

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

PRESENT:

THE HON'BLE JUSTICE AJOY KUMAR MUKHERJEE

SA 481 of 2006

**Pulin Makal (Since deceased) & Ors.
Vs
Padma Karmakar**

For the Appellants : Mr. Partha Pratim Roy
Mr. Nobiul Islam
Ms. Somashree Dey
Ms. Amrita Sen

For the Respondent : Mr. Probal Kr. Mukherjee
Mr. Sukanta Chakraborty

Heard on : 27.02.2024

Judgment on : 05.03.2024

Ajoy Kumar Mukherjee, J.

1. This Second Appeal has been directed against the judgment and decree dated 28.03.2005 passed by learned Civil Judge (Senior Division) 8th Court, Alipore in T.A. No. 331 of 2001. By the impugned judgment learned Court below has set aside the judgment dated 31.07.2001 passed by the learned Civil Judge, (Junior Division) 1st Court Alipore, in T.S. No. 349 of 1994.

2. Plaintiff in the instant suit prayed for declaration of his ownership in “Ka” Schedule property and for recovery of khas possession from the “Kha” schedule, which is within “ka” schedule property. It is the case of plaintiff

that property measuring .06 decimal of land under plot no. 234 pertaining to Khatian No. 171 along with structure standing therein previously belonged to one Haridas Mondal, who by registered deed of sale transferred the same to one Nandalal Pal on 29.06.1994 and delivered possession thereof. Said Nandalal during his possession sold .06 decimal of land in plot no. 234 by two registered sale deeds executed on 23.05.1984, one in favour of plaintiff and the other in favour of one Benu Bagui. Accordingly plaintiff and said Benu Bagui both purchased .03 decimal of land each, together with structure standing therein. Plaintiff's further case is after purchase he began to possess the said purchased land but the defendants who have no right title interest in the suit plot continuously disturbing plaintiffs possession by various means in the year 1985 and had demolished plaintiffs structure on the suit land. Subsequently in the year 1994, the defendants tried to raise construction over the plaintiffs property and for which several criminal proceedings were initiated. On 18.01.1994, the defendant illegally tried to construct bath and privy over the plaintiffs land and for which a proceeding under section 144 of the Code of Criminal Procedure was initiated and inspite of pendency of the said proceeding and also ignoring plaintiffs resistance, the defendants completed construction of bath and privy over the plaintiffs land by encroaching a strip of plaintiffs land measuring 10ft x 47ft on the eastern side, which is mentioned in the "kha" schedule to the plaint. Accordingly plaintiff has prayed for declaration of his ownership in the entire "ka" schedule land and for recovery of khas possession from the "kha" schedule land out of "ka" schedule.

3. The defendants contested the suit by filing written statement denying material allegations made in the plaint. Defendants contention is that in the year 1970 the defendants' predecessor in interest purchased 5 chittaks of land in plot no. 232 by a registered deed of sale from Haridas Mondal and got possession thereof since 1970 by erecting structure thereon. Defendants have denied in the pleading about alleged encroachment of plaintiffs "kha" schedule land and they have also denied and disputed the plaintiffs title with regard to plot no. 234. Accordingly the defendants prayed for dismissal of the suit.

4. Learned Trial Court had dealt with the said issue elaborately being issue no. 4 & 5 and observed that plaintiffs have prima facie proved his title in plot no. 234 measuring 3 satak and his purchase deed is marked as exhibit-1. Referring learned commissioner's report, he noted that though the defendants had taken the plea that they had purchased plot no. 232 but they are not in possession of plot no. 232 and at the same time they do not have any right title interest in plot no. 234. Commissioners' report further reveals that in the southern side of plaintiffs land, the land of defendant situates but the defendants land in plot no. 232 is not adjacent to plot no. 234. Learned Trial Court further held that the defendants have not filed or proved any deed to show that they are owners of plot no. 232 nor they have anything to show that they are possessing plot no. 232. He further noted that from the report of the commissioner, it appears that the defendant's privy and room situates in the adjacent southern side of the plaintiffs land. However, after comparing the relevant documents including the evidence and the commissioner's report, Trial Court came to a finding that the

description of “kha” schedule as given by the plaintiff in his plaint does not exact tally with the report of the learned commissioner and the extent of land allegedly forcefully occupied by the defendants as mentioned in the “kha” schedule has not been clearly depicted and/or substantiated with the commissioner’s report. Accordingly the Trial court came to a definite finding that in the absence of a clear depiction about alleged encroached land by the defendant, any decree of recovery of possession in favour of the plaintiff would be of no use and the decree passed in connection with a vague and indefinite scheduled of land could not be executed. While deciding issue no. 6 and 7 the Trial court clearly held that though it is true that learned commissioner has stated that defendants are also possessing plot no. 234 but he has not clearly described the exact extent of area occupied by the defendant in plot no. 234. Accordingly Trial court came to a conclusion that there is no bar to declare plaintiffs title in “ka” schedule property which is his purchased property by dint of exhibit-1 but the prayer for recovery of possession from the “kha” schedule property cannot be granted in the absence of proper corroboration of “kha” schedule with the evidence. He concluded even if any decree is passed in respect of “kha” schedule, it shall remain un-executable.

5. The First Appellate court i.e. the Court below while dealt with the said issue did not agree with the Trial Courts observation regarding any vagueness of encroached portion and accordingly he not only conquered with the view of the Trial Court that the plaintiff is entitled to get declaration of ownership about “ka” schedule property but he further held that plaintiff is also entitled to get a decree for recovery of possession in respect of “kha”

schedule property and the court below did not agree with the Trial Court that “kha” schedule property is indefinite or that if any decree is passed, it would remain un-executable. In support of such observation the court below held that against the commissioner’s report defendants have not filed any objection. Relying upon evidence and the commissioner’s report he came to a finding that though defendants have stated that they are owners of plot no. 232 and they have constructed bath and privy over plot no. 232 but from the commissioner’s report it is clear that on south-east corner of plaintiff’s land defendants have constructed their bath and privy and they have failed to prove their ownership in plot no. 232. However the court below agreed with the trial court’s view that in the plaint schedule there are certain discrepancies. Relevant portion of the trial courts observation may be reproduced below.

“Though, it is fact that in the plaint schedule, there is some discrepancy, but on the basis of oral testimonies of the parties and on the basis of the report of the commissioner together with the evidence, it is clear that defendants have constructed their bath and privy on the south east corner of the plaintiff’s land. The defendants unequivocally stated in their evidence that on the adjacent north of defendants house, there is plaintiff’s land. Therefore, from the admissions of the defendants also it is clear that on the south east corner of the plaintiff’s land, the defendants dispossessed the plaintiff by constructing thereon bath and privy.”

6. The evidence which has been heavily relied by the court below in passing decree in respect of “kha” schedule is that plaintiff’s possession in plot no. 234 has been admitted by the defence witnesses and they further admitted that the defendants have no claim over plaintiffs plot no. 234 and learned commissioner also held that defendants also possessing plot no. 234.

7. This court while admitting the Appeal framed following substantial questions of law for adjudication:-

“(1) whether the learned Judge of the first Appellate Court committed substantial error in law in allowing the appeal and setting aside the judgment and decree passed by the learned trial court.

(2) whether the learned Judge of the first Appellate court committed substantial error in law in not appreciating that no decree for recovery of possession could be granted in favour of the plaintiff on the basis of the commissioner’s report regarding identity of the suit property.

(3) whether the learned Judge of the first Appellate Court committed substantial error in law in holding that the trial court was justified in refusing the prayer of the plaintiff for recovery of possession in respect of ‘Kha’ schedule property.”

8. Having considered the submissions made by the parties and on perusal of documents available in record it appears that, learned commissioner in his report did not delineate the exact extent of encroached portion. Instead of that he observed that he measured only plot no. 234 where he found both plaintiffs and defendants are in possession without specifying the extent of defendants possession in plot no. 234. In the absence of specific description in the report about the exact extent of defendants possession in plot no. 234, it is really difficult to execute decree for recovery of possession, even though commissioner opined that defendants are also in possession of plot no.234. In this context I fully agree with the Trial courts observation that as the “kha” schedule property has not been properly described by the commissioner in comparison to the description of ‘kha’ schedule made in the plaint, even if any decree is passed in respect of “kha” schedule in terms of commissioner’s report that would remain unexecutable unless extent of alleged possession by defendant in plot no. 234 is exactly brought before the court.

9. In view of aforesaid discussion the impugned judgment and decree passed by the courts below are hereby set aside. The case is sent before the Trial court on open remand for giving opportunity to the parties to amend

their pleading as permissible by law and to give further opportunity to the parties to adduce additional evidence. Plaintiff will be at liberty to pray for appointment of same commissioner if available or any other commissioner for clear ascertainment of defendants alleged possession, if any, in the “ka” schedule mentioned land on plot no. 234. After giving opportunity to the parties as above the court below will pass a judgment afresh. Since the case is pending for a petty long time I want to specify that if there be any prayer for amendment and for filing additional pleading that will have to be completed within six weeks from the date of communication of the order and thereafter in case of prayer of further investigation commission and additional evidence (if any to be adduced by the parties), will have to be completed within twelve weeks thereafter and then the court below will give opportunity to parties to submit their arguments and thereafter Trial Court will deliver judgment afresh within a period of four weeks.

10. S.A. 481 of 2006 is accordingly disposed of. Court Records which were called for, be returned at once.

11. Urgent photostat certified copy of this order, if applied for, be given to the parties upon compliance of all requisite formalities.

(AJAY KUMAR MUKHERJEE, J.)