

JUDGMENT AND ORDER

(CAV)

This second appeal is preferred by the plaintiffs against the judgement and decree dated 12-12-2003 passed by the learned Civil Judge, Senior Division No.1, Silchar in Title Appeal No. 29 of 2002 reversing the judgement and decree dated 10-05-2002 in Title Suit No. 101 of 1993.

2. This appeal was admitted to be heard on the following substantial questions of law :

1. Whether the learned Lower Appellate Court was justified in dismissing the suit on the ground of non-joinder of co-pattadars since it was not a suit for partition but a suit for declaration of right, title and interest on the basis of a deed of partition between the plaintiffs and the defendants?

2. Whether the learned Lower Appellate Court was justified in dismissing the suit on the ground that the plaintiffs have sought for only a declaration with no further relief in as much as the plaintiffs have sought declaration along with further relief of confirmation of joint possession with the defendants?

3. After hearing had progressed to a considerable extent, Mr. B.C. Das, learned senior counsel for the appellant submitted that for fair adjudication of this case, one more substantial question of law is required to be formulated in respect of the finding recorded by the learned appellate court that the plaintiff failed to prove their possession.

4. After hearing Mr. Das, learned senior counsel for the appellant as well as Mr. A.B. Siddique, learned counsel for the respondents, by an order dated 19-06-2012, one more substantial question of law was formulated to the following effect :

Whether the finding of the learned lower Appellate Court that the plaintiffs failed to prove their possession, is perverse to the evidence on record?

5. A suit was filed by one Jongi Singh (also known as Jongi Singh Chettri) against Ram Bilash Singh, Smti Janaki Devi and Pankaj Singh as defendants. During the pendency of the suit, Jongi Singh died and the decree of the learned trial court shows the names of the following legal representatives of the original plaintiff :

(1) Chandrabhan Singha (2) Satya Narayan Singha (3) (4)Gopal Singha (5) Smti Parbati Singha (6) Smti Geeta Singha and (7) Smti Kunti Singha.

6. The decree of the learned trial court shows the following defendants :

(1) Smti Janaki Devi (2) Shri Pankaj Singh Chettri (3) Smti Purnima Singh Chettri (4) Smti Pratima Singh Chettri (5) Smti Pritom Singh Chettri (6) Smti Bhageswari Devi (7) Shri Ranjit Singh (8) Shri Uday Singh (9) Shri Amar Singh (10) Shri Ajit Singh (11) Smti Madhumita Singh and (11) Smti MadhuChanda Singh.

7. The first appeal was preferred by Janaki Singh, Pankaj Singh, Ajit Singh and Ranjit Singh against Chandrabhan Singh.

8. The second appeal is filed by Chandrabhan Singh against Janaki Singh, Pankaj Singh, Ajit Singh and Ranjit Singh.

9. The following is the prayer made in the suit :

It is therefore prayed that the court will be pleased to pass a decree in favour of the plaintiff and against the defendants declaring the title of the plaintiff to the extent of 14K 3 Ch of land in the patta land mentioned in the Schedule below being in 14 K 3 Ch only and confirming in such possession along with the defendants who are co-sharers of the patta and/or pass such other order or orders as would be deemed fit and proper under the circumstances of the case.

10. Schedule to the plaint reads as under :

S C H E D U L E

District Cachar, Ph. Barakpar, Mouza Tarapur Part-VIII (B.Town) 2nd R.S. Patta N o. 27, Dag No. 106,107,118 and 119, total area being 16 K in which the plaintiff 's share is 14 K 3 Ch with revenue of Rs. 8.42 Paise. The land being in Urban a reas of Silchar Town appertaining to holding No. 75, Ward No. 27, Tarapur-3.

11. The case set out in the plaint is that one Bishen Singh Chetri h ad purchased 1 B 7 K 3 Ch of land in the PP No. 78 of Tarapur -VIII Mouza along with some other land by a kabala dated 20-05-15. A portion of the said purchased land measuring 16 K was surveyed to be part of second RS Patta No. 27 in Dag N os. 106, 107, 118 and 119. Bishen Singh Chetri had five sons, namely, Shew Naray an Singh Chetri, Kuber Singh Chetri, Ramagya Singh Chetri, Kanta Prasad Singh Ch etri and Beni Singh Chetri. Beni Singh Chetri died without any issue and wife. Plaintiff is the son of Shew Narayan Singh Chetri. Kuber Singh Chetri died leavin g behind Ram Bilash Singh Chetri, who is the defendant No.1 and Ram Naresh Singh Chetri who is the predecessor-in-interest of defendant Nos. 2 and 3. Ramagya S ingh Chetri and Kanta Prasad Singh Chetri died leaving behind Shew Narayan Singh Chetri and Kuber Singh Chetri as their heirs.

12. It is further pleaded that the patta shows the names of two othe r persons, namely, Subhasini Devi and Mohendra Chandra Paul. However, they never possessed any land in the patta and it is not known whether the said two person s were alive or dead. Subhasini Devi had filed a mutation case in the year 1946 alleging that she had purchased the share of Bishen Singh Chetri's three sons an d in the Mutation Appeal being No. 32 of 1946-47, it transpired that Subhasini h ad no possession on the land of the patta. It is asserted that the plaintiff and the defendants are possessing the entire patta land for more than 60 years peac efully and adversely against the interest of Subhasini Devi and Mohendra Singh P aul. By amending the plaint, it is pleaded that the predecessor of the parties o f the suit bilaterally executed a deed of partition dated 30-11-1975 partitionin g the properties of the said patta along with other lands whereby an area of 1 4 K 3 Ch of land fell in the share of the plaintiff. The land of second RS Patta No. 27 was surveyed from the land of RS Patta No. 18, which was partitioned in the names of the predecessors of the parties in the suit and the land covered by second RS Dag No. 106/107/118/119 was surveyed from patta No. 18, in Dag Nos. 54/53/50/49, respectively. Cause of action of the suit is stated to have arise n on 20-03-1991 when the plaintiff, while in his home, defendant No.1 raised a d ispute that the plaintiff is not entitled to the extent of half interest in the patta. Be it noted that prior to amendment of the plaint, the plaintiff had pray ed for declaration etc. in respect of 8 K of land, being only half interest in t he patta.

13. The defendants had filed a written statement and an additional w ritten statement.

14. In the written statement, apart from other pleas, it is pleaded that the suit is bad for non-joinder of necessary parties, all the co-sharers of the said patta having not been made parties to the suit with specific emphasis on Smti Subhasini Devi and Mohendra Chandra Paul. It is also pleaded that as th e parties are guided by the Mitakshara School of Law, on the death of Bishen Si ngh Chetri, all his successors including grand sons/grand daughters are require d to be made parties. While denying the allegations made in the plaint, it is as serted that plaintiff never possessed any land in the said patta and he resides at Karimganj. While it is accepted that Bishen Singh Chetri had purchased 1 B 7 K 3 Ch in RS Patta No. 78, stand is taken that name of Mohendra Chandra Paul was wrongly recorded as co-sharer in the patta and that Subhasini Devi never had a ny possession of the suit land and if she had any interest, the same had been extinguishe d by operation of law.

15. The genealogy and number of sons of Bishen Singh Chetri and dea th of three of them are not disputed. It is stated that Shew Narayan Singh died leaving behind Balaram Singh Chetri, Jongi Singh Chetri and Shyam Sunder Singh Chetri. Balaram Singh Chetri and Shyam Sunder Singh Chetri died unmarried. J

ongi Singh Chetri had three wives. One of the wives had died leaving behind one son. He has four more daughters and two sons living. Kuber Singh Chetri died leaving two sons, namely, Ram Bilash Singh Chetri and Ram Naresh Singh Chetri. Ram Bilash Singh Chetri had five sons, two daughters and wife. Out of the sons, one died unmarried. Ram Naresh Singh Chetri died leaving his wife and two sons, namely, Pankaj Singh Chetri and Pradip Singh Chetri and three daughters. It is pleaded that all the sons, daughters and wives of Jongi Singh Chetri, sons, daughters and wife of Ram Bilash Singh Chetri, sons and daughters of Ram Naresh Singh Chetri are necessary parties to the suit. It is pleaded that Ram Bilash Singh Chetri with the family members and the heirs of Ram Naresh Singh Chetri are residing on the suit land excluding all others beyond the period of limitation, asserting exclusive right openly, peacefully and without any interruption from any quarter.

16. By filing the additional written statement, the plea taken by way of amendment of the plaint regarding partition of the suit properties by a deed of partition dated 30-11-1975 is denied.

17. Before proceeding further it will be appropriate to try to place on record the names of the surviving heirs of Jongi, Ram Bilash and Ram Naresh.

18. The pleadings of both the parties read together indicate that Premjyoti and Radhikha were two wives of Jongi Singh Chetri. Name of the third wife is not available. Premjyoti died during the pendency of the suit and name of Premjyoti and Radhikha were struck off on 24-09-1998. Nandita Singha is a daughter whose name was also struck off. The names of the other legal representatives of Jongi Singh Chetri are as found in the decree, which have already been noted. Bhageswari Devi is the wife of Ram Bilash and Ranjit Uday, Amar and Ajit are the sons of Ram Bilash and Madhumita and Madhuchanda are the daughters of Ram Bilash. Janaki is the wife of Ram Naresh and Pankaj and Pradip are the sons and Purnima, Pratima and Pritom are the daughters of Ram Naresh.

19. The learned trial court framed the following issues :

1. Is there any cause of action for the suits?
2. Is the suit maintainable?
3. Is the suit bad for defects of necessary parties?
4. Whether the suit is properly valued and stamped?

5. Whether the plaintiff has right, title, interest and possession over the suit land to the extent of 8 katha as alleged?

6. To what relief or reliefs the plaintiff is entitled to?

7. Whether the plaintiffs are entitled to get a decree declaring the title of the plaintiff to the extent 14 katha 3 chattaks of land and confirming possession over the suit land?

8. Whether the predecessors of the plaintiff and defendants partitioned their properties of the suit patta land by executing a bilateral deed of partition dated 30-11-1975.

20. Both the parties examined two witnesses each and the plaintiffs had exhibited the Deed of Partition as Exhibit 1. The learned trial court decreed the suit of the plaintiff declaring plaintiffs' right, title and interest in respect of 14 K 3 Ch of land and confirming possession of the plaintiffs over the decreetal land in ejmali (jointly) with the defendants. An appeal was preferred being Title Appeal No. 29 of 2002 by the respondents of the instant appeal arraing only the appellant herein as respondent in the said appeal. In the memo of appeal submitted before the learned lower appellate court it is stated that as the said respondent, namely Chandrabhan Singh, had filed a petition to implead the names of other legal heirs of Jongi Singh Chetri without their signing in the petition, though impleaded as legal representatives of Jongi Singh Chetri, they were not the parties to the suit.

21. I have heard Mr. B.C. Das, learned senior counsel for the appellants and Mr. A.B. Siddique, learned counsel for the respondent.

22. Mr. Das, with reference to the pleading, submits that the suit filed by the plaintiffs was for declaration of title of the plaintiffs in respect of land measuring 14 K 3 Ch on the basis of Deed of Partition dated 30-11-1975

5 and the suit was not a suit for partition. It is submitted by him that in such a suit, co-pattadars, if there be any, are not necessary parties. He submits that even the defendants in their written statement in paragraph 24 (a) asserted that Subhasini Devi and Mohendra Chandra Paul, whose non-impleadment had been held to be fatal by the learned lower appellate court considering them to be necessary parties, stated that they do not have any surviving interest in the patta in question. He has submitted that in a given case, even if all the co-sharers are not made parties, if the estate is sufficiently represented by a large number of co-sharers, not making one or any of the co-sharers as a party, cannot entail dismissal of the suit. Learned senior counsel submits that in the aforesaid view, the learned lower appellate court was not correct to reverse the findings of the learned lower appellate court without any discussion by holding that the suit was bad for not impleading Subhasini Devi and Mohendra Chandra Paul as co-pattadars of the suit patta. It is further submitted by him that though the learned lower appellate court held that the plaintiffs are not entitled to get a decree for not impleading co-sharers, who are required for proper adjudication of the suit, it has not named the co-sharers who had not been impleaded.

23. Mr. Das submits that the learned lower appellate court also did not peruse the plaint as a whole in its correct perspective. According to him, pleading must receive a liberal construction and it is the duty of the Court to ascertain the substance of the pleading. In essence, the plaintiffs' suit was for declaration of title and confirmation of possession and, therefore, though in the prayer, declaration for confirmation of possession along with the defendants who are co-sharers of the patta was prayed, relief can be moulded by ignoring that portion of the prayer which sought a declaration of confirmation of possession along with the defendants, who are co-sharers of the patta.

24. Mr. Das submits that though a contention was raised by the learned counsel for the appellant before the learned lower appellate court that when no further relief was sought by the plaintiff in the original suit, declaration cannot be granted, the learned lower appellate court did not as such record any finding on that issue. He submits that seeking confirmation of possession is a kind of consequential relief and failure to prove possession is not one and the same thing as not making a prayer for consequential relief. The learned lower appellate court, without adverting to the evidence on record, suddenly came to a conclusion that the plaintiff failed to prove possession over the suit land, he contends. He submits that the said finding is perverse and in the cross-examination of PW-1, there is positive evidence of his residing in a room of the original house. The learned counsel relies in support of his submissions on the following judgements : (1) Kedar Lal Seal and Another-v- Hari Lal Seal, reported in AIR 1952 SC 47 (2) Ram Sarup Gupta (dead) by L.Rs. -v- Bishnu Narian Inter College and Others, reported in AIR 1987 SC 1242 and (3) Abdul Latif and Others -v- Chanchala Devi Nath, Legal Heirs of Digendra Nath and Others, reported in 2003 (3) GLT 606.

25. Mr. Siddique, learned counsel for the respondent, submits that proviso to Order 1 Rule 9 CPC makes it clear that non-joinder of necessary party is fatal to the suit and the decree becomes a nullity. In the instant case, admittedly, Subhasini Devi and Mohendra Chandra Paul who are co-pattadars and thus, necessary parties, having not been made parties, the learned lower appellate court is right in holding that the suit is bad for non-joinder of necessary party.

In this connection he relies on the judgement in the case of Khetrabasi Biswal -v- Ajaya Kumar Baral and Others, reported in (2004) 1 SCC 317. Mr. Siddique submits that no substantial question of law has arisen in this case inasmuch as, the learned lower appellate court had exercised its discretion in a judicial manner, and therefore, error, either of law or of procedure, cannot be permitted to be raised as a substantial question of law and in this connection, the learned counsel relies upon in the case of Kondiba Dagadu Kadam -v- Savitribai Sopan Gujar and Others, reported in (1999) 3 SCC 722 . He submits that it is impossible to reconcile the prayer of the plaintiff for declaration of title along with confirmation of possession with the defendants and, therefore, no interference is called for with the judgement of the learned lower appellate court.

26. In paragraph 24 (a) of the written statement, the pleaded stand of the defendants is as follows :

24 (a) The RS Patta No. 78 of Mouza, Tarapur Pt-VIII, PG: Barakpar consisting of Dag Nos. 467, 466, 465, 464 and 468 was issued in the names of Durgacharan Deb and Mohandra Mohan Deb, Bishen Singh Chetri purchased an area 1 B 7 K 3 C of land in Dag Nos. 466, 467 and 468 of the said patta from they and duly got his name mutated in the settlement record. It appears from the note of the record of RS Patta No. 78 that by order dated 11-04-47 of the SDC in place of the above mentioned Bishen Singh Chetri subsequently the names of Subhasini Devi, Jongi Singh Chetri, Syam Sundar Chetri, Rambilash Singh Chetri and Ram Naresh Singh Chetri were mutated by way of purchase and inheritance. Out of the above mentioned 1 B 7 K 3 C of land an area of 16 Khattas of land was surveyed in 2nd RS Patta No. 27 and the said patta was issued in the name of Jongi Singh Chetri, Ram Bilash Singh Chetri, Ram Naresh Singh Chetri. Subhasini Devi and Mohendra Chandra Paul. Out of the above name persons Mohendra Chandra Paul exhausted his entire interest in the said RS Patta No. 78 during continuance of the same by way of transfer and as such his name was wrongly recorded as co-sharer in the said 2nd RS Patta No. 27. The above named Subhashini Devi neither got possession of any land by virtue of her so called purchase or otherwise nor even possess any land of either RS Patta No. 78 or 2nd Patta No. 27 and as such her interest if any either in the said RS Patta No. 78 or 2nd RS Patta No. 27 was extinguished by the operation of law.

27. In view of the aforesaid stand, it is difficult to comprehend how Subhasini Devi and Mohendra Chandra Paul are necessary parties in the perception of the defendants. With regard to the aforesaid two persons, both the plaintiffs and defendants share a common platform. The learned lower appellate court completely overlooked this stand of the defendants. That apart, even though the drafting of the plaint left a lot to be desired, substance of the pleading would leave no room for doubt that the suit was not for partition but a suit for declaration of right, title and interest on the basis of deed of partition in respect of a particular land. In the aforesaid view of the matter, the finding of the lower appellate court that the suit is bad for non-joinder of co-pattadars cannot be sustained. In the facts and circumstances of the case, even if all the legal representatives of the defendants are not brought on record, there being no manner of doubt that estate is represented by large number of co-sharers, the suit is not liable to be dismissed on this count also.

28. The deed of partition was proved as Exhibit-1 and Mr. Siddique submits that original of the deed of partition having not been produced and only certified copy of the same having been produced, Exhibit-1 is not admissible. It has come on evidence that original deed of partition was destroyed in a fire when the house was gutted in 1979. The plaintiff had also examined the Lower Division Assistant in the office of the Deputy Registrar, Silchar as PW-2 who proved Exhibit-1 by bringing the original volume in which the contents of Exhibit-1, certified copy of the deed, was recorded.

29. In the case of Kedar Lal (supra), the Apex Court observed :
I would be slow to throw out a claim on a mere technicality of pleading when the substance of the thing is there and no prejudice is caused to the other side, however clumsily or inartistically the plaint may be worded. In any event, it is always open to a Court to give plaintiff such general or other relief as it deems just to the same extent as if it had been asked for, provided that occasion is no prejudice to the either side beyond what can be compensated for in costs &..

30. In Ram Sarup (supra), the Apex Court stated as follows:-

The question which falls for consideration is whether the respondents in their written statement have raised the necessary pleading that the license was irrevocable as contemplated by S.60(b) of the Act and, if so, is there any evidence on record to support that plea. It is well settled that in the absence of pleading, evidence, if any, produced by the parties cannot be considered. It is also equally settled that no party should be permitted to travel beyond its pleading and that all necessary and material facts should be pleaded by the party in support

t of the case set up by it. The object and purpose of pleading is to enable the adversary party to know the case it has to meet. In order to have a fair trial it is imperative that the party should state the essential material facts so that other party may not be taken by surprise. The pleadings however should receive a liberal construction, no pedantic approach should be adopted to defeat justice on hair splitting technicalities. Sometimes pleadings are expressed in words which may not expressly make out a case in accordance with strict interpretation of law, in such a case it is the duty of the Court to ascertain the substance of the pleadings to determine the question. It is not desirable to place undue emphasis on form, instead the substance of the pleadings should be considered. Whenever the question about lack of pleadings is raised the enquiry should not be so much about the form of the pleadings, instead the Court must find out whether in substance the parties knew the case and the issues upon which they went to trial. Once it is found that in spite of deficiency in the pleadings parties knew the case and they proceeded to trial on those issues by producing evidence, in that event it would be not be open to a party to raise the question of absence of pleadings in appeal. In *Bhagwati Prasad v. Shri Chandramual*, (1966) 2 SCR 286: (AIR 1966 SC 735) a Constitution Bench of this Court considering this question observed (at p.738 of AIR):

If a plea is not specifically made and yet it is covered by an issue by implication and the parties knew that the said plea was involved in the trial, then the mere fact that the plea was not expressly taken in the pleadings would not necessarily disentitle a party from relying upon it if it is satisfactorily proved by evidence. The general rule no doubt is that the relief should be founded on pleadings made by the parties. But where the substantial matters relating to the title of both parties to the suit are touched, though indirectly or even obscurely in the issues, and evidence has been led about them, then the argument that a particular matter was not expressly taken in the pleadings would be purely formal and technical and cannot succeed in every case. What the Court has to consider in dealing with such an objection is : did the parties know that the matter in question was involved in the trial, and did they lead evidence about it? If it appears that the parties did not know that the matter was in issue at the trial and one of them has had no opportunity to lead evidence in respect of it, that undoubtedly would be a different matter. To allow one party to rely upon a matter in respect of which the other party did not lead evidence and has had no opportunity to lead evidence, would introduce considerations of prejudice, and in doing justice to one party, the Court cannot do injustice to another.

31. From the aforesaid 2 judgments it is clear that the object and purpose of pleading is to enable the adversary party to know the case it has to meet. The pleadings have to receive a liberal construction and instead of undue emphasis on form, substance of the pleadings should be considered. While it is correct that in absence of pleadings, evidence, if any, produced by the parties cannot be considered and that no party should be permitted to travel beyond its pleading, yet, if a plea not specifically made but nonetheless covered by an issue by implication and the parties knew that the said plea was involved in the trial, the fact that the plea was not expressly taken in the pleadings would not disentitle a party to rely upon such a plea if proved by evidence. The important aspect is to determine as to whether the parties knew that the matter in question was involved in trial.

32. The plaintiffs had asserted in the plaint that the plaintiffs and the defendants are possessing the entire patta land for more than 60 years peacefully and adversely against the interest of Subhasini Devi and Mohendra Singh Paul. The only evidence with regard to possession of the plaintiff is found in the evidence of PW1 in cross-examination when he stated that he was staying in one room of the original house. Defendants had categorically pleaded that Ram Bila Singh with his family members and the heirs of Ram Naresh Singh are residing on the suit land beyond the period of limitation asserting exclusive right openly, peacefully and without any interruption from any quarter. DW 1, Ajit Kumar Singh, in his evidence has asserted such possession of the defendants, and that the original plaintiffs and the successors had no possession over the suit land. D

W2, who resides in the vicinity of the suit land also had asserted the possession of the defendants.

33. The assertion of the plaintiffs in the prayer is unequivocal that the plaintiffs seek a declaration of title along with confirmation of possession along with the defendants who are co-sharers of the patta. It is noticed that though the defendants had pleaded exclusive right in the suit land and had also set up a plea of adverse possession against the plaintiffs, no issues were framed. It was also asserted in the written statement there could not have been any cause of action for filing the suit for declaration of title and confirmation of possession jointly with the defendants. Declaration of exclusive title and at the same time praying for confirmation of possession along with the defendants cannot be reconciled, as has been rightly argued by Mr. A.B. Siddique.

34. Mr. Das is right that prayer for confirmation of possession is also a consequential relief. The submission of Mr. Das that along with the defendants as appearing in the prayer portion may be ignored while considering the prayer for confirmation of possession, in the facts and circumstances of the case, does not appeal to the Court. There was no pleading at all to suggest that the plaintiffs are seeking exclusive confirmation of possession, and on the contrary, starting with paragraph 1 of the plaint, the plaintiff prayed for confirmation of possession in the suit land along with the defendants. The possession of the defendants in the suit patta, is, thus, an admitted position.

35. In the aforesaid backdrop, ignoring along with the defendants which is the course of action suggested by Mr. Das, will result in causing prejudice to the defendants as this Court is of the opinion that such a plea, even by necessary implication, was not involved in the trial. The case relied on by Mr. Das in Abdul Latif (supra) wherein, this Court upheld the decree granting declaration of right and title over the suit land to the plaintiff although there was no prayer for declaration of right and title is distinguishable inasmuch as there were averments in respect of acquiring of right, title, interest in the pleadings.

36. In view of the above, it has to be held that there is no effective prayer for consequential relief and in the said view of the matter, no interference is called for with regard to the judgment of the learned Lower Appellate Court. In the result, there is no merit in this appeal and accordingly, the same is dismissed.

37. Before parting, it is placed on record that the decision in Kondiba (supra) was in reference to a suit for specific performance and the Supreme Court had noted that finding of the first Appellate Court could not be termed to be either perverse or based upon no evidence and therefore, in that context the Apex Court had made the observation which is relied on by Mr. Siddique. There is no dispute that the respondent is at liberty to show that the question formulated by High Court was not involved in the case. To be a substantial question of law, it must be debatable and must have a material bearing on the decision of the case. In view of the foregoing discussions, this Court is unable to accept the submission of Mr. Siddique that there was no substantial question of law at all involved in this appeal.

38. No costs.