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Court : Kolkata Appellate

Decided On : Mar-18-2011

Judge : Prasenjit Mandal, J.

Appeal No. : C.O. No. 1174 of 2008 With CAN No.10174 of 2009

Appellant : Ashis Kumar Sarkar and ors.

Respondent : Satyanarayan Ray and ors.

Advocate for Def. : Mr. Probal Kumar Mukherjee; Mr. Suhrid Sur, Advs

Advocate for Pet/Ap. : Mr. B.K. Banerjee; Ms. Shila Sarkar, Advs

Judgement :

1. This application is at the instance of the plaintiffs and is directed against the judgment and order dated February 29, 2008 passed by the learned Additional District Judge, Fifth Court, Burdwan in Misc. Appeal No.17 of 2007 thereby reversing the order no.84 dated May 4, 2006 passed by the learned Civil Judge (Junior Division), First Court, Burdwan in Title Suit No.263 of 2001.

2. The short fact is that the plaintiffs instituted a suit being Title Suit No.263 of 2001 before the learned Civil Judge (Junior Division), First Court, Burdwan against the defendants/opposite parties herein for declaration of title, permanent injunction and other reliefs in respect of the suit property, as described in the schedule of the plaint. The defendants/opposite parties entered appearance and they are contesting the said suit by filing a written statement. The plaintiffs filed an

application for appointment of a receiver and the defendants filed a written objection against the said application denying all the material allegations contained in the application. Upon hearing both the sides, the learned Trial Judge allowed the application for appointment of a receiver. Being aggrieved, the defendants preferred a misc. appeal being Misc. Appeal No.17 of 2007 and that misc. appeal was allowed setting aside the order of appointment of a receiver passed by the learned Trial Judge. Being aggrieved by such orders, the plaintiffs have come up with this application.

3. Now, the point is whether the learned lower appellate Court is justified in allowing the said misc. appeal.

4. Upon hearing the learned counsel for the parties and on going through the materials on record, I find that predecessor-ininterest of the plaintiffs, namely, Mangala Charan Sarkar, was in possession of the suit property and the C.S. Record stands in his name. During the R.S. operation, the suit property was recorded in the name of the defendants. It may be mentioned that the suit property comprises dag no.1380 of Mouza Serampore, P.S. Raina, District Burdwan and it is a tank called Tataripukur having an area of 1.45 acres of land. The present plaintiffs are the heirs and successors of Mangala Charan Sarkar, since deceased, but the suit tank has not been recorded in their names in the R.S. record.

5. On the other hand, the R.S. record in respect of the suit tank stands in the name of the defendants. This fact reveals from the papers filed by the defendants before the learned Trial Court. It appears that out of the area of 1.45 acres of tank in suit, 30 decimals of land had been requisitioned by the Government of West Bengal for making a road and for that reason notice was issued upon the defendants and not upon the plaintiffs at all.

6. Therefore, such facts clearly indicate that the defendants had possession over the entire suit tank.

7. The plaintiffs filed the suit for declaration of title and injunction in the year of 2001 meaning thereby they have possession over the suit property but after filing of the suit, they did not pray for appointment of a receiver in respect of the tank in

suit. After lapse of three years, they filed the application for appointment of a receiver in respect of the tank in suit. Admittedly, the learned Trial Judge appointed the local Panchayat Prodhan as receiver of the suit tank and he is now in possession of the suit tank but such a measure was taken after lapse of three years. The plaintiffs did not specify the reasons why they have taken such measures after lapse of three years from the date of institution of the suit. Neither the plaint nor the application for appointment of a receiver clearly indicates when and which of the defendants took steps for dispossession of the plaintiffs from the suit tank. Nor is there any evidence/material as to what mischief the defendants are doing in respect of the tank in suit. There is also no clear evidence as to the manner of threatening the plaintiffs with regard to the possession of the plaintiffs in respect of the tank in suit after three years from the date of filing of the suit. But the learned Trial Judge without considering such factors and the basic principles in granting the prayer for appointment of a receiver, allowed the application for appointment of a receiver thereby appointing the local Panchayat Prodhan as receiver in respect of the tank in suit.

8. The plaintiffs did not take any step for recording their names in the R.S. record. Nor did they get any notice at all for requisition of a part of the tank in suit. On the other hand, it is the defendants who got the notice before requisition by the Government and they got the compensation for requisition of 30 decimals of land out of the tank in suit. The R.S. record has been prepared in their name showing their possession of the tank in suit to the extent of 1.15 acres of land.

9. Now, the tank in suit stood in the name of the predecessor-in-interest of the plaintiffs as Niskar. Neither the R.S. record nor the C.S. record are the documents of title but they have a presumptive value unless the presumption is rebutted by appropriate materials. In the instant case, the predecessor-in-interest of the plaintiffs had possession over the tank in suit and thereafter from the R.S. record and the materials relating to requisition and compensation by the Government it is apparent that it is the defendants who were in possession of the entire tank in suit. Had the plaintiffs been in possession over the tank in suit, they were not required to pray for appointment of a receiver in respect of the said tank in suit.

10. In case of a dispute relating to possession between the C.S. record and the R.S. record, the latter document, that is, the R.S. record shall prevail and in the instant case the R.S. record supports the possession of the defendants in respect of the suit tank.

11. Mr. Banerjee, learned senior advocate appearing for the plaintiffs, refers the decision of Jambagavalli Ammal vs. Govindaraja Kandiar and anr. reported in AIR 1980 Madras 103 and thus, he submits that the responsibility of the Courts becomes all the more greater if there is a race as between the two competing parties to possess the suit properties. So, the learned Trial Judge was justified in allowing a third party as a receiver. In the instant case, the learned lower appellate Court has considered all the aspects and the decision referred to by the parties and thereafter he has come to the conclusion that no subsequent event or development has been shown by the plaintiff, which necessitated for appointment of a receiver by the trial Court. The learned lower appellate Court has also discussed the materials placed by the defendants in support of their possession and thus, he has concluded that the defendants were in possession of the suit tank.

12. Mr. Banerjee has contended that the appeal Court judgment lays down independent observations and it does not lay down the consideration of the judgment of the learned Trial Judge or why the judgment passed by the learned Trial Court has been set aside by referring the conclusions arrived at by the learned Trial Judge. With due respect to Mr. Banerjee, I am of the view that the learned lower appellate Court has considered all the aspects of the matter in dispute in details. He has relied on the documents produced by the parties. He has given reasons why he did not consider the affidavits filed by the parties in support of their respective contentions. It may be pointed out here that though the defendants have claimed that their predecessor in interest purchased the land from Mangalal Charan Sarkar but they could not produce the deed. Anyway, from the materials on record, the learned lower appellate Court has come to a conclusion that the defendants are in possession of the suit tank. Under such circumstances, according to the provisions of Order 40 Rule 2 of the C.P.C. a party in possession of the suit property should not be dispossessed by appointment of a third party as

a receiver over the suit property.

13. Mr. Banerjee has also referred to the decision of S. Saleema Bi v. S. Pyari Begum and anr. reported in (2000) 9 SCC 560, particularly paragraph no.3 and thus, he submits that the Court may appoint a receiver when it is just and convenient and when there is a prima facie case in favour of the plaintiff. So, the learned Trial Judge has rightly appointed a third party as receiver. With due respect to Mr. Banerjee, I hold that in view of the provision of Order 40 Rule 2 of the C.P.C. the defendants should not be dislodged from the possession of the suit tank.

14. In view of the above findings, I am of the view that the findings arrived at by the learned lower appellate Court cannot be said to be perverse or without any materials. The learned lower appellate Court has rightly concluded that the findings of the learned Trial Court for appointment of a receiver is not based upon judicial conscience and is, thus, liable to set aside.

15. Therefore, I am of the view that this application has no merit at all. The judgment and order dated February 29, 2008 passed by the learned Additional District Judge, Fifth Court, Burdwan is affirmed. Since the property in suit is a tank, the receiver is directed to hand over possession of the suit tank in favour of the defendants by the end of Chaitra, 1417 B.S. If no possession is delivered by that date, the defendants shall be presumed to be in possession of the tank in suit with effect from 1 st Baisakh, 1418 B.S.

16. In view of the above orders, the CAN No. 10174 of 2009 praying for interim order has now become infructuous and it is, thus, dismissed.

17. It is also hereby recorded that the above observations are made for the disposal of the application.

18. Considering the circumstances, there will be no order as to costs.

19. Urgent xerox certified copy of this order, if applied for, be supplied to the learned Advocates for the parties on their usual undertaking.

