

**HIGH COURT OF TRIPURA
AGARTALA**

RSA No.22 of 2021

Sri Kabindra Chandra Paul

S/o- Lt. Kamini Mohan Paul

Resident of Khowai Town

P.O-Khowai-799201

P.S-Khowai, Dist.-Khowai Tripura

....Defendant-Appellant(s)

Versus

1. Sri Kanai Lal Paul

2. Sri Jyotirmoy Paul

Both are sons of Lt. Kamini Mohan Paul

Both are residents of Khowai Town,

P.O-Khowai-799201, P.S-Khowai

Dist.-Khowai Tripura

....Plaintiff-Respondent(s)

For the Appellant(s) : Mrs. S. Deb(Gupta), Advocate

For Respondent(s) : Mr. Kohinoor N. Bhattacharyya, Advocate

Date of hearing
and delivery of
judgment & order

: **02.05.2023**

Whether fit for
reporting

: **No**

HON'BLE MR. JUSTICE ARINDAM LODH

Judgment and Order (Oral)

Heard Mrs. S. Deb (Gupta), learned counsel appearing for the appellant. Also heard Mr. Kohinoor N. Bhattacharyya, learned counsel appearing for the respondents.

This is a second appeal preferred by the appellant, the original defendant to the suit, against the judgment dated 31.08.2021 and decree dated 08.09.2021, passed by the learned Addl. District Judge, West Tripura, Agartala in Title Appeal No. 25/2018, reversing the original judgment dated 07.07.2018 and decree dated 13.07.2018, passed by the learned Civil Judge, Agartala, West Tripura, in Title Suit No.36/2006.

2. The facts of the case as projected by learned first appellate Court are reproduced here-in-below:

“2. For convenience plaintiffs-appellants are hereinafter may be referred as plaintiffs and defendant-respondent may be referred as defendant. The brief fact of the plaintiffs’ case is that total land 10 ganda 3 kara and 9 dhurs as mentioned in schedule-1 of the plaint was joint property. By way of registered partition deed (No.1-1965 dated 11.06.1984) plaintiffs jointly got schedule-2 land (eastern portion) measuring 4 ganda and 2 kara specifically described in the 3rd schedule of partition deed by boundary having L -pattern building thereon but by guess work quantum of the land is mentioned as 3 ganda 1 kara 10 dhurs. It is also pleaded that defendant got schedule-3 land of plaint measuring 6 ganda, 1 kara, 1 kranta and 5 dhurs having cloth shop and candle factory namely “Maa Candle factory” by partition and described in 5th schedule of partition deed. The joint pathway has been described in schedule-4 of the plaint measuring 1 ganda, 1 kranta, 14 dhurs and described in 3rd, 5th and 7th schedule of partition deed. L-pattern building was let out to the sales emporium namely “Priyadarshani” and United Bank and for the security of United Bank a Kacca Kitchen was constructed behind the cloth shop building i.e., on the west side of the cloth shop building. In the partition deed it is mentioned that as the said kitchen fell on the share of the land of defendant, the defendant should shift the kitchen to the vacant portion of the land of the plaintiffs as said kitchen was being used by the security guard of the bank who is the tenant of the plaintiffs and, accordingly, the defendant shifted the said kitchen to the vacant portion land of the plaintiffs. Plaintiffs further pleaded that after partition plaintiffs and

defendant and other sharers have been possessing their respective land without any disturbance and objection from others. Specifically, it is pleaded that the plaintiffs have been possessing and enjoying the L-pattern building by taking total rent and the kitchen (shifted on the land of the plaintiffs) without any objection. The defendant used to collect rent on behalf of plaintiffs of L-pattern building and used to pay the same to the plaintiffs on the basis of power of attorney and never raised any objection and plaintiffs rebuked the power of attorney on 08.05.2006. The cause of action arose when on 09.05.2006 the defendant has written a letter to the tenant of L-pattern building stating that tenants have been paying rent to the plaintiffs continuously since after partition and raised claim. It is also pleaded that the defendant illegally mutated the joint pathway (Schedule-4 land of plaintiff) and a part of the land of plaintiffs in his name. It is further pleaded that on the basis of wrong quantum of land mentioned in the partition deed and wrong mutation, the defendant has claimed 824 sq.ft area of the L-pattern building of the plaintiff covered by boundary. It is further pleaded that in the month of December, 2005 when plaintiff No.2 tried to repair the said kitchen the defendant raised objection. Hence, plaintiffs filed TS 36 of 2006.

3. The suit of the plaintiffs was contested by defendant by filing written statement denying the plea of the plaintiff and, inter-alia, pleaded that by way of partition the plaintiff only got land measuring 3 ganda, 1 kara 10 dhurs land as per partition deed and accordingly mutation was done and 846 sq.ft area of the L-pattern building falls into the share of defendant and beyond the share of plaintiffs but the benefit of the said part of the building has been denied to the defendant for long time by plaintiffs and till date share of the defendant in the L-pattern building has not been given to the defendant and enjoyed by the plaintiffs unlawfully for long time. It is further pleaded that as in the partition the quantum of the land of the plaintiffs are mentioned as 3 ganda, 1 kara, 10 dhurs, the plaintiffs cannot claim more land defeating the partition deed being barred by time, acquiescence and estoppel. It is the clear plea of the defendant that the entire L-pattern building cannot be the land of the plaintiffs as it occupies more than land 3 ganda, 1 kara, 10 dhurs and excess part of the building beyond the land measuring 3 ganda, 1 kara, 10 dhurs is the building of defendant. It is further pleaded that the security guard of the United Bank has been using the latrine situated within the land of the defendant as per partition deed and the same was not shifted to the land of

the plaintiffs as till date plaintiffs have not shown any area of land for shifting the latrine. Thus, it is the plea of the defendant that the kitchen as alleged by the plaintiffs is in the land of the defendant.

The defendants claimed that he is the owner of the share of the building measuring 846 sq.ft and entitled to get rent of the said share and accordingly intended to file counter claim. It is also pleaded by the defendant that reliance cannot be given on the boundary description and boundary described cannot be determining factor without looking into the quantum of the area mentioned in the partition deed and the plaintiffs themselves mutated their share of 0.062 acre land and never raised any claim more than that area and, therefore, the suit filed by plaintiffs is liable to be dismissed.

4. The trial court framed following issues for consideration:-

(i) whether the suit land is attracted by the boundary of the schedule-2 of the deed of partition;

(ii) Whether at the time of partition, possession of the respective sharers were taken over by the plaintiffs together in schedule-2 and the defendant in schedule-3 of the said deed of partition;

(iii) Whether the defendant was appointed as attorney by the plaintiff No.1;

(iv) Whether the defendant realised rent from the bank for and on behalf of the plaintiff No.1 in regard to the entire building;

(v) Whether the defendant paid the said amount as realised by him to plaintiff No.1 since 1984 to April, 2006;

(vi) Whether the land under present(Hal) dag No.4613 of, Khatian No.79 standing in the name of defdt is a part of the common path;

(vii) What other relief/reliefs parties are entitled to?

5. Initially, the Ld. Trial Court by Judgment dated 31.03.2011 allowed the suit of the plaintiff with a declaration that plaintiffs are owner of whole schedule-2 land of plaintiff and injuncted the defendant and it was also declared that schedule-4 land is joint pathway. In appeal the Ld. First Appellate Court by Judgment dated 28.07.2012 allowed the appeal and set aside the Judgment of the Ld. Trial Court mainly considering the discrepancy of the schedule land as in the first schedule there is only land measuring 10 ganda, 3 kara, 9 dhurs but total land shown in schedule-2, 3 and 4 comes to 12 ganda, 1 kara, 1 kranta and 19 dhurs and thus plaintiffs have shown erroneous land in schedule-2 claiming

excess land more than allotted to plaintiffs by partition deed. The appellate court also came to the conclusion that the kitchen is situated on the land of the defendant. On second appeal, the Hon'ble High Court of Tripura by Judgment dated 08.04.2016 in RSA 58 of 2012 set aside the Judgment of the first appellate court and trial court and remanded the case to the trial court to appoint a survey commissioner to find out how much land is attracted by the plinth area of the building which houses the United Bank of India or the Priyadarshani Emporium vis-a-vis the third schedule of the partition deed and the fifth schedule of the partition deed and to pass fresh judgment and decree. The operative part of the direction of the Hon'ble High Court of Tripura runs as follows:-

“10. Having held so, this court is inclined to interfere with the Judgment of the first appellate court as well as of the trial court and both the Judgments are set aside. The case is remanded to the trial court only for purpose of appointing a Survey Commissioner and to get a report from the Survey Commissioner as to the land attracted by the plinth area of the building which houses the United Bank of India or the Priyadarshini Emporium vis-a-vis the 3rd Schedule of the partition deed and the 5th schedule of the partition deed. The trial court is given liberty to formulate the reference having due regard to the issues as framed and, in particular, to the arrangement made in the partition deed. After the report from the Survey Commissioner is considered in accordance with law, the trial court shall pass a fresh judgment and decree. The parties will be afforded scope to take their own defences in respect of the report of the Survey Commissioner”.

6. On remand, the Ld. Trial Court obtained report by appointing Survey Commissioner and by Judgment dated 07.07.2018 decided Issue No.(i),(ii) and (vi) in affirmative but issue No.(iii) in negative. The Ld. Trial Court while deciding issue No.(iv) and (v) opined that as per report of survey commissioner plot No.1 to 4 attracts the second schedule of partition deed and plot No.5 and 6 attracts 3rd and 5th schedule of the partition deed and in the L-pattern building there is excess land measuring 1 ganda, 1 kara, 1 kranta and 15 dhurs beyond the share of plaintiffs. The Ld. Court while deciding the issue No.(vii) also came to the conclusion that excess land more or less 1 ganda, 1 kranta and 15 dhurs is also covered by the L-pattern building which is beyond the land mutated in the name of the plaintiffs and as per partition deed the

plaintiffs are only entitled to 3 ganda, 1 kara and 5 dhurs of the L-pattern building. Thus Ld. Trial Court passed decree declaring that plaintiffs are owner of land measuring 3 ganda, 1 kara, 5 dhurs only and not of excess land measuring 1 ganda, 1 kranta and 15 dhurs and accordingly the defendant was restrained from disturbing the possession of the plaintiff of land measuring 3 ganda, 1 kara and 5 dhurs. Ld. Trial Court also declared that the schedule 4 land is the joint pathway of plaintiffs and defendant.”

3. In addition to the issues formulated by the learned trial Court, the first appellate Court had drawn up the following two points for determination:

***“(a) Whether this court has territorial jurisdiction to decide appeal?
(b) Whether plaintiffs are owners of the whole L-pattern building and the land described in plot No.1 to 5 of the report of the survey commissioner?”***

4. In determining the above points, learned first appellate Court had passed the following order:

“ O R D E R ”

In the result, the appeal is allowed and, the judgment dated 07.07.2018 and decree dated 13.07.2018 passed by Learned Civil Judge (Sr. Division), Court No.2, West Tripura, Agartala in TS 36/2006 is modified as below.

It is hereby declared that plaintiffs have right, title and interest over the whole L-pattern building and the land of plot No.1 to 5 of the report of survey commissioner dated 31.08.2017(in three sheets).

Accordingly, the defendant is perpetually enjoined and restrained from disturbing the possession of the plaintiffs over said building and land.

It is also declared that the plaintiffs and defendant are joint owner of the schedule-4 land of plaintiff. This appeal is disposed of on contest. Prepare appellate decree accordingly.

The report of survey commissioner dated 31.08.2017 shall form part of the decree.

Send down the LC Record along with a copy of this Judgment and decree.

Make entry in Trial register and upload in CIS.”

5. For convenience, the findings and order passed by the learned trial

Judge may also be reproduced here-in-below:

“ISSUE No. VII:-

The point to be decided under this issue is what other relief/reliefs parties are entitled.

As it has already been discussed earlier that the documentary evidence marked as exhibit 3 is the main source of document in the suit on which the parties claiming their respective shares relies upon, so, from that source of evidence, it is found that, at the time of the execution of the said document, parties made some commitment against each other to fulfill the very language of the recital of the said deed.

As per shares mentioned in exhibit 3, the shares of the plaintiffs jointly are specifically described in third schedule and seventh schedule of the said document and the portion of the share of the defendant has been clearly described in the fifth schedule of the said document. It also appears from the record that none of the parties in the suit denied about the portion of the share mentioned in the document marked as exhibit 3. The portion of the share of the plaintiffs jointly is mentioned in schedule 2 of the plaint, under which also falls the ‘L’ patent building comprising their shares of three gandas, one kranta and five dhurs. Accordingly, plaintiffs entered their names in the record of rights as per the said amount of land allotted to them as per the document marked as exhibit 3. Whereas, the measurement of the entire portion of the said ‘L’ patent building covers around four gandas and two karas, in local measurement i.e. measuring more or less 0.09 acres. So, in view of the above calculation there is an excess land of more or less one ganda, one kara, one kranta and fifteen dhurs. The question and the dispute in between the parties in the suit lies in this instant excess land area. However, the language of the recital of the partition deed (exhibit 3) shows that plaintiffs are jointly entitled to only three gandas, one kara and five dhurs in the said plot of ‘L’ patent building.

All the respective shares of the co-sharers of the document of partition deed (exhibit 3) including the parties in the suit are clearly mentioned and demarcated therein and cannot go beyond what has been mentioned or described therein.

Hence, this court finds no any relief to the parties in the suit beyond the entitlement of the register partition deed which has been marked as exhibit 3 in the suit.

Therefore, issue no. VII is also decided accordingly.

9. *In the light of threadbare discussions made above on several issues and points, it is clearly established that parties are not entitled to any decree or relief in the suit.*

In view of the issue-wise discussion made above, I hereby pass the final order in the suit which is as follows:-

10. *In the result, this suit stands decreed partially in favour of the plaintiffs on contest without cost.*

11. *The plaintiffs has the right and title over the land measuring 3 gandas, 1 kranta and 5 dhurs of the land mentioned in Schedule-2 of the plaint, but is not entitled to the right and title over excess or balance land measuring 1 ganda, 1 kara and 15 dhurs in Schedule-2 of the plaint.*

The defendant, his men and agents are also perpetually restrained from disturbing the peaceful possession over the land measuring 3 gandas, 1 kara and 5 dhurs mentioned in Schedule-2 of the plaint.

The suit is also decreed with the declaration that the plaintiffs and the defendant has right and title jointly over the land of Schedule-4 of the plaint which is used as their common path-way.

Sheristadar of this Establishment is hereby directed to prepare the preliminary decree accordingly and put up the same before me for seal and signature within 15 days latest by 21-07-2018."

6. Considering the controversy raised in this suit, I deemed it fit and proper to cause an appearance of the parties to the suit. Today both the appellant and the plaintiffs have personally appeared before this Court. This Court has an opportunity to interact with both the brothers (i.e. the plaintiff/respondents and the defendant/appellant). During the course of interaction, it comes to fore that under the partition deed the plaintiffs/respondent is entitled to get share of a land measuring 3 gandas, 1 kara and 5 dhurs, but he physically has been possessing a building measuring 3 gandas, 3 krantas and 11 dhurs, which is an admitted fact.

7. I have specifically asked the defendant/appellant as to whether he has any objection or claim over the land, the plaintiffs have been possessing in excess of the land that mentioned in the partition deed. The defendant/appellant has fairly stated and conveyed to this Court that since the plaintiffs are his younger brothers, he has no objection and he will

never raise any claim in the peaceful possession of the excess land possessed by the plaintiffs. The plaintiffs have further conveyed to this Court that they will not demand more land other than the land they have been possessing i.e. 3 gandas, 3 krantas and 11 dhurs. The plaintiff/respondents have also admitted that as per condition of the partition deed, the security guard room and kitchen have been relocated at the cost of defendant/appellant to the land of the plaintiff/respondents as per the stipulation in the partition deed. Since the construction in whichever form, whether it is kitchen or the security guard room, has already been shifted to the land of the sixth party, so, the defendant/appellant may clean his land in the manner he wishes and in that case, the plaintiffs shall never raise any objection.

8. In view of the above interaction and the settlement arrived at between the parties, both the parties appeared before this Court have agreed to settle the controversy raised in this appeal in the manner as indicated here-in-above.

In the light of above, the instant appeal stands disposed in the manner as indicated here-in-above. Decree may be drawn accordingly.

JUDGE