

Sushila Hati and ors. Vs. Subhas and ors.

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Court : Kolkata

Decided On : Apr-18-1984

Reported in : AIR1985Cal197

Judge : Sukumar Chakravarty, J.

Acts : [Code of Civil Procedure \(CPC\) , 1908](#) - Section 100; ;Easement Act, 1882 - Section 15

Appeal No. : A.F.A.D. No. 1271 of 1974

Appellant : Sushila Hati and ors.

Respondent : Subhas and ors.

Advocate for Def. : Ashoke Kr. Sengupta, Adv.

Advocate for Pet/Ap. : Jamini Kumar Banerjee, Adv.

Disposition : Appeal dismissed

Judgement :

Sukumar Chakravarty, J.

1. This second appeal is directed against the judgment and decree passed by the learned Subordinate Judge, Second Court, Hooghly in Title Appeal No. 262 of 1973, setting aside the judgment and decree of dismissal passed by the learned

Munsif, first court, Serampore in Title Suit No. 73 of 1971 and decreeing the suit.

2. Plaintiff filed the suit for partition and injunction on a declaration of his alleged title to the suit land.

3. It was the case of the plaintiff that there was one 'Baithakkhana' (parlor) consisting of two rooms situated in plot No. 1294 of Khatian No. 692 in Mouja Adan. There was a partition between plaintiffs predecessor Nibaran Hati, defendants 1 to 3, defendants 4 and 5, and defendants 7 to 10 in respect of their properties including the Baithakkhana mentioned in the Ka Schedule to the plaint. By that partition plaintiffs predecessor Nibaran Hati and defendants 4 and 5 got the western room of the said Baithakkhana. This partition was effected by a registered deed of partition D/- 9-12-44, By virtue of the sale deed D/- 18-10-54 defendant No. 4 sold their half share of the western room of the Baithakkhana to the pro forma defendant No. 6 and put her in the possession of the same. Thereafter by a deed of exchange D/- 26-11-67 pro forma defendant No. 6 exchanged her share in the western room of the Baithakkhana with the defendants Nos. 1 to 3. The defendant No. 1 felt inconvenience in residing at the rooms of his homestead which he got by an amicable partition with his co-sharers and he accordingly approached the plaintiffs and pro forma defendant No. 6 for allowing him to reside in the Ka scheduled room which is the suit room for 3 years and he was given the permission in the month Agrahayan, 1362 B.S. and on further request by defendant No. 1 the permissive possession was extended. The defendant No. 1 broke a window on the eastern wall of the disputed western room of the Baithakkhana and caused damage and filled up the gaps with bricks on 28-2-71. The permission given to the defendant No. 1 was thereafter revoked and the suit was filed for the relief as claimed.

4-5 . The defendant No. 1 alone contested the suit after filing the written statement. The material allegations in the plaint were denied by the defendant No. 1. The permissive possession of the defendant No. 1 as alleged by the plaintiff was denied. It was contended by the defendant No. 1 that he acquired title to the disputed room by adverse possession for the last 40 years. According to the defendant No. 1 the plaintiff had no title to the suit land and he was not entitled to

any relief in the suit

6. The learned Munsif on consideration of the evidence dismissed the suit on the ground that the plaintiff failed to prove his alleged title to the disputed room. On appeal the learned Subordinate Judge reversed the judgment and decree of the learned Munsif and decreed the suit by holding that the plaintiff had 8 annas share in the Kha scheduled disputed room and the defendants Nos. 1 to 3 had the remaining 8 annas share, and that the defendant did not acquire title to the entire disputed room by adverse possession.

7. Being aggrieved, the defendants have preferred this second appeal on the ground that the learned Subordinate Judge committed mistake in law in reversing the judgment and decree of dismissal passed by the learned Munsif and decreeing the suit.

8. Mr. Jamini Kumar Banerjee, learned Advocate for the appellants, while advancing his argument in support of the appeal has urged two points. His first point is that the first appellate court has erred in law by not holding that there is no sufficient evidence before the Court on the strength of which it can be held that plot No. 1292 was wrongly mentioned in the partitioned deed dated 9-12-44 (Ext. 1) in places of plot No. 1294 and that the first appellate Court accordingly committed mistake in holding that the plaintiff had title to the half share of the disputed room in plot No. 1294. His second point is that the first appellate court committed mistake in law by not holding that the defendant had acquired title to the suit land by adverse possession when the plaintiff failed to prove that the defendant was in permissive possession.

9. Mr. Ashoke Kumar Sen Gupta, learned Advocate for the respondent-plaintiff on the other hand, has submitted that the findings of fact of the first appellate Court which have been challenged in this second appeal are based upon appreciation of relevant evidence and accordingly the said findings of fact cannot be interfered with in the second appeal by the High Court. Placing reliance on the decision in : [1962]2SCR509 (Sinha Ramanuja Jeer v. Ranga Ramanuja Jeer), Mr. Sen Gupta has submitted that the High Court has no jurisdiction to entertain a second appeal even on the ground of erroneous finding of fact however gross the error may seem

to be.

10. The learned Subordinate Judge (first appellate court) on due consideration of the pleadings, evidence on record and other relevant facts and circumstances held that the plot No. 1292 containing the Baithakkhana was wrongly mentioned in the partition deed Ex. 1 in place of plot No. 1294. The allegation of the plaintiff that the plot No. 1294 contains the Baithakkhana consisting of two rooms and deuri and royak as described in Ka schedule to the plaint and that the disputed property is the western room out of the said two rooms and the corresponding deuri and royak as described in the Kha schedule, has not been denied by the defendant. In the written statement, this allegation has been rather admitted. The allegation in the plaint that in the partition deed the plot No. 1292 has been wrongly mentioned in place of plot No. 1294 has also not been challenged. The learned Subordinate Judge has also established the said fact by discussion of the sale deed D/-18-10-54 by virtue of which the defendant No. 4 sold their half share in the disputed Kha scheduled suit property to pro forma defendant No. 6 and also by discussion of the deed of exchange dated 26-11-67 by which pro forma defendant No. 6 exchanged the said property with defendants Nos. 3 to 3. Having considered all the materials, the learned Subordinate Judge arrived at the finding that the two roomed baithakkhana with its premises as described in schedule Ka to the plaint situated in plot No. 1294 and that the said plot was wrongly stated as plot No. 1292 in the partition deed Ex. 1. This finding of fact of the learned Subordinate Judge cannot be interfered with in the second appeal. On due consideration of all evidence specially the partition deed Ex. 1, the sale deed D/- 18-10-54 and the deed of exchange D/- 26-11-67 the learned Subordinate Judge arrived at the finding of fact that the plaintiff had 8 annas share in the disputed Kha Scheduled property and that the remaining 8 annas share belonged to the defendants Nos. 1 to 3. This finding of fact also cannot be interfered with in this second appeal.

11. As regards the second point with regard to defendant's acquisition of title to the suit land by adverse possession for long 40 years as urged by Mr. Banerjee, learned Advocate for the appellant-defendant, the learned Munsif held in his judgment that defendant No. 1 Jatindra who is the sole D. W. 1 could not establish the same in evidence. The learned Munsif observed also that the plaintiff's

allegation that the defendant was a licensee in the suit land could not be also satisfactorily proved, as there was discrepancy in the evidence and plaint as to who actually gave the permission. In the plaint it was alleged that plaintiff gave the permission whereas in evidence it was stated that plaintiffs father gave the permission. The learned Subordinate Judge held that if it was assumed that the plaintiff failed to prove that the defendant was a licensee, still the defendant as a co-sharer could not acquire title to the suit property by his alleged adverse possession, when there was no case of complete ouster of other co-sharers. It may be stated here that the defendant (D. W. 1) admitted in his deposition that plaintiffs father allowed him to live in the disputed room. So according to the defendant the starting point of possession by the defendant was by permission. The defendant himself admitted that he was a licensee in the disputed room and the evidence has shown that plaintiff allowed the defendant to continue his such possession till the defendant had expressed his sole right of ownership by removing the window and filling up the gap with bricks in 1971. The Court below therefore rightly found that the defendant did not acquire title to the disputed property by adverse possession. The learned Subordinate Judge therefore did not commit any mistake in law in decreeing the suit.

12. In the result, this second appeal is dismissed on contest. I make no order as to costs.