

23.12.2021
SL No.6
Court No.1
(AJ/SM)

Circuit Bench of Calcutta High Court
At Jalpaiguri
(Via video Conference)

SAT 4 of 2021
I.A. No.: CAN 1 of 2021

Sri Biplab Karmakar
-Vs-
Sri Satendra Nath Karmakar

Mr. Bhaskar Roy Mahashaya,
Mr. Deborshi Dhar.
... for the appellant.

This Second Appeal has come up for admission.

The appellant has challenged the appellate decree partially modifying the trial Court decree in a suit for recovery of possession, mesne profits, perpetual injunction and other allied reliefs.

The plaintiff filed the suit claiming ownership of the land mentioned in the 'A' Schedule property of the plaint and shown as shop room 'F' in the site plan annexed to the sale deed executed by the plaintiff being no.1 1775 of 2006 in RS Khatian No.7197 in RS Plot No. 2183 and 2184 respectively under Mouza Kharia P.S.: Kotwali, District: Jalpaiguri which has been described in Schedule 'B' property of the plaint.

The said property was identified as the suit property.

The plaintiff contended that the plaintiff is the owner in respect of residential and commercial building standing on the land more particularly mentioned in 'A' schedule property. The plaintiff obtained the sanctioned plan on the basis whereof he raised construction in the suit property. One of the rooms in the newly building earmarked as 'E' has been sold to the defendant who happens to be a close relation of the plaintiff, namely, bhagina (sister's son). The said room is adjoining to the north of the passage as shown in the sanctioned building plan through the registered sale deed bearing no.1 1775 of 29th March, 2006.

The defendant/appellant obtained the permission of the plaintiff on 10th September, 2006 and stored some woods in the plaintiff's own retained shop being room no.'F' and also some woods in the middle passage of the plaintiff's building structure. Thereafter on 13th February, 2007 when the plaintiff was cleaning the suit premises, he requested the defendant to vacate the area. The defendant refused to do so and threatened the plaintiff with dire consequences. The immediate result in effect was

a proceeding initiated under Section 144(2) of the Code of Criminal Procedure, 1973 followed by the civil suit.

The defendant entered appearance in the suit and in the written statement the defendant admitted that some shop rooms were standing on the land mentioned in the scheduled property but it is not true that the plaintiff is an owner or in possession of that shop room over which the plaintiff is presently claiming ownership and prayed for recovery of possession and other ancillary reliefs.

It was alleged in the written statement that the said building structure was constructed by the plaintiff and the defendant jointly and the defendant not only supported the plaintiff financially and otherwise, but also he also assisted him to build and complete the said residential/commercial building. It was also alleged that although the Jalpaiguri Municipality has sanctioned the municipal building plan on 12th February, 2003 showing ten shop rooms including the passage existing in the said building, at the time of execution of the plan no partition wall was constructed in between the shop earmarked 'E', passage and room no. 'F' as shown in the map. The whole space i.e. 'E',

passage and room no. 'F' is comprised of one unit measuring about 359.71 sq. ft. with a door fixed on the western side of the said space for exclusive use of the defendant for his entry to the godown.

On the basis of the pleading, the learned trial Judge framed various issues. All the issues were answered in favour of the plaintiff after appreciation of oral and documentary evidence.

The learned Trial Judge in answering the issues in favour of the plaintiff had recorded that the defendant in paragraph 5 of his written statement stated that at the time of execution of the plaint no partition wall was constructed in between room earmarked 'E' passage and room no. 'F' as shown in the map the whole space i.e. 'E', passage and room no. 'F' is comprised of one unit measuring about 3597.71 sq.ft. with a door fixed on the western side of the said space for exclusive use of the defendant for his entry to the godown.

However, during cross-examination of D.W.3, the said witness stated that "all the shops are lying in a single row one after another under the same roof. All the shops are divided by wall, there is no gap in between".

The D.W.1 at the time of his cross-examination has stated that "I do not know

whether the plaintiff has sold nine shop rooms but I only know that I have purchased one shop room by virtue of 'Exhibit 10', thereby the defendant agreed that he had purchased the shop room through the registered deed being no.1775 of 2006 'Exhibit 10' and as per the said deed the plaintiff sold the shop room being earmarked 'E' not the shop room 'F' which is the suit property and the D.W. 3 also stated at the time of his examination that 'E' marked shop room is belonged to the defendant.

On appreciation of the aforesaid evidence, the learned Trial Judge has held that it is evident from the examination of the witness that the defendant has right over the shop room 'E' and not over the shop room 'F' .

The appeal Court below while affirming the decree of the learned trial Judge partly modified the aforesaid decree and affirmed the trial Court decree insofar as it decreed the suit in favour of the plaintiff for recovery of possession and mesne profits.

The findings with regard to the confirmation of the possession and permanent injunction, however, was set aside.

In our view, it does not make much of a difference while the suit was substantially

decreed in favour of the plaintiff for recovery of possession and mesne profits and the portion that was not confirmed may be mutually destructive.

The appeal Court while affirming the decree of the learned Trial Judge had taken note of paragraph 5 of the written statement where the right, title and interest of the plaintiff over the 'B' Scheduled property was not disputed.

It was further noted that as the suit proceeded, the defendant came up with diverse pleas which were not consistent with his earlier plea, in fact, he was changing his defences and stands as the trial progressed. The appellant attempted to amend his written statement on the basis of evidence of D.W.4 that the 'A' Schedule property forms part of the vested land.

It is not in dispute that Exhibit 1, 2, 3, 4 and 10, namely, the deed bearing no.1563 of 1992, series of rent receipts and certified copy of the sale deed executed by the plaintiff in favour of the appellant whereby an incomplete shop room measuring 122 sq.ft. mentioned in the alphabet 'E' in the map annexed thereto abutted by the passage in the north shop room was transferred in favour of the appellant.

It is also significant to mention that the appellant did not challenge the sale deed Exhibit 10. If the said deed in any way affects his right, title and interest in respect of his claim, he should have challenged the said deed in accordance with law.

There are prevarications in the pleadings as well as in the deposition of the defendant witness and the defendant with regard to Exhibit 10 and other exhibits of which reliance has been placed by the plaintiff and also by the learned Trial Judge as well as appeal Court below. Significantly, Exhibit 10 was marked as admission.

In a Second Appeal, the Court should not interfere with the concurrent findings of facts arrived at by the Trial Court as well as by the appeal Court below, unless it appears to be perverse or there has been wrong appreciation of evidence meaning thereby that the Court has admitted inadmissible evidence leading to miscarriage of justice.

The construction and interpretation of documents unless it appears to be grossly perverse are not to be interfered in a Second Appeal.

The appreciation of evidence by the trial Court, who is master of the proceeding, should be respected unless as we observed earlier that the findings are based on no evidence or perverse as the case may be.

The learned counsel for the appellant submits that both the learned Courts below have committed substantial error of law in passing a decree of recovery of possession in respect of suit schedule 'B' property as there is no existence of the said property.

The appeal Court below on appreciation of evidences on record has arrived at a finding that it can be safely concluded that such excess property is none other than schedule 'B' property, so was the finding of the learned Trial Judge.

We have gone through the judgment of the trial Court as well the appeal Court below carefully and do not find that the appellant is able to raise any substantial questions of law, far less the substantial question of law suggested by the learned counsel for the appellant warranting admission of the present Second Appeal.

It needs to be remembered that the legislature has consciously used the word 'substantial' as opposed to question of law in section 100 of the Code of Civil Procedure.

A mere question of law raised is not sufficient to admit Second Appeal unless it appears to the Court that the issue involved gives rise to a substantial question of law.

On such consideration, the present Second Appeal being SAT No. 4 of 2021 is dismissed under Order XLI Rule 11 of the Code.

In view of the dismissal of the appeal, the connected application being CAN 1 of 2021 has become infructuous and is accordingly dismissed.

Urgent photostat certified copy of this order, if applied for, be supplied to the parties subject to compliance of all requisite formalities.

(Biswajit Basu, J.)

(Soumen Sen, J.)