

Roy and Co. and anr. Vs. Sm. Nani Bala Dey and ors.

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Court : Kolkata

Decided On : Aug-31-1978

Reported in : AIR1979Cal50

Judge : B.N. Maitra, J.

Acts : [Evidence Act, 1872](#) - Sections 35, 95 and 101 to 104; ;[Transfer of Property Act, 1882](#) - Section 8; ;[Code of Civil Procedure \(CPC\) , 1908](#) - Section 75

Appeal No. : A.F.A.D. No. 249 of 1974

Appellant : Roy and Co. and anr.

Respondent : Sm. Nani Bala Dey and ors.

Advocate for Def. : Kashi Kanta Moitra and ;Adya Nath Ghosh, Adv.

Advocate for Pet/Ap. : Ranjit Kumar Banerjee, ;Saktinath Mukherjee and ;Dilip Kr. Dhar, Adv.

Disposition : Appeal allowed

Judgement :

B.N. Maitra, J.

1. The plaintiffs have alleged that the land of the Schedule B to the plaint forms part of the land of the Schedule A. On the 8th Dec., 1933, one Modal Singh

purchased the property of Schedule A from one Mohabir Prosad Mistri by a registered kobala and thereafter he was in peaceful possession of the same. By a registered Sale Deed dated 10-1-1962 the plaintiff purchased that property from Modal Singh. Defendants Nos. 2 to 4 have been carrying on business under the name and style of Messrs. Roy & Co. (Defendant No. 1). In 1958-59 the defendants illegally trespassed into the small 'Tin Chhapra' of Modal Singh. They possessed that shed as a godown for sometime. Thereafter they constructed a new C.I.T. sheet structure. The suit was filed for recovery of khas possession of the disputed land on declaration of plaintiffs' title thereto.

2. Defendants Nos. 2 and 3 filed a written statement alleging inter alia that the suit was not maintainable and the plaintiff had no title and possession. The property did not belong to Modal Singh, who never possessed the same. In 1948 they erected structures on the disputed land with verbal permission of the landlord. Subsequently it was renovated. They are in exclusive possession and have acquired indefeasible title thereto. The suit is barred by adverse possession.

3. The learned Munsif issued a writ for local investigation. The Pleader Commissioner reported in plaintiff's favour. The learned Munsif believed the plaintiff's version and decreed the suit. The defendants preferred an appeal and lost the same. Hence this appeal.

4. It has been contended at present that the Pleader Commissioner was directed by the learned Munsif to make relayment with reference to the C. S. map, but no such relayment was made. The Pleader Commissioner made a mistake in stating that the disputed land was included within the two kobalas produced by the plaintiff. But he did not apply the area test. The railway line has been shown as the western boundary But the Pleader Commissioner's case map shows that the railway line is to the further west and to the contiguous west of the disputed land there is an existence of Hill cart Road. So the western boundary did not tally. The Pleader Commissioner's report is therefore liable to be rejected. The suit is for declaration of title and hence plaintiff can succeed only on the strength of his own case. The case of Mahima Chunder v. Mahesh Chunder reported in (1888) 16 Ind App 23 at p. 26 (PC) has been cited in this connection. The documents of title

(Exts. 1 (a) and 1 (b)) show that the disputed property was a part of 'Chukani Jote'. So, it is a tenure. After the provisions of West Bengal Act I of 1954 came into force, the rights of the intermediaries vested in the State. The plaintiff has not proved that his vendor retained the disputed land according to the provisions of Section 6 of the Act. Hence on that ground alone the suit will fail. Since it was intermediary interest, the intermediary cannot, in the eye of law, retain the disputed land since the same was not retained by the plaintiff's vendor by filing a proper return. The cases in : [1969]3SCR908 , : [1970]2SCR566 ; : [1973]3SCR893 and : [1976]1SCR739 have been cited to show that mere right to possess is not sufficient. If the disputed land is in possession of a trespasser, the suit by the proprietor or tenure-holder for declaration of title and possession is not maintainable. Here there was a conflict between the area and the boundary described in the two documents, Exts. 1 (a) and 1 (b). Half cottah of land was sold to the plaintiff's vendor and that half cottah land was purported to be transferred to the plaintiff in 1962, vide the kobalas, Exts. 1 (a) and 1 (b) respectively. In the case of Durga Prosad v. Rajendra Narayan in (1909) 10 Cal LJ 570 it has been held that in case of conflict between the area and boundary, the description of the boundaries will prevail. But that decision was reversed by the Privy Council in the case reported in (1913) 40 Ind App 223 (PC). The courts below took into consideration the entry in the draft R. S. Khatian Ext. 5. But the khatian prepared during the attestation stage of the R. S. operations is not admissible in evidence. It will appear from the first document, Ext. 1 (a) that the property in question appertains to the 'Jote Gazal Singh'. The same description appears from the Schedule A to the plaint. The case of Midnapur Zamindari Company v. Naresh Narayan in 48 Ind App 49 at p. 54 : (AIR 1922 PC 241 at p. 242) has been cited to show that, that 'Jote' is a general term and it is not necessarily equivalent to a 'raiya Jote'. Since on the plaintiff's own showing it is a 'raiya Jote', the suit is not maintainable, because there is no cogent evidence that the plaintiff's vendor had retained the same.

5. The learned advocate appearing on behalf of the plaintiffs respondents has contended that no objection was filed against the Pleader Commissioner's report, though several chances had been given to the defendant-appellant to prefer objection. Further there is no pleading that originally the disputed property

appertained to any Jote or that the plaintiff's vendor did not retain the suit land. Hence at this stage of the second appeal, the appellant is not entitled to argue that, since it is an intermediary interest, it vested in the State. The main defence was of adverse possession, but the same was negated by both the courts. Hence the fate of the appeal is concluded by the findings arrived at by the first appellate court.

6. Reference may be made to the cases of Gossain Das in (1913) 18 Cal LJ 541, 59 Cal LJ 532 at p. 534 : (AIR 1934 Cal 851 at p. 852) and 52 Cal WN 719 at p. 722 : (AIR 1948 PC 207 at p. 209) to show that in case of conflict between the area and the boundary, the description of the boundary will prevail. It will be pertinent to point out that the Bench decision of our Court in (1909) 10 Cal LJ 570 was set aside by the Judicial Committee in the case in (1913) 40 Ind App 223 (PC) on a different point and not on the question of conflict between the area and the boundary. So this branch of the appellant's arguments is not accepted.

7. Then about the report of the Pleader Commissioner. Reference may be made to the famous decision of the Judicial Committee in Chandan Mull's case reported in 44 Cal WN 205 at p 212 : (AIR 1940 PC 3, at pp. 5, 6) to show that the Commissioner's report should not be rejected except on clearly defined and sufficient grounds. The Court should not act as an expert and overrule the Commissioner's report whose integrity and carefulness are not questioned and who did not blindly accept the assertion of either party. Here the Pleader Commissioner's honesty has not been challenged. He did not blindly adopt the assertion of the plaintiff. As stated before several chances were given to the defendant-appellants to assail the Commissioner's report, but no objection was filed. Hence at this stage this objection against the Commissioner's report cannot be accepted.

8. Then about the question of admissibility of the document, Ext. 5 which is a draft khatian prepared during the attestation stage of the R. S. operations. Reference may be made to the decision of Mr. Justice Mukherji in AIR 1962 Cal 393 at p. 394 to show that the entries made in the draft record of rights are admissible in evidence under Sec. 35 of the Indian Evidence Act, because such entry was made

by a public servant in the discharge of the official duty. So this objection raised on behalf of the appellant will also fail.

9. Then about the question whether it is a tenure and if the plaintiff can succeed on the strength of his own case. Reference may be made to the decision of Sir John Beaumont in 50 Cal WN 477 at p. 478 : (AIR 1946 PC 59 at pp. 60, 61) and of Mr. Justice Jagannath Das in AIR 1954 SC 526 to show that in a suit for title, the plaintiff can succeed only on the strength of his own case and not on the defendant's weakness. Let this aspect of the case be considered now.

10. Of course emphasis has been laid on behalf of the respondent that the alleged defects in the plaintiff's title were not pleaded in the written statement. Similar argument was advanced before the Judicial Committee in the case in 50 Cal WN 377, vide p. 378: (AIR 1947 Cal 338 at p. 339) of the report. Their Lordships pointed out that though the defendant did not plead the possible defects in the plaintiff's title, the same did not relieve the plaintiff of the task of proving his own title. Here the question is of maintainability of the suit and that is a legal plea. The decision of the Supreme Court in : AIR 1971 SC 2018 may be referred to show that the plea of maintainability is legal one and if the suit on the face of it is not maintainable, the fact that no specific plea was taken or no precise issue framed, is of little consequence. Here the plea of maintainability of the suit was raised and issue framed. The specific defence was that the plaintiff had no title.

11. It has been very pertinently pointed out on behalf of the appellant that in the Schedule A to the plaint there is a clear averment that this property appertains to 'Jote Gazal Singh, Pargana Baikunthapur, Mauza at present Siliguri'. Since necessary averment has been made by the plaintiff himself in the plaint, the task has been made easier. It has already been stated that the Judicial Committee has pointed out that the Jote is not equivalent to raiyati Jote. The cases in (1911) 14 Cal LJ 38 and 48 Cal LJ 97 : (AIR 1928 Cal 880) will have to be looked into. This is a question of law and the same cannot be lightly brushed aside by taking a plea that this was not pleaded in the written statement. According to the provisions of Order 14, Rule 3 of the Civil P. C., an issue can be framed on the pleadings and documents as well.

12. So, considering the facts and circumstances of the case, for the ends of justice, the suit must be sent back on remand. On receipt of the records the learned Munsif will consider only three points, viz., the question of maintainability of the suit and the question of plaintiff's title. He will determine whether the disputed property appertains to an intermediary interest and who was in actual physical possession of the same at the date of the vesting. If it is found that it is an intermediary interest and a trespasser was in possession thereof on the relevant date, the plaintiff cannot succeed merely by saying that he had a right to recover khas possession thereof. This contention was repelled by Mr. Justice Krishna Aiyar in the latest case in : [1976]1SCR739 . There is a Bench decision of our High Court on this point, vide the case of Ratindra v. Subodh Gopal reported in ILR (1969) 2 Cal 315. No other point will be discussed or reopened by the learned Munsif.

13. The appeal is allowed. The judgment and decree appealed against be set aside and the suit remitted to the trial court for disposal according to law in the light of the observations made in the body of the judgment.

14. The costs will abide the result.

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