

IN THE HIGH COURT OF TRIPURA
AGARTALA

RSA NO.02 OF 2010

Sri Tapan Datta,
son of late Nalini Ranjan Datta,
resident of Sarashima,
P.S. Belonia, District South Tripura.

.....Plaintiff-appellant

– Vs –

1. Sri Anil Debnath,
son of late Madhab Debnath
resident of Sarashima,
P.S. Belonia, District South Tripura.
2. Sri Goutam Debnath
3. Sri Haradhan Debnath
4. Sri Manik Debnath
- all are sons of Sri Anil Debnath,
resident of Sarashima,
P.S. Belonia, District South Tripura.

..... Principal-defendant respondents

5. Sri Arun Chandra Datta,
6. Sri Anjan Datta,
both are sons of late Nalini Ranjan Datta,
resident of Sarashima,
P.S. Belonia, District South Tripura.
7. Smt. Kusum Bala Datta,
wife of late Nalini Ranjan Datta,
resident of Sarashima,
P.S. Belonia, District South Tripura.

..... Proforma-defendant respondents

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

For the plaintiff-appellant : Mr. P. Chakraborty, Advocate

For the respondents : None

Date of hearing & order : 26.02.2015

Whether fit for reporting :

Yes	No
√	

JUDGMENT & ORDER (ORAL)

Heard Mr. P. Chakraborty, learned counsel, appearing for the plaintiff-appellant. Despite due notice from this court, none appears for the respondents.

2. This is an appeal under Section 100 of the CPC, questioning the legality of the judgment dated 10.07.2009, delivered in Title Appeal No.02/2009 by the Addl. District Judge, South Tripura, Belonia.

3. At the time of admitting this appeal, this court framed the following substantial question of law with liberty to the appellant to raise any other relevant substantial question of law :

“Whether the appellate court can reverse the decree of the original/trial court relying on a document (Exhibit R1) inadmissible under the provisions of Section 33 of the Evidence Act.”

4. The essential fact that may be relevant for appreciating the substantial question of law that has been raised for demonstrating illegality in the impugned judgment dated 10.07.2009 may be introduced at the outset.

The land measuring 3.23 acres under plot Nos. 5194, 5196, 5197, 4652 and 4653 of Mouza Sarashima had been allotted to the father and mother of the plaintiff, the appellant herein by the Order No.13/374, dated 16.06.1985 and thereafter a khatian recording the said allotment under No.3064 of Mouza Sarashima was created in the name of Nalini Ranjan Datta and Smt. Kushum Bala Datta, the parents of the plaintiff. During revisional survey operation, the allotted land had been re-surveyed in khatian No.1478. The parents of the plaintiff, by virtue of the allotment, became the owner of the suit land and description of which has been elaborately given and appended in the plaint. The father of the plaintiff, Nalini Ranjan Datta expired in the year 1998, leaving behind the plaintiff and the proforma-defendants and the mother of the plaintiff as his legal heirs and thus the plaintiff and the proforma defendants have become the owner by inheritance of the suit land. In the month of April, 2007 the defendants ventured to take forceful possession of the suit land, but for the resistance their bid could not succeed. On 25.06.2007 the defendants and their collaborators tried to enter into the suit land, but having resisted by the plaintiff, their attempts failed. Out of apprehension, the suit being Title Suit

No.24/2007 was filed in the court of the Civil Judge, Jr. Division, Belonia, South Tripura.

5. The defendants contested the suit by filing written statement and contending that the order of allotment as issued in favour of the parents of the plaintiff was illegal as the defendants were in possession of the suit land since 1988, within the knowledge of the plaintiff. The defendants also denied the title of the plaintiff and the proforma-defendant No.7 and projected the plea of adverse possession for purpose of extinguishing the title of the true owner. The pleadings as to the bids to dispossess the plaintiff and proforma-defendant No.7 was squarely denied by the defendants.

6. On the basis of the pleadings, the following issues were framed by the trial court :

- "1. Is the suit maintainable in its present form?
2. Has the plaintiff a cause of action?
3. Has the plaintiff's right, title and interest over the land of 'A' Schedule of the plaint?
4. Is the story of possession of the plaintiff true?
5. Is the plaintiff entitled to get decree as prayed for?
6. What other relief or reliefs the plaintiffs are entitled under laws and equity?"

7. The plaintiff, Sri Tapan Datta is examined as PW.1, whereas another independent witness, namely Mukul Chakraborty has been examined as PW.2. The plaintiff has also brought on evidence the certified copy of the khatian No.3064 of Mouza Sarashima (Exbt.1), original allotment order No.13/364 (Exbt.2), certified copy of the map of the sheet No.5 (P) of Mouza Sarashima (Exbt.3) and the certified copy of the khatian No.1478 of Mouza Sarashima (Exbt.4). For the defendants, three witnesses, namely Anil Debnath (DW.1), Dhirendra Malakar (DW.2) and Lalit Baidya (DW.3) have been examined.

8. By dint of those witnesses, the plaintiff has introduced in the records of evidence the certified copy of the judgment and order dated 07.09.2006 in T.S.31/2005 (Exbt.P), certified copy of the deposition of Mukul Chakraborty in connection with T.S.31/2005 (Exbt.Q), certified copy of the deposition of Smt. Kusum Bala Datta in connection with T.S.31/2005 (Exbt.R), original summon in connection with case No.T.S.31/2005 (Exbt.S) and photo-copy of the plaint of Title Suit No.31/2005, which was compared with the original (Exbt.T).

9. After appreciating the evidence, the trial court has returned the finding that the defendants have failed to prove their adverse possession as well as the possession over the suit land as asserted. Moreover, Exbt.R, which is the statement of one of the co-owners of the suit land, the proforma-defendant No.7, was not taken into consideration by the trial court. Thereafter, the suit has

been decreed, declaring the right, title and interest of the plaintiff over the suit land and by the decree, perpetual injunction against the defendant Nos. 1 to 6 from disturbing the peaceful possession of the plaintiff.

10. Being aggrieved by the judgment dated 16.01.2009, delivered in T.S.24/2007, the defendants filed an appeal under Section 96 of the CPC in the court of the Addl. District Judge, South Tripura, Belonia, being Title Appeal No.02/2009. By the impugned judgment dated 10.07.2009, the said appeal was partly allowed, on returning the finding that:

“On the contrary the appellants side mainly relied on the statement of Smti Kusum Bala Datta, the plaintiff of T.S.31/05 wherein she admitted in her cross that the appellants are possessing the suit land adversely near about for 20 years and on the contrary she was not possessing the suit land for 20 years. The appellants side submitted certified copy of cross-examination of Smti Kusum Bala Datta in T.S.31/05 (Court Ext.-No.8). At the same time the appellants side also produced certified copy of order of withdrawal dated 7.9.2006 in connection with T.S.31/05 (Court Ext.-No.P). They have also submitted the copy of the plaint of T.S.31/05 (Court Ext.No.T). It appears from the Court Ext.No.T that Smti Kusum Bala Datta, one of the principal owner of the suit land filed T.S.31/05 against the appellants for declaration of her title and permanent injunction. It further appears from the Court Ext.No.P that the T.S.31/05 was withdrawn on the prayer of Smti Kusum Bala Datta. It further appears from the copy of the plaint (Court Ext.No.T) that Plot Nos. 5194/5196/5197, land measuring 2.64 acres was the suit land of T.S.31/05. At the same time I also find that the suit land of T.S.31/05 is also a part of the suit land of T.S.24/07 in respect of which the respondent prayed for declaration of title and permanent injunction. Smti Kusum Bala Datta, the principal owner who was the plaintiff of T.S.31/05 and in the present suit of T.S.24/07 she is also impleaded as proforma-defendant No.7. Smti Kusum

Bala Datta is one of the principal owner of the suit plot No.5194/5196/5197 of land measuring 2.64 acres which is the suit land of both T.S.31/05 and T.S.24/07. Smti Kusum Bala Datta being the plaintiff of T.S.31/05 specifically deposed in her cross-examination (Court Exbt.R) that the defendant-appellants are possessing the suit land adversely for 20 years and she was not possessing the land for last 20 years. From her above statement in cross it is proved here that the suit plot Nos.5194/5196 and 5197 have been possessing by the appellants for last 20 years before filing of T.S.31/05. Her statement in cross also substantiate the contention of the appellants that they have been possessing the suit land for last 20 years.

In view of the above admitted facts I find that the appellants have been possessing the suit plot Nos.5194/5196/5197, land measuring 2.64 acres for last 20 years and conversely neither the respondent nor any other proforma-defendants of T.S.24/07 is in possession of the suit plot Nos. 5194/5196/5197. So, I find that the respondent and the pro-defendant Nos. 5, 6 and 7 though having title over the entire suit land, but they are not possessing the suit plot Nos. 5194/5196/5197 and as such they are not entitle to get an order of permanent injunction against the appellants."

In view of that finding, the decree of perpetual injunction was interfered with and the appeal was partly allowed.

11. Having regard to this finding, the pertinent question that emerges for consideration of this court is that, whether the court was right in considering the deposition of proforma-defendant No.7 (Exbt.R) as the sole piece of evidence for purpose of determining the possession of the suit land or not.

12. Mr. P. Chakraborty, learned counsel appearing for the appellant, has submitted that such consideration is entirely illegal in

terms of Section 33 of the Evidence Act, 1872, which provides as under :

“33. Relevancy of certain evidence for proving, in subsequent proceeding, the truth or facts therein stated.- Evidence given by a witness in a judicial proceeding, or before any person authorized by law to take it, is relevant for the purpose of proving, in a subsequent judicial proceeding, or in a later stage of the same judicial proceeding, the truth of the facts which it states, when the witness is dead or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or if his presence cannot be obtained without an amount of delay or expense which, under the circumstances of the case, the court considers unreasonable.

Provided-

that the proceeding was between the same parties or their representatives in interest;

the adverse party in the first proceeding had the right and opportunity to cross-examine;

that the questions in issue were substantially the same in the first as in the second proceeding.”

13. From a bare reading of Section 33 of the Evidence Act, it would appear that the following conditions are to be fulfilled for purpose of proving the contents or any elements from the previous judicial proceeding :

- (i) The proceeding was between the same parties or their representatives in interest,
- (ii) the adverse party in the first proceeding had the right and opportunity to cross-examine and

- (iii) the questions in issue were substantially the same in the first as in the second proceeding.

Apart that, the substantive requirement of having the aid of Section 33 of the Evidence Act is that either that witness is dead or cannot be found or is incapable of giving evidence, or is kept out of the way by the adverse party, or if his presence cannot be obtained without an amount of delay or expenses which, under the circumstances of the case, the court considers unreasonable.

14. After reading the impugned judgment, this court does not find any endeavour for ascertaining these requirements on record. In absence of compliance of those requirements, obviously the provision of Section 33 of the Evidence Act cannot be applied for leading evidence in a previous judicial proceeding or before any person authorised under law to take such evidence. In this regard, a decision of the apex court may beneficially be reproduced. In **Sashi Jena & Ors. Vs. Khadal Swain & Anr.**, reported in **(2004) 4 SCC 236**, the apex court while enunciating the scope of Section 33 of the Evidence Act, has laid down the following principles of law:

7. According to the prosecution case, PW.1 was the solitary eyewitness to the alleged occurrence, but in his evidence before the trial court, he did not at all support the prosecution case though he supported the same in all material particulars in his statement made before the learned Magistrate during the course of inquiry under Section 202 of the Code. The crucial question to be examined in this case is as to whether the statement of PW.1 recorded during the course of inquiry under

Section 202 of the Code is relevant and admissible in the case on hand so as to form basis of conviction of the accused persons. It has been submitted on behalf of the appellants that such a statement is not admissible under Section 33 of the Evidence Act, 1872 ("the Act" for short) as the accused had neither any right nor opportunity to cross-examine PW.1 during the course of inquiry. It may be useful to refer to Section 33 of the Act which runs thus :

***"33. Relevancy of certain evidence for proving, in subsequent proceeding, the truth of facts therein stated-* Evidence given by a witness in a judicial proceeding or before any person authorized by law to take it, is relevant for the purpose of proving, in a subsequent judicial proceeding, or in a later stage of the same judicial proceeding, the truth of the facts which it states, when the witness is dead or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or if his present cannot be obtained without an amount of delay or expense which, under the circumstances of the case, the Court considers unreasonable:**

Provided -

that the proceeding was between the same parties or their representatives in interest;

that the adverse party in the first proceeding had the right and opportunity to cross-examine;

that the questions in issue were substantially the same in the first as in the second proceeding.

Explanation.- A criminal trial or inquiry shall be deemed to be a proceeding between the prosecutor and the accused within the meaning of this section." (emphasis added)

8. From a bare perusal of the aforesaid provision, it would appear that evidence given by a witness in a judicial proceeding or before any person authorized to take it is admissible for the

purpose of proving in a subsequent judicial proceeding or in a later stage of the same judicial proceeding, the truth of the facts which it states in its evidence given in earlier judicial proceeding or earlier stage of the same judicial proceeding, but under proviso there are three pre-requisites for making the said evidence admissible in subsequent proceeding or later stage of the same proceeding and they are (i) that the earlier proceeding was between the same parties; (ii) that the adverse party in the first proceeding had the right and opportunity to cross examine; and (iii) that the questions in issue in both the proceedings were substantially the same, and in the absence of any of the three pre-requisites aforesaid, Section 33 of the Act would not be attracted. This Court had occasion to consider this question in the case of **V.M. Mathew Vs. V.S. Sharma : (1995) 6 SCC 122**, in which it was laid down that in view of the second proviso, evidence of a witness in a previous proceeding would be admissible under Section 33 of the Act only if the adverse party in the first proceeding had the right and opportunity to cross examine the witness. The Court observed thus at AIR pp.110 and 111: (SCC p.125, para 8)

"8. The adverse party referred in the proviso is the party in the previous proceeding against whom the evidence adduced therein was given against his interest. He had the right and opportunity to cross-examine the witness in the previous proceeding..... the proviso lays down the acid test that statement of a particular witness should have been tested by both parties by examination and cross-examination in order to make it admissible in the later proceeding." (emphasis added)

15. The apex court, while approving the proposition as laid down in **V.M. Mathew Vs. V.S. Sharma**, reported in **(1995) 6 SCC 122**, has reiterated that the proviso lays down the acid test i.e. the statement of a particular witness should have been tested by both parties by examination and cross-examination in order to make it admissible in the later proceeding. It has been further laid

down that there are three pre-requisites for making the said evidence admissible in subsequent proceeding or later stage of the same proceeding and they are : (i) that the earlier proceeding was between the same parties, (ii) that the adverse party in the first proceeding had the right and opportunity to cross examine and (iii) that the questions in issue in both the proceedings were substantially the same, and in the absence of any of the three pre-requisites aforestated, Section 33 of the Act would not be attracted.

16. These are in addition to the requirements for purpose of having taken the recourse to Section 33 of the Evidence Act. The plaintiff in the suit was not admittedly a party in the previous judicial proceeding. However, the proforma-defendant No.7 was the plaintiff in the previous suit. But, for purpose of title, the proforma-defendant No.7 cannot be squarely stated to be the person representing the wholesome interest of the plaintiff. Secondly, what has been observed here is that the proforma-defendant No.7 is alive and the defendants did not make any endeavour to bring her in the proceeding as the witness, but they have tried to use her previous statement as made in the earlier judicial proceeding. This fact on record would clearly debar the defendants to take recourse to her statement made during the cross-examination as the plaintiff in the previous suit. Section 33 of the Evidence Act never authorises the court to look into the evidence in the previous judicial proceedings if three requirements as stated are fulfilled. After satisfying those requirements, further three prerequisites as

indicated by the apex court are to be met. The first appellate court has definitely not taken due care of those provisions of Section 33 of the Evidence Act while considering that previous statement (Exbt.R) and reading its contents for purpose of determining the state of possession.

17. As such, in the considered opinion of this court, by reading Exbt.R, the first appellate court has committed serious illegality, warranting this court to interfere with the impugned judgment. Accordingly, the finding of the first appellate court that the defendant Nos. 1 to 6 are on possession over the suit land, is interfered with and set aside. That part of the reversal judgment is also accordingly quashed. The cumulative effect of these findings would be that this court would restore the judgment and decree as passed by the trial court. Accordingly, the judgment and decree passed by the trial court is restored.

18. In the result, the appeal stands allowed to the extent as indicated above.

The decree be prepared and thereafter the LCRs be sent down.

JUDGE

ROY