

IN THE HIGH COURT AT CALCUTTA
Civil Appellate Jurisdiction
APPELLATE SIDE

Present:

The Hon'ble Justice Tapabrata Chakraborty
&
The Hon'ble Justice Partha Sarathi Chatterjee

FAT 451 of 2016

Kalyan Kumar Bera
versus
Milan Kumar Khutia & Ors.

For the Appellant : *Mr. Pratip Kumar Chatterjee,*
Mr. Chittapriya Ghosh,
Mr. Kuntal Ray.

For the Respondents : *Mr. Goutam Thakur,*
Ms. Anandamayi Ghosh.

Hearing is concluded on : *16th November, 2022.*

Judgment On : **6th December, 2022.**

Partha Sarathi Chatterjee, J.

1. Judgment and decree dated 27th April, 2016 passed by the learned Civil Judge, Senior Division, First Court at Contai, Purba Medinipur, whereby the suit was dismissed, has been impugned in this instant appeal.

2. Capsulated form of the facts leading to filing this appeal is that plaintiff filed one suit for recovery of khas possession after evicting the trespassers as well as for mandatory injunction.

3. Facts projected in the plaint are that one Bhanu Charan Jana happened to be the owner and possessor of the suit property. Mr. Jana transferred the suit property to the plaintiff by virtue of a registered deed of sale being no. 6589 which was executed and registered on 14.9.2010 & 15.9.2010 respectively. The suit property was recorded in his name in L.R.R-O-R under khatian no.1251 and the L.R.R-O-R was finally published. It was claimed that the defendants, who belonged to a political party, illegally and forcibly trespassed into the suit property and illegally constructed one room having asbestos shed thereon on 10.4.2014 and thereby dispossessed the plaintiff from that property and now, they are denying the title of the plaintiff over the suit property and hence, this suit.

4. Record speaks that the defendants contested the suit by filing written statement denying all the allegations contained in the plaint. It was specifically contended that the suit is barred by mis-joinder of cause of action and the suit is also barred by the provisions of Order 1 Rule 8 of the Code of Civil Procedure (hereinafter referred to as CPC) since all the members of All India Trinamul Congress, Sahapur East Branch had not been made parties. It was also contended that Mr. Jana, the erstwhile owner, was unmarried and he was an active member of All India Trinamul Congress (in short, AITC) and since the date of formation of that party, i.e., from 01.1.1998, he was living in a room having a tin shed standing on the

southern part of the suit property and all the political activities of that party were carried out from that room and hence, that property was not personal property of Mr. Jana but was used as the property of the party office of AITC. It was also pleaded that said Mr. Jana was bed-ridden for a pretty long time and he had no sound and disposing state of mind and the deed which the plaintiff had claimed to have been executed and registered in his favour is a forged and manufactured document. It was also alleged that on 18.02.2010, by virtue of one registered deed being no.1199, plaintiff purchased .01 decimal from the northern part of suit property and the plaintiff sold out that portion of the suit property to one Premanand Shaw on 5.8.2010 and property which has been recorded under khatian no.1251, is the subject matter of the deed being no. 1199 executed and registered on 14.09.2014. It was also stated that in connection with an application under Section 144(2) the Code of Criminal Procedure (hereinafter referred to as Cr.P.C.) filed by the plaintiff on 8.3.2014, Office-in-Charge of the concerned P.S. and concerned R.I. have filed reports wherein it was stated that plaintiff was not in possession of the suit property and lastly, prayer was made for dismissal of the suit.

5. Upon pleadings of the respective parties, the learned Court below framed as many as nine issues which are as follows :

- 1. Whether the suit is maintainable in its present form and prayer ?*
- 2. Whether the plaintiff has any cause of action to institute this suit ?*

3. *Whether the suit is barred by the principles of estoppel, waiver and acquiescence?*

4. *Whether the suit is barred by limitation?*

5. *Whether the suit is barred by S. 34 of the Specific Relief Act ?*

6. *Whether the plaintiff has right, title and interest in the suit property ?*

7. *Whether the defendants are trespasser in the suit property ?*

8. *Whether the plaintiff is entitled to get the decree as prayed for ?*

9. *To what other relief, if any, is the plaintiff entitled to ?*

6. Record further speaks that to substantiate his claim, the plaintiff adduced oral testimonies of himself and also of one Ranjit Kumar Mandal, who were examined as PW-1 & PW-1 and the plaintiff tendered some documents being the certified copies of deed of sale, L.R. R-O-R and rent receipt of the suit property which were marked as Ext. 1, 2 and 3 respectively.

7. On the other hand, the defendants in support of their contention adduced oral accounts of one Milan Kumar Khutia and of one Ashis Ghorai, who were examined as DW-1 and DW-2 respectively and they submitted some documents namely, certified copies of information in respect of L.R. Plot no. 988, order sheet of case no. M/1184 /10, deed of sale being no. 1199 of 2010 and order sheet of Misc. Case no. 94 of 2014 along with

application U/s. 144(2) of Cr.P.C. and inquiry reports which were marked as Ext. A to D.

8. Judgment impugned reveals that issue nos. 1 to 4 were answered in favour of the plaintiff and while deciding issue nos. 5, 6 & 7 conjointly, the learned Court below has virtually held that the plaintiff is the owner of the suit property and that the defendants have admitted that they have no right, title, interest and possession over and in the suit property and hence, the defendants have no locus to challenge the deed of sale of plaintiff. Learned Court further held that the defendants admitted that they were not in possession of the suit property and dispossessing the plaintiff, AITC, Sahapur is in possession of the suit and hence, AITC, Sahapur Branch is a necessary party to the suit and since the plaintiff did not implead AITC, Sahapur Branch as party to the suit, the suit is liable to be dismissed. While deciding issue nos. 8 and 9, the learned Court below held that the plaintiff has failed to prove his case beyond preponderance of probability and as such the plaintiff is not entitled to get any relief and ultimately, the suit was dismissed.

9. The judgment and decree have been assailed in this appeal, *inter alia*, on the grounds that the learned Court below dismissed the suit on the issue that the suit is bad for non-joinder of necessary party without framing any issue on that score and the learned Court below had arrived at an erroneous conclusion that AITC, Sahapur East is a necessary party but AITC has no legal entity and the respondents being members thereof are necessary parties and learned court below did not consider that since the

plaintiff could not meet the illegal demands of the defendants, who belong to a strong political party, he was dispossessed and the defendants trespassed into the suit property on 10.4.2014 and the defendants taking the name of such political party have taken forceful possession of the suit property and hence, the plaintiff was in doubt against whom he is entitled to get relief and the defendants being best available persons have been made parties and as such, the suit should not have been dismissed under Order 1 Rule 7 CPC. The learned Court below did not consider that there is a difference between necessary party and party joined for convenience and expediency.

10. While pressing the appeal, the learned advocate for the appellant submitted that the learned Court below had dismissed the suit on the issue of non-joinder of necessary parties but no issue on that score had been framed and that the defendants, taking the name of one political party, had forcibly taken possession of the suit property but at the time of argument, they took the plea that AITC, Sahapur is in possession of the suit property. The plaintiff was in doubt against whom, he would get relief and hence, the defendants were made parties and the Court should have given opportunity to add AITC, Sahapur as party to the suit. There was a doubt as to whether AITC, Sahapur had got any legal sanctity. Lastly, he made a prayer for remand of the suit for deciding the issues afresh. In support of the arguments advanced reliance has been placed upon the judgment delivered in the case of *Pratima Sinhas versus Shashi Kumar Narain Sinhas*, reported in (2004) 13 SCC 599.

11. *Per contra*, the learned advocate for the respondents, drawing our attention to the inquiry report submitted in connection with Misc. case no. 94 of 2014 (Ext.-B), argued that before initiation of the suit, it was within the knowledge of the appellant that AITC, Sahapur was in possession of the suit property, yet he had filed the suit against the present defendants. He added that even in the written statement, the defendants mentioned that from one room lying on the suit property, all the political activities of AITC, Sahapur Unit were being carried out. According to him, the plaintiff with a *mala fide* intention had made the defendants as parties to the suit in spite of having knowledge that it was not the defendants but AITC, Sahapur Unit was is in possession of the suit property and lastly, he submitted that learned court below by passing a reasoned order has dismissed the suit and hence, there is no scope before this Court to interfere with the same. Reliance has been placed upon a judgment delivered in the case of the *Moreshar Yadaoraao Mahajan versus Vyankateshj Sitaram Bhedi (D) Through LRS. And Others* reported in 2022 Live Law (SC) 802.

12. Admittedly, no issue had been framed as to whether suit was bad for non-joinder of necessary party but the learned Court below had dismissed the suit on such issue. Framing of issues is an important stage at which the scope of the trial is determined. Basically, the correct decision of civil *lis* largely depends on correct framing of issues, correctly determining the real points in controversy which need to be decided. 'Issue' means a point in question at the conclusion of the pleading between contending parties in an action and issues are to be framed in respect only of those

facts which have been alleged by one party and either denied or not admitted by the other party and duty of framing issues primarily rests on the Court but such duty can be shared with the pleaders.

13. Admittedly, the defendants/respondents did not urge that the suit was bad for non-joinder of a necessary party and no issue has been framed to the effect whether the suit is bad for non-joinder of necessary party. So, within the scope of trial, such issue has not been included but suddenly, defendants have raised such plea in trial.

14. Order I of CPC deals with the subject namely, '*Parties to Suits*'. Rules 3, 9 and 13 of Order I are the relevant provisions which should be taken into consideration besides Section 99 of the Code. Rule 3 lays down as to who are to be joined as defendants. Rule 9 states that no suit shall be defeated by reason of the misjoinder or non-joinder of parties. Rule 9 speaks further that the Court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it. The general rule of procedure in rule 9 is subject to the proviso thereto which speaks that such general rule shall not apply to non-joinder of a necessary party. So it is obvious that non-joinder of a necessary party stands on a different footing and is a ground to dismiss a suit. Rule 13 mandates to take all objections on the ground of non-joinder or misjoinder of parties at the earliest opportunity and, in all cases where issues are settled, at or before such settlement, unless the ground of objection has subsequently arisen and any such objection not so taken shall be deemed to have been waived. Admittedly, Rule 13 is applicable only to cases of mere

non-joinder or misjoinder of parties. It has no manner of application to a case of non-joinder of a necessary party. Section 99 of CPC provides that no decree shall be reversed or substantially varied, nor shall any case be remanded, in appeal on account of any misjoinder or non-joinder of the parties or causes of action or any error, defect or irregularity in any proceedings in the suit, not affecting the merits of the case or the jurisdiction of the Court but such general rule is also subject to the proviso which provides that nothing in this section shall apply to non-joinder of a necessary party. So, it can be deduced that non-joinder of a necessary party by itself is a ground to reverse or substantially vary a decree in appeal. It by itself is a ground to remand a suit, after setting aside the decree, in an appropriate case.

15. Whether a person is a necessary party, is a question of fact depending upon the relief claimed in the suit. But once it is established that the said person is a necessary party to the suit, it becomes a question of law and therefore can be raised for the first time in appeal.

16. Now, question that arises is as to whether it would be proper to dismiss the appeal or to remand the suit. Had the issue say '*whether the suit was bad for non-joinder of necessary party*' been framed, the plaintiff could have taken appropriate steps. Since no such issue had been framed, we think it proper to give an opportunity to the plaintiff/appellant to implead AITC, Sahapur Unit. Thus, in our opinion, a remand appears to be the proper course to avoid multiplicity of suits. The judgment relied upon on behalf of the respondents is distinguishable on facts.

17. The next question is whether Order 41 Rule 23 or Rule 23A would be applicable in the given case. Although the learned Court below has held that the plaintiff has right, title and interest in the suit property and defendants have no right, title and interest in the suit property and they have no *locus standi* to challenge the deed of plaintiff, but ultimately, the suit has been dismissed on the ground that suit is bad for non-joinder of necessary party. Considering the peculiarity of the judgment impugned, we are of the view that proper course would be Order 41 Rule 23 of CPC. We, however, think that the direction for de-novo trial would not be proper.

18. Accordingly, the judgment and decree impugned herein are set aside. The learned court below shall re-admit the suit under its original number in the register of the suits and shall afford an opportunity to the plaintiff to implead and/or bring AITC, Sahapur Unit in the array of the defendants within a reasonable period of time. If such opportunity is not availed of by the plaintiff/appellant, the learned Court shall have liberty to dismiss the suit. It is clarified that evidence recorded during trial shall, subject to all just exceptions, be evidence during the trial after remand.

19. After AITC, Sahapur Unit, is brought in the array of the defendants through its appropriate office bearers, the learned Court below shall decide the following issues :

- a. *Whether AITC, Sahapur Unit is capable to sue or be sued as juristic person ?*

- b. Whether AITC, Sahapur Unit is trespasser in the suit property ?*
- c. Whether the defendant nos. 1 to 4 are in forceful occupation of the suit property taking the name of AITC, Sahapur Unit ?*

20. In deciding these issues, Court shall have liberty to take further evidence and then pronounce its judgment on all issues framed by the learned Court below and by this Court.

21. With these observations and directions, this appeal is disposed of.

22. There shall, however, be no order as to costs.

23. Let a copy of this order and the LCR be sent to the learned Court below forthwith.

24. Urgent Xerox certified copy, if applied for, shall be given expeditiously upon completion of all formalities.

(Partha Sarathi Chatterjee, J.)

(Tapabrata Chakraborty, J.)