

DL. February
19. 7, 2022

S.A. 122 of 2021
Sri Kashinath Saha
Vs.
Smt. Maya Rani Baidya & ors.

Mr. Tapan Kumar Rakshit,
Mr. Surojit Roy,
...for the appellant.

The present appeal has arisen out of a decree of reversal passed by the learned Civil Judge (Senior Division), Second Court at Krishnagar, Nadia, in Title Appeal No. 90 of 2010 arising out of decree dated July 6, 2010 passed by the learned Civil Judge (Junior Division) at Kalyani, Nadia in Title Suit No. 209 of 2000.

The learned advocate for the appellant submits that the present appeal against the decree of reversal is required to be admitted as substantial questions of law are involved in this appeal. It is submitted that the appellate court had failed to appreciate that the plaintiff had failed to establish her right, title and interest in the property in suit and that the appellate court had completely disregarded the fact that the defendants had clear title over the property in suit by virtue of a sale deed. It is further submitted that the State of West Bengal was not made a party to the suit.

A second appeal can only be admitted provided a substantial question of law is involved in such appeal. If it is essentially a question of fact, unless the findings are perverse and contrary, the second appeal cannot be admitted.

In the instant case, it transpires from the evidence that

the property in suit measures about 8 decimal after the land acquisition and that the then joint owners of such land, namely, Robjel and Mofajjel transferred the entire 8 decimal in the year 1979 in favour of the plaintiff/respondent and, accordingly, the claim of the defendant/appellant that Mofajjel transferred 1 decimal of land in favour of Dulal Karmakar by way of a deed of sale being Exhibit-B in the year 1996 is not sustainable in view of the latin maxim, namely, *Nemo dat quod (qui) non habet*, as at the relevant time even if it is assumed that such deed was executed by Mofajjel, the transferor had lost her right, title and interest over the property in suit by reason of the earlier transfer in the year 1979. The deed of 1979 was proved by the plaintiff/respondent in the trial court. In a civil proceeding, the issues are required to be decided on the basis of the preponderance of probabilities and not beyond reasonable doubt. Since the trial court had discredited the plaintiff, who failed to prove her case beyond reasonable doubt, the appellate court corrected the said error. It was evident from the evidence on record that Dulal Karmakar was a permissive occupier under Robjel and Mofajjel and such fact was specifically mentioned in the written statement. The evidence before the trial court does not show that apart from the aforesaid property, forming the subject matter of the suit, Robjel and Mofajjeal had any other property, which had been transferred to Dulal Karmakar.

The case of the plaintiff/respondent specifically was that after transfer of the property in her favour, she permitted Dulal Karmakar to remain in the property as long as she is not asking him to vacate the same.

There cannot be any doubt that initial burden of proof is on the plaintiff/respondent to prove her case. During trial, not only the husband of the plaintiff but other witnesses also corroborated the case made out by the plaintiff that Dulal Karmakar was a permissive occupier under the plaintiff after the suit property was purchased. The published land revenue record of rights, being Exhibit-4, also shows that 8 decimal of land is under the possession of the plaintiff and Dulal Karmakar was a permissive occupier under the plaintiff/respondent. This record of rights was never challenged by Dulal Karmakar. The learned trial judge failed to consider such record of rights, which has a presumptive value in the eye of law until and unless rebutted by cogent evidence. Entry in the record of rights does not create any title, but it is only an evidence of possession. The evidence on record shows that Dulal Karmakar was a permissive occupier of the property in suit.

The conclusion arrived at by the first appellate court in appreciation of the evidence on record does not call for any interference in the second appeal. moreover, we do not find any substantial question of law involved in this appeal for which the same is required to be admitted.

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

There will be no order as to costs.

(Soumen Sen, J.)

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(Ajoy Kumar Mukherjee, J.)

