

**IN THE HIGH COURT AT CALCUTTA
(Civil Appellate Jurisdiction)
APPELLATE SIDE**

Present:

The Hon'ble Justice Supratim Bhattacharya

S.A. 59 of 2022

**Krishna Kamal Goswami
Versus
Deb Ratan Mallick @ Debobrate Mallick**

For the Appellant : Mr. Joyjit Roy Chowdhury
 Mr. Subhendu Bhattacharjee
 Ms. Priyanka Chunari
 Ms. Joyeeta Adhikary

For the Respondent : Ms. Deblina Lahiri
 Mr. Mrinmoy Chatterjee
 Ms. Moumita Sharma

Heard On : 24.04.2024

Judgement Delivered On : 23.07.2024

Supratim Bhattacharya, J.:

- 1.** The instant appeal has been preferred by the appellant being aggrieved by and dissatisfied with the judgment dated 26.10.2017 passed by the Ld. Additional District Judge, Kalyani, Nadia in title Appeal No. 35 of 2014.
- 2.** The appellant herein was the plaintiff before the Ld. Trial Court and the respondent before the Ld. First Appellate Court while the

respondent herein was the defendant before the Ld. Trial Court and the appellant before the Ld. First Appellate Court.

3. Facts of the instant lis

The appellant herein had purchased 61.80 decimals of land by virtue of a deed of sale being No. 3049 executed on 30.03.2006 and since then had been possessing the said property. It has been stated that the respondent/defendant on 03.03.2011 and 04.06.2011 forcibly dispossessed the appellant/plaintiff from 2 cottahs of land mentioned in schedule 'B' of the plaint and has been depicted through a sketch map which has been mentioned in schedule 'C' of the plaint. After the aforementioned incident of dispossession of the appellant/plaintiff the respondent /defendant constructed a room having tile shed and since then the respondent/defendant is in possession in respect of the said 2 cottahs of land. This being the situation the appellant/plaintiff has instituted a suit praying for eviction of the respondent/defendant, being a suit for eviction of trespasser bearing the no. Title Suit 94 of 2011.

The aforesaid title suit has been decreed by the Ld. Trial Court on contest.

Being aggrieved by the judgment of the Trial court the respondent /defendant had preferred an appeal being First Appeal bearing the No. Title Appeal 35 of 2014. The said First appeal was allowed by the Ld. First Appellate Court.

This setting aside of the judgment of the trial court and thus allowing the first appeal by the first appellate court has given rise to the instant second appeal.

4. Facts before the Trial Court:

The appellant/plaintiff instituted the instant *lis* by filing a plaint praying for decree of recovery of possession of the 2 cottahs of land, mentioned in the schedule 'B' and depicted in schedule 'C' of the plaint, by demolishing the illegal shop room raised by the respondent/defendant.

The respondent/defendant contested the suit by filing written statement. On the basis of the pleadings of the parties the following issues were framed.

ISSUES

1. *Is the suit maintainable in its present form and manner?*
2. *Has the plaintiff valid and proper cause of action to file this suit?*
3. *Has the plaintiff got any right, title, interest over the suit property?*
4. *Is the plaintiff entitled to get the decree as prayed for?*
5. *What other relief or reliefs the plaintiff is entitled to get as per law and equity?*

Evidence was adduced on behalf of both the plaintiff and the defendant.

Two witnesses adduced evidence on behalf of the plaintiff and the original sale deed being No. 3409 of 2006 and series of rent receipts have been exhibited on behalf of the plaintiff.

On the behalf of the defendants three persons adduced evidence. Apart from oral evidence no documentary evidence has been produced on behalf of the defendant. After scrutiny of the pleadings and the evidence on record the Ld. Trial Judge decreed the suit on contest.

5. Facts before the First Appellate Court

Being aggrieved by and dissatisfied with the judgment of the Ld. Trial Court the respondent/defendant preferred an appeal being Title Appeal No. 35 of 2014. After hearing the parties the Ld. First Appellate court set aside the judgment of the Ld. Trial court on two grounds. Firstly on the ground of non-joinder of co-sharers and the other ground being defects as regards to description of the suit property.

- 6.** Heard Mr. Joyjit Roy Chowdhury being assisted by Mr. Subhendu Bhattacharjee, Ms. Priyanka Chunari and Ms. Joyeeta Adhikary on behalf of the appellant/plaintiff and also heard Ms. Deblina Lahiri being assisted by Mr. Mrinmoy Chatterjee on behalf of the respondent /defendant.

7. The Ld. Counsel representing the appellants/ plaintiffs has submitted the following:

- i) The appellant is the sole and absolute owner in respect of 61.80 decimals of land comprised in the four dag nos. situated within Mouja 151 Purba Bishnupur, PS-Chakda, Dist-Nadia by virtue of a deed of conveyance being no. 3049 of 2006.
- ii) He has further submitted that the appellant/plaintiff was dispossessed by the respondent/defendant on 03.03.2011 and 04.06.2011 from the land measuring 2 cottahs comprised in dag numbers 62 and 63, Mouja 151 Purba Bishnupur, PS- Chakda which is part of the entire property mentioned in schedule 'A' of the plaint. Thereafter the respondent defendant constructed illegal structure upon the suit land.
- iii) He has further submitted that the suit property is defined in schedule 'B' and schedule 'C' of the plaint. The schedule 'C' is a sketch map delineating the suit property with complete area, specification of dag numbers, measurement, definition, demarcation and boundary.
- iv) He has further submitted that in view of such dispossession in the year 2011 the appellant/plaintiff instituted the suit for eviction of the trespasser and praying for decree of recovery of possession.

- v) The Ld. Counsel has further submitted that the respondent filed an incomplete written statement and has not filed any additional written statement. He has further submitted that the respondent/defendant has claimed himself to be in possession of the suit property for the last 25 years and as such has claimed himself to be entitled for ownership of the suit property by way of adverse possession.
- vi) He has further submitted that the respondent /defendant through his written statement has applied for mutation and/or recording his name with the concerned BL &LRO under the The West Bengal Acquisition Of Homestead Land For Agricultural Labourers, Artisans And Fishermen Act, 1975 (for short the 1975 Act).
- vii) The Ld. Counsel has further submitted that the respondent /defendant has stated in his written statement that he has paid Rs. 20,000/- as advance to the appellant/plaintiff for purchasing the suit property.
- viii) He has further submitted that the respondent/defendant failed to prove all his pleas taken in defence as regards to possession, ownership and the respondent/defendant has not submitted a scrap of paper to establish his case.
- ix)The Ld. Counsel has further submitted that though the Ld. Trial judge was satisfied with the plea of the plaintiff and decreed the

suit but the First Appellate Court has set aside the judgment of the Trial Court on the reasons that the suit property said to be the encroached property mentioned in the plaint is having insufficient description and is not identifiable and the other ground being that the appellant/plaintiff has not impleaded all the necessary parties who are the co-sharers of the said land and has thus reached the conclusion that the decree is inexecutable as the plaint does not bear proper description of the suit property and is not identifiable.

- x) He has further submitted that the respondent/defendant admitted the ownership of the appellant/plaintiff and has also admitted the illegal possession over the specific plot of land being the suit property.
- xi) The Ld. Counsel has further submitted that the First Appellate Court has set aside the judgment of the Ld. Trial Court on the ground of misdescription and non-joinder of parties which have never been pleaded by the respondent/defendant.
- xii) He has further submitted that the appellant purchased the entire property from two vendors namely Sisir Karmakar and Siddharta Sen and the properties have been specifically and absolutely demarcated. He has further stated that if any person purchases certain plot of land in a certain LR and RS dag, that does not mean he becomes the co-sharer with other owners of

the said LR or RS dag. He has further submitted that unless the purchaser purchases undivided and undemarcated interest from the vendor or part interest of the vendor then the purchaser steps into the shoes of the said vendor and he becomes a co-sharer with the said vendor.

xiii) He has further submitted that the appellant/plaintiff has specifically defined the suit property through the schedule 'B' and schedule 'C' of the plaint bearing specific dag numbers, boundary, area of encroachment of the portion of and/or the area of land from which the appellant has been dispossessed. He has further submitted that during deposition of evidence the witnesses have completely corroborated the boundaries/properties and the suit dag numbers in terms of the sketch map given in the plaint.

xiv) He has further submitted that it is well established principle of the Apex Court and various High Courts that failure to give complete description of the suit property is not at all fatal and can be cured at later stage.

xv) He has further submitted that providing both description are only optional to the plaintiff.

xvi) He has further submitted that it is also settled principle that even by plain map showing the location of the disputed immovable property it can be described, if the suit plot can be

identified by only the boundaries or the municipal number or dag number then the same is sufficiently described.

xvii) He has further submitted that it is settled by the Apex Court that in a case where property can be identified by boundary or number, in a record or settlement of survey or dag number, the plaint shall specify such boundaries with numbers.

xviii) He has further submitted that if the appellant/plaintiff had committed an error the respondent/defendant should have objected to the same promptly.

xix) The Ld. Counsel has further submitted that when a suit as regards to immovable property has been decreed and the property is not definitely identified the defect in the record can be cured by overlooking the provisions contained in Order VII rule 3 and Order XX Rule 3 of the Code of Civil Procedure and a successful plaintiff should not be deprived of the fruits of the decree and resort can be had to Section 152 or Section 47 of the Code of Civil Procedure depending upon the facts and circumstances of each case as to which provision could be more appropriate.

xx) Ld. Counsel has further submitted that in the instant lis the appellant has prayed for execution which is still pending for adjudication and the appellant/plaintiff has fair chance to rectify the omission if any in the plaint.

xxi) He has further submitted that the appellant/plaintiff is the absolute owner of the suit property and it has been admitted that the respondent/defendant is illegally possessing the suit property as such the appellant should not be deprived of his right where there is recourse in law by which the decree and judgment can be executable and the possession of the suit property is recoverable.

xxii) Banking upon the aforesaid facts and circumstances the ld. Counsel has prayed for allowing the instant appeal.

xxiii) In support of his contention the Ld. Counsel has referred to following judgments:

1. (2003) 2 SCC 330
2. AIR 2015 SC 1236
3. (2006) (4) GLT 160

8. The Ld. Counsel representing the respondent/defendant during his exhaustive submission has submitted the following:

i) He has submitted that the case was particularly dismissed by the First Appellate Court on two grounds. Firstly on the ground of insufficient description of the suit property holding that the appellant/plaintiff has failed to prove his case as to the actual position and measurement of land in possession of the

respondent/defendant and on the ground of exclusion of other co-sharers.

- ii) The Ld. Counsel has further submitted that the present case is not one where the description of the schedule 'B' property in respect of which the recovery of possession has been sought is such that even if the decree had been passed in favour of the appellant the same could not have been rendered enforceable for the reason that the schedule 'A' property mentions 4 plot numbers and specifies the share purchased by the appellants in the said 4 plots.
- iii) She has further submitted that there is no schedule or even pleading to show that out of the shares purchased by the appellant/plaintiff which portions have been sold by the appellant /plaintiff and which portion has been retained by the appellant /plaintiff on the date of filing of the suit specially it has been mentioned in the plaint that the plaintiff has sold some portion of the suit land by making plots and the rest land is in possession of the plaintiff for sale and use.
- iv) She has further submitted that the schedule 'B' of the plaint only mentions out of 61.80 decimals 2 cottahs of the suit plot has been forcibly occupied by the defendant having raised a structure over it illegally, thus not mentioning as to which plot

numbers or the identification of the portion in respect of which the decree is sought.

- v) The Ld. Counsel has further submitted that the sketch map drawn in schedule 'C' of the plaint shows that the suit land covers some portion of the plot No. 62 and 63 but there has been no RS or LR mouja map brought before the Ld. Court to ascertain the actual position of all the suit plots or the area covered by the alleged structure of the respondent/defendant.
- vi) She has further submitted that the genuineness of the hand sketch map cannot be ascertained in the absence of evidence or the mouja maps specially when in the oral evidence the appellant/plaintiff has made contradictory statement as to the identification of the schedule 'B' property to that of the purported hand sketch map in the schedule 'C'.
- vii) She has further submitted that the cross-examination of the appellant/plaintiff completely establishes that there are other co-sharers in respect of whom no partition has taken place till date.
- viii) She has further submitted that from the cross-examination of the appellant/plaintiff it has revealed that the appellant/plaintiff has sold portions out of the schedule 'A' property and therefore it is not known as to what prohibited the

appellant/plaintiff from the bringing the true picture of the land owned and possessed by him on the date of filing of the suit.

- ix) She has further submitted that there is nothing to show that the appellant/plaintiff had been diligent to bring the mouja map before the Ld. Courts, when from the written statement and from the cross-examination it is evident that the question of defect in the suit schedule property and non impleadment of necessary parties were the specific stands taken by the respondent/defendant.
- x) Ld. Counsel has further submitted that it is not a fact that the plea of defect in schedule was not specifically pleaded by the respondent/defendant and has further submitted that it was pleaded through the written statement and the cross-examination of the appellant/plaintiff that there are defects in the suit as regards to schedule as well as on the point of non-impleadment of necessary parties.
- xi) She has further submitted that the schedule mentioned property in the instant case cannot be said to be only ambiguous in view of the stern contradiction in the pleadings, schedules and evidence.
- xii) She has further submitted that the identification of the property/plot in respect of which delivery of possession is sought

for cannot be ascertained and even if a decree would have been passed the same would have been unenforceable.

xiii) She has further submitted that it is not understandable as to why appellant /plaintiff in spite of getting ample opportunity to amend the plaint or get the same inspected did not avail of these opportunities.

xiv) She has further submitted that the appellant/plaintiff has only exhibited his deed of purchase when the appellant has admitted that he has sold considerable portion from the said suit plot.

xv) She has further submitted that it is the duty of the appellant/plaintiff to prove his own case but the appellant/plaintiff has failed and neglected to cure the defects.

xvi) She has further submitted that according to Order VII rule 3 of the Code of Civil Procedure it was the specific duty caste upon the appellant plaintiff to give description of the property so that it can be identified. Thus appellant/plaintiff has failed to provide the boundaries or numbers in record of settlement or survey.

xvii) The Ld. Counsel has further submitted that the judgments relied upon by the Ld. Counsel representing the appellant are not at all applicable in this instant case.

xviii) The Ld. Counsel banking upon the aforementioned facts and circumstance has prayed for dismissing the instant appeal.

xix) The Ld. Counsel has relied upon the following authorities which are as follows:

1. 2020 (2) ALL MR 156
2. 2023(6)MLJ 520
3. 2013(1)KLT 454
4. (2017) 5 SCC 63
5. (2023) SCCOnline SC 9

9. At the time of admission of the instant appeal the following three substantial questions of law have been framed.

“i) whether the suit for recovery of possession against the trespasser is liable to be dismissed solely on the ground of misdescription of the schedule property and/or ambiguous description thereof?

ii) whether the appellate court is justified in reversing the judgment and decree of the trial court solely on the ground that the schedule appended to the plaint was ambiguous without looking at the plea taken by the defendant in the written statement, where he did not specifically take the plea of misdescription or non-description of the property?

iii) whether the appellate court was justified in reversing the judgment of the trial court solely on the ground of ambiguity in the schedule property when the defendant did not prove his title in respect of the suit premises and the plaintiff was found to have title over the suit property ?”

10. On going through the pleadings specifically the written statement filed by the respondent/defendant it transpires that except a sentence stating that the schedule mentioned as suit property is vague and erroneous, nothing has been vividly and specifically stated as regards

to the schedule mentioned in the plaint, on the contrary the respondent/defendant has stated that he has no other house except the suit property and in the suit property the respondent/defendant has started his marital life and has given birth to her daughter and his family members have their ration card and voter identity card wherein the schedule mentioned property is stated. The respondent/defendant has further stated that he has been residing in the suit property for the last 15 years by constructing upon the same and has further claimed that the plaintiff had assured him to sale the 2 cottahs of land in respect of which he had advanced Rs. 20,000/- but ultimately no registered deed has been executed by the appellant/plaintiff in his favour. He has further stated that he had applied before the BL & LRO Chakda for registering his name under the 1975 Act (supra). Thus, from the statements made by the respondent /defendant in his written statement it is apparently clear that the respondent /defendant is absolutely aware and sure about the suit property.

- 11.** Though some facts are being dealt with at this juncture but it has become incumbent for this court to deal with the same and it will not be out of context to mention that the schedule 'C' of the plaint bears a sketch map. From the sketch map it is clear that the suit property has been mentioned as regards to its area and the suit property is

identifiable and a decree if allowed in favour of the appellant/ plaintiff is executable.

12. The suit property as has been depicted in schedule 'C' gives a clear picture as regards to its position and the plot number/numbers. The boundaries have also been mentioned so it cannot be said that the description of the schedule property is ambiguous.

13. In respect of this issue the judgment passed by the Hon'ble Apex Court in the case between Subhaga and Ors. Vs. Sobha and Ors., reported in (2006) 5 SCC 466 is being referred. Paragraph 6 of the said judgment states as follows:

"6. 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. There was no occasion to spin a theory that it was necessary in this suit to survey all the adjacent lands to find out whether an encroachment was made in the land belonging to the plaintiff."

14. As regards to non-joinder of necessary parties, as has been stated in the judgment of the First Appellate Court that co-sharers are there in respect of the plots of land, is also not acceptable. The appellant /plaintiff has purchased demarcated portion having mention of the boundaries and in addition the sketch map clearly depicts the suit property which is mentioned in schedule 'B' and depicted by a sketch

map mentioned is schedule 'C'. Thus, there is no ambiguity as regards to the suit property.

- 15.** From the above discussion it also reveals that the suit property has been stated and depicted having no ambiguity and also having a sketch map and no necessary parties are there who are to be made parties in the instant lis and in absence of whom the instant proceeding cannot be proceeded and in addition nobody will be prejudiced if the decree is granted in favour of the appellant/plaintiff as sought for.
- 16.** The appellant/plaintiff has proved his right, title and interest in respect of the suit property while the respondent /defendant has taken several pleas and grounds to defend himself without producing any document and only on the basis of verbal submission. All the attempts of the respondent/defendant have resulted to be futile. From the aforementioned discussion it is evident that the suit property is absolutely clear in the mind of the respondent /defendant and he has no question as regards to the identification of the suit property.
- 17.** Thus, from the aforestated discussion it is felt that justice cannot be provided if the relief sought for by the appellant/plaintiff in the instant lis is not granted when the appellant/plaintiff has proved his right, title and interest in respect of the suit property while all the attempts made by the respondent/defendant have been all in vain.

18. From the aforementioned discussion it also transpires that the First Appellate Court has not been justified in reversing the judgment of the Trial Court and that too on the ground of ambiguity in the schedule property and non addition of parties.
19. So this Court feels that the judgment of the Ld. First Appellate court is required to be interfered with.
20. As such the judgment of the **Learned First Appellate Court is set aside** and the judgment of the **Learned Trial Court is restored**.
21. Taking into consideration all the aspects the respondent/defendant is granted time **till 31.10.2024 to vacate and hand over vacant possession** of the suit property to the appellant/plaintiff without creating any third party right or damage to the property.
22. Thus the appeal being **S.A. 59 of 2022** stands **allowed**.
23. 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.
24. Urgent certified photo copies of this judgment, if applied for, be given to the parties upon compliance of the requisite formalities.

(Supratim Bhattacharya, J.)