

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

Present:

**THE HON'BLE JUSTICE HARISH TANDON
&
THE HON'BLE JUSTICE MADHURESH PRASAD**

SAT 373 of 2018

CAN 1(7306) of 2018

**Baharpota Upper Primary School
Vs.
Santimayee Manna & Ors.**

Appearance:

For the Appellant : **Mr. Goutam Thakur, Adv.
Mr. D.P. Adhikari, Adv.**

Judgment On : **20.05.2024**

Harish Tandon, J.:

The dispute pertains to the Plot nos. 1349, 1350 and 1352 which according to the plaintiff/respondent owned and possessed by them by way of inheritance from their predecessors who were admittedly the owners thereof. It is a specific case of the plaintiff/respondent that undisputedly the aforesaid properties belonging to one Indra Manna and Jagannath Manna in equal share and on the death of Jagannath Manna his son Jharu Manna inherited the undivided half share along with his uncle namely Indra Manna. The DSROR was prepared in the name of said Indra Manna and the

Jharu Manna. The Indra Manna admittedly died as a bachelor and the Jharu Manna being the only heir under the law intestate succession acquired an exclusive right, title and interest in respect thereof. It is further alleged that after the death of Jharu Manna his three sons namely Sripati, Satish and Ratikanta inherited the suit properties in equal share but subsequently, Satish transferred his undivided 1/3rd share by several deeds in favour of his another brother Ratikanta and correspondingly, the Sripati also transferred his undivided 1/3rd share by several deeds in favour of the said Ratikanta and thus Ratikanta become the exclusive owner of the suit properties. The plaintiffs are admittedly the heirs and successors of the said Ratikanta and instituted a suit for declaration that the defendants have no right, title and interest in respect of the suit premises as the appellant school is situated in a non-suit plot no. 1348 and 1351 and have surreptitiously stack the building material on the suit plot with an intent to raise construction on 28.02.2001.

The defendant/appellant admitted that the suit plots originally belong to Indra Manna and Jagannath Manna. On the death of Jagannath Manna it is alleged that the said Indra Manna and Jharu Manna executed a sale-deed in favour of the appellant in the year 1950 in respect of a portion of the aforesaid plot. It is further averred that since the value of the property was below 100, the said sale-deed was not registered. It is further stated that on the basis of the aforesaid fact the RS Record of Right and LR Record of Right contained the entry and since then they are owning and possessing the aforesaid plots. It is further stated that the aforesaid factor would further be

corroborated on the basis of the Record of Right prepared in respect of the remaining land comprised in the aforesaid plot numbers and, therefore, the contention of the plaintiff in this regard is untenable.

At one hand the plaintiff has sought for a declaration that the entry in the Record of Right is erroneous on the other hand the defendant/appellant is claiming the right, title and interest not only on the basis of an unregistered deed of sale allegedly executed in 1915 but also on the basis of an entry in the RS Record of Right and LR Record of Right. It is pertinent to record that the alleged deed of 1915 as claimed by the defendant/appellant was not produced before the Trial Court for the reason that a defence was taken that the said deed was destroyed in the flood in 1978. The Trial Court proceeded on the basis that since the carved out plot was recorded in the name of the predecessor of the plaintiffs and the several deeds executed amongst the heirs of the said Jagannath is in respect of those carved out plots. It *ipso facto* leads to an inescapable conclusion that the remaining land which the defendant/appellant alleged to have acquired by way of purchase and on the basis of the RS and LR Record of Right is fully established. It is further observed that the plaintiffs cannot acquire title on the strength of those deeds executed by the brother of the Jagannath Manna as it was restricted to carved out portion of the said plots and, therefore, in absence of the heirs of the other brothers the suit is hit by the non-joinder of the parties. The Trial Court further observed that the suit is hit by Section 34 of the Specific Relief Act as the possession in respect of a suit plot was found to be with the defendant/appellant and in absence of any relief for

recovery of possession the suit is hit by the proviso attached to this aforesaid provision. It is further held that the plaintiff/respondent had a knowledge that the remaining portion of the said plot has not been recorded in their names and having not taken any steps for correction of the Record of Right, the suit is otherwise hit by the provision of the Limitation act.

The Appellate Court reversed the judgment and decree of the Trial Court on the score that the defendant/appellant was permitted to construct the structure on the disputed plot on the strength of an order passed on an application for temporary injunction with the rider that in the event the title is declared in favour of the plaintiff/respondent, they would remove such structure at their own cost. It is also undeniable that an undertaking was filed by the defendant/appellant before the Court at the interlocutory stage that they would remove the structure in the event a decree for declaration is passed in the said suit. The Appellate Court further held that there is no impediment in passing a decree for recovery of possession upon removal of the structure in terms of the such observation made in the suit at the interlocutory stage which, in fact, has also been observed by the High Court in a revisional application filed by the school assailing the order of amendment of the plaint at the appellate stage. The Appellate Court further observed that their entry in the Record of Right does not create any title nor the defendant/appellant have been able to prove their title over the suit plot on the strength of a purported deed of sale which is admittedly unregistered. The Appellate Court believed the cause of action to have received on 28.02.2001 when the school stacked the building material and thus held

that there is no question of any limitation to intervene for the reliefs claimed in the plaint. The Counsel for the appellant vociferously submits that the said Indra Manna and Jagannath Manna were the admitted owner and on the death of the death of the Jagannath Manna his son Jharu Manna inherited the said property and in fact executed a sale-deed in the year 1951 divested their right, title and interest in respect of the portion of the land in favour of the defendant/appellant. It is further submitted that pursuant to the said sale-deed the larger plot was divided and carved out plot was recorded in the Record of Rights in the name of the plaintiff/respondent and the original plot remained recorded in the name of the school appellant. It is sought to be contended that the entry made in the Record of Right is presumed to be correct unless controverted by a cogent evidence. In this regard, the reliance is placed upon before a judgment of the Apex Court in case of ***Vishwasrao Satwarao Naik & Ors. Vs. State of Maharashtra, reported in (2018) 6 SCC 580***. A plea is further taken that the Appellate Court being the Court of fact and law must decide all the issues and must returned to its independent finding thereupon which, in fact, has not been done in the instant case to support the aforesaid contention reliance is placed upon the judgments in case of ***H.K.N. Swami vs. Irshad Basith (Dead) By Lrs., reported in (2005) 10 SCC 243, Executive Officer, Arulmigu Chokkanatha Swamy Koil Trust, Virudhunagar vs. Chandran & Ors., reported in (2017) 3 SCC 702 and Somakka (Dead) By Legal Representatives vs. K.P. Basavraj (Dead) By Legal Representatives, reported in (2022) 8 SCC 261***. It is further submitted that the finding of the Trial Court that the suit hit by the Section 34 of the

Specific Relief Act has been wrongly held by the Appellate Court to be so maintainable when admittedly the law of limitation has intervened as the plaintiff/respondent failed to assert the title or claim possession from the defendant/appellant for a considerable period of time and placed reliance upon a judgment on the Apex Court in ***Vasantha (Dead) Thr. Lr. Vs. Rajalakshmi @ Rajam (Dead) Thr. Lrs. (Civil Appeal no. 3854 of 2014 decided on February 13, 2024)***. It is thus contended that the judgment of the Trial Court is perverted and, therefore, the instant second appeal involved a substantial question of law to be decided on merit.

Taking a plea of limitation an embargo created in proviso to Section 34 of the Specific Relief Act let us consider whether finding of the Trial Court as well as the First Appellate Court is perverted and not in consonance with the law enunciated in this regard. It admits no ambiguity to the fact that proviso inserted to Section 34 of the Specific Relief Act creates a bridle in granting a simplicitor decree for declaration in absence of further relief to be claimed thereupon. On the above point, reliance is heavily placed upon the unreported judgment of the Supreme Court in case of ***Vasantha (supra)*** decided recently. It is a trite law that the Court should find out the ratio of the decision in the context in which the case has been decided. In the said report, a deed of settlement was executed on 10th July, 1947 by an admitted owner pursuing the right on her property to her two sons for their lives and thereafter, to her two daughters. Subsequently, the aforesaid two sons executed the settlement deed on 31st July, 1952 reverting the said interest in favour of their mother i.e., the original owner. Within a close proximity of

time, the original owner the mother of the aforesaid two sons executed a further deed of settlement on 18th August, 1952 conferring an absolute interest in favour of the aforesaid two sons with the further stipulation that any right created in favour of the aforesaid two daughters is extinguished. Admittedly one of the sons had no biological children and his wife enjoyed the life interest bequeathed to her husband. It further appears that they adopted a daughter who is the appellant therein namely *Vasantha*. In 1993, the widow of the deceased son along with husband of one of the daughter filed a suit for declaration of their title on the basis of first settlement deed. In the above backdrop the question arose whether a suit is hit by a provision of the Limitation Act as well as under Section 34 of the Specific Relief Act having filed admittedly after a considerable period of time elapsed in the meantime. In the above backdrop of the fact it was held that if the suit is based upon the first settlement but claiming a right of reversioner, the possession remained with the widow of one of the sons the possession admittedly remained with one of the widow of the son and upon expiration of the period of limitation enshrined under Section 27 of the said Act the suit is not maintainable. The Court further held that the right to seek its decree of declaration accrued much prior to the period of institution of the suit and, therefore, in view of the provision contained in Section 27, Article 58 and 65 of the Limitation Act the suit is barred. On the plea of the applicability of Section 34 of the said Act, it was observed that since possession was admittedly not with the plaintiff therein, a suit simplicitor for declaration is not maintainable as further reliefs have not been claimed therein.

We are *ad idem* with the law so enunciated in the above report on the applicability of Section 27 and Article 58 and 65 of the Limitation Act. Section 27 of the Limitation Act postulates that on determination of the period limited for any persons for instituting a suit for possession in respect of any property is right to such property shall be extinguished it is an exception to the well-expected proposition of law relating to the period of limitation that the said act is aimed to bar the reliefs in the court of law but does not extinguish the right. The language used in the said section cannot be construed to confer any title into a person simply because a suit for possession of any property is not instituted within the time limited thereof. What it indicates in the extinguishment of such right to such property which is in contradistinction with the conferment of title. The brindle which is created under Section 27 of the Limitation Act is in relation to a right to recover the property from a person in possession which is required to be established by taking a shelter under the concept of perfecting the title based upon such possession. The aforesaid notion can further get impetus from the fact that mere long possession in the property cannot *ipso facto* convert into a perfection of title by adverse possession which is based on the *legal maxim, nec vi, nec clam, nec precario*. Therefore, in order to apply Section 27 of the Limitation Act the first and foremost thing is required to be seen whether there was a continuous possession over the period limited in the said Act and a suit for possession in respect of any property has not been filed. It is essentially a question of fact and depends upon a case to

case basis. *Apropos* the same Article 58 and 65 also to be read in such perspective and cannot be applied in an abstract manner. It is no longer *res integra* that the entry in the record of right neither creates any title nor extinguishes the title of a person in respect of an immovable property. The entry may have a presumptive value of its correctness and may at times on possession but depends upon the nature of the claim and the evidence to be produced in this regard.

It is a specific case of the plaintiff/respondent that they have acquired right, title and interest in respect of the aforesaid three plots and the DS record of right was prepared in the name of the predecessor. It is also an admitted fact that the school was situated in non-suit plot no. 1348 and it is sought to be claimed by the defendant/appellant that they purchased the portion of the suit plots from the admitted owners on the strength of an unregistered deed in the year 1915. The defendant/appellant failed to produce any such deeds in support of aforesaid contention and admittedly the construction was sought to be raised in the year 2001 in respect of a portion of the suit plots though it is sought to be contended that those plots were used for the playground but it appears that the defendant/appellant also claimed the title and possession in respect of the other non-suit plot i.e., plot no. 1351 from the persons in whose name such plot stand. In order to attract the embargo under Section 27 in conjunction with the Article 58 and 65 there must be a clear proof of possession uninterruptedly and the failure on the part of the title holder of the aforesaid plot in filing a suit for possession within the time limited in the said act. It is a specific

case of the plaintiff/respondent that in the year 2001 the appellant stacked the building material with an intend to construct which is tantamount to not only invasion of their right in respect of the aforesaid property but interference with the possession as well and temporary injunction was passed in the said suit restraining the defendant/appellant from making any construction on the subject plot but the said temporary injunction was vacated on an undertaking given by the appellant/respondent that they would remove the construction in the event, the title is declared in favour of the plaintiff/respondent. The construction over the plot of land on the strength of the order of the Court with the restrictions as aforesaid cannot be taken as a possession within the purview of the aforesaid provision of the Limitation Act. The appellants have not been able to produce a single scrap of paper on the strength of title having acquired on the basis of an unregistered deed. Even aforesaid contention is accepted, for the sake of argument the DS record of right was prepared much at a later point of time in the name of the admitted owners which *ipso facto* proves that the defendant/appellant did not assert their right at such relevant point of time. Merely, on the basis of RS and LR record of right the possession is sought to be presumed which appears to have been made erroneously on the strength of specific case made out by the plaintiff that they remained in possession throughout until interfered with and/or invaded by the school authority in the year 2001. The suit was filed within a period of 12 years on the strength of the positive categorical assertion that a plaintiff/respondent was all along in possession of the property. We do not find that the plea of limitation

under Section 27 together with Article 58 and 65 of the said Act is sustainable.

Reverting back to a suit that in absence of a relief claim for recovery of possession, the suit simplicitor for declaration of title is not maintainable. Immediately after the institution of the suit and injunction was granted against the appellant from making any construction which was assailed before the First Appellate Court wherein the defendant/appellant undertook to remove the structure so constructed upon the outcome of the suit. A plea sought to be raised by the counsel of the appellant that such undertaking was given under compulsion does not appear to whole water as the persons manning the school are not a rustic villagers lacking imperfect intellect to understand the consequences thereof. Furthermore, the proviso to Section 34 of the Specific Relief Act contemplates a further reliefs and in the instant case apart from a decree for declaration, decree for permanent injunction was also sought for on categorical assertion that the possession remained with the plaintiff/respondent though the plaintiff/respondent sought to amend the plaint incorporating the reliefs of recovery of possession at the appellate stage but the order granting such amendment by the First Appellate Court was reversed by the High Court in revision with categorical finding that all the orders passed in the interlocutory proceedings shall be taken into account at the time of disposing of the said appeal and the reliefs to be granted in this regard. At the one hand, the defendant/appellant is taking a shelter under the embargo created in proviso to Section 34 on the other hand, resisting the amendment having carried out in the plaint and

emerge successful therefrom a person cannot be permitted to approbate and reprobate at the same time. Apart from the same, the moment the Court permitted the construction to be undertaken subject to its removal on a final decision to be taken in the suit, it is preposterous to suggest that a person who reaped the benefit of the order of the Court shall take a diametrically opposite stand and resist the said claim on technicalities. It is a duty of the Court to remedy any act done on the strength of its order and bring back the position as it stands on the date of the said order as no right can be created in favour of a person which is otherwise lacking. We thus do not find that the suit can be hit by Section 34 of the Act. The appeal does not involve a substantial question of law.

The appeal is thus dismissed.

No order as to costs.

Urgent Photostat certified copies of this judgment, if applied for, be made available to the parties subject to compliance with the requisites formalities.

(Harish Tandon, J.)

I agree.

(Madhuresh Prasad, J.)