

Abdul Haque and Others Vs. Abdul Rashid and Others

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Court : Guwahati

Decided On : Sep-08-2015

Judge : Suman Shyam

Appeal No. : RSA No. 72 of 2006

Appellant : Abdul Haque and Others

Respondent : Abdul Rashid and Others

Advocate for Pet/Ap. : Mr. A. Choudhury, Mr. Choudhury

Judgement :

Oral Order:

1. Heard Mr. A. Choudhury, learned counsel appearing for the appellants. Also heard Mr. M. H. Choudhury, learned counsel representing the respondents.
2. The present Second Appeal has been preferred against the concurrent judgment and decree dated 12.12.2005 passed by the learned Civil Judge(Senior Division), Nagaon in Title Appeal No.14/2004 upholding the judgment and decree dated 18.12.2003 and 24.12.2003 respectively passed in Title Suit No.77 of 1995 by the learned Civil Judge (Junior Division) No.2, Nagaon.
3. This Second Appeal was admitted to formal hearing by framing the following substantial question of law :-

Whether the learned Courts of facts below were justified and legally permitted to grant relief beyond the pleadings as the plaint did not speak of any existing cause of action?

4. The plaintiffs case, in short, is that land measuring 22 bighas 3 kathas 10 lechas was originally recorded in the name of Ezafor Ali i.e. elder brother of Jonab Ali who is the predecessor-in-interest of the plaintiff Nos.1, 2 and proforma defendant Nos.27, 28 and 29. Jonab Ali purchased a plot of land measuring 5 bigha 2 katha 17 lechas under P.P. No.105 pertaining to dag No.13 from Ezafor Ali by means of a registered deed of sale bearing No.2857 dated 29.03.1954 where-after he was put in possession of the said plot of land. Besides the above, Jonab Ali had purchased another contiguous plot of land measuring 1 bigha covered by dag No.54 of K.P. Patta No.124 by means of registered deed of sale bearing No.9441 in the year 1968 from Somed Ali and Rohim Ali. It may be mentioned herein that the original Patta No.105 was split up during the settlement operation and Patta Nos.104 as well as 124 were created whereas the dag No.13 was split into dag nos.56 and 55. Besides the above land, Jonab Ali had also purchased another plot of land measuring 2 katha 10 lechas covered by dag No.56 of Patta No.104 by means of registered deed of sale bearing No.4250 dated 04.09.1971 from the aforementioned Somed Ali and Rohim Ali. In the aforesaid manner, Jonab Ali became the absolute owner in possession of a plot of land measuring 7 bighas 0 katha 7 lechas covered by the aforementioned dags and patta.

5. Jonab Ali died leaving behind the plaintiff Nos.1, 2 and proforma defendant Nos.27, 28 and 29 besides three other sons, viz., Abdul Somed, Abdul Hamed and Abdul Hakim as his legal heirs. The said Abdul Somed, Abdul Hamed and Abdul Hakim died unmarried. The proforma defendant Nos.27, 28 and 29 had relinquished their shares in the inherited property in favour of the plaintiff Nos.1 and 2. However, Abdul Somed and Abdul Hamed had, during their lifetime, transferred by way of sale two bighas of land in total as a result of which the plaintiff Nos.1 and 2 had jointly become the owners in possession in respect of a plot of land measuring 5 bighas 0 katha 7 lechas.

6. The plaintiff No.3 had purchased 1 bigha land from Abdul Somed and another 1 bigha land from Abdul Hamed thereby totaling to 2 bighas of land as mentioned herein before. As such, the plaintiff Nos.1, 2 and 3 were the owners in possession in respect of a total area of land measuring 7 bighas 7 kathas in the manner indicated herein before.

7. It is the case of the plaintiffs that the defendant Nos.1 to 8 do not have any semblance of right, title and interest or possession in respect of the suit land. But despite the same, they have been trying to dispossess the plaintiffs from the suit land. An attempt made by the defendants to dispossess them from the suit land had been successfully resisted by the plaintiffs which had led to institution of a proceeding under Section 145 Cr.P.C. before the Court of Executive Magistrate, Nagaon in respect of 1 bigha 2 katha 10 lechas of land which forms part of the suit land and accordingly the said land was attached by the Executive Magistrate. The defendant Nos.7 and 8 had also made attempts to dispossess the plaintiffs even from the remaining 5 bighas of land in a most illegal manner as a result of which the plaintiffs have been compelled to institute the suit praying for the following reliefs :

It is therefore prayed that the court may be pleased to pass a decree

- a) For declaration of right, title and interest of the plaintiffs over the Schedule A land, and
- b) For confirmation of possession of the plaintiffs over the schedule A land, and
- c) For a permanent injunction against the defendants not to disturb the peaceful possession of the plaintiffs over the schedule A land, and
- d) That during the pendency of the suit if the defendants dispossess the plaintiffs from the suit land or any part thereof or if during the course of evidence it is found that the plaintiffs are out of possession then for a decree of khas possession, and
- e) A percept may be issued to the revenue authority or correction of name in the revenue records in the name of the plaintiffs, and

f) For all costs of the suit also be decreed against the defendants.

g) Any other relief or reliefs the plaintiffs are entitled to may also be decreed in favour of the plaintiff.

8. The defendant Nos.1 to 7 have filed their written statement denying the case of the plaintiffs. In para 25 of the written statement the defendants while narrating the real story of the case have stated as follows :-

25. That the real state of affairs is that :

Abdul Aziz, son of Isafar Ali, original owner of the suit pattadar, gifted orally 5 bighas of land to Abdul Mazid and Samed, 36 years back and delivered possession to them. And both Samed and Abdul Majid by accepting the gift obtained possession of the gifted property. They constructed their dwelling houses and also residential premises thereon. They got their names mutated in the revenue record. These defendants are the heirs of said Abdul Majid and Samed. That for last 30 years these defendants prior to their predecessor have been possessing the suit land peacefully, publicly without interruption from anybody by paying land revenue to the government and local authorities.

It would be pertinent to mention herein that the contesting defendants, however, did not claim any title or interest in respect any part of the suit land described in the schedule to the plaint.

9. Based on the pleadings of the parties, the learned trial Court had framed the following issues :-

1) Whether there is any cause of action for the suit?

2) Whether the plaintiffs have right, title and interest over the suit land described in Schedule A to the plaint?

3) Whether the plaintiffs have possession over the suit land?

4) Whether the defendants have right, title and interest over the suit land and they have been possessing the same?

5) Whether the suit is barred by law of adverse possession?

6) Whether the plaintiffs are entitled to decrees as prayed for?

7) To what other relief/reliefs the parties to the suit are entitled?

10. On the basis of evidence available on record the learned trial Court had decreed the suit filed by the plaintiffs by declaring their right, title and interest over the suit land and also granting a decree for recovery of possession in respect of the suit land based on the alternative prayers made in the suit seeking recovery of possession.

11. Being aggrieved by the judgment and decree passed by the trial Court the defendant Nos.1 to 6 as appellants had preferred Title Appeal No.14/2004 before the Court of learned Civil Judge (Senior Division), Nagaon on the grounds and reasons mentioned therein. By the impugned judgment and decree passed by the learned Lower Appellate Court the appeal filed by the contesting defendants was rejected by the Lower Appellate Court as a result of which the present Second Appeal was preferred by the four appellants/defendants which admitted to be heard on the substantial question of law indicated herein before.

12. Mr. A. Choudhury, learned counsel appearing for the appellants/defendants fairly submits that although the contesting defendants do not have any claim over any part of the suit land nor are they questioning the entitlement of the plaintiffs to get a decree declaring their right, title and interest over the suit land, yet, what the appellants/defendants are aggrieved with is that part of decree passed by the learned Court below for recovery of possession in respect of the suit land although the plaintiffs have neither been able to show by leading evidence that they had been dispossessed from the suit land during the pendency of the suit land nor have they properly amended the relief portion prayed for in the plaint so as to claim such a relief. By placing reliance on the evidence adduced by PW 1 and PW 3, Mr. Choudhury submits that it is the admitted case of the plaintiffs that they are in possession of the suit land and taking note of such evidence the learned Courts below have also recorded their concurrent finding as regards Issue No.3 reflecting the evidence of the PWs 1 and 3 in the above aspect of the matter. However,

having done so, both the Courts below have placed reliance upon the evidence of the DW 1 and DW 3 to come to the conclusion that the suit land was under the possession of the defendants and on such basis went on to decree the suit for recovery of possession. He, therefore, submits that the Courts below have committed manifest illegality in granting relief to the plaintiff which was beyond their pleaded case and as such the substantial question of law framed in this appeal deserves to be answered in favour of the appellants.

13. Mr. M. H. Choudhury, learned counsel representing the respondents, on the other hand, submits that a perusal of the evidence on record would go to show that the plaintiffs have succeeded in proving and establishing their title over the suit land as per the pleadings contained in the plaint. Since the defendants do not have any claim over the suit land, hence, the learned Courts below were justified in declaring the right, title and interest of the plaintiffs over the suit land followed by a decree for recovery of possession taking note of the evidence adduced by the DWs 1 and 3 claiming that they were in possession of the suit land. Such being the position, there is no illegality or infirmity in the view adopted by the Court below in the facts and circumstances of the case and as such this Second Appeal is devoid of any merit.

14. I have considered the rival submissions made at the bar and have also perused the materials available on record. From a scrutiny of the judgment and decree under appeal it appears that the plaintiffs side has been able to prove the due execution of the registered deed of sale dated 29.03.1954 i.e. Ext-1; deed bearing No.9441 executed in the year 1968 i.e. Ext-8 as well as the sale deed dated 04.09.1971. That apart, the plaintiffs side have also produced the certified copies of the jamabondi to show that the land in question was recorded in the name of their vendors. As such, the plaintiffs have succeeded in discharging their initial burden of prima facie establishing their title and possession over the suit land.

15. A perusal of the pleading in the plaint further goes to show that although the plaintiffs had claimed to be in possession over the suit land, yet, as per the pleadings contained in paragraph 9 of the plaint it is apparent that there was a

dispute regarding actual physical possession in respect of a plot of land measuring 1 bigha 2 katha 10 lechas which had led to the institution of a proceeding under Section 145/146 Cr.P.C. being registered as M.R. Case No.437/94 which case was pending at the time of institution of the suit. There was an order of attachment of the land issued by the Executive Magistrate which order was in force on the date on which the suit was instituted. Under the circumstances, it was quite natural for the plaintiffs to pray for an alternative relief of recovery of possession if they were found to be dispossessed from any part of the suit land by the Court.

16. While discussing the Issue No.3 on the question of possession of the suit land the learned Court below took note of the evidence adduced by the PW 1 and PW 3 as well as the evidence of DW 1 and DW 3, both the parties having claimed their possession over parts of the suit land. From the materials available on record it is evident that the contesting defendants had made an attempt to occupy land measuring 1 bigha 2 katha 10 lechas out of the suit land which had lead to institution of proceeding under Section 145/146 Cr.P.C. Mr. A. Choudhury does not deny that the said land forming part of the suit land is under the possession of the contesting defendants. Since the contesting defendants did not have any claim regarding right, title and interest over any portion of the suit land, hence, acting on the basis of evidence available on record, the learned Courts below have exercised their discretionary power available under the provisions of Order VII Rule 7 CPC to pass a decree for recovery of possession in favour of the plaintiffs. Since the defendants do not have any claim over the suit land and having regard to the fact that the Courts below have declared the right, title and interest over the suit land in favour of the plaintiffs it is quite natural that the plaintiffs should be entitled to possession of the same in the event there is any doubt as regards the fact as to who is in possession.

17. Having regard to the facts and circumstances of the case as well as the evidence available on record, I am of the considered opinion that on the face of competing claim made by both the parties as regards possession over the parts of the suit land there was a serious doubt as regards the possession, both actual as well as constructive, of the plaintiffs over the entire suit land and therefore, the learned Courts below have rightly decreed the suit for recovery of possession so

as to set at rest any controversy that may still persist on the aforesaid aspect. Such a decree was necessary and called for so as to avoid multiplicity of proceedings between the parties and the Court below was justified in considering the same particularly when the plaintiffs had prayed for a relief of such nature in the plaint itself.

18. Order VII Rule 7 of the CPC confers adequate powers upon the Court to mould a relief that the Court may think just and proper even if the same has not been specifically prayed for. The power under Order VII Rule 7 CPC is a discretionary power available to the Court to be exercised for the ends of justice. Such discretion having been exercised by the Courts below in the facts and circumstances of the case, I do not find any justifiable ground to interfere with the same even if two views are possible in the facts and circumstances of the case. In view of the above, the submissions made by Mr. A. Choudhury, learned counsel for the appellants, does not merit consideration in the opinion of this Court. As such, the substantial question of law stands answered against the appellants.

19. At this stage, Mr. Choudhury, learned counsel for the appellants, has sought to raise a question as to in what manner the decree for recovery of possession could be executed since the plaintiffs have not indicated as to which portion of the suit land are in possession of the defendants. The said question is not relevant for the purpose of answering the substantial question of law framed by this Court and can be adequately gone into at the stage of the execution proceeding if and when the decree is put to execution. The parties to an execution proceeding would always be at liberty to raise any valid question that may come within the purview of Section 47 of the CPC read with the relevant provisions of Order XXI of the CPC.

20. In view of what has been discussed herein before, this Second Appeal must fail and the same is accordingly dismissed. There would be no order as to cost.

Registry to send back the LCR.

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