

5 SCOB [2015] HCD 96

High Court Division

(Civil Appellate Jurisdiction)

Mr. Md. Oziullah, Advocate

..... For the appellants

First Appeal No. 03 of 2013

Mr. A.M. Aminuddin, Advocate

..... For the Respondents

Ramesh Chandra Das and others

..... Appellants

Versus

Heard On: 05.07.2015 and

Judgment On: 07.07.2015.

Sureshwar Mazumdar and others

..... Respondents

Present:

Mr. Justice Sharif Uddin Chaklader

And

Mr. Justice Khizir Ahmed Choudhury

Section 106 of Transfer of Property Act:

The defendant forfeited their right to stay in the suit properties by denying the title of the plaintiffs and as such the contents of the notice or any purported facts are insignificant here. Because if someone denies title of the land lord, notice under section 106 of the Transfer of Property Act may be dispensed with. Consequently the decision referred in 51 DLR 393 is not applicable here. On the other hand the case reported in 1 BLC AD 156 as reported by Mr. A.M. Amin Uddin has got semblance with the present case. ... (Para 14)

Judgment

Khizir Ahmed Choudhury, J:

1. This first appeal has been preferred against the judgment and decree dated 04.11.2012 passed by learned Joint District Judge, 5th Court, Dhaka in Title Suit No. 484 of 2012 decreeing the suit in favour of the plaintiff.

2. Gopal Chandra Majumder, the predecessor-in-interest of respondent Nos. 1-7 and respondent Nos. 8-2 as plaintiffs instituted the aforesaid title suit impleading the present appellants and respondent Nos. 15-26 as defendants praying for declaration of title in the “ka” schedule property and further declaration that registered deed of sale No. 4132 dated 07.09.1996, deed of sale No. 4134 dated 07.09.1996, deed No. 4130 dated 07.09.1996, deed No. 4139 dated 07.09.1996. deed No. 3510 dated 31.08.1998, as described in the “kha” schedule to the plaint are inoperative, valueless, ineffectual and plaintiffs are not bound by those deeds and also to pass decree for evicting the defendant Nos. 1-11 from schedule Ga(1)-Ga(5).

3. The case of the plaintiff, in brief, is that suit properties belonged to Satish Mohon Roy who has two sons namely Sushil Mohon Roy and Narayon Chandra Roy, 4 daughters namely Purno Shashi, Chara Bala, Swadesh Bala and Bina Bala. Purno Shashi was married with Subol Chandra Das, son of Subodh Chandra Das. Except Purno Shashi Das, sons and others daughters left for India where they started residing as their permanent abode and in spite of earnest request by Satish Mohon Roy, they did not return to Bangladesh. Purno Shashi Das and her Husband Subol Chandra Das came to the homestead of Satish Mohon Roy and started to reside there taking care of Satish Mohon Roy. Subsequently Satish Mohon Roy executed a will in favor of Purno Shashi Das on 03.01.1963 appointing Subol Chandra Das as executor of the will. Purna Shashi Das and her husband Subol Chandra Das continued to reside with Satish Monon Roy by looking after him. Thereafter Satish Mohon Roy passed away and subsequently Subol Chandra Das, executor of the will initiated a Probate Case being Probate Case No. 19 of 1963 and learned District Judge granted Probate on 01.07.1963 in favor of Purno Shashi Das. Subsequently, Subol Chandra Das, transferred the suit land to plaintiff Nos. 1-3, Jatendra Chandra Majumder, father of plaintiff Nos. 4-6 and grand father and father-in-law respectively of plaintiff Nos. 7-8 vide five (5) sale deeds and delivered possession thereof. The plaintiffs mutated their names in the record of rights, paid rent and continued to hold and possess the same by themselves and through Bharatias. The defendants were monthly ejectable tenants but they were habitual defaulter in payment of rent and in spite of repeated demand they didn't pay rents. Subsequently, on being approached, Marshal Law authority issued notice to defendants to quit suit properties.

4. Challenging the Notices, the defendants instituted Civil Suit being Civil Suit No. 98 of 1984 in the 1st Court of Subordinate Judge Dhaka which was renumbered as civil Suit No.93 of 1991, wherein they made an application for amendment of plaint claiming to have purchased the suit land from Narayon Chandra Roy through registered deed of sale but their application for amendment of plaint was rejected against which they preferred Civil Revision No.1810 of 2000 before the High Court Division.

5. In the plaint they admitted to be a Bharatia but subsequently they claimed ownership to the suit land by filing amendment application and as such their claim has rightly been rejected. The plaintiffs have been holding and possessing the suit land but due to creation of collusive deeds, title of the plaintiffs being clouded, they issued notice under section 106 of Transfer of Property Act but in spite of getting Notice, the defendants did not pay heed thereto which constrained the plaintiffs to file the instant suit.

6. Defendant Nos. 1 and 2, 10-12 contested the suit by filing written statement contending, inter-alia that Sotish Mohon Roy being owner of the suit properties died leaving behind two sons namely Sushil Mohon Roy and Narayan Chandra Roy, wife Naresh Bala Roy and four daughters namely Tanu Bala Roy, Shadeshi Bala Roy, Bina Bala Roy and Purno Sashi Das. The defendants were tenants under the original owner and subsequently under Narayan Chandra Roy son of Sushil Chandra Roy. Thereafter, they used to pay rent to Narayan Chandra Roy through plaintiff No.1. Narayan Chandra Roy transferred .017 acres of land on 07.09.1996 in favor of Romesh Chandra Das vide deed of sale No. 4131, .0175 acres of land in favor of Nur Mohammad Gazi vide deed of sale No. 4132, .0175 acres of land in favor of Shanti Ranjon Sarker vide deed of sale No. 4133 and .0175 acres of land in favor of Khorshed Alom vide deed sale No. 4134 and thereafter transferred .1697 acres of land in favor of Shanti Ranjon Sarker and aforementioned other purchasers vide deed of sale No. 3510 dated 31.08.1998.

Defendant Nos. 1-2 in the meantime filed Civil Suit No. 94 of 1984 before the sub-Judge, 1st Court Dhaka praying declaration of title and challenging Notice dated 06.03.1984 issued from the office of Deputy Commissioner, Dhaka for evicting defendant Nos. 1-2. Satish Mohon Roy without executing any will died leaving behind his aforesaid heirs and hence, the will as mentioned in the plaint is fraudulent and the plaintiff probated the will through deceitful means without serving any Notice to the next of kin of Satish Mohon Roy. With a view to grab the suit property plaintiffs created the deed of sale showing Subal Chandra Das as vendor who had no saleable interest in the suit land and as such the suit be dismissed.

7. Both the parties examined 3 witnesses from each side and also submitted documentary evidences. The trial Court, after hearing the parties and upon perusal of the evidences held that the plaintiffs submitted the certified copy of the Probated will dated 01.07.1963 whereby it is proved that Sotish Chandra executed will in favour of daughter Purnososhi which has been duly probated and record of right has been prepared in the name of Purnososhi. The trial Court further found the defendants contention that the sons and daughters of Sotish Chandra did not go to India has not been substantiated. The trial Court further found that Purno Shashi through the executor transferred the suit properties to the plaintiffs and they mutated their name in the record of right and paid all utility bills to the authority and the defendants being tenants under the plaintiffs subsequently claimed title by creating registered documents denying plaintiffs title and accordingly decreed the suit.

8. Mr. Md. Oziullah, the learned Advocate appearing for the appellant submits that the Subal Chandr Das, the executor of the will has no right to transfer the suit property. He further submits that the suit is barred by Limitation. The suit as framed by the plaintiff for declaration of title and other claims are not maintainable and the defendants being purchaser of the suit land have been possessing the same. He further submitted that notice under section 106 of the Transfer of Property Act is not a proper notice and without filing a suit for partition instant suit is not maintainable. In support of his contention learned Advocate has referred the case of Kamruzzaman Khan -vs- Shahidul Alam Khan and others reported in 51 DLR 393 and case of the Most. Sahida Alam –vs- Md. Hasmat Ali reported in 61 DLR(AD) 8.

9. On the other hand Mr. A.M. Aminuddin, learned Advocate appearing on behalf of the respondents submits that the plaintiff purchased the suit property from the lawful owner namely Purno Shashi who has got the suit properties from her father Sotish Chandra Roy by virtue of will which was duly probated and also record of right was prepared in her name. Purno Shashi transferred the suit property through her husband Subol Chandra Das by registered sale deeds and after purchase, the plaintiffs have mutated their names in the record of right, paid utility bills and while owning and possessing through tenants i.e. the defendants, they denied title of the plaintiffs for which the plaintiffs have been constrained to file the instant suit and as such the suit is maintainable. He further submits all the reliefs are required to be sought in a suit for proper adjudication. He further submits that as the defendants by creating documents regarding the suit properties denied title of the plaintiffs, their varatia right has been forfeited and the trial Court rightly and reasonably decreed the suit. Mr. Aminuddin in support of his contention referred a decision reported in 1 BLC (AD) 156 wherein it has been reiterated that the tenant cannot set up title to a property in which he is monthly tenant, without surrendering possession to his landlord.

10. It is found that the original owner Sotish Chandra made a will in favour of his daughter Purno Shashi Roy on 03.01.1962 which has duly been probated and by virtue of the said will Purno Shashi as owner and possessor, transferred the same to plaintiffs through his executor Subol Chandra Das. The said will has not been challenged till date by any other heirs of Sotish Chandra Roy for which it is assumed that the will is genuine one. By filing title suit being Title Suit No.93 of 1991, defendants challenged the eviction notices and also they prayed for declaring the plaintiffs deeds being collusive and void and also for decree of permanent injunction in respect of the suit land wherein the present plaintiff are defendants. Although the defendants intended to assert that they tendered rent to the plaintiffs on behalf of the Narayan Chandra Roy son of Sotish Chandra Roy, but said contention is not sustainable as because they failed to submit papers showing payment of rents to Narayan Chandra Roy. In that suit they have challenged the notices issued by Martial Law Authority and also they have claimed tenancy right for the suit properties. But subsequently they sought to amend the plaint claiming purchase of the suit property from Narayan Chandra Roy son of Sotish Chandra Roy by registered instrument. Such prayer for amendment has not been allowed by the Court of original jurisdiction which has been upheld up to revisional stage. From the above conduct of the defendants, it can be assumed that the defendants shifted from their earlier position and subsequently they raised claim for ownership and thereby forfeited bharatia right in the suit property.

11. The plaintiffs, after purchase mutated their name in the record of right, paid rents and other utility services which also proved that plaintiffs documents have been acted upon. It is curious that no heirs of Sotish Chandra Roy challenged the probate proceeding at any point of time and also they did not challenge the documents executed and registered in favour of the plaintiffs which also prove that plaintiffs are owner of the suit properties.

12. Now we shall deal with the contention of the learned advocate for the Appellant that due to insertion of so many prayers in the plaint, the suit is not maintainable. Order 2 rule 2(1) of the Code of Civil Procedure runs as follows:

2. "(1) Every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action; but a plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any Court".

(2) Where a plaintiff omits to sue in respect of, or intentionally relinquishes, any portion of his claim, he shall not afterwards sue in respect of the portion so omitted or relinquished.

(3).....

13. So, as per provisions of law all the prayers are to be inserted in a suit which the plaintiffs have rightly done.

14. So far the defects of notice under section 106 of the Transfer of Property Act as submitted by the learned advocate for the appellant, it can be said that the defendant forfeited their right to stay in the suit properties by denying the title of the plaintiffs and as such the contents of the notice or any purported facts are insignificant here. Because if someone denies title of the land lord, notice under section 106 of the Transfer of Property Act may be dispensed with. Consequently the decision referred in 51 DLR 393 is not applicable here. On the other hand the case reported in 1 BLC AD 156 as reported by Mr. A.M. Amin Uddin

has got semblance with the present case. Submission of the learned Advocate for the appellant that instead of filing a SCC suit the present suit filed by the plaintiff for declaration of title along with other prayers being not maintainable is also cannot stand. In the instant case the defendants have created some registered instruments regarding the suit properties denying the title of the plaintiffs and as such plaintiffs have legitimate right to file the instant suit for declaration of title and other reliefs and the present suit is quite maintainable.

15. Upon consideration of the evidences, documents and other circumstances we found that the defendants as tenant denied title of the plaintiffs and so they forfeited right to stay in the suit properties and as such the trial Court justifiably decreed the suit in favour of the plaintiffs.

16. We find no merit in the appeal.

17. In the result, the appeal is dismissed without any order as to costs.

18. Let a copy of this judgment be sent to the concerned Court. Send down the Lower Court Record.