

IN THE HIGH COURT AT CALCUTTA
CIVIL APPELLATE JURISDICTION
APPELLATE SIDE

Present : The Hon'ble Justice Shivakant Prasad

SA 36 of 2008

With
CAN 5 of 2019 (Old No. CAN 8384 of 2019)

Kalyan Kumar Dutta

Vs.

Sanatan Sarkar

For the appellant	:	Mr. Bhudeb Chatterjee Mr. Basudeb Ghosh
For the respondent Nos. 1 & 2	:	Mr. Rabindra Narayan Dutta Mr. Sibasis Ghosh Mr. Hare Krishna Halder Mr. Kaushik Bhattacharjee
CAV on	:	16.03.2021
Judgment on	:	20.04.2021

SHIVAKANT PRASAD, J.

This appeal is at the instance of defendant no. 3/appellant directed against the judgment and decree dated 10th March, 2005 passed by learned Additional District Judge, 4th Court, Barasat, North 24-Parganas in Title Appeal No. 4 of 2000 and in Title Appeal No. 19 of 2000, *inter alia*, partly confirming and partly reversing the judgment and decree dated 26th August, 1999 passed by learned Munsif, 2nd Court, Barasat, North 24-Parganas in Title Suit No. 174 of 1981.

Brief facts leading to the instant appeal is that one Kiranbala Dasi was the owner of suit property measuring an area of 17 satak appertaining to J.L. No. 06, R.S. Khaitan No.3787, R.S. Dag No. 2521, 11 satak of land in R.S. Khatian No. 3786, R.S. Dag No. 2520/9238 and 04 satak in R.S. Khatian No.206, R.S. Dag No. 2522/9242 of mouza Halisahar, old holding no.294, Colonel K.P. Gupta Road, Ward No. 8 within Halisahar Municipality, P.S. Bizpur, District North 24 Parganas.

The said Kiranbala Dasi died intestate on 24.10.1964 leaving behind her surviving two daughters namely, Nanibala Ghosh and Sabita Sarkar as heirs and legal representatives. The eldest daughter Nanibala Ghosh died on 31.08.1973 without any issue and her husband also predeceased her. According to plaintiffs' case the youngest daughter Sabita Sarkar acquired the share of late Nanibala Ghosh in respect of the above property which originally belonged to Kiranbala Dasi their mother. Thus it is contended that the said Sabita Sarkar inherited the entire immovable properties left by Kiranbala Dasi.

On 7th January, 1981 said Sabita Sarkar when felt disturbances from her two daughters Sunitarani Ghosh and Gitarani De and when she came to learn that her said daughters in collusion with Nanibala Ghosh fraudulently created registered deed of partition dated 02.6.1972 being deed no. 2915 of 1972 showing the said Sabita Sarkar as non traceable and defendant no. 2 Gitarani De got 5^{1/2} decimal and defendant no. 1 Sunitarani Ghosh got rest half of the land out of 11 decimal in Dag No. 2510/9238 as mentioned in schedule 'kha' to the

said partition deed which is a non suit plot. It has been specifically contended that the said partition deed is manufactured as the plaintiff has been shown as non traceable and dead. In the said partition deed the Gitarani De got 'kha' schedule property and Sunitarani got 'ga' schedule property having inherited from their mother Sabita Sarkar, though said Sabita Sarkar was then alive. Hence, Sabita Sarkar filed title suit no. 14 of 1981 on 07.01.1981 in the Court of learned Munsif at Barasat praying for declaration that the plaintiff is the absolute owner in respect of the suit property mentioned in the schedule to the plaint. The original plaintiff Sabita Sarkar further stated that defendant no. 1 in connivance with defendant no. 2 manufactured a Will in the name of Nanibala Ghosh who died on 31st August, 1973. Accordingly, it was claimed that Sabita Sarkar being only sister of Nanibala as heir and legal representative acquired 50 per cent share in the suit property of her said sister and the said Will has been probated.

The specific case of the present plaintiffs is that on 09.01.1981 said Sabita Sarkar transferred the suit property in favour of Sanatan Sarkar and his other three brothers who have been subsequently substituted and added as per provision of Order 22 Rule 10 of the Code of Civil Procedure by order dated 22.2.1990 of the learned Trial Court.

On 24.3.1981 due to lack of territorial jurisdiction the original plaintiff Sabita Sarkar was permitted to return the plaint and to re-file the same in the Second Court of learned Munsif, Barasat and the said suit was re-numbered as Title Suit No. 174 of 1981. Thus, said Sabita

Sarkar had withdrawn Title Suit No. 14 of 1981 from the learned First Munsif Court Barasat and the suit was presented before the learned Second Munsif Barasat Court on the same day.

On 26.11.1989 Sabita Sarkar died thereafter on 22.2.1990 Sanantan Sarkar and his other brothers filed application under order 22 Rule 10 of the Code of Civil Procedure for addition and substitution being assigned in place of original transferor Sabita Sarkar since deceased.

Further case of plaintiffs/respondents 1 to 4 is that by way of amendment of the plaint they sought for recovery of possession of 5½ decimal of land in the suit property from the defendant no. 3 Kalyan Kumar Dutta/appellant herein whose possession was allegedly illegal as per his purchase by sale deed dated 25.5.1979 executed and registered by said Gitarani De/defendant no. 2 in the suit.

It would appear that defendants nos. 1 to 3 contested the suit by filing written statement denying all material allegations made in the plaint contending *inter alia* the positive case of the defendant no. 1 that the original plaintiff namely, Sabita Sarkar since deceased is an imposter and not the actual first wife of Manoranjan Sarkar or the real mother of the defendants nos. 1 and 2. It would appear that Manoranjan Sarkar happened to be the father of defendant nos. 1 and 2 who had motivatedly posed the plaintiff as imposter in order to grab the property left by his mother-in-law Kiranbala and that the actual mother of the defendant's nos. 1 and 2 was untraceable for last 40 years prior

to institution of the suit while they all resided at Baniakhamar of Khulna. She remained untraceable and unheard for more than 7 years and she was considered as dead in the eye of law for not having been heard for more than 7 years. After the incident of her leaving of house and becoming untraceable, Manoranjan Sarkar their father married for the second time. It is also contended that the defendants nos. 1 and 2 were brought up by their grandmother Kiranbala Dasi after their mother became untraceable and Kiranbala came to Halisahar along with her daughter Nanibala and the defendants nos. 1 and 2 from East Pakistan in 1950 and settled there and secured ownership in respect of the suit property by way of settlement and purchase. Kiranbala arranged the marriages of the defendants nos. 1 and 2 and she died in 1966 and on her demise the property mentioned in lot 1 and 2 of the plaint i.e. scheduled A and B were inherited by her daughter and grand-daughters. Nanibala Dasi inherited half of the property and remaining half being jointly inherited by the defendant's nos. 1 and 2 as daughters of predeceased daughter Sabita Sarkar. Thereafter, registered deed of partition dated 02.6.1972 was executed and registered while Nanibala and the defendants nos. 1 and 2 and the said Nanibala Dasi obtained the property mentioned in lot 1 of the plaint by way of partition. It is also the case of the defendants that she bequeathed by a Will the said property along with property purchased by her mentioned in lot 3 of the plaint and other properties in favour of the defendant no. 1 who obtained probate in Misc Case No. 181 of 1975. It is pointed out that the

defendant no. 2 obtained half of the property mentioned in lot 2 of the plaint schedule from grand-mother by way of inheritance which fell in her share upon partition and sold it to the defendant no. 3 on 25.5.1979 by a registered deed of sale. The defendant no. 1 obtained on partition half of the property mentioned in lot 2 and properties in lot 1 and 3 by probate of Will.

The grounds *inter alia* taken by the appellant is that the learned Courts below erred in law and in fact is holding that Sabita Sarkar had locus standi to file the Title Suit inasmuch as she had transferred the suit property to Sanatan prior to institution of Suit No. T.S. 174 of 1981, and that the provisions of Order 22 Rule 10 of the Code of Civil Procedure was not applicable in the given case as the representation of plaint before a Court of competent jurisdiction after return of plaint amounts to a fresh suit.

It is contended that the suit for declaration valued at Rs. 60/- is not sufficient in view of subsequent prayer for recovery of 'Khas' possession incorporated in the plaint by way of amendment but neither the value of the suit was enhanced nor the additional Court fees was paid.

It is specifically contended on behalf of the appellant that the Plot No. 2522/9242 did not belong to Kiranbala as such the same cannot be part of suit property and be decreed. Since Sabita Sarkar had allegedly conveyed her share in the property by a registered sale deed on 09.01.1981 in favour of present plaintiffs/respondents 1 to 4, she had

no right, title and interest and no right to sue for declaration for her title and possession in the suit property by institution of T.S. 174 of 1981 as the suit was registered on representation of plaintiff after withdrawal of T.S. 174 of 1981 for lack of jurisdiction.

The present plaintiffs/respondents were substituted upon the death of Sabita Sarkar by order which was passed without assigning reasons as to why the present plaintiffs/respondents did not institute suit and why they did not bring their names in the plaint immediately after the sale deed was executed on 09.01.1981 in their favour. It is also submitted that the learned Court has failed to appreciate that even considering that Sabita Sarkar was alive, she had one-half share in the property left by her mother Kiranbala and not the other property which have been tagged with the properties of Kiranbala as suit property and properties succeeded by Nanibala who subsequently bequeathed to Sunita the property under the Will duly probated cannot be considered as part of suit property.

Moreover, property owned by Sunita on the basis of probate to the Will of Nanibala cannot be challenged or decreed in the Title Suit without revocation of probate under the provision of Section 263 of Indian Succession Act, 1925 and under the provision of Section 216 of the said Act, as grantee of probate of administration alone can sue, until same is revoked. It provides that after any grant of probate or letters of administration, no other than the person to whom the same may have been granted shall have power to sue or prosecute any suit or otherwise

act as representative of the deceased throughout the State in which the same may have been granted, until such probate or letters of administration has been recalled or revoked. Therefore, the prayer of the plaintiffs/respondents for annulment of the probate is not legally maintainable in my considered opinion.

It is pointed out that the suit properties are joint properties and the appellant is in joint possession in the suit property, therefore, First Appellate Court's decree for eviction against the appellant is not tenable in law and in fact. In this regard the facts required to be noted is that plaintiffs have sought for eviction of the appellant/defendant no. 3 from .05½ decimals of land out of the suit property but admittedly the appellants/defendant no. 3 purchased land in respect of Dag No. 2510/9238 of said Mouja as the appellant's specific case is that he is the owner of the property under Dag No. 2510/9238 and 2519/9237 whereas suit for declaration is in respect of Dag Nos. 2521, 2520/9238 and 2522/9242. Therefore, there cannot be any decree for eviction against the appellant. As such, the learned Appeal Court below committed error in law and in fact in holding the appellant as a trespasser.

The Trial Court by judgment dated 26.08.1999 decreed Title Suit No. 174 of 1981 simplicitor declaring the plaintiffs/respondents 1 to 4 as the owners of one half share in the 'A' scheduled property. So, being aggrieved by the part decree, appeal being Title Appeal No. 4 of 2000

was preferred and defendant no. 1, Sunita Ghosh also filed Title Appeal No. 19 of 2000 on being aggrieved by the entire judgment and decree.

The aforesaid two appeals were heard analogously by the learned Lower Appellate Court and while decreeing the Title Appeal No. 4 of 2000 in favour of the plaintiffs/respondents 1 to 4, the Trial Court judgment was modified holding that the plaintiffs/respondents are entitled to get recovery of possession by evicting the defendant no. 3/appellant herein from a portion of land measuring 5½ decimal in the 'A' schedule property and directed the defendant no. 3/appellant to quit and vacate the suit property within 3 months from the date of the judgment dated 10.03.2005 and on being aggrieved by and dissatisfied with the appellate judgment, the appellant/defendant no. 3 has preferred the instant appeal which was admitted for hearing on the following substantial questions of law:

- I. *The suit having been admittedly filed by one Sabita Sarkar on March 24, 1981 and she having already transferred her interest in the property in favour of the present respondents on January 09, 1981, whether the learned Courts below committed substantial error of law in holding that the suit originally filed by Sabita Sarkar was maintainable.*
- II. *Whether the learned Courts below committed substantial error of law in allowing an application under order XXII Rule 10 of the Code of Civil Procedure filed by the present respondent although he is not the transferee pendente lite, he having acquired interest in the property prior to the institution of the suit.*
- III. *Whether the learned Courts below committed substantial error of law in passing a decree for recovery of possession*

notwithstanding the fact that even after the order allowing amendment of plaint the added plaintiff did not act in terms of Order VI Rule 18 of the Code within the time fixed therein.

It is submitted by learned counsel for the respondents/plaintiffs that the appellant/defendant no. 3 did not adduce evidence in the Trial Court and has failed to cross examine the original plaintiff Sabita Sarkar whose evidence was taken on commission and the other defendants also did not cross examine the said plaintiff, Sabita Sarkar hence, the evidence of Sabita Sarkar stood unchallenged. That apart, the defendant no. 3/appellant herein did not prefer any appeal against the judgment of the learned Trial Court decreeing the suit in part in favour of the plaintiffs/present respondents 1 to 4.

It is submitted that Sabita Sarkar had sold her 1/2 of share in the suit property left by Kiranbala Dasi to Sanatan Sarkar the substituted plaintiff in January, 1981 whereas the said Sabita had filed suit for declaration in March, 1981 when her right was not subsisting in the property sold to Sanatan Sarkar, therefore, the suit was premature and was not maintainable on that ground. It is contended that represented plaintiff in the Court of competent jurisdiction has to be treated as new plaintiff and in support of his contention reliance is placed on the observation at para 13 of the decision in case of **ONGC Ltd Vs. M/s. Modern Construction and Co** reported in **AIR 2014 Supreme Court 83** wherein it has been held that the trial even if concluded in Court having no jurisdiction has to be conducted *de novo*. It is submitted that the law on the issue has been summarised to the effect that if the Court

where the suit instituted is of view that it has no jurisdiction, the plaint has to be returned in view of the provision of Order 6 Rule 10 CPC and the plaintiff can present it before the Court of competent jurisdiction. In such a factual matrix, the plaintiff is entitled to exclude the period during which he prosecuted the case before the Court having no jurisdiction in view of the provisions of Section 14 of the Limitation Act, and may also seek adjustment of court fees paid in the Court. However, after presentation before the Court of competent jurisdiction, the plaint is to be considered a fresh plaint and the trial is to be conducted *de novo* even if stood concluded before the Court having no competence to try the same. Thus, it is argued that the original plaintiff had no right accrued to sue against the defendants as there was no clear and unequivocal threat to infringe any right of the original plaintiff, since she had already transferred her right, title, interest and possession allegedly in respect of the suit property in favour of the present plaintiffs/respondents. There was no scope for her to have instituted a fresh suit. The reference has been made to a decision in case of ***Zee Telefilms Ltd. (Now known as Zee Entertainment Enterprises Ltd.) Vs. Suresh Productions*** reported in ***AIR ONLINE 2020 SC 461*** to contend that right to sue accrues when there is a clear and unequivocal threat to infringe a right of plaintiff. The reliance is also placed in case of ***Kanailal Das and Another Vs. Jiban Kanai Das and Another*** reported in ***AIR 1977 Calcutta 189*** at para 9 which reads thus:

“ 9. It has been held that "the right to sue" in [Article 58](#) which is the residuary Article on suits relating to declarations is not there until

an accrual of the right asserted and its infringement or at least a clear and unequivocal threat to, infringe that right by the defendant against whom the suit is instituted as was held in [Mt. Bolo v. Mt. Koklan](#), AIR 1930 PC 270 as also in [Md. Yunus v. Syed Un-nissa](#), . Though there is no reference in the Article to the knowledge of the plaintiff, there may be cases where the nature of the right imports knowledge of certain facts and in such case the right to sue cannot be said to arise until the plaintiff have the necessary knowledge, as was held in [Sheonandan v. Ugrah Sao](#), . If was further held that there can be no apprehension of threat to right where due to mistake or fraud things are done in secrecy or at the back of the plaintiffs.

10. According to the plaintiff he was not aware of the purported transfers of 1968 prior to the filing of the written statement by the defendant and that was the date of his first knowledge in respect thereto when there was the invasion of his right in the suit properties. On the fact of these allegations we are prima facie satisfied that the claim that the said deeds are not binding on him was within the period of limitation being within three years from the date of filing of the written statement which is to be deemed to be the accrual of the cause of action subject however to the determination of the controversy in the suit during the trial.”

Thus, having regard to the principle of law on the right to sue as observed in the above cited decisions, it can be said that the original plaintiff had no cause of action or right to sue because she had already sold the suit property in favour of Sanatan Sarkar and others and that was prior to the filing of the suit.

Yet, a decision in case of ***Hanamanthappa Vs. Chandrashekharappa*** reported in ***AIR 1997 Supreme Court 1307*** has been relied to impress upon the object of Order 8 Rule 10A of C.P.C. to the effect that the plaintiff, on return of the plaint either challenge in appellate forum or represent to the Court having territorial jurisdiction to entertain the suit. In substance it is a suit filed afresh subject to the limitation, pecuniary jurisdiction and the payment of the Court fees. As

such, representation of the plaint can be treated to be a fresh plaint and the matter can be preceded with according to law.

It would appear from the judgment of the trial Court that Title Suit No. 174 of 1981 was decreed on contest against the defendants declaring the plaintiffs as the owner of 8 annas share in property mentioned in schedule A being the 17 satak of land Dag No. 2521 of Khatian 3787, 11 satak in Dag No. 2520/9238 appertaining to Khatian No. 3768 and land in Dag No. 2522/9242 appertaining to R.S. Khatian No. 206, old holding No. 294, Colonel K.P. Gupta Road, Ward No. 8 within Halisahar Municipality, P.S. Bijpur, Dist- North 24 Parganas by judgment and decree dated 26.8.1999.

It appears that defendant no. 2 Gitarani De did not prefer any appeal to challenge the decree of the Trial Court. The defendant no. 3 Kalyan Kumar Dutta, the appellant herein though filed written statement and additional written statement but failed to adduce any evidence in support of his claim, therefore, the evidence of the plaintiffs remain unchallenged and unrebutted and the defendant no. 3 did not also prefer any appeal and he thereby accepted the judgment and the decree passed by the Trial Court declaring right, title and interest of the plaintiffs/respondents herein in respect of the one-half share in the suit property mentioned in Schedule A of the plaint.

The appeal filed on behalf of the defendant no. 1 being Title Appeal No. 19 of 2000 was dismissed by the Appeal Court below

whereas the Title Appeal No. 4 of 2000 preferred on behalf of the plaintiff/respondent 1 to 4 was allowed.

It would appear from the judgment passed by the Appeal Court in Title Appeal No. 4 of 2000 that the judgment of the Trial Court was modified to the extent that plaintiffs are entitled to get recovery of possession of the suit property to the extent of 5½ decimal from the possession of the respondent no. 1 of Title Appeal No. 4 of 2000. The defendant no. 3 the appellant herein, namely, Kalyan Kumar Dutta was directed to quit and vacate the suit property within three months from the date. However, the Title Appeal No. 19 of 2000 was dismissed on affirming the judgment of the Trial Court; and application filed on behalf of Sunita Ghosh the defendant no. 1 under the provision Order 41 Rule 27 CPC was rejected but the defendant no. 1 has not put the appellate decree in second appeal.

The plaintiffs' case as introduced by way of amendment of the plaint is that defendant no. 3 Kalyan Kumar Dutta has no legal possession in the suit property. The property purchased by him vide deed of sale dated 25.5.1979 from Gitarani De is illegal. This contention of the respondents cannot be readily considered as the defendant no. 3/appellant has admittedly purchased non suit property from Gitarani by virtue of a registered sale deed dated 25.5.1979. Therefore, the defendant no. 3/appellant herein cannot be held to have possession of any piece of land as mentioned in the schedule property to the plaint.

On behalf of the defendants of the suit, the registered patta in the name of Kiranbala Dasi dated 19.10.1950 as Exhibit A; the sale deed No.991 of 1969 between vendors Madan Mohan Sanyal and another and vendee Nanibala Ghosh Exhibit B; the written statement in T.S. 538 of 1979 of the 2nd Munsif Court, Barasat Exhibit C; partition deed no. 2915 of 1972 between the defendant nos. 1 and 2 namely, Sunita and Gitarani De and Nanibala Ghosh Exhibit D; and sale deed dated 25.5.1979 executed by Gitarani De in favour of defendant no. 3 Exhibit E have been adduced in evidence in proof of defendants' case.

Admittedly, the suit property belonged to Kiranbala Dasi the grand-mother of the defendants nos. 1 and 2 namely, Sunita Ghosh and Gitarani De and they had share in the property left by Kiranbala Dasi. Kiranbala Dasi admittedly had two daughters Sabita Sarkar and Nanibala Ghosh had executed certain documents during her life time and as she had half share in the suit property. It is true that the purchaser being the outsider and stranger to the family cannot possess the joint property without the claim for partition in the suit but the plaintiffs/respondents have not claimed any partition by metes and bounds and there has not been any partition rather Sabita Sarkar had claimed the suit property in entirety against her own daughters. It is not understood, while a question raised by the defendants nos. 1 and 2 was that the original plaintiff Sabita Sarkar was not their mother and the plaintiff was somebody as an imposter set up by Manoranjan Sarkar father of Sabita Sarkar and Gitarani De, against whom they had filed

suit for eviction. This is also not understood as to why the two daughters would actually file suit for eviction against their own father. Be that as it may, the fact remains that the appellant Kalyan Kumar Dutta has purchased non suit plot as per the deed Exhibit E and he has no claim as such in respect of the suit property. Therefore, without the possession being ascertained in respect of the plot, this Court fails to understand why the learned Appeal Court was of the view that the defendant no. 3 has the possession in respect of $5\frac{1}{2}$ decimal of land in the suit property because at the inception the defendant no. 3 has not claimed any right in respect of the suit property as well as the possession rather he only claims his right by virtue of his purchase of non suit plot sold to him by Gitarani De who is one of the co-sharer in respect of entire property. Since the property as purchased by the defendant no. 3 has not been even claimed by the plaintiffs/respondents 1 to 4 not being the part of the suit property, this Court is unable to hold the defendant no. 3/appellant herein having illegal possession as rank trespasser.

The original plaintiff Sabita Sarkar allegedly the mother of the defendant nos. 1 and 2 has been considered as alive person and not an imposter in view of the findings arrived at by the Trial Court and the Appeal Court but the share in property in suit of Nanibala Ghosh, another daughter of Kiranbala cannot be ignored. She had half share in the entire suit property left by Kiranbala Dasi and if she has executed any deed or transferred any of her share in favour of her own nieces

namely, Sunita Ghosh and Gitarani De, that cannot be negated and the right to sell the plot being the non suit plot by Gitarani to Kalyan Kumar Dutta the defendant no. 3 may have been from the share of Nanibala Ghosh from the land being purchased by Gitarani De. The deed of partition Exhibit D also reflects that Gitarani De had got some property but there is no mention of Dag no. 2520/9238 in the sale deed Exhibit E as per the said partition deed Exhibit D. Learned Counsel for the respondents invited my attention to the fact that the defendant no. 3 had filed an application on 24.7.1984 in the Title Suit No. 174 of 1981 before the Trial Court stating that his property is lying in Dag No. 2510/9238 and praying for permission of water and electricity connection and the learned Trial Court by his order dated 14.01.1986 was pleased to reject the application holding that the defendant no. 3 prayer for water and electricity connection in non suit holding cannot be considered as he has not challenged the order dated 14.01.1986 before any higher forum and thereby the entire claim of the defendant no. 3 right from the beginning established that the alleged purchased property from Gitarani De is in respect of non suit plot but it is argued that the defendant no. 3/appellant herein is occupying item no. 2 of the schedule property being Dag no. 2520/9238 under Khatian No. 3686 whereas, the defendant no. 3 has claimed title in respect of non suit plot no. 2510/9238 by virtue of his deed of sale Exhibit E. So, if and only if the defendant no. 3/ appellant herein is found to be in occupation of item no. 2 of the schedule property being Dag no. 2520/9238 under

Khatian No. 3686 he must vacate the suit Dag but at the same time defendant no. 3 has not claimed any portion in the suit plot. If the argument of the respondents is accepted, then the two plots being 2520/9238 and 2510/9238 are required to be relayed by survey investigation on commission and if it is found on investigation that the defendant no. 3 does not possess any part of the suit plot no. 2520/9238, then the decree for recovery of possession or eviction of the defendant no. 3/appellant herein passed by the appeal Court below cannot be sustained, however, if he is otherwise found in possession of the land in Dag No. 2520/9238 under Khatian No. 3686 then only he can be evicted therefrom the suit property.

This Court does not agree with the reasoning of the learned appeal Court in respect of finding the defendant no. 3/appellant herein in possession of the said suit plot warranting decree of eviction therefrom without proper finding on evidence because the defendant no. 3/appellant herein is in possession of non suit plot by virtue of sale deed dated 25.5.1979 executed and registered by said Gitarani De the defendant no. 2. So, the prayer and the averment made on behalf of the respondents/plaintiffs about the defendant no. 3's possession in respect of the land being illegal Exhibit E cannot be entertained, hence the decree for eviction of the defendant no. 3/appellant herein passed by the appeal Court below in respect of 0.5^{1/2} decimal of land in the suit property as rank trespasser is without any evidence. I am of the view that the defendant no. 3/appellant herein had not contested the suit

after he filed written statement, may be, because he realized having no right in respect of the suit property mentioned in the schedule to the plaint and for that the Trial Court decree was not challenged in appeal by the appellant herein.

As regards substantial question of law as framed at the time of admission of appeal the original plaintiff Sabita Sarkar filed suit against the defendant nos. 1 and 2 on 07.01.1981 and during pendency of her said suit she transferred the suit property in favour of the substituted plaintiffs on 09.01.1981. The said original plaintiff was permitted to take back the plaint on 24th March, 1981 by the order of the learned Trial Court and the plaint was refiled before the learned 2nd Munsif and she continued the said suit till her death on 22.02.1990 and the transferee Sanatan Sarkar and others on an application under Order 22 Rule 10 read with Order 1 Rule 10 CPC dated 22.02.1990 where added as the plaintiffs 1 to 4 by Order of the trial Court dated 7.7.1993 and the present plaintiffs/respondents continued the suit and added defendant no. 3 and other defendant did not challenge the said order and allowed the suit to be decided finally and thereby on mere technical ground that the original plaintiff transferred her interest in the suit and yet continued with the suit, such technicality cannot be taken at this stage as substantial question of law more particularly, defendant no. 3/present appellant, against the order allowing substitution and/or addition of respondents 1 to 4 and also against the Trial Court judgment and decree did not prefer any first appeal, as such the question of law

regarding maintainability of the suit in the second appeal cannot be agitated by the appellant herein in view of the settled position of law that even an erroneous decision passed by both the Courts below concurrently cannot be interfered with in the second appeal under Section 100 of the Code of Civil Procedure, notwithstanding, original plaintiff having sold the suit property, had no legal right to maintain and continue the suit till her death on 22.2.1990.

Therefore, the defendant no. 3/appellant herein having not challenged the order of the Trial Court under Order 22 Rule 10 of C.P.C., being an appealable order as per Order 43 Rule 1A of the C.P.C. and more particularly defendant no. 3 having not preferred any appeal, it is not open for him to challenge the legality and validity of the order allowing the application for substitution and/or addition in the suit has reached its finality in view of the decision in case of **Vithalbai Pvt. Ltd. Vs. Union of India** reported in **2005 (3) ICC 640** wherein it has been observed (Para 21,21) thus:

“21 No amount of waiver or consent can confer jurisdiction on a Court which it inherently lacks or where none exists. The filing of a suit when there is cause of action though premature does not raise a jurisdictional question. The claim may be well-merited and the Court does have jurisdiction to hear the suit and grant the relief prayed for but for the fact that the plaintiff should have waited a little more before entering the portals of the Court. In such a case the question is one of discretion. In spite of the suit being premature on the date of its institution the Court may still grant relief to the plaintiff if

no manifest injustice or prejudice is caused to the party proceeded against. Would it serve any purpose, and do the ends of justice compel the plaintiff being thrown out and then driven to the need of filing a fresh suit are pertinent queries to be posed by the Court to itself.

22. Where the right to sue has not matured on the date of the institution of the suit an objection in that regard must be promptly taken by the defendant. The Court may reject the plaint if it does not disclose the cause of action. It may dismiss the suit with liberty to the plaintiff to file a fresh suit on its maturity. The plaintiff may himself withdraw the suit at that stage and such withdrawal would not come in the way of the plaintiff in filing the suit on its maturity. In either case, the plaintiff would not be prejudiced. On the other hand, if the defendant by his inaction amounting to acquiescence or waiver allows the suit to proceed ahead then he cannot be permitted to belatedly urge such a plea as that would cause hardship, may be irreparable prejudice, to the plaintiff because of lapse of time. If the suit proceeds ahead and at a much later stage the Court is called upon to decide the plea as to non-maintainability of the suit on account of its being premature, then the Court shall not necessarily dismiss the suit. The Court would examine if any prejudice has been caused to the defendant or any manifest injustice would result to the defendant if the suit is to be decreed. The Court would also examine if in the facts and circumstances of the case it is necessary to drive the plaintiff to the need of filing a fresh suit or grant a decree in the same suit inasmuch as it would not make any real difference at that stage if the suit would have to be filed again on its having matured for filing.”

Accordingly, the substantial question of law being I and II are answered and decided in favour of the plaintiffs/respondents 1 to 4.

As regards substantial question of law no.III as framed at the time of admission of appeal when the order of amendment was allowed by the Trial Court treating the said amendment application as part of the plaint cannot be any substantial question of law in not following Order 6 Rule 18 C.P.C. because the application under Order 6 Rule 17 has been made part of the plaint by the Trial Court, nevertheless the Rule 18 of Order 6 provides that if an Order for leave to amend is obtained and if a party does not amend within the time limited for that purpose by the order or within fourteen days from the date of the order he shall not be permitted to amend after expiry of such limited time unless the time is extended by the Court.

In view my observation in the forgoing paragraphs in clear crystal term an apparent error on the part of the learned Appeal Court below has cropped up for decreeing the appeal in holding the defendant no. 3/appellant herein as rank trespasser in respect of 5½ decimal of land in the A schedule property directing the defendant no. 3/appellant to quiet and vacate from the suit property within three months from the judgement dated 10.3.2005 without ascertaining the real possession of the defendant no. 3/appellant herein in non suit plot, ergo, in order to dispel the misgiving in the judicial mind with regard to the possession of the defendant no. 3/appellant herein in suit plot no. 2520/9238 or in non suit plot no. 2510/9238, the decree of the Appeal Court could be

executable only on survey investigation to ascertain the real possession of the defendant no. 3/appellant and not otherwise.

In the context of what has been discussed in the forgoing paragraph, the Trial Court judgment and decree is restored and that of the appellate judgment and decree in respect of eviction of defendant no. 3/appellant herein from 5½ decimal of land in suit plot is hereby set aside.

Accordingly, the appeal being SA 36 of 2008 with CAN 5 of 2019 (Old No. CAN 8384 of 2019) is allowed in part and disposed of.

Department to send the LCR to the learned Court below at once.

Certified website copies of the judgment, if applied for, be urgently made available to the parties, subject to compliance with all requisite formalities.

(SHIVAKANT PRASAD, J.)