

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

PRESENT:

THE HON'BLE JUSTICE AJOY KUMAR MUKHERJEE

S.A. 280 of 2005

**Kalyani Sardar & Ors.
Vs
Debaki Mondal & Ors.**

For the Appellants : Mr. Sounak Bhattacharya
Mr. Abhirup Halder
Mr. Sounak Mondal

For the Respondents : Mr. Arijit Chatterjee
Mr. Kalidas Saha
Mr. Abhik Sarkar

Heard on : 22.03.2024

Judgment on : 02.04.2024

Ajoy Kumar Mukherjee, J.

1. Being aggrieved by and dissatisfied with the judgment and decree dated 17th February, 2005 passed by the learned Additional District Judge First Track Court, Baruipur, in T.A. No. 278 of 1998, present second Appeal has been preferred. By the impugned judgment the Court below affirmed the judgment and decree dated 26th February, 1998 passed by Civil Judge (Junior Division) 2nd Court Bariupur in T.S. No. 139 of 1996.

2. Plaintiffs case in a nutshell is that the property mentioned in Schedule to the plaint belongs to the plaintiffs and their names have been correctly recorded in the R.S. record of Rights. On the basis of the partition effected amongst the co-sharers of the suit khatian, the present suit property has been exclusively allotted in the name of the plaintiffs. Plaintiffs further case is that they are in possession in the suit property by paying tax to the State of West Bengal .The defendants have no right, title interest in the suit property but they are trying to forcibly dispossess the plaintiff from a portion of the suit property, in collusion with the local antisocial elements. The cause of action of the suit arose on 30.08.1996 when the defendants along with their men and agents tried to forcibly dispossess the plaintiffs from a portion of the suit property. Accordingly plaintiffs have prayed for declaration of their right title interest in the suit property and for a decree of permanent injunction, restraining the defendants from disturbing plaintiffs possession in respect of the suit property.

3. The defendant no. 2 and 3 contested the suit by filing written statement wherein they have denied the averments made in the plaint. Defendants specific case is that they are in possession of the suit land since long by inheritance being the legal heirs of their father. According to the defendants, their predecessor in interest took settlement of the suit land from one Atul Krishna and after the abolition of zamindari system the defendants are paying tax to the Government. Defendants alleged that the entry in Record of Right is without any foundation and is not liable to be sustained.

4. On the basis of aforesaid pleading learned Trial court framed as many as five issues and after scanning evidence adduced by the parties, the learned Trial court decreed the suit in favour of the respondents/plaintiffs.

5. The Appellants/defendant no.2 and 3 assailed the said judgment and decree on the ground that the Trial court erred in not holding that the plaintiffs/respondents failed to prove the oral partition which was the basis of their title. However during pendency of the appeal the defendant/appellants made a prayer before the learned first appellate court seeking amendment in the written statement, in order to incorporate a further defence that the defendants have been possessing suit land for much more than 12 years to the knowledge of the plaintiffs and their predecessor-in-interest and by such possession they have perfected their title to the suit land by way of adverse possession. Learned court below allowed the said prayer for amendment during pendency of the appeal.

6. However when the first appeal came up for hearing, learned court below after hearing the contention of both the parties affirmed the judgment and decree passed by the Trial court and thereby dismissed the Appeal. The Division Bench of this court, while admitted the Second Appeal, by its order dated 18.07.2005, was pleased to frame following substantial questions of law.

- I.** *The learned first appellate court below itself having allowed an application for amendment of written statement, thereby permitting the appellant to take additional plea of adverse possession, whether the said court committed substantial error of law in not permitting the appellant to adduce evidence in support of the additional plea.*
- II.** *Whether the learned court of appeal below committed substantial error of law in not remanding the matter back to the trial court for the purpose of framing additional issue on the question of adverse possession and for permitting the parties to lead evidence on the additional point.”*

Decision with Reasons

7. While affirming the judgment of the Trial Court learned Court below also relied upon RS and LR khatian recorded in the name of plaintiff which are marked as Exhibit 1 and 2 and the khajna receipt marked Exhibit-3 and came to a finding that the plaintiff's name have been recorded separately in a separate khatian in respect of a separate portion of the suit plot. LR porcha in respect of khatian no. 2050 in respect of suit plot marked Exhibit-2 indicates that the name of the plaintiff no. 2 Himanshu Mondal has been separately recorded in LR khatian No. 2050 in respect of specified portion and PW-1 Himanshu Busan in his evidence categorically stated that by way of an amicable partition amongst the co-sharers, the plaintiffs got the suit property. Learned court below further held that oral partition of the land of any holding was permissible prior to 1965 i.e. before section 14 of the West Bengal Land Reforms Act, 1955 came into being. As the evidence adduced by the plaintiffs establishes that the plaintiffs are in separate possession of a specified portion of the suit plot prior to 1965, so the court below justified Trial Court's finding with the observation that the plaintiffs are owning and possessing the suit land. So far as the defendants claim over the suit property is concerned, the court below held that though burden lies upon the defendants to rebut the entries in RS and LR khatian in respect of the suit land but they have miserably failed to prove the same before the court.

8. Now from the substantial question of law as well as the arguments advanced on behalf of the learned counsel, the moot question that emerges in this second Appeal is whether the court below was wrong in not

remanding the matter or committed mistake by not taking additional evidence on the ground of defendants claim of title in the suit property, specially when the court below had allowed the defendants to incorporate the plea of adverse possession in the written statement during pendency of the appeal. It was strenuously argued that since the defence of adverse possession has been inserted in the written statement, the appellants /defendants should have been given an opportunity to adduce additional evidence by framing an additional issue in this regard and thereby the court below ought to have remanded the suit for passing fresh judgement by the Trial court after hearing on additional issue relating to adverse possession.

9. While dealing with the aforesaid argument made by the appellants herein, the court below held that though the plea of adverse possession has been incorporated in the written statement but it does not speak in the pleading as to when such possession started on the suit land and therefore he has found no justification either to frame additional issue to this effect, nor he was inclined to held that the defendants have acquired any right title interest in the suit property by way of adverse possession.

10. Before going to further discussion let me state the contents of the amendment which was incorporated in the written statement during pendency of the appeal. From the schedule of the amendment it appears that after paragraph 8 of the written statement, the words which are incorporated is that the contesting defendants have acquired title in the suit property for possessing the suit property much more than 12 years with the knowledge of the plaintiff and declaring hostile title in the suit property and

as such the defendants have acquired title in the suit property by way of adverse possession.

11. It is no more *res integra* in view of several judicial pronouncements that when the defendants claimed that they have acquired title in the suit property by way of adverse possession, they are required to plead as to when their possession became adverse in order for the real owner to lose title 12 years hence from that time. In ***Hemaji Wagahji Jat Vs. Bhikabhai Khengharbhai Harijan and others*** reported in **AIR 2009 SC 103**, it has been specifically held that a plea of adverse possession is not a pure question of law but a blended one of fact and law and therefore, a person who claims adverse possession should show:-

- (i) On what date he came into possession
- (ii) what was the nature of his possession
- (iii) Whether the factum of the possession was known to the other party
- (iv) How long his possession has continued
- (v) Whether his possession was open and undisputed

It was further held that a person pleading adverse possession has no equities in his favour. Since he is trying to defeat the rights of true owner, it is for him to clearly plead and establish all facts necessary to establish his adverse possession.

12. Needless to say that mere possession by a person for any length of time would not raise an inference that such possession was adverse against real owner unless there is a manifest hostile animus to the knowledge of the true owner, mentioning commencement of such possession in the pleading.

Because this is the requirement of law that when adverse possession has been claimed such possession must be adequate in continuing, in publicity and in extent to show that his possession is adverse to the true owner. It must start with a wrongful disposition of the rightful owner.

13. I have already stated above that in the amendment made in the written statement claiming adverse possession, there is no mention as to when, the defendant came into possession i.e. the commencement of his right of adverse possession, against true owner.

14. Needless to repeat that defendants' original plea in the written statement is that their predecessor-in-interest took settlement in the suit land from Atul Krishna and after the abolition of Zamindari system they are claiming interest over the suit property by paying tax to the Government. So by the assertion made in the written statement, the defendants are claiming that they came into possession of the land lawfully and even after the abolition of Zamindari system they continued to remain in possession till the date of filing the suit. In the above background during the pendency of the appeal, they have come up with the inconsistent plea that they have perfected their title in the suit property by way of adverse possession without mentioning when and how their lawful right title interest got extinguished and their right of adverse possession started against true owner. In a suit for possession since the defendant claimed to be in the possession over disputed property on the ground of settlement, and/or by operation of law due to abolition of zamindari system, the alternative plea by the defendant that they have perfected their title by way of adverse possession cannot be allowed. A person who pleaded his possession

lawfully in the written statement, can never become an owner by way of adverse possession.

15. In *Karnataka Board of Waqf Vs. Government of India & others* (Appeal Civil) 16899 of 1996) it has been clearly set out that When such a plea of advance possession is projected, it is inherent in the nature of it that someone else is the owner of the property. The pleas on title and adverse possession are mutually inconsistent and the later does not begin to operate until the former is renounced. It is also well settled that to establish adverse possession an enquiry is required to be made during trial about starting point of adverse possession and accordingly pleading regarding commencement of such possession by dispossessing the original owner is crucial. A mere suggestion in the defence clause that there was an uninterrupted possession for several 12 years and on that defendants have acquired an absolute title, is not enough to raise such a plea. Long possession is not necessarily adverse possession. Having come into possession under settlement and/or by operation of law as pleaded, Appellants must disclaim their right thereunder and plead assertion of their independent hostile adverse possession to the knowledge of any true owner and that such true owner had acquiesced to their legal possession during the entire period of twelve years.

16. When the First appellate court has come to a finding that the amended written statement does not indicate from which date or from which year the contested defendants started possessing the suit land adversely, there is no justification to frame additional issue to that effect or to go on trial to consider the issue as to whether the defendants have acquired title

in the suit property by way of adverse possession or not I do not find any perversity in the said finding. In the absence of specific pleading in the written statement, the court below rightly came to a conclusion that in view of the said additional pleading made in the written statement by way of amendment, neither additional issue is required to be framed nor the suit is required to be remanded for fresh trial to determine the issue of alleged acquisition of title by way of adverse possession, in view of the discussions and the settled position of law as stated above.

17. The words “*the Appellate Court may, if necessary, frame issues*” clearly suggests that Rule 25 of order XLI read with section 107(1) (c) of CPC empowers the appellate court to frame issues, if necessary, and then to refer them for trial and as such the appellate Court is not bound to frame issue in each and every case under the above Rule and direct the trial court to record findings on such issue. It’s a discretionary power of the Appellate Court to be exercised in appropriate cases, where it becomes necessary. Since in the present context it did not appear before the court below that in view of inadequate, inconsistent and unauthorised pleading, no additional issue is required to be framed, there is nothing to interfere in the said finding.

18. In such view of the matter **SA 280 of 2005** accordingly dismissed. Return the record of the courts below immediately.

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

(AJAY KUMAR MUKHERJEE, J.)