

THE HIGH COURT OF TRIPURA
AGARTALA

RSA No.42 of 2010

Sri Litan Pal,
son of late Sarada Ch. Pal,
resident of Baroj Colony, Sarasima,
P.O. Sarasima, P.S. Belonia,
Dist. South Tripura

.....Defendant-Appellant

- Vs -

1. Sri Sunil Ch. Biswas,
son of late Ramchandra Biswas,
resident of Baroj Colony, Sarasima,
P.O. Sarasima, P.S. Belonia,
Dist. South Tripura

.....Plaintiff-Respondent

2. Sri Pabitra Bhakta,
son of late Sripada Bhakta,
resident of Baroj Colony, Sarasima,
P.O. Sarasima, P.S. Belonia,
Dist. South Tripura

..... Defendant-Respondent

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

For the appellant	: Mr. R. Datta, Advocate
For the plaintiff-respondent	: Mr. D. Chakraborty, Senior Advocate Mr. H. Laskar, Advocate
Date of hearing and delivery of judgment & order	: 19.03.2015
Whether fit for reporting	: NO

JUDGMENT & ORDER (ORAL)

Heard Mr. R. Datta, learned counsel appearing for the appellant as well as Mr. D. Chakraborty, learned senior counsel assisted by Mr. H. Laskar, learned counsel appearing for the plaintiff-respondent.

02. The appellant, the defendant No.1 in the suit, by means of this appeal filed under Section 100 of the CPC has questioned the legality of the judgment dated 23.07.2010 delivered in Title Appeal No.06 of 2010 by the Additional District Judge, South Tripura, Belonia.

03. By the order dated 27.01.2011 when this appeal was admitted, the following substantial questions of law were formulated.

"1. Whether in view of the decision rendered in Title Suit No.02 of 2003, the Title Suit No.26 of 2007 was hit by the principle of res judicata i.e. Section 11 of CPC?"

2. Whether during the subsistence of the will executed in 2000, the father of the appellant had any transferable right to execute the sale deed in favour of the plaintiff-respondents in respect of the land mentioned in the will?"

04. The substantial question No.2 is not at all to be considered as a substantial question of law on the face of the settled question of law that during the life time of the testator of a will he does not lose the competence to transfer. Someone having the competence to transfer at his discretion may sell or otherwise create lien on the right of the property by executing appropriate instrument or by entering into the other arrangement. Moreover, on scrutiny of the record, it is revealed that no testament (the will), as referred, has been brought in the record of evidence. Therefore, the existence of the will has to be held not proved. As cumulative impact, the substantial question No.2 is superfluous in the context of this appeal and accordingly, it is discarded.

05. The other substantial question of law invariably requires consideration. The suit was filed for recovery of possession under Section 5 of the Specific Relief Act as according to Mr. Chakraborty, learned senior counsel, the title has never been questioned by the defendant No.1. In the suit land, the defendant No.1, the appellant herein, has constructed one hut and he has been living there. According to the plaintiff, on 15.05.2007, the defendant No.1 having noticed the description of the plot number in the decree and for non-execution of the decree of TS No.02 of 2002 dispossessed the plaintiff from the entire land measuring .30 acre illegally. By way of amendment, carried out on 04.08.2008, it has been pleaded by the respondent No.1, the plaintiff that the defendant No.2 in connivance with the defendant No.1 on 08.07.2008 forcibly encroached the part of the suit land.

06. The appellant, the defendant No.1 in the suit, filed the written statement and raised the issue of *res judicata* in view of the judgment delivered in the previous suit being Title Suit No.02 of 2003. The said suit was decreed in favour of the plaintiff. But the decree could not be executed for incorrectly referring the plot number in the description of the suit land. But in the written statement, the defendant No.1 has made certain categorical assertions. For purpose of reference, the paragraph 20 and paragraph 24 are extracted hereunder.

"20. In response to the allegations made in Para 10 of the plaint this answering defendant submits that the plaintiff did submit a suit for declaration of right, title and interests over .30 acres of land and in that suit this answering defendant did not contest as he

was convinced that, he was not in possession of the land for which the plaintiff sought for the eviction of this answering defendant. Accordingly when the bailiff of the Honourable Court went to execute the decree he found the plaintiff in possession of the said land for which the eviction of this answering defendant was sought. Allegations to the contrary are denied.

24. In response to the averments made in Para 11, this answering defendant submits that the plaintiff never dispossessed the plaintiff from entire .30 acres of land. The plaintiff has inserted the date only create new cause of action only to save the case from the embargo of Section 11 of the Civil Procedure Code. The plaintiff is in possession of entire land except the hut."

07. Therefore, the defendant No.1 has admitted that he has been possessing some parts of the suit land where the hut is standing. It would be also apparent that the defendant No.2 whose creditworthiness has been questioned by the trial court has also stated that for bona fide mistake he encroached some land of the plaintiff and he had no intention to continue with that possession and he has vacated his possession over the suit land by that time.

08. Mr. Datta, learned counsel appearing for the appellant has submitted that the trial court by the judgment dated 09.02.2010 has correctly decided the issue of *res judicata* by discarding the objection as to the maintainability of the suit. But on returning the finding, as quoted below, it has been held that the plaintiff is not entitled to get the decree of recovery of the khas possession.

"Further in para 11 the plaintiff alleged that he was dispossessed from the suit land by defendant No.1 but again in Para No.11(a) he pleaded that both the defendants dispossessed him from the suit land

which seems to be a bit unusual particularly when the defendant No.2 was not in picture at the beginning of the suit and when he was added on the prayer of the plaintiff, he sided with the plaintiff."

Thus, the suit was dismissed.

09. Being aggrieved by that judgment, the respondent No.1 herein, preferred an appeal under Section 96 of the CPC in the Court of the Addl. District Judge, South Tripura, Belonia being Title Appeal No.06 of 2010. But no appeal was preferred by the defendants against the finding as returned on *res judicata*.

10. From scrutiny of the impugned judgment dated 23.07.2010 it appears that by taking advantage of the provisions of Order 41, Rule 22 of the CPC, the said objection was again pressed for consideration but the first appellate court has discarded that objection by observing as under:

"During hearing, Ld. Counsel for the respondent has argued that considering the earlier suit relating to the same suit land between the same parties, the instant case was barred by the principle of resjudicata. But the Ld. Court below committed error in deciding the matter while dealing with the issue No.1. Defendant No.1 not having filed any appeal against the decision of that issue or any cross objection of the point in the instant appeal. I am afraid, the issue has raised finality and it is beyond the jurisdiction of this Court to reopen the matter. On the point, the judgment between S.R. Nath vrs. Supriti Kar Nath, reported in 2007(2)GLT-779 is conveniently referred to. Hence no point is formulated on the issue."

11. This observation may not properly be reflecting the position of law. While hearing the appeal, if serious illegality of substantial nature is observed by the appellate court, the appellate court has the power under order 41, Rule 33 of the

CPC to return appropriate finding or grant appropriate relief. However, the exercise of the said power is circumvented and only in exceptional circumstances such prayer is usually exercised by the appellate court. But from the admission made by the defendant No.1 that he had realised that the suit land in the former suit was not under his occupation and that is why he did not contest the suit itself takes the wind from the objection, raised by him under Section 11 of the CPC. While the decree passed in the former suit was frustrated in execution, according to the defendant No.1, it has been observed by the bailiff that the decreetal land does not cover the land occupied by the defendant No.1. As such, when it is admitted by the defendant No.1 that the decreetal land in the former suit and the suit land in the present suit is different, the principle of *res judicata* even if the suit is between the same parties cannot have any manner of application. Moreover, the defendant No.1 has admitted which is a substantive admission in terms of provisions of Section 17 of the Evidence Act that the plaintiff is in possession of the entire land demised in the Exbt.1 except a very small piece of land where the hut is constructed. It cannot be held that the entire suit has been set up with mala fide pleadings as observed by the trial court.

12. There is no evidence to rebut the title and right of the plaintiff over the suit land vis-a-vis the sale deed (Exbt.1). Even the defendant No.1 has not categorically contested the title of the plaintiff. According to the defendant No.1, the suit land was initially allotted in favour of the predecessor of the plaintiff.

He raised doubt whether the allotted land can be sold out or not. But on scrutiny of the written statement, we do not find any specific pleading as regards when the land was allotted in favour of the predecessor of the plaintiff. As such, whether the restrictions under the Allotment Rules, 1980 would be applicable or not cannot be determined as there is no specific pleading or evidence in support thereof. Hence, this objection is of no avail to the defendant No.1, the appellant herein. Lastly Mr. Datta, learned counsel has raised one objection regarding the valuation of the suit. It is in the considered opinion of this Court that on the face of the admission he made in para-24, this Court cannot go for determination whether the suit has been properly valued or not and for that reason the decree cannot be disturbed in view of Section 149 of the CPC. As there is no specific pleading available in the records, this Court also cannot direct for deposit of additional court fees inasmuch as the Suit Valuation Act has not given effect to, in this State.

13. Having held thus, it is apparent that this appeal does not merit any further consideration. Accordingly, the appeal stands dismissed.

The LCRs be sent down after preparation of the decree.

JUDGE

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