

HIGH COURT OF TRIPURA AGARTALA

RSA 40 of 2008

1. Sri Chairifru Mog
S/o Sri Aatafru Mog

2. Sri Aabrechai Mog
S/o Sri Aatafru Mog
Manu Bankul,
P.S. Sabroom,
South Tripura

3. Sri Chelafru Mog
S/o Ugya Mog
Vill Baikhora
P.S. Baikhora, Belonia
South Tripura

plaintiff-appellants

-vs-

1. Sri Chatang Mog alias Raju Mog
S/o late Rifru Mog

2. Smti Parul Das (Mog)
W/o late Rifru Mog

3. Shri Nari Chandra Tripura
S/o Shri Rabi Kishore Tripura

4. Sri Manaiya Baruah
S/o late Surendra Baruah

5. Sri Ramani Mohan Tripura
S/o Sri Annaram Tripura

6. Sri Kali Charan Tripura
S/o late Manik Tripura

7. Sri Bimalsen Tripura
S/o late Laxmichan Tripura
South Manu Bankul

P.S. Sabroom, South Tripura... defendant-respondents

**BEFORE
THE HON'BLE MR JUSTICE U.B. SAHA**

Advocate for the appellants : Mr. S.M. Chakraborty
Sr. Advocate

Advocate for the respondents : Mr. P. Saha
Advocate

Date of hearing : 16.01.2015
& delivery of the judgment.

Whether fit for reporting : yes/no

JUDGEMENT AND ORDER(oral)

1. The instant second appeal is filed by the plaintiff-appellants against the judgment dated 29.5.2008 passed by the learned District Judge, South Tripura, Udaipur in Title Appeal No. 01 of 2008 setting aside the judgment and decree dated 11.10.2007 and 15.10.2007 respectively passed by the learned Civil Judge (Junior Division), Sabroom, South Tripura in Title Suit No. 03 of 2007.

2. Heard Mr. S. M. Chakraborty, learned senior Counsel for the plaintiff-appellants and Mr. P. Saha, learned counsel for the defendant- respondents.

3. The instant appeal was admitted on the following substantial questions of law:

(a) Whether the non-production of khatian automatically disproves the possession of a true owner over his land when his right, title and interest is declared on appreciation of evidence on record?

(b) Whether the khatian lying in the name of the vendor showing his possession over the land transferred by him, can be taken into consideration to confirm the possession of the purchaser of the said land when no evidence of dispossession of the vendor from the said sold out land is available before the learned court below ?

(c) Whether the First Appellate court below has got any authority or jurisdiction to set aside the judgment and decree in absence of any regular appeal or cross appeal against the said judgment and decree?

4. The facts needed to be discussed are as follows:

The plaintiff appellants filed a suit in the court of the learned Civil Judge (Junior Division), Sabroom, South Tripura being Title Suit No. 03 of 2007 against the defendant-respondents for declaration of their title with consequential relief for confirmation of possession and perpetual injunction.

5. The case of the plaintiff-appellants before the trial Court is that by three separate registered sale deeds, they purchased the suit land described in Schedule B, C and D of the plaint from one Suibai Choudhury and the said Suibai Choudhury is the vendor of the said land of the plaintiffs and his name was duly mutated in R.S. Khatian No. 192 against Hal plot Nos. 1946, 1944 and 1943 for 6.11 acres of land which has been described in the Schedule-A of the plaint. After purchasing of the land from the aforesaid Suibai Choudhury, while the plaintiff-appellants were in possession, the defendant-respondents forcibly and unlawfully tried to dispossess the

plaintiff-appellants from the suit land described in schedule B, C, and D of the plaint on 15.5.2006, but could not ultimately dispossess them and the plaintiff-appellants continued their possession over the said land.

6. The respondents appeared before the trial court as defendants and also submitted their written statement admitting the ownership and possession of the vendor of the plaintiffs over the suit land described in Schedule-A of the plaint. But they added that the said A scheduled land was sold to one Rafru Mog before 15 years, but no sale deed was executed and the said Rafru Mog was in possession of the suit land along with the members of his family and that the respondent No.1 and 2 are the sons of the said Rafru Mog and possessing the suit land. So they prayed for dismissal of the suit.

7. On the basis of the pleadings of the parties, the learned Trial Court framed three issues which are as follows:

(i) Whether the suit is maintainable in its present form?

(ii) Whether the plaintiffs have right, title and interest over the suit land?

(iii) Whether the plaintiff has been possessing the suit land, if so whether the defendants has been threatening to dis-possess therefrom?

8. After hearing the parties, the learned trial Court decided the issue No. 1 and 2 in favour of the plaintiff-appellants concerning the right, title and interest over the suit land and

while deciding the issue no 3, the learned trial Court found that the plaintiff-appellants could not prove their possession as they did not submit any document like khatian etc. in support of their claim of possession of the suit land. The learned trial court ultimately allowed the suit partly. Being aggrieved by and dissatisfied with the findings of the learned trial Court regarding the issue No.3, the plaintiffs preferred an appeal before the learned District Judge, South Tripura, Udaipur which was numbered as Title Appeal No. 01 of 2008. The defendant-respondents though appeared in the appeal, but did not prefer any regular appeal or cross-objection against the decree of the learned trial Court.

9. The learned first appellate Court in absence of any appeal from the side of the defendant-respondents set aside the entire decree passed by the learned trial court in favour of the plaintiff-appellants on the ground that the plaintiff-appellants were not entitled to the part decree of declaration of their right, title and interest over the suit land as the suit of the plaintiff-appellants ought to have been dismissed as it would fall within the mischief of Section 34 of the Specific Relief Act.

10. The first appellate Court is also of the opinion that the learned trial Court wrongly decreed the suit of the plaintiff-appellants partially in their favour and the decision of the court below is not at all tenable according to law and hence he set

aside the judgment and decree of the learned trial Court and dismissed the title suit.

11. Mr. Chakraborty, learned senior counsel has taken this court to the cause title of the plaint to show that the suit was not only for declaration of title, but also for consequential relief for confirmation of possession, perpetual injunction etc. Thus question of mischief under Section 34 of the Specific Relief Act does not come at all. He further submits that absence of khatian cannot be considered that the person with title has no possession when the khatian is in the name of the vendor as in the instant case the defendant-respondents admitted the title of the vendor of the plaintiffs as well as his possession. More so, when there was no appeal or cross-objection from the side of the defendant-respondents, the first appellate Court had no jurisdiction to set aside the judgment and decree passed in favour of the plaintiff-appellants which was not under challenge. In support of his aforesaid contention, he has placed reliance on a decision in **Banarsi & ors vs. Ram Phal, (2003) 9 SCC 606** wherein the Apex Court stated that

" A defendant against whom a suit for specific performance has been decreed may file an appeal seeking relief of specific performance being denied to the plaintiff and instead a decree of smaller relief such as that of compensation or refund of money or any other relief being granted to the plaintiff for the former is larger relief and the latter is smaller relief. The defendant would be the person aggrieved to that extent. It follows as a necessary corollary from the abovesaid statement of law that in an appeal filed by the defendant lying challenge to the relief of compensation or refund of money or any other relief while decree for specific performance was denied to the plaintiff, the

plaintiff as a respondent cannot seek the relief of specific performance of contract or modification of the impugned decree except by filing an appeal of his own or by taking cross objection.”

12. In the instant case, it appears from the record that the plaintiff-appellants already filed an appeal challenging the impugned judgment of the trial Court on its findings relating to Issue No.3 and admittedly, no appeal or cross-objection was preferred by the defendant-respondents. But the first appellate Court dismissed the suit of the plaintiff-appellants setting aside the decree of the trial Court which was not challenged before him by the defendant-respondents. In view of the above, it would be proper for this court to interfere with the judgment of the learned first appellate Court.

13. Mr. Chakraborty has also relied upon a judgment of the Gauhati High Court in **Suniti Rani Nath vs. Supriti Kr. Nath legal heirs of Pabitra Kr. Nath & ors, 2007(2)GLT 779** where in the learned Single Judge of the Gauhati High Court relying upon the aforesaid judgment of the Apex Court held, inter alia,

“ The Apex Court further held that the exercise of power under Order 41, Rule 33 has got certain limitations, firstly-the power cannot be exercised to the prejudice or disadvantage of a person not a party before the Court; secondly,-a claim given up or lost cannot be revived and thirdly such part of the decree which essentially ought to have been appealed against or objected to by a party and which that party has permitted to achieve a finality, cannot be reversed to the disadvantage of the other party.”

14. In the instant case, though the defendant-respondents did not file any appeal or cross-objection against findings of the learned trial Court in favour of the plaintiff-appellants, yet the learned appellate Court set aside such findings and dismissed the suit which is totally beyond his jurisdiction and perverse.

15. In view of the above this court is of the considered opinion that it would be proper for this court to set aside the judgment and decree passed by the first appellate Court and accordingly the same is set aside. Consequently, the matter is remanded to the learned first appellate Court to decide the appeal afresh taking note of the observation given hereinabove after issuance of notice to the parties for their appearance in accordance with law.

16. The appeal is disposed of. Send down the L.C. records.

JUDGE

mdn