

IN THE HIGH COURT AT CALCUTTA
CIVIL APPELLATE JURISDICTION
Appellate Side

Present:

The Hon'ble Justice Harish Tandon

And

The Hon'ble Justice Ajay Kumar Gupta

FMAT 494 of 2022
With

CAN 1 of 2022
and

CAN 2 of 2023

Sri Bhandul shaw @ Manik Shaw

Vs.

Sri Tarak Shaw

For the Appellant : Mr. Siva Prasad Ghose, Adv.

For the Respondent : Mr. Arnab Roy, Adv.
Mr. Satyam Mukherjee, Adv.
Ms. Sayani Ahmed, Adv.

Heard on : 23.08.2023

Judgment on : 14.09.2023

Ajay Kumar Gupta, J:

1. The appellant/defendant has assailed judgment and decree dated 16th day of September, 2022 passed by the Learned Additional District Judge, Fast Track, 1st Court, Barrackpore, North 24 Parganas in Title Appeal No. 56 of 2015, thereby the learned Appellate Court set aside the judgment and decree passed by the learned Civil Judge (Junior Division), previously 4th Court, now re-designated as 2nd Court (Junior Division), Barrackpore in Title Suit No. 304 of 2009, whereby the learned Trial Court has dismissed the title suit on the ground that the plaintiff could not properly describe the suit property in the schedule of the plaint, apparently it appears erroneous and insufficient description of the suit property so no effective decree for eviction can be passed against the defendant though the plaintiff has been able to prove his ownership of the suit property.

2. The appeal involves a short issue as would be clear from the facts mentioned herein below:

Originally, the father of the plaintiff and defendant filed a suit for eviction against appellant/defendant alleging him as a licensee contending therein that the plaintiff had acquired right, title and interest of the property being Holding No. 53/39, P.K. Biswas Road, Ward No. 15, P.O.

and P.S. Khardah, District North 24-Parganas, within Titagarh Municipality together with structure therein by way of partition deed for the year 1973 (hereinafter referred to as “the said property”).

3. It is further averred in the plaint that due to love and affection the plaintiff had gifted a portion of the said property measuring an area 5 Chatakhs 23 Sq. ft. of Bastu land together with one shop room in favour of the defendant in the year 2006. Thereafter, the defendant being the son of the original plaintiff, approached to accommodate him in another shop room on a temporary basis, which is situated just adjacent to his shop room i.e. western side of the defendant’s gifted property as licensee without any licence fees. The original plaintiff agreed upon such proposal due to love and affection as well as in addition to undertaking offered by the defendant that whenever the suit shop room is required for him, he shall vacate the same. Original plaintiff asked to vacate the shop room for his own purpose but in spite of several requests, defendant did not vacate and further refuse to oblige the request of original plaintiff. Having no alternative, the original plaintiff instituted a suit for eviction against defendant occupied as a licensee after expiry of 15 days from the date of receipt of the legal notice to quit and vacate the suit property.

4. Defendant duly appeared and contested the suit by filing written statement. He denied and disputed all the material allegations as levelled against him and also took a plea that the suit shop room was possessed by one Sadique Ali as a tenant from the beginning. The said tenant relinquished his tenancy right. All family members including the defendant were running a joint family business from the said shop room. Question of granting licence to the defendant is wholly denied by the defendant and prayed for dismissal of the suit.

5. The suit was dismissed by the Trial Court observing that the plaintiff has been able to prove his ownership over the suit property but the defendant cannot be stated to be a licensee under him. Moreover, no effective decree for eviction can be passed against the defendant in favour of the plaintiff since the same cannot be executed on account of erroneous and insufficient description of the suit property.

6. Respondent/plaintiff being aggrieved and dissatisfied with the findings of the Trial Court filed Appeal before the Appellate Court below. During pendency of the appeal, original plaintiff died and in his place, another son namely, Tarak Shaw stepped into the suit as a plaintiff by way of substitution with a plea that the remaining portion of property including suit shop room was gifted to him by his father during his life

time. He became a sole owner of the subject matter of suit i.e. shop room and prayed for decree of eviction against the defendant, who occupied suit property as licensee. The facts of execution and registration of the gift deed came to the knowledge of the Appellate Court below that the original plaintiff/father had gifted remaining portion of land including shop room in favour of present Plaintiff while disposing application filed under Order 22 rule 10, Order 10 Rule 1 read with Section 151 of the C.P.C. and thereby substituted Tarak Shaw as appellant/plaintiff in appeal after hearing the parties.

7. It is admitted facts that the present plaintiff as well as defendant are the biological sons of the original plaintiff. It is the case of the appellant herein that after the death of the original plaintiff, both sons became legal heirs of the original plaintiff accordingly the suit property automatically devolved upon them as co-sharer after demise of the original plaintiff. During pendency of the appeal, it came to the knowledge that the original plaintiff had already executed and registered a gift deed in favour of the present plaintiff. Plaintiff prayed for substitution in place of his father as he derived a bonafide right over the suit property as right to sue survives. So, the matter twisted differently as suit shop room is now in the ownership of present respondent/plaintiff and the original suit was filed for eviction against the defendant as licensee under the original plaintiff.

In such a situation, it is imperative upon the Court to examine the gift deed in which property in question was gifted in favour of the plaintiff by the original plaintiff for final and effective adjudication of instant suit. It is not disputed that the trial Court finally dismissed the suit only on the ground that the plaintiff could not properly describe the suit property in the schedule of the plaint. So, no effective decree for eviction can be passed against the defendant. The said dismissal was challenged before the First Appellate Court by the appellant/plaintiff.

8. After hearing the parties and coming to know about the new facts that during pendency of appeal original plaintiff had gifted his remaining property including suit shop room in favour of another son, namely, Tarak Shaw, respondent herein, the Appellate Court has finally set aside the judgment and order passed by the Trial Court and further remanded it back as open remand for fresh adjudication directing to re-admit the suit in its original file and framed and recast the issues in terms of observations made in the body of judgment and given opportunity to the parties to amend their respective pleadings in respect of the gift deed executed and registered by original plaintiff and further permitted the parties to adduce additional evidence on the point of their amended pleadings and proceed to decide the said suit in accordance with law.

9. The present appellant/defendant has challenged the said impugned order of remand in the instant Appeal feeling dissatisfied.

10. Learned counsel appearing on behalf of the appellant/defendant strenuously submitted that the learned Appellate Court below erred in law by setting aside the judgment and decree of the trial Court even knowing the facts that original plaintiff had filed an eviction suit against the defendant, by suppressing the fact that he was not an owner of the suit property on the date of institution of suit.

11. Learned counsel further raised another question of law that the learned Appellate Court committed an error in sending the case record on open remand though both parties had already adduced their evidence. Learned Appellate Court could have re-assessed the evidence of the parties and adjudicated the case on the basis of the materials available on the record but without doing such exercise remanded the entire case on open remand, which is not at all permissible in law.

12. Learned Appellate Court below also failed to appreciate that upon death of the original plaintiff, the appellant and the respondent got equally

right over the said shop room in terms of class-I of Hindu Succession Act being his own sons.

13. The Learned appellate Court below erred in remanding the suit on open remand in spite of recording a finding that original plaintiff remained completely silent before the Trial Court and not a single whisper made regarding such gift deed and continued as an owner of the said property filed a suit against his own son as such order of remand cannot be sustainable in the eye of law.

14. The Appellate Court also committed an error by allowing the parties to amend their pleadings at the appellate stage despite of specific finding that when the factum of gift deed is beyond the pleadings such facts cannot be allowed at later stage in the eye of law.

15. The learned Appellate Court further fails to apply his judicial mind that the partition deed being Exhibit 5 answered that he got 1 Katha and 6 Chitakhs of property along with building consisting of five residential rooms and out of total five rooms, the original plaintiff along with his family occupied two rooms and other three rooms were under the occupation of tenant. So, the decision of the Appellate Court for remanding the case is totally on the basis of surmises and conjectures.

16. Having heard the submission made elaborately by the learned counsel appearing on behalf of the appellant/defendant and on perusal of the materials available in the record, we find the original suit was filed by the father of the present plaintiff and defendant for eviction of the defendant from the suit shop room on the ground that he had allowed his son to run a business on condition that he shall vacate the same as and when it would be required for himself without charging any licence fees. It was the case of the original plaintiff that he had gifted a bastu land measuring an area of 5 Chittaks 23 Sq. ft. including one shop room in the year 2006 in favour of defendant. The suit shop room is situated to the adjacent and on the western side of the defendant's gifted property. He allowed defendant as a licensee due to love and affection as well as undertaking given by him to vacate the same but he failed in spite of repeated requests. Written notice was also issued by the original plaintiff to the defendant to vacate the same but he refused. Ultimately, plaintiff instituted an eviction suit against appellant/defendant.

17. The present plaintiff being a son did not object to his father despite of the fact that his father had gifted the remaining portion of land including the suit shop room, which is subject matter of the present appeal. It might be due to mutual understanding between the original and

present plaintiff or suppression of fact or ignorance of law is to be decided. During pendency of the said appeal, the father expired. The present plaintiff has informed the Appellate Court that his father had gifted the suit property by way of gift deed prior to his death at the time of hearing applications filed under Order 22 Rule 10, Order 1 rule 10 read with Section 151 of the Code of Civil Procedure for substitution. Original plaintiff neither adduced nor brought on record the said gift deed in the evidence though the said gift deed was ultimate importance and squarely affect the status of the appellant in the property. Accordingly, the Appellant Court below rightly opined it is required to be brought on record by way of amendment for proper and effective adjudication of the suit. It is also necessary for the benefit of respondent/plaintiff as well as appellant/defendant as the plea raised by the appellant/defendant is that the appellant and the respondent got equally right over the said suit shop room in terms of class-I of Hindu Succession Act being his own sons.

18. We have also considered the submission made by learned advocate for the appellant that the trial Court has dismissed the suit as the suit property has not been properly described in the schedule of the plaint, so no effective decree for eviction can be passed against the defendant as it could not be executed as such the judgment and decree of the Trial Court

does not call for any interference. However, the Appellate Court has interfered and set aside the judgment and decree passed by the trial Court and finally remanded it back on open remand for fresh adjudication directing to re-admit the suit in its original file and framed and recast the issues in terms of observations made in the body of judgment and give opportunity to the parties to amend their respective pleadings in respect of the gift deed executed and registered by original plaintiff and further permitted the parties to adduce additional evidence on the point of their amended pleadings and proceed to decide the said suit in accordance with law.

19. It is relevant to mention here the description of the suit property as described in the Schedule of the plaint by the plaintiff is as follows:

SCHEDULE OF THE SUIT PROPERTY

ALL THAT piece and parcel of one pucca shop room with R.C.C. Roof measuring about 12' X 10' feet situated on the ground floor at H/O Sri Jiut Sha, being Holding No. 53/39, P.K. Biswas Road, Ward No. 15 within Titagarh Municipality, P.O. & P.S. Khardah, District: North 24-Parganas, Kolkata: 700 117, Butted and bounded

ON THE NORTH : Another tenanted room.

ON THE SOUTH : P.K. Biswas Road.

ON THE EAST : J.Kite shop room of the defendant.

ON THE WEST : Main Entrance.

20. From the above, it would be evident that the respondent/plaintiff has clearly indicated the suit property particularly the shop room which involves in the instant appeal. It is apparent from the record that the learned Trial Court has committed a mistake that no effective decree can be passed due to erroneous and insufficient description of the suit property.

“A bare reading of Order 7, Rule 3 (as amended by our High Court), it is clear that where the subject-matter of the suit is immovable property, it is provided that the plaint shall contain a description of the property. The basic requirement of the rule is that the plaint shall contain the description of the suit property, which is sufficient to identify it by giving the description but it may not be necessary in all cases for providing a boundary or numbers in a record of settlement or survey, it is left to the option of the party because the amendment of our High Court provides

that in case any area is mentioned, such description shall further state the area according to the notation used in the record of settlement or survey with or without, at the option of the party, the same area in terms of the local measures.”

Thus, as per Order 7 Rule 3, option is left with the party whether such description is to be provided or not. The rule also does not provide the consequence of such omission and in terms of the decision in **Pratibha Singh and Anr. vs. Shanti Devi and Anr.**¹ the decree, even if it lacks description of the decreetal property, the said defect can be cured at the executing stage by filing necessary application. Thus, it is abundantly clear that even for failure on the part of omission to give a description of the suit property by giving Holding No 53/39 and lying and situated at P.K. Biswas Road, Ward No. 15 within Titagarh Municipality, P.O. & P.S. Khardah, District: North 24-Parganas, Kolkata 700 117 along with four sides boundaries in the plaint would not fatal the suit and that can be cured at a later stage. Thus, providing those descriptions are only optional to the plaintiff and not obligatory one on the basis of provisions laid down in the Code of Civil Procedure. Moreover, the description of the suit property indicated in the schedule of the plaint appears sufficient to identify it.

¹ AIR 2003 SC 643, (2003) 2 SCC 330

21. The Apex Court in the case of **Pratibha Singh (supra)** has held as follows:

“17. When the suit as to immovable property has been decreed and the property is not definitely identified, the defect, in the court record caused by overlooking of provisions contained in Order 7, Rule 3 and Order 20, Rule 3 of the CPC is capable of being cured. After all, a successful plaintiff should not be deprived of the fruits of decree. Resort can be had to Section 152 or Section 47 of the CPC depending on the facts and circumstances of each case which of the two provisions would be more appropriate, just and convenient to invoke. Being an inadvertent error, not affecting the merit of the case, it may be corrected under Section 152 of the CPC by the court, which passed the decree by supplying the omission. Alternatively, the exact description of decreetal property may be ascertained by the Executing Court in a question relating to execution, discharge or satisfaction of decree within the meaning of Section 47 CPC. A decree of a competent court should not, as far as practicable be allowed to be defeated on account of an accidental slip or omission. In

the facts and circumstances of the present case we think it would be more appropriate to invoke Section 47 of the C.P.C.”

22. The Order specifically provided that the plaintiff is required to describe the suit property with sufficient particulars necessary for identification of the same. If the particulars of immovable property have been sufficiently described in the plaint, it can be easily identified but the same would depend on the facts and circumstances of each case. Even if no one can be identified the suit property that can be cured at later stage but the trial Court overlooked the provisions contained in Order 7 Rule 3 and Order 20 Rule 3 CPC, which is capable of being cured only on the basis of non-description of the suit property in the Schedule of the plaint.

23. Apart from the above findings, we are also of the view that gift deed executed and registered by the original plaintiff in favour of the present plaintiff during pendency or prior to institution of suit is ultimate importance and squarely affect the status of the appellant in the suit property. Furthermore, point raised by the defendant is also important and relevant to decide in the suit that upon death of the original plaintiff, the appellant and the respondent got equally right over the said suit shop

room in terms of class-I of Hindu Succession Act being his own sons. Consequently, it is required to be brought on record the relevant facts as raised by the appellant that he became owner of the suit shop room by way of gift deed as well as respondent regarding his ownership by way of inheritance for proper and effective disposal of the suit. So, Judgment and Order passed by Appellate Court has no infirmity or illegality. Hence, it does not deserve interference by this Court.

24. In the light of above discussions and findings, the appellant fails to raise the substantial question of law for setting aside the judgment and decree passed by the Appellate Court. Accordingly, Judgment and Decree dated 16th day of September, 2022 passed by learned Additional District Judge, Fast Track, 1st Court, Barrackpore, North 24 Parganas in T.A. No. 56 of 2015 is hereby affirmed.

25. Accordingly, the instant Appeal is dismissed with no order as to costs. We express our view that expression whatever made herein above would not in any way influence, while deciding the suit on open remand by the trial Court.

26. Consequentially, **CAN no.1 of 2022** and **CAN no.2 of 2023** are also thus disposed of

27. Department is directed to send down a copy of this judgment at once to the learned First Appellate Court for information and necessary steps.

28. Photostat certified copy of this judgment and award, if applied for, be given to the parties on priority basis on compliance of all formalities.

I Agree.

(Harish Tandon, J.)

(Ajay Kumar Gupta, J.)