the defendant No.6 of the former suit was restrained, as he was a stranger amongst the other co-sharers. But his right, title and interest over the 1/5th share of the suit land, both in the former suit and in the present suit were never touched and disturbed in the former suit. As such, the declaration of the possessory right is absolutely unsustainable in law. Having regard to the judgment passed in the former suit,

which reached to its finality in view of the judgment dated 24.05.1974 delivered in Second Appeal No.49/1971, the suit ought to have been declared as barred by *res judicata*.

15. In view of all these considerations, the suit instituted by the appellant is bound to be dismissed, but not for the reasons as assigned by the impugned judgment. The reasoning of the impugned judgment stands substituted by the reasoning as stated above. Accordingly, this appeal fails and is dismissed.

Prepare the decree accordingly and send down the records thereafter.

JUDGE

ROY