

**IN THE HIGH COURT AT CALCUTTA
CIVIL REVISIONAL JURISDICTION
APPELLATE SIDE**

PRESENT:

THE HON'BLE JUSTICE AJOY KUMAR MUKHERJEE

**S.A. 441 of 1984
With
CAN 6 of 2008
(Old CAN 3520 of 2008)**

**Sudhangsu Mohan Roy , Since deceased, represented by Smt.
Jyotirmoyee Roy & Ors.**

Vs.

**Sri Haradhan Roy, since deceased, represented by Smt. Manju Roy &
Ors.**

For the Appellant : Mr. Asim Datta
Mr. Prokash Chandra Pal
Mr. Quazi Md. Hafizullah

For the respondent no.3 : Mr. Mrityunjoy Chatterjee
Mr. Ravi Ranjan Kumar

Heard on : 19.06.2023

Judgment on : 20.07.2023

Ajoy Kumar Mukherjee, J.

1. This second appeal has been assailed against Judgment and decree passed in Title Appeal No. 81 of 1983 reversing the judgment and decree passed by Munshiff, 2nd Court, Serampore in Title Suit No. 48 of 1983. Division Bench of this court while admitting present second appeal, Their Lordship pleased to held that the second appeal will be heard on the

grounds set out in the memo of Appeal. In the Memo of Appeal total 17 (seventeen) grounds have been set out.

2. During the course of hearing the learned counsel appearing on behalf of Appellants assailed the judgment of the court below mainly on two grounds.

(i) The entry in C.S. Record of Rights cannot prevail over the R.S. record of rights in view of the settled principle of law.

(ii) A co-sharer in an undivided property cannot construct a building without obtaining consent from other co-sharers.

3. The dispute which cropped up over the subject matter relates to land described in “ka” schedule to the plaint comprising of plot no. 1097, 1099 and “kha” schedule to the plaint comprising of plot no. 1262,1088,1100 of Mouza-Samil, District-Hooghly.

4. The appellants herein as plaintiffs filed aforesaid Title Suit No. 48 of 1983 against the respondents herein contending that one Satya charan Roy, Khama bala Dasi and Manumatha Roy each had 1/3rd share in respect of aforesaid “kha” schedule property and Satyacharan Roy was the owner of “Ka” schedule suit property to the plaint and their names were duly recorded in the RS Record of Rights. After the demise of said Satyacharan Roy plaintiff/appellant no. 1 being the predecessor of present appellants got 1/7th Share in respect of the ka schedule property and 1/21th share in “kha” schedule property and he had possessed the same along with the other co-sharers. According to the plaint case the “kha” schedule property originally belong to Kedar Roy who died leaving behind three sons late Manmatho Roy, late Harigopal Roy and late Satya Charan Roy. Satya

Charan roy died leaving behind his widow and other legal heirs namely Late Sudhangshu roy, Late Kiriti Roy, Prasanta Roy, Sandhya Roy, Late Bolai Roy and Late Sadhana Roy. Aforesaid Harigopal Roy died leaving behind his widow Khama Bala Dasi. On the other hand aforesaid Manumatho Roy died leaving behind Patal Rani Roy and Patal Rani Roy died leaving behind only son Dinbandhu Roy and accordingly the heirs of Satyacharan Roy has 1/7th share in respect of “ka” schedule property and 1/21th share in “kha” schedule property. Further case is Khamabala Dasi the heir of Harigopal transferred her 1/3rd share in favour of Haradhan Roy, who became owner and possessor of 1/3rd share in the “kha” schedule property and according to the plaint case, after the demise of Manmatho Roy his daughter Patal Rani became owner of 1/3rd share and after the death of Patal Rani her only son Dinbandhu Roy inherited 1/3rd share of her mother in “kha” schedule property. Further case is while Dinbandhu Roy was in possession of 1/3rd share in “kha” schedule property, he sold it to the Plaintiff/Appellants no. 2 by executing registered deed of sale on 02.04.1980 and accordingly plaintiff/appellant no. 2 has become one of the co-sharers in respect of the “kha” schedule property and She is in possession of the said property since purchase.

5. The cause of action of the suit arose when the defendant no. 1 on the strength of a permission granted by the Gram Panchayet started construction over the said undivided property and cut down some trees. The defendant/respondents contested the suit by filing written statement and defence case is Satyahcaran and Harigopal Roy were absolute owners of “ka” and “kha” schedule properties by way of settlement granted by the

then Zamindars and accordingly their names were duly recorded in the CS Record of Rights. The defendant denied that Manmatho Roy had any right title interest in the suit property and the name of Manmatho Roy as appearing in the Revisional Settlement (RSROR) is erroneous. In view of the same Manmatho Roy's daughter Patal Rani did not inherit any right title or interest in the suit property. Accordingly her son Dinabandhu Roy cannot have any right of inheritance over the same and Dinabandhu Roy had no right title or interest to sell the same in favour of the plaintiff no.2. Accordingly plaintiff no. 2 has got no right title interest in the suit property.

6. The Trial court accordingly *inter alia* framed an issue whether Satyacharan Roy, Harigopal Roy took any settlement from the Zamindar in respect of the "ka" and "kha" schedule properties and another issue framed as to whether Manmatho Roy had any right title interest in the suit property by which plaintiff no. 2 can have acquired any right title interest in the suit property by purchase.

7. At the very outset it can be said that the title deed stands in favour of plaintiff no. 2 dated 02.04.1980 has not yet been declared as null and void by any competent court of law nor any challenge has been made in connection with the entry in R.S. Record of Rights in the name of the Manmatho Roy in respect of the "kha" schedule property. In evidence defence witness has stated that Harigopal and Satyacharan Roy took settlement of the suit property from the Zamindars and in the CS settlement Manmatho's name was not recorded but said witness admitted that they have no document to prove that Harigopal Roy and Satyacharan Roy took settlement from the Zamindars. During the course of trial the defendants

have not called for any document from competent sherestha nor they have disclosed who was the Zamindars at the material point of time, from whom they took the grant. Accordingly the Trial Court held that the defendants have failed to prove that Satya Charan and Harigopal Roy took any settlement of the suit property from the then Zamindars. Regarding the other issue the Trial Court observed that it is not in dispute that Satyahcaran Roy, Harigopal Roy and Manmatho Roy were three brothers. The claim of the defendant that Manmatho Roy had no title is based on the CS recording. In this context learned counsel appearing on behalf of the appellants submits when there is a conflict in between the CS recording and R.S. and LR recording the latter entry shall prevail and in this context he relied upon the judgment of ***Durga Singh Vs. Tholu*** reported in **AIR 1963 SC 361**. During hearing I am told that LR recording is also made in the name of plaintiff which has not been challenged. There is no dispute about the proposition of law that entry in record of Rights does not create title nor extinguish title but it is certainly a document showing prima facie possession unless rebutted.

8. It is not in dispute that Manmatho Roy died about 60 to 70 years back though in the RS Record of Rights Manmatho Roy has not been shown as deceased but this appears to be a clerical mistake because in the same record Harigopal Roy and his father Kedarnath Roy also not shown as deceased though by that time they also died. A clerical mistake for not putting the late mark before the name of Manmatho Roy does not signify anything. In this context, the Trial court held, when the defendant has failed to establish the case of settlement in favour of Harigopal Roy and

Satyacharan Roy, then property is presumed to be a property of their father Kedarnath Roy and being ancestral property, the three legal heirs of Kedar namely Manmatho Roy, Harigopal Roy and Satyacharan Roy, inherited $1/3^{\text{rd}}$ share each in the suit property and it is settled proposition of law that possession of one co-sharer is possession of others. It is not in dispute that Manmatho Roy died leaving behind Patal Rani Roy as her only heir and Patal Rani died leaving behind Dinabandhu Roy as her legal heir. There is nothing to show that Patal Rani died prior to 1956 and as such Patal Rani acquired full interest in her father's share. Since the deed of sale in favour of plaintiff No. 2 has not been challenged, so there is nothing to disbelieve the registered deed executed by Dinabandhu Roy in favour of the plaintiff no. 2 and as such the Trial court held that plaintiff no. 2 validly acquired $1/3^{\text{rd}}$ share in the "kha" schedule property being plot no. 1088/1100/1262. Learned Trial Court also held that plaintiff no. 1 has got $1/7^{\text{th}}$ share in respect of his father's share. Accordingly Satya, Harigopal and Manmatho Roy had $1/3^{\text{rd}}$ share each in the schedule property and plaintiff no.1 is entitled to have title to the extent of $1/7^{\text{th}}$ share of his predecessor's $1/3^{\text{rd}}$ share in the "kha" schedule suit property. Trial Court decreed the suit on 15th February, 1983 declaring that the plaintiff no. 1 has got $1/7^{\text{th}}$ share of his father's $1/3^{\text{rd}}$ share and plaintiff no. 2 has got $1/3^{\text{rd}}$ share in the suit plot described in "kha" schedule to the plaint and also ordered permanent injunction restraining defendants from disturbing plaintiffs' peaceful possession to the extent of their share in the joint property.

9. The First Appellate court while reversing the order held that the entire plaint case is based on RS Record of Rights which is in conflict with the

entry in C.S. Record of Rights. The appellate Court further observed that the plaintiffs did not challenge the entry in C.S. Record of Rights in respect of the plot no. 1262/1088/1100 being “kha” schedule property. Learned First Appellate Court referring the judgment of ***Shri Raja Durga Singh of Solon Vs. Tholu and others*** reported in **AIR 1963 SC 361** observed that the new entry will not take the place of old one and will not be entitled to the presumption of correctness, until and unless earlier entry established to be wrong or duly substituted by another entry. In such perspective learned First Appellate Court pointed out, since the plaintiffs never challenged the entry in C.S. record of rights, either in the pleading or in evidence, so correctness of entry in CS Record of Rights remains undisputed and further held that the principle that in case of conflict later entry shall prevail cannot be said to be applied here, as there was no real conflict of any nature in the instant case between these two records. Accordingly the vendor of plaintiff no. 2 had no transferrable interest. However, the First Appellate Court held that plaintiff no. 1, has 1/7th share in the properties in respect of 1/2nd share of his father which they inherited from their father and as such plaintiff no. 1 is co-sharer with the defendant in both “Ka” and “Kha” schedule properties but not the plaintiff no. 2.

10. With regard to injunction towards construction of a building by co-sharer in an undivided property, without obtaining consent from the other co-sharers the Appellate Court observed that without a specific suit for partition none of the co-sharers can pray for an injunction against other co-sharers and in view of such, since the plaintiff No.1 is just a co-sharer in all the suit properties, he cannot get any relief in the nature of injunction

against other co-sharers/defendants. On the basis of such observation learned court below allowed the appeal in part declaring plaintiff no. 1 is co-sharer in respect of both the suit plots and judgment and decree passed by the Trial Court was accordingly modified.

11. Having considered the facts and circumstances of the case it appears that the defendants failed to prove their case of settlement in favour of Harigopal Roy and Satya Charan Roy from the Zamindars. Accordingly though there is a conflict in the entry of CSROR and RSROR but the presumption in the RSROR shall prevail as this is the later one. It is also not in dispute that the RS recording has not been challenged by the defendants nor the deed in favour of the plaintiff no. 2 has been declared null void by any competent court of law. In such view of the matter the Trial court has committed no mistake in declaring plaintiff no. 2 as co-sharer in the suit property.

12. Regarding the issue of granting injunction against construction of building by a co-sharers in the undivided property, it can be said that right of a co-owner to raise construction on the common property depends on the consent express or implied of the other co-owners but when the plot is in joint possession of the co-sharers anyone of them may erect building or raise construction thereon with the consent of the others. But if other co-sharer refused to give consent then such construction would amount to ouster and injunction order may be passed from doing so by the court. It is settled that a co-sharer though in possession of the joint property, has no right to change the user of that property without consent of the other co-owners and that if the aggrieved co-owner comes to the court with due

promptness for restraining the defendants from raising of a building on the joint property the Court can very legitimately pass decree of injunction.

13. In view of the above the Trial Court has committed no mistake in passing a decree declaring share of the parties and order of injunction. Learned counsel for the respondent strenuously argued that though the plaintiff had not prayed for declaring share of the parties in the suit properties and he had only prayed for declaring him as a co-sharer in the suit property but the court below exceeding his jurisdiction has declared share of the plaintiff which is not just.

14. It is true that relief not founded on the pleadings should not as a rule be granted but order VII, Rule 7 has the definite object of avoiding multiplicity of suits in cases, where relief can be granted in the facts and circumstances of the case, even if in the prayer portion it has not been distinctly pleaded. The wordings in rule 7 “it shall not be necessary to ask for general or other relief which can always be given to the same extent, as if it had been asked for” clearly indicates that such provision empowers court to grant any other relief arising out of same cause of action. Since present suit is for declaration of co-sharership and injunction to restrain defendants who are also co-sharers, it is open to the court to declare also share of respective parties in the suit properly, even if no prayer thereof is made, to avoid another separate suit for declaration of share of the parties. It is not the form of the prayer which matters, but it is the substance thereof, which should be looked into by the court provided all such reliefs are consistent with the averments in the plaint.

15. In such view of the matter the judgment and decree passed by the First Appellate Court dated 12.08.1983 is hereby set aside and the judgment and decree passed by the Trial Court in Title Suit No 48 of 1983 on 15.02.1983 is hereby affirmed.

16. S.A 441 of 1984 is accordingly allowed.

17. Connected application accordingly disposed of.

There will be no order as to costs.

Urgent Photostat certified copy of this judgment, if applied for, be supplied to the parties upon compliance with all requisite formalities.

(AJAY KUMAR MUKHERJEE, J.)