

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

PRESENT:

THE HON'BLE JUSTICE AJOY KUMAR MUKHERJEE

S.A. 264 of 1985

**Alauddin Sheikh & Ors.
Vs.
Santu Sheikh & Ors**

For the Appellants : Ms. Ameena Kabir
Mr. Syed Shahidul Arefin

For the Respondents : Mr. Kumar Jyoti Tewari
Mr. Manas Kumar Das
Mr. Aritra Kumar Thokdar

Heard on : 16.04.2024

Judgment on : 21.05.2024

Ajoy Kumar Mukherjee, J.

1. This second appeal has been preferred by the appellants/plaintiffs against the judgment and decree dated 28.01.1984 passed by learned Additional Sub Judge, Murshidabad. By the impugned judgment learned court below was pleased to set aside the judgement and decree passed by the Trial Court in Title Suit no 41 of 1977 dated 07.03.1983.

2. Before the Trial court plaintiffs/appellants filed aforesaid Title Suit no. 41 of 1977 contending that Heraj Seikh, Minaj Seikh, Khokon Bibi and Zeratul Bibi were the original owners of the properties described in 'Ka'

Schedule to the plaint under Zamindar Purna Chandra Tribedi. Said Zamindar Purna Chandra filed a rent suit being no 1862 of 1937 against aforesaid owners for arrear of rent of Rs. 46/-. Since the aforesaid occupiers failed to pay the decretal amount of Rs. 46/-, the property mentioned in 'Ka' schedule was auctioned and the present plaintiff and his brother Joulus Sk purchased the 'Ka' schedule property from the auction sale on 21.11.1938 and took possession of the properties. The said sale was confirmed on 20.01.1939.

3. Joulus Sk thereafter died leaving behind his brother i.e. plaintiff as only legal heir and as a result of which plaintiff inherited the share of Joulus and became full owner of the 'Ka' schedule property to the plaint and was in possession of the same. Subsequently he sold some of the properties to Moslem Sk. and Akul Sk. Said Muslan and Akul are the owners of their purchased share and after getting possession, they have also recorded their names in the R.S Record of Right. After the auction purchase the plaintiff paid rent to the then landlord and after abolition of Zamindari system he has paid rent to the Government all along.

4. Plaintiff's further case is that the plaintiff is an illiterate person and defendant no.1 is his cousin brother. The plaintiff on good faith asked the defendant no. 1 to record the name of plaintiff in the R.S Record of Right in respect of said property but taking advantage of his foolishness, the defendant no.1 falsely recorded his name in respect of some properties in 'Ka' schedule to the plaint, which is described in 'Kha' schedule. Plaintiff further contended that the R.S recording of 'Kha' schedule properties in the name of defendant no. 1, has no basis and completely erroneous. The

defendant no. 1 has no right title or possession over the suit properties. Accordingly the suit was filed for permanent injunction.

5. Defendant no. 1 contested the said suit by filing Written Statement contending that the R.S recording is not at all erroneous but it was recorded on the basis of possession of the properties. The defendant denied that the plaintiff purchased the 'Ka' schedule property from auction sale. Defendant's case is defendant is paying rent and defendant's further case is plaintiff is the owner of more or less eight annas share in said 'Ka' schedule property but in column no. 13 of Record of Rights, more than eight annas share recorded in the name of plaintiff, which is erroneous. Defendant further contended that the suit is hit by section 57 of the West Bengal Estates Acquisition Act and since the suit property has been correctly recorded in the name of the defendant on the basis of his possession, defendant has prayed for dismissal of the suit.

6. Learned Trial Court came to a finding that there is no document in favour of defendant no. 1, on the basis of which the suit properties were recorded in his name and accordingly he declared plaintiff's right title interest and possession over the 'Kha' schedule suit property with further observation that the recording in R.S Record of Right in the name of defendant no.1 is erroneous and thereby granted permanent injunction in favour of plaintiff.

7. Being aggrieved by that order defendant/appellant preferred First Appeal before the court below being Title Appeal no. 47 of 1983. After hearing both the parties learned court below came to a finding that the auction sale of the property described in 'Ka' schedule to the plaintiff was

never acted upon and no new tenancy was created in favour of plaintiff by the alleged auction purchase. Plaintiff failed to show that the 'Ka' schedule property to the plaint was ever mutated in his name and accordingly the Court below came a finding that the plaintiffs are not exclusive owner in respect of the suit property described in 'Kha' schedule to the plaint. He also observed that the appellant/defendant has not denied plaintiff's distinct share in the suit property and accordingly the court below was pleased to set aside the decree passed by the Trial Court and thereby dismissed plaintiffs' suit.

8. The Division Bench of this court while admitting the appeal vide order dated 14th September, 1984 was pleased to hold that the Appeal will be heard on the points of law taken as the grounds of appeal. On perusal of the ground of Appeal I find that the following grounds, among others may be relevant for discussion for the purpose of disposal of the present appeal

- (i)** Whether the court below went wrong in relying Exhibit-D and D-1 which were not disclosed in Written Statement and no issue was framed on that point.
- (ii)** Whether court below failed to appreciate that the Exhibit D purported to have contained L.T.I of the Plaintiff which was attested by defendant no. 1, who wrote the name of the plaintiff under the said L.T.I. (Left Thumb Impression).
- (iii)** Whether court below failed to appreciate that the zamindari rent receipts Exhibit A to A4 filed by defendant no. 1 were not proved and rents taken by the Government on the basis of R.S record of

Right being Exhibit B to B-3 never created any title of defendant no.1.

- (iv) Whether learned court below failed to peruse the provision of section 65 of the Code of Civil Procedure and simply brushed aside the importance of sale certificate, which was confirmed on 20.01.1939 and marked as Exhibit-4 and thereafter the possession of plaintiff was proved by Pws 1,2,3,4,5 and 6 and thereby came to an erroneous finding that the sale certificate was not acted upon and no new tenancy was created after the auction sale.
- (v) Whether court below failed to appreciate that plaintiff was not given any opportunity to challenge the validity of the deed which was alleged to have executed by putting his L.T.I.
- (vi) Whether the court below failed to appreciate that defendant no. 1 has failed to establish basis of the recording of his name in R.S Record of Right in respect of 'Kha' schedule properties.

9. Ms. Ameena Kabir learned counsel appearing on behalf of the appellants submits that the property was purchased by the appellant's father in auction sale and the sale was confirmed because there was no application challenging the sale. After the sale became absolute, the court granted certificate specifying the property sold and the name of the person who at the time of the sale is declared to be the purchaser, bearing the date on which the sale became absolute. PW-7 has proved the sale certificate by bringing the original register before the Trial Court. Accordingly Trial Court rightly decreed the suit. However appellate court set aside the decree with erroneous observation that the sale has not been acted upon. In this context

she relied upon ***Rocky Tyres and Ors. Vs. Ajit Jain*** reported in ***AIR 1998 P & H 202*** and contended that the interpretation and meaning giving to a sale certificate should be one which would lend support to the validity of the certificate. Referring another judgment of the Apex Court reported in ***AIR 1995 SC 1357***, she further contended that certificates of sale are documents of title which ought not to be lightly regarded or loosely construed.

10. Ms. Kabir further argued that the DW-1, Ummar Seikh i.e. the original defendant stated in his deposition that the property belonged to his father and he has inherited the same. But defendant failed to prove the same. In fact the properties in question originally belonged to Heraj, Minaj , Khokon Bibi and Zeratul Bibi and all were tenants of the then zamindar Purna Chandra Trivedi. They defaulted in payment of rent and for which Rent suit 1862/1937 was initiated. The original appellant Lawzi Seikh and his brother Joulus Seikh purchased the suit property from abovementioned auction sale on 21.11.1938 and the sale was confirmed on 20.01.1939 being Rent Suit no. 1862 of 1937. She further argued that the defendants are estopped from questioning the sale certificate because the father of defendant was a defaulter in payment of rent. She further submits that the documents filed by the defendants and marked as Exhibit-A series were not proved properly, as counter part of rent receipts not called for and the documents filed by the defendants marked as Exhibit C to C-3 series are R.S Record of right, which are erroneous recording made at the instance of the defendants and is not a proof of title and exhibit-B series are the government rent receipt which were prepared on the basis of erroneous recording in R.S Record of Rights. She

further argued that defendant has denied auction sale and contended that he has got the property by way of inheritance, but such argument is not sustainable because there were four heirs and the property cannot exclusively devolve upon DW-1 to the exclusion of others.

11. Ms. Kabir argued that the court below heavily relied upon exhibit-D to D-1, the sale deeds purportedly executed by appellant and defendant jointly, selling a property to defendant no.3 in order to prove that the defendant also had a share in the property, but such defence was not taken by the defendant in the written statement and such defence was raised for the first time during evidence by the defendants, thereby taking the plaintiff by surprise. No issue was framed on this point and it should not have allowed. This is also because, the sale deeds marked exhibit-D and D1 purportedly bears LTI of Lawzi Seikh as argued by the respondents but the learned judge failed to consider that the L.T.I was attested by the pen of the original defendant Ummar seikh and as such there is every probability of committing forgery and or creating fake documents, specially when the original defendants no. 3, 4 and 5 did not contest the said suit.

12. Referring **84 CWN 221**, she further contended that in the absence of any issue, the evidence in connection with the sale deeds marked Exhibit-D and D-1 ought not to have relied upon to cause injustice to the other side. She further contended that the possession of appellant herein has been proved by the plaintiff's witnesses and by the sale certificate, the government rent receipts. By the oral evidence, plaintiff has successfully rebutted the presumption in connection with the entry in the Record of Rights and for which the burden of proof having been discharged by the

plaintiff, the onus shifted upon the defendant to prove the basis of recording suit properties in his name in the Record of Rights, which he has failed to discharge. Accordingly the defendants case that the suit property was ancestral and owned jointly, could not be proved by the defendant and accordingly she had prayed for setting aside the order impugned, passed by the court below and prayed for affirmation of the order passed by the Trial Court.

13. Mr. Tewary learned counsel appearing on behalf of the respondent submits that the plaintiffs suit for decree of permanent injunction is not maintainable as the plaintiff being not in possession did not pray for declaration of title and for recovery of possession. He further submitted that the alleged sale certificate in connection with 'Ka' Schedule to the suit property was never acted upon. Plaintiff's suit is therefore barred under section 34 of the Specific Relief Act 1963 and in this context he also relied upon a judgment reported in **(2017) 3 SCC 702 (Executive officer Vs. Chandran and others)**. He further contended that the confirmation of sale allegedly made on 20.01.1939 but the suit was filed long thereafter on 08.02.1977 and accordingly the suit is also barred under Article 134 of the Limitation Act. In this connection he referred judgment of the Apex Court reported in **(2005) 9 SCC 354 (K.L. LaxmiNarayana Rao Vs. New premier Chemical Industries)**. Accordingly opposite party had prayed for dismissal of the present second appeal.

DECISION

14. It is more or less settled law that the jurisdiction of the High Court under section 100 of the Code of Civil Procedure to interfere with the

judgment of the courts below is confined to the substantial question of law. Now so far as the facts are concerned the First Appellate Court i.e. the court below is the final court and unless and until the finding of the facts recorded by the courts below are found to be manifestly perverse and/or contrary to the evidence on record, it is not permissible for the High Court to re-appreciate the entire evidence on record and come to its own finding, specially when the findings of the court below are based on appreciation of evidence. However this does not mean that High Court cannot interfere in a second appeal on a question of fact because section 103 of the Code enables the High Court to consider the evidence when the same has been wrongly determined by the Courts below on which a substantial question of law arises. In view of above let me consider whether the observation of the court below has been wrongly determined on the basis of evidence available in record.

15. Accordingly the moot question to be adjudicated in the present context is whether the sale certificate was acted upon or not, in other words whether plaintiff obtained exclusive possession in “ka” schedule property after issuance of sale certificate marked exhibit 4. Plaintiff in support of his possession in the property has brought six witnesses including himself. He has also filed government rent receipt in support of his case to show that after issuance of sale certificate he obtained possession in the schedule property.

16. On perusal of documents available in record it appears that court below did not rely upon plaintiff's documents marked Exhibit-3 which are the rent receipt filed by the plaintiff because it recorded the names of Ummar

Seikh and others and/or Ummar Seikh and Lawzi Seikh as tenants in respect of the payment of rents made thereunder. It further appears that the witnesses who were brought by the plaintiff in support of his possession, out of them, plaintiff himself deposed as PW-1 who admitted that he does not have any document to show that he got possession of the suit property through court. Plaintiff's other witnesses though stated in examination in chief that the plaintiff is in possession of the suit property but their evidence were shakened during cross-examination when they failed to identify the plaintiffs property or even their own property, which alleged to have situated within the same mouza. Moreover, such oral evidence adduced by PWs in support of possession has practically become oath Vs. Oath, since the defence witnesses in a similar tone in their examination in chief have stated that the plaintiff and defendant no.1 are in possession of their respective portion in the suit property.

17. On the contrary from the documentary evidence as produced by the parties it appears that the defendant has proved entry in the record of right in their name marked as Exhibit-C series. They have also proved zamindari rent receipt which are marked as exhibit- A to A-4 without any objection and also government rent receipt in connection with the schedule property marked as exhibit-B to B-3. Defendant has also proved sale deeds allegedly executed by both appellant and defendant, jointly selling a property to defendant no.3 Nahar Seikh, showing thereby that the defendant also had share in the property which are marked as Exhibit-D and D-1. Be it mentioned here that the defendant no. 1 in his written statement has admitted that plaintiff is also a co-sharer in respect of the suit property.

18. Now plaintiff/appellant has taken a specific plea about exhibit-D and D-1 which have been relied by the court below and thereby set aside the judgment of the Trial court. According to Appellant, said Exhibit- D to D1, purportedly executed by appellant and defendant, jointly selling a property to defendant no.3 Nahar Seikh, showing thereby that the defendant also had a share in the property but such documents should not have been relied by the court below, since no defence was taken by the defendants in the written statement and said documents were filed and proved for the first time during defence evidence. Accordingly no issue was framed on that point and as such placing reliance upon said document amounts to violation of principles of natural justice, since the plaintiff did not get sufficient opportunity to contradict the same.

19. It is the law under order VI rule 2 of the Code of Civil Procedure that pleading is to state material facts and not evidence. Here material fact stated in his pleading by the defendant is that defendant has paid rent etc. in connection with the disputed land and was a tenant and thereafter acquired raiyati possessory right over the suit property and that seeing his possession in the disputed property the record of rights has been prepared in his name. Now the said material fact as pleaded by defendant in the written statement has to be proved by him and how he wants to prove the same is not required to be pleaded in the written statement. Here comes the second substantial question of law that whether the court below failed to appreciate that the Exhibit-D and D-1 purported to have contained L.T.I of the plaintiff which was attested by defendant no.1, who wrote the name of the plaintiff under the L.T.I.

20. It is nobody's case that said deeds marked as Exhibit -D series is under challenge before any court of law even after it's disclosure by the defendants in evidence or that said deeds have been declared as null and void by any court of law. The oral and the documentary evidence adduced by the parties, *ifso facto* shows that exclusive possession of plaintiff in respect of suit property was never given by the court to the plaintiff after execution of sale-certificate marked Exhibit-4, as correctly held by the court below and plaintiff as PW-1 also admitted in cross examination that he has no document to show that he got possession of the suit property through court.

21. There is no quarrel with the proposition of the law that entries in record of rights neither creates title nor extinguish title and the respondents/defendants have also not based their right title interest over the property with the help of recording in the record of rights or with the help of rent receipts. Said documents are *prima facie* documents of possession by the defendants unless rebutted. While dealing with the other substantial questions of law I find that under section 65 of the Code of Civil Procedure, once sale is confirmed, the title of the purchaser relates back to the date of the sale and not from the time when the sale becomes absolute. But section 65 is to be read in the context of procedural law laid down in Order XXI Rule 95 of the Code.

22. Present suit has been filed by the plaintiff praying for a decree for permanent injunction. Plaintiff failed to establish his absolute possession in the suit property and as such after purchasing the suit property by the plaintiff in the auction sale as described in the schedule ka, an application under order XXI rule 95 of the Code was needed to have filed by the plaintiff

for obtaining exclusive possession of the suit property. The provisions of Rule 95 are mandatory. If the condition as laid down in the Rule is satisfied, the court is bound to give auction purchaser in actual possession of the property by removing the judgment debtor or any other person claiming through such judgment debtor. It is further provided that application for delivery of possession under Rule 95 of order XXI can be made within one year from the date, the sale becomes absolute and delay in filing application or delivery of possession cannot be condoned. Accordingly for making an application under Rule 95, limitation period is one year from the date when the sale became absolute, under Article 134 of the Limitation Act.

23. In the present case plaintiff has neither sought for a declaration of title in the property nor sought for recovery of possession. Rule 95 clearly states that after obtaining sale certificate under order XXI rule 94, the court shall on the application of the purchaser, order of delivery to be made by putting such purchaser or any person whom he may appoint to receive the delivery on his behalf in possessing of the property and a separate suit to enforce such a right is not maintainable under any circumstances. In the present case the plaintiff though failed to prove possession in the suit property, did not pray for declaration of his title nor has prayed for recovery of possession. The date of confirmation of sale as appearing from Exhibit-4 is 28th January, 1939, whereas plaintiff has filed suit for injunction on 8th February, 1977 which is much beyond one year. It is clear that plaintiff did not take any step to obtain delivery of possession of the suit property within a period of one year in terms of order XXI rule 95 of the Code.

24. In *K.R. LaxmiNarayan Rao Vs. New Premier Chemical Industries* reported in **(2005) 9 SCC 354** Supreme Court observed that though a separate suit would not be maintainable for the purpose of recovery of possession of a property which was in possession of the judgment debtor but their Lordship proceeded to grant relief to the decree holder *ex debito justitiae* by directing that the plaint be treated as an application under order XXI rule 95 of the Code provided the suit has been filed by the plaintiff within the period of limitation. In the present context plaintiff filed the suit after about 38 years of the confirmation of sale, though he failed to prove exclusive possession in the suit property, accordingly in the present context there is no scope even to treat the plaint as an Application under order XXI, rule 95.

25. Since the plaintiff failed to prove exclusive possession in the suit property. The property never recorded in his name, nor there is anything to show that he ever raised objection against such recording and on the contrary admitted in evidence that he has nothing to show that he got possession of the suit property through court in compliance with order XXI, Rule 95. Moreover plaintiff has not prayed for declaration of title nor prayed for recovery of possession and in the absence of such prayer for declaration or recovery of possession, the suit is also barred under section 34 of Specific Relief Act.

26. It would not be proper in such circumstances, for the High Court in exercise its jurisdiction under section 100 of the code to reverse the decree of the court's below as there is nothing to say that the observation of the

court below, that the sale certificate has not been acted upon, is without evidence or that such observation is not legally sustainable.

27. In view of above **S.A.264 of 1985** is dismissed. The judgment and decree passed by the court below dated 28.01.1984 in Title Appeal no. 47 of 1983 is hereby affirmed.

Urgent photostat certified copy of this order, if applied for, be supplied to the parties, on priority basis on compliance of all usual formalities.

(AJOY KUMAR MUKHERJEE, J.)