

**Sri Pradyut Kumar Ghosh & Ors.
Vs.
Nur Hossain Sk.**

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Mr. Sukanto Chakraborty
Mr. Anindya Halder
... For the Appellants

The second appeal is arising out of the appellate judgement and decree dated 4th December, 2018 passed by learned District Judge, Murshidabad in Title Appeal No. 66 of 2016 affirming the judgement and decree dated 01st July, 2016 passed by learned Civil Judge, Junior Division, 2nd Court, Berhampore, in Title Suit No. 285 of 2010.

We have heard the learned counsel appearing for the appellants. We have perused the judgment and decree of the trial court as well as the first appellate court. There cannot be any doubt that in spite of disclosure of materials at the trial the plaintiffs did not amend the plaint to bring necessary parties, who are likely to be affected, if the suit is decided in favour of the plaintiffs.

The learned trial judge, in our view, has rightly observed and referred to in the case of **Maharaja of Benaras vs. Ramji, repoted in ILR 27 All 138**, which clearly held that “*non-joinder of necessary parties is a good ground for refusing to grant a declaratory decree in the exercise of discretionary power, because the Court will not make a decree which is ineffective.*”

Moreover, the plaintiffs failed to substantiate in the trial that the defendant has disturbed their possession. The first appellate court has

elaborately dealt with the issue and the relevant portion whereof is reproduced below:-

“Here, RS record speaks that the suit property was originally belonged to one Khudiram Ghosh and Jamini Ghosh and plot no. 5381 comprised of an area of 14 decimal and plot no. 5382 comprised of an area of 19 decimal and LR Record of Rights of plot no. 5382 speaks that the suit property belonged to Tushar Kanti Ghosh, Pradyut Kumar Ghosh, Mrinal Kanti Ghosh and Khudiram Ghosh and from the deed vide No. 11100, it is appearing that Khudiram Ghosh transferred 5 decimal out of 19 decimal in respect of plot No. 5382 to Pradyut Kumar Ghosh and from deed vide No. 4795, it is appearing that Mrinal Kanti Ghosh sold out 4 decimal of land in respect of plot no. 5382 and 3.75 decimal in respect of plot no. 5381 in favour of the defendant herein. So, plaintiffs suppressed the fact that the suit property was initially belonged to one Khudiram Ghosh and Jamini Ghosh. Now, the suit property belonged to Khudiram Ghosh, Pradyut Kumar Ghosh, Tushar Kanti Ghosh and Mrinal Kanti Ghosh. So, it is appearing that the plaintiffs did not come before the learned court below in clean hand. So the suit is bad for non-joinder of necessary parties. It is fact that if necessary parties are not impleaded, the court can refuse to give a decree of declaration. A declaratory decree cannot be asked for as a matter of right. The Court has a discretion to grant it having regard to circumstances to this case. However, such discretion is not arbitrary, rather it is governed by settled principle of law and at the cost of repetition it can be stated that if necessary parties are not joined or necessary parties are not made

parties in the suit, court can refuse to exercise such discretion. It goes without saying that as per Or. 1 Rule 9 CPC, no suit shall be defeated by reason of mis-joinder or non-joinder of parties but proviso of such rule says that such rule is not applicable in case of non-joinder of necessary parties.

Here, Tusher Kanti Ghosh has sold out a certain portion of land in favour of the defendant herein and put the defendant in possession. So, defendant is in possession of the land but plaintiffs did not claim possession and hence, the suit is barred by S.34 of Specific Relief Act, 1963 as per judgment of Ram Saran reported in AIR 1972 SC 2685.”

In view of such admitted position, in our view, the plaintiffs were cautioned more than one to cure defects in order to make the suit effective, however, the plaintiffs did not take the opportunity to cure such defects.

On such facts, the findings of the trial court as well as the first appellate court are in accordance with law and does not call for any interference.

Learned counsel for the appellant has submitted that this order may be raised as res judicata, however, caution for nuisance, if any, is a continuous cause of action.

On such consideration, we do not find any merit in the second appeal.

The second appeal is, therefore, summarily dismissed under Order XLI Rule 11 of the Code of Civil Procedure.

(Ajoy Kumar Mukherjee,J.)

(Soumen Sen, J.)

