

Item-13. 16-09-2022

sg

Ct. 8

SA 465 of 2003

Nanda Dulal Ghosh & Anr.

Versus

Tushar Jana & Ors.

Mr. Murali Mohan Ray, Adv.

...for the appellants

The judgment and decree dated 23<sup>rd</sup> December, 2002 passed by the learned Additional District Judge, Fast Track Court, 2<sup>nd</sup> Court, Burdwan affirming the judgment and decree of the trial court dated 26<sup>th</sup> June, 1992 passed by learned 2<sup>nd</sup> Additional Court at Burdwan in a suit for declaration of title and injunction is the subject matter of the second appeal.

The concurrent findings of fact with regard to title to the ka schedule property is now being assailed in the second appeal by Mr. Murali Mohan Ray, the learned Counsel representing the appellants.

Mr. Ray has submitted that the possession of the plaintiffs in the suit property is not proved as there was no prayer made in the plaint for rectification of the deed of purchase not the plaintiff was able to establish their right in respect of the suit property. It is submitted that the plaintiff has failed to produce any document of title in respect of the suit property. The alternative case of the plaintiff with regard to acquisition of title by adverse possession runs contrary to the claim made by the plaintiff based on title. Mr. Ray has strenuously submitted that the second appeal is required to be admitted on the aforesaid grounds as it raises a substantial question of law. Mr. Ray has submitted that the trial court has arrived at a finding that no effective decree could have been

passed when the plaintiff has not been able to prove his title. The decree of the trial court is perverse and affirmed of the said decree of the first appellate court disregarding the material evidence of record leads to perversity.

We have carefully considered the judgment of the trial court and the first appellate court with a view to find out if the appeal can be admitted. The second appeal can be admitted provided it involves a substantial question of law. A substantial question of law arises when it appears that the judgment was passed overlooking a material piece of evidence or contrary to law. It could also happen when there is a glaring error in the form of wrong interpretation of the documents. Concurrent findings of facts are not to be duly interfered with unless it is manifestly perverse. In the instant case, the plaintiffs have prayed for a declaration of title over the properties described in schedule ka appended to the plaint and for permanent injunction based on a registered sale deed dated 9<sup>th</sup> April, 1936 read with the record of rights that were exhibited as exhibit nos. 4(a) and 4(b). It is also based on the exhibit 1 which is the CSROR of khatian no. 181. The aforesaid documents were exhibited by the plaintiffs during trial and were admitted into evidence. The plaintiffs have alleged that the ka schedule properties originally belonged to Panchu Dalui and Tirtha Dalui and the properties described in schedule kha belonged to the five sons of Surendranath Ghosh, namely, Gopal, Gobinda, Jitendra, Kamal and Balai. For convenience, the parties exchanged their said properties with each other before the CS settlement as would be evidence from the exhibit 1, Panchu and Tirtha started owning and possessing the kha scheduled

properties and the said five brothers namely Gopal and four others started owning and possessing the ka scheduled properties. The possession of the said properties by way of exchange has been recorded in the CS settlement. Apart from the aforesaid said exchange, the said Gopal and four brothers acquired an independent title by adverse possession in respect of the said ka scheduled properties having had possessed the same for over 12 years. The father of the plaintiffs purchased the said ka scheduled properties together with other properties from said Gopal and others for a consideration under a registered sale deed dated 9<sup>th</sup> April, 1936 and took over possession of such properties. The deed writer while preparing the aforesaid deed erroneously mentioned the properties of schedule kha instead of those of schedule ka as the properties conveyed under the deed. However, the fact remains that the father of the plaintiffs possessed the ka schedule properties as owner thereof for over 12 years since execution of the aforesaid deed and till his demise. As there was no written deed in respect of exchange and as the ka scheduled properties were not mentioned in the deed of conveyance in favour of the father of the plaintiffs, the settlement authorities did not record such ka scheduled properties in the name of the plaintiffs in the RS. In the RS such properties were recorded erroneous in the name of Panchu and Tirtha as Korfa tenant in khatian no. 732. The kha scheduled properties have been recorded to have been in possession of said Panchu and Tirtha by way of exchange. Defendant no.1 (Pulama) acquired the said kha scheduled properties after the demise of the said Panchu and Tirtha. She never possessed the ka scheduled properties in exchange of which

kha scheduled properties had been obtained by her predecessors Panchu and Tirtha. Pulama later transferred the said kha scheduled properties in favour of the defendant nos. 3 and 4 under different deeds. Recording in respect of the said ka scheduled properties has also been made erroneously in the name of the defendant no.1 relying upon the erroneous RS records. In view of the erroneous RS recording, the father of the plaintiffs approached Panchu and Tirtha for their executing a 'Na-Dabi' (no claiming) deeds in respect o the said ka scheduled properties and they agreed to do so. After the demise of the said Panchu and Tirtha, Pulama also assured to execute such "Na-Dabi" deed but ultimately she declined since she had already transferred the said ka scheduled properties in favour of the defendant no.2 on 18<sup>th</sup> September, 1984 and since then the transferees were in possession of the ka scheduled properties. It was contended before the trial court as well as appellate court that in such deed which clearly interfered with the possession of the plaintiffs in respect of the ka scheduled property is in operative because of the recognition of the State hereinabove. The defendants contested the proceeding. PW 1 did not come forward to adduce any evidence. The case of the defendants was primarily based on the RS record and the plaintiffs merely reiterated that Panchu and Tirtha were possessing the suit properties as "Korfa" tenants under Harmohan Ghosh and the contemporaneous interest in the RS record should be presumed to be correct. It was further contended that the plaintiffs were able to prove oral exchange and in absence of establishing that there has been any oral exchange, the suit must fail. Before us, it is argued that the law does not permit any oral exchange and in absence of

any registered documents showing that there has been an exchange of properties between the predecessors in the title of the parties both the learned trial court as well as the learned appellate court have arrived at a wrong finding.

It was in the conspectus of the aforesaid facts, we need to appreciate the quality of the evidence in order to find out whether any substantial question of law is involved in the second appeal. It is the specific case of the plaintiffs before the learned trial court that an exchange took place between the legal heirs of Bipin Dalui on one hand and legal heirs of Surendranath Ghosh on the other, prior to cadastral survey of C.S.R.O.R. carries with it the evidence of such exchange. This factum of exchange of property is also getting support from the oral testimony of DW-1 in respect of title of Pulama Rani Malik over 'kha' schedule property. It is fact that R.S.R.O.R. in respect of the suit property through stands in the name of two sons of Bipin Dalui – Tirtha and Panchu, such document does not indicate title. A rebuttable presumption of possession can at best be drawn up from the R.S.R.O.R. The state being the paramount title holder could not produce any document, demonstrating the foundation for preparation of such R.S.R.O.R. Under such circumstances learned trial court and learned first appellate court cannot be said to have committed any error in holding that the predecessor-in-interest of the plaintiff had right, title and interest in respect of 'ka' schedule property which the plaintiffs/respondents have acquired by purchase.

In absence of any document towards settlement of land, the mere entry in the R.S.R.O.R. as 'Korfa tenant' is of no consequence.

Both the courts below, in our view, were justified in interfering with the long settled possession of the parties since they exchanged the schedule recognizing the long continuous settled possession of the predecessor in title of the plaintiffs in relation to the suit properties based on cogent evidence.

It was on the basis of the aforesaid evidence, we are of the view that the appellate court was justified in confirming the decree of the trial court. We do not find any substantial question of law involved in the second appeal for admission. The second appeal stands dismissed. However, there shall be no order as to costs.

**(Uday Kumar, J.)**

**(Soumen Sen, J.)**