

IN THE HIGH COURT AT CALCUTTA

(Civil Appellate Jurisdiction)

APPELLATE SIDE

Present:

The Hon'ble Justice Supratim Bhattacharya

F.M.A. 2123 of 2018

Sri Kumar Kora and others

Vs.

Smt. Malati Saha and another

For the appellants : Mr. Mukundalal Sarkar

Mr. Dipankar Mondal

Mr. Abdul Aziz Mondal

For the respondent No.1 : Mr. Kamlesh Jha

Mr. Biswajit Tiwari

Heard On : 28.02.2024

Judgment Delivered On : 04.04.2024

Supratim Bhattacharya, J.:

1. The instant First Miscellaneous appeal has arisen out of an order of remand passed by the Ld. First Appellate Court that is the Ld. District Judge Malda whereby the said Court has passed the following:

“The appeal succeeds on contest. The observation and finding of the Ld. Trial Court as regard issue No. 4 is hereby set aside and the suit is remanded back to the Ld. Trial Court to properly ascertain the suit property by

engaging a survey commissioner and thereafter consider the prayer for decree of permanent injunction as has been sought for by the plaintiff on the basis of the documents as well as evidence adduced at the time of trial of the suit. ... ”

2. Background facts:

Proceeding before the Trial Court:

- i)** The appellants herein were the defendants before the Ld. Civil Judge Junior Division, Malda in Title Suit No. 171 of 2011, while the respondent No. 1 was the plaintiff in the said suit. The respondent No. 2 that is Tribal Welfare officer-cum Project Officer who is the proforma respondent was the proforma defendant in that suit.

As the proforma respondent herein did not appear in and contest the lis so the matter has been heard in absence of the said proforma respondent.

- ii)** Through the said plaint the plaintiff had sought for permanent injunction on establishment of the right and title in respect of the suit property.
- iii)** The plaintiff has sought for right and title in respect of the suit property by claiming himself to be the owner of the said suit property that is 66 decimal, by filing a plaint which was later amended.
- iv)** The plaintiff has stated that the property was once purchased by one Danesh Muhammed in the year 1973 and thereafter being subsequently purchased by one Ganesh

Prasad Saha who in turn sold to Ramdhoni Saha who thereafter sold the suit property on 24.01.2005 to the plaintiff namely Malati Saha.

- v)** The principal defendants in the title suit contested the same by filing written statement and thereafter has also filed an additional written statement and has stated that the total area of the property in Dag No. 473 is 1.34 acres and not 66 decimal which has been claimed by the plaintiff.
- vi)** The defendants have stated that Jyotsna Rani Das Sarkar had in her possession 66 decimal which she had sold to Ganesh Prasad Saha while Danesh Muhammad had 66 decimal which he had also sold to Ganesh Prasad Saha. The defendants have further stated that Ganesh thereafter sold the entire property to Ajijur Rahaman who in turn sold 66 decimal to Gyanandra Nath Chowdhury who thereafter sold to Kanika Das and the said Kanika Das sold the said 66 decimal to the defendants.
- vii)** Through the additional written statement the defendants have stated that 66 decimals of land which has been purchased by them from Kanika Das has detailed description of the boundary and they are accordingly enjoying the rightful possession of the same.
- viii)** The Trial Court framed four issues which are as follows:
 1. Is the suit maintainable in its present form and in law?
 2. Is the suit bad for non-joinder of necessary parties?

3. Has the plaintiff acquired absolute right, title and interest over the schedule suit land through alleged registered deed of sale being no 157 dated 24.01.2005?
 4. Is the plaintiff entitled to get relief/reliefs as sought for in this suit?
- ix)** The Trial Court has disposed of the suit by deciding all the issues in favour of the plaintiff except the issue No. 4.
 - x)** In respect of the issue No. 4 the said Trial Court has come to the finding that *“in absence of certainty of the exact location of the suit property in the suit plot and upon the consideration that the suit plot has other co-sharers, and also upon consideration that defendants too are claiming certain portions in the suit plot, I do not find the present case to grant a prayer for permanent injunction. This issue is accordingly disposed of against the plaintiff ”*
 - xi)** The Trial Court ordered *“that the instant suit be and the same is dismissed on contest without any order as to costs.”*

3. Proceeding before the First Appellate Court:

- i)** Against the said order of dismissal the said plaintiff preferred an appeal being Title Appeal No. 7 of 2016. The said appeal was heard by the Ld. District Judge, Malda.
- ii)** The Ld. District Judge, Malda disposed of the said appeal by passing an order which is as follows:

“The appeal succeeds on contest. The observation and finding of the Ld. Trial Court as regard issue No. 4 is hereby set aside and the suit is remanded back to the Ld. Trial Court to properly ascertain the suit property by engaging a survey commissioner and thereafter consider the prayer for decree of permanent injunction as has been sought for by the plaintiff on the basis of the documents as well as evidence adduced at the time of trial of the suit.”

iii) Being aggrieved by the aforementioned order of the First Appellate Court the instant miscellaneous appeal has been preferred.

4. Submissions:

This Court has heard Mr. Mukundalal Sarkar being assisted by Mr. Dipankar Mondal and Mr. Abdul Aziz Mondal appearing on behalf of the appellants and Mr. Kamalesh Jha being assisted by Mr. Biswajit Tiwari appearing on behalf of the respondent No. 1. As the proforma respondent herein that is the Tribal Welfare Officer cum Project Officer did not appear and contest the lis so the matter has been heard in the absence of the said proforma respondent.

On behalf of the Appellants:

- i)** It has been submitted that the defendant is the owner of the portion of the suit property by way of purchase and the suit property being plot No. 473 is measuring about 1.34 acres.
- ii)** The Ld. Counsel has further submitted that the other owners and possessors of the suit property have not been made party in the suit.
- iii)** He has further submitted that the plaintiff during her cross-examination has deposed that total area of land in plot No. 473 in the sale deed of Ganesh has been correctly mentioned as 1.68 decimals. He has further submitted that Ganesh, the plaintiff witness No. 3, during his cross-examination has further submitted that all the owners and possessors of the suit property have not been made party in the suit.
- iv)** He has further submitted that no registered deed of partition is in existence in respect of the land appearing as plot No. 473.
- v)** The Ld. Counsel has further submitted that no partition has been made through Court as well.
- vi)** The Ld. Counsel has further submitted that in the plaint the suit property has been roughly described along with its boundary.
- vii)** He has further submitted that the suit property which has been described as 66 decimal is not correct, as to that effect from the evidence of the witness who has adduced on behalf

of the plaintiff and the witnesses who have deposed on behalf of the defendant it reveals that the suit plot is about 1.34 acres.

- viii)** He has further submitted that although the plaint describes the demarcation yet the same does not seem to tally with the demarcation as suggested by the plaintiff.
- ix)** The Ld. Counsel has further submitted that the demarcation mentioned does not seem to match with the impugned deed of title of the plaintiff.
- x)** The Ld. Counsel has further submitted that in the absence of certainty as regards to exact location of the suit property the prayer for permanent injunction cannot be granted.
- xi)** The Ld. Counsel has also submitted that the Ld. District Judge has not been able to ascertain the actual fact of the case and has passed the impugned order.
- xii)** Banking upon the aforesaid facts and circumstances the Ld. Counsel representing the appellant has prayed for allowing the instant appeal.

On behalf of the respondent No.1:

- i)** The Ld. Counsel representing the respondent No. 1 has submitted that the Ld. Trial Court after detailed discussion and introspection of the evidence and the exhibits adduced on behalf of the respondent No. 1 has come to the conclusion that the respondent No. 1/plaintiff has the right,

title and possession over the suit property and accordingly disposed of the issue in favour of the plaintiff.

- ii)** The Ld. Counsel has further submitted that as the issue No. 4 i.e. 'Is the plaintiff entitled to get relief as sought for in this suit?' has been decided against the respondent/plaintiff so the respondent No. 1/plaintiff preferred an appeal but the appellants herein did not prefer any cross appeal against the said judgment passed by the Trial Court.
- iii)** The Ld. Counsel has further submitted that the Ld. First Appellate Court *vide* its order has set aside the findings of the Ld. Trial Court as regards to the issue No.4 and remanded the suit to the Ld. Trial Court in order to properly ascertain and identify the suit property by engaging a survey commissioner.
- iv)** The Ld. Counsel has further submitted that the appellants/defendants filed two applications before the Ld. Trial Court on 06.09.2016 and 19.09.2016 respectively.
- v)** Relying upon the aforesaid facts the Learned Counsel has prayed for dismissal of the instant appeal.

5. On going through Paragraph No. 16 of the additional written statement it reveals that the appellants have stated the following:

"16. The actual fact is that, the property under dispute at Dag No. 473 having a total area of 1.34 acre. Out of which 66 decimal of land was sold to Ganesh Prasad Saha by Jyotsna Rani Das Sarkar vide a registered deed bearing

date and number and possession was also given. Similarly the said Ganesh Prasad Saha also received 66 decimal of land from Danesh Mohm. Vide Deed No. 19712 of 1973. Subsequently Ganesh Prasad Saha on last 25.10.90 vide Deed No. 5182 transferred 1.34 acre of land property in favour of Ajijur Rahaman and gave the possession. Subsequently Ajijur Rahaman on last 09.07.93 vide Deed No. 4179 & 4140 transferred 66 decimal of land property in favour of Gyanendranath Chowdhury and gave the possession. Subsequently Gyanendranath Chowdhury on last 01.01.98 vide Deed No. 11 transferred 66 decimal of land property in favour of Kanika Das and gave the possession. The defendants vide the out and out Sale Deed Nos. 5401 & 5358 signed and executed by Kanika Das on 26.04.2011 have received 52.8 decimal and 13.2 decimal of land property respectively. The said property was received by Kumar Kora, Dharani Kora, Sukhiram Kora, Smt. Neto Kora and Jaharlal Sarkar with detail description of the boundary and accordingly enjoying rightful possession of the same. The defendants since purchasing the same are enjoying rightful possession in lieu of the right and possession enjoyed by their predecessors and paying rent etc. to the Govt. of West Bengal. Taking the opportunity of some erroneous L.R. records the plaintiff brought this

present case though she didn't have absolute possession over it."

6. Thus, from the contention of the appellants it is clear that the appellants have not raised any direct question as regards to the identification of the suit property. The appellants have relied upon the facts that they have purchased (52.8 decimal + 13.2 decimal) 66 decimals of land out of the entire plot of land. According to the appellants they are in possession of the land which has detailed description of the boundary as such it is apparent that the remaining portion of the said plot of land apart from the property which is in possession of the appellants belongs to the respondent No. 1.
7. Though from the plain reading of the plaint it is apparent that in the schedule of the property District Malda, P.S. Gajon, Mouja Paharivita, JL NO. 7, LR Khatian No. 285, Dag No. 473 an area measuring 66 decimal has been mentioned but the boundaries have not been properly mentioned.
8. In such circumstance, the respondent No. 1 has been able to prove his right, title and interest over the suit property but the boundary mentioned in the plaint is not clear, as such this Court is at one with the finding of the Ld. First Appellate Court.
9. This specific identification of a plot of land can be done by a local Investigation Commissioner provided under Order XXVI Rule 9 of the Code of Civil Procedure. Order XXVI Rule 9 of the Code of Civil Procedure states as follows:

“In any suit in which the Court deems a local investigation to be requisite or proper for the purpose of elucidating any matter in dispute, or of ascertaining the market-value of any property, or the amount of any mesne profits of damages or annual net profits, the Court may issue a commission to such person as it thinks fit directing him to make such investigation and to report thereon to the Court.”

In this regard this Court refers to the judgment of the Hon’ble Apex Court published in (2006) 5 SCC 466. In paragraph No. 6 of the said authority the principle has been vividly laid, which is as follows:

“That a property can be identified either by boundary or by any other specific description is well established. Here the attempt had been to identify the suit property with reference to the boundaries and the Commissioner has identified that property with reference to such boundaries. Even if there was any discrepancy, normally, the boundaries should prevail.”

- 10.** This Court is also of the view that the Ld. Trial Court ought not to have dismissed the suit
- 11.** From the above discussion it is clear that the description of the suit property is not absolutely vague but it has to be specifically identified. To come to the absolutely correct finding a survey passed commissioner has been appointed by the Ld. First Appellate Court.
- 12.** Though the Ld. First Appellate Court has remanded the lis to the Court of the Ld. Trial Judge but the Ld. First Appellate Court could have itself appointed a survey passed commissioner and after obtaining the report could have disposed of the case.

13. Without going into the fact as to what could have been done and without lingering the matter, this Court does not intend to interfere with the order of the Ld. First Appellate Court. The order of the Ld. First Appellate Court is affirmed.
14. Hence it is ordered that the instant First Miscellaneous Appeal being **F.M.A. 2123 of 2018** stands **dismissed**.
15. Parties shall be entitled to act on the basis of the server copy of the judgment and order placed on the official website of the Court.
16. Urgent Xerox certified photo copies of this judgment, if applied for, be given to the parties upon compliance of the requisite formalities.

(Supratim Bhattacharya, J.)