

**THE HIGH COURT OF TRIPURA
AGARTALA**

RSA NO. 11 OF 2015

DEFENDANT-APPELLANTS :

**1. Sri Samir Chowdhury,
@ Shanti Chowdhury**
S/O. Lt. Balai Chowdhury,
Resident of Joynagar West,
Upendra Bidya Bhaban Road,
P.S. West Agartala,
District West Tripura.

2. Smt. Shilpi Chowdhury(Kar),
D/O. Lt. Balai Chowdhury,
W/O. Sri Siddhartha Sankar Kar,
Resident of H.G.B. Road (Battala-
Dashamighat Road), P.O. Agartala,
P.S. West Agartala,
District-West Tripura.

3. Smt. Mithu Chowdhury(Ganguly),
W/O. Sri Tarup Ganguly,
D/O. Lt. Balai Chowdhury,
Resident of Joynagar West,
Near Upendra Bidya Bhaban,
P.O. Agartala, P.S. West Agartala,
District West Tripura.

BY ADVOCATES :

Mr.D.R.Choudhury ,
Mr.D.Deb,
Mr.S.Sarkar,
Mr.K.G.Bhowmik,

- Vs -

PLAINTIFF-RESPONDENTS :

1. Sri Debashish Chowdhury,
S/O. Late Kanai Chowdhury,
Resident of Joynagar West,
Near Upendra Bidya Bhaban,
P.O. Agartala, P.S. West Agartala,
District West Tripura,
Presently residing at
233/I/ID/APC Road,
PS Ultadanga,
Kolkata – 700004.

2. Smt. Sukla Chowdhury(Ganguly),
W/O. Sri Bijan Ganguly,
D/O. Lt. Kanai Chowdhury,
Resident of Chandi Babu Bagan,
Khan Bazar, P.O. Hoogly,
PIN-712101.

3. Smt. Shikha Chowdhuty(Bagchi),
W/O. Sri Harsha Deb Bagchi,
D/O. Lt. Kanai Chowdhury,
Resident of Ruby-II Apartment,
Goria Garden, P.O. Goria,
P.S. Sonarpur,
District-24 Parganas(South),
PIN-700084.

BY ADVOCATE :

Mr.R.R.Dutta,

**BEFORE
THE HON'BLE MR. JUSTICE S.C. DAS**

Date of hearing & delivery
of Judgment & order : **27.08.2015.**

Whether Fit for Reporting :

Yes	No
	✓

JUDGMENT & ORDER(ORAL)

Heard learned counsel, Mr. D. R. Choudhury for the appellants.

2. This second appeal is filed challenging judgment and decree dated 16.02.2015 passed by learned District Judge, West Tripura, Agartala in Title Appeal No.53 of 2012, whereunder the learned District Judge dismissed the appeal and affirmed the judgment and preliminary decree dated 12.09.2012 passed by learned Civil Judge, Junior Division, Court No.1, Agartala, in Case No. Title Suit(Part) 52 of 2011.

3. The respondents as plaintiffs instituted Title Suit (Part) No.52 of 2011 seeking partition of the suit land described in schedule of the plaint claiming that the plaintiffs were entitled to $\frac{1}{3}$ rd share each in 50% of the suit land and the defendants were entitled to the rest 50% of the suit land in equal share.

4. The defendant-appellants contested the suit admitting the right of the plaintiffs, but contended that the predecessor of the defendants constructed houses on a portion of the suit land and that they should be allowed to retain that part of the suit land.

5. The trial Court considering the pleadings of the parties framed four issues, namely:-

"(i) Whether the suit is maintainable?

(ii) Whether the cost of construction of building over the suit land is also borne by the predecessor of the plaintiffs?

(iii) Whether the plaintiffs are entitled to a decree of declaration of getting 50% share of the suit land including the constructed building situated thereon?

(iv) Whether the plaintiffs are entitled the decree as prayed for and or any other relief or reliefs in this suit?"

6. Both side led evidence and considering the pleadings and evidence, the trial Court decided all the issues in favour of the plaintiffs and accordingly, decreed the suit. The defendants preferred first appeal, i.e., Title Appeal No. 52 of 2012, which has also been dismissed with the impugned judgment passed by the learned District Judge, West Tripura, Agartala.

7. It is submitted by learned counsel, Mr. Choudhury that the predecessor of the plaintiffs, namely, Kanai Chowdhury and the predecessor of the defendants, namely, Balai Chowdhury were full blood brothers and the suit land belonged jointly to both the brothers. After purchase of the suit land Kanai Chowdhury left for Kolkata and settled there. For last 20/30 years Kanai Chowdhury living at Kolkata and Balai Chowdhury constructed his house in a portion of the suit land and living there. The defendant-appellants in their pleadings contended that their possession in the portion of the suit land may be maintained at the time of partition, but that has been rejected by the trial Court, which is affirmed by the appellate Court. It is submitted by learned counsel, Mr. Choudhury for the appellants that since the defendant-appellants are in possession of a particular part of the suit land, while making partition, the possession of the defendant-appellants may be given importance and that part of the suit land may be allowed to the defendant-appellants to retain. It is submitted by learned counsel, Mr. Choudhury that the Supreme Court in the case of **M.L. Subbaraya Setty & ors. V. M.L. Nagappa Setty & ors.**, reported in **(2002) 4 SCC 743** has held that as far as possible person in possession of the property may be permitted to retain his possession by means of equalization of share.

8. In the Memorandum of appeal, the appellants suggested the following substantial questions of law :-

"viii. For that, there are substantial questions of law involved in the present appeal which are to be formulated as follows :

a. Whether the Ld. Courts below committed wrong and illegalities without considering the principle in making the partition of the joint Hindu Family Properties pass the preliminary decree of partition of the suit land in 50% share jointly by the Plaintiff Respondents and 50% share jointly by the Defendant Appellants without any direction to provide the share of the Defendant Appellants within the portion under their possession along with building and structures constructed by them?

b. Whether the Ld. Courts below passed the judgment and preliminary decree without appreciation of the evidences adduced by the parties and thereby allotted shares of the parties 50% share jointly to the Plaintiff Respondents and Defendant Appellants without any instruction of partition of the suit land providing the share to the Defendant Appellants as per their possession while the Plaintiff Respondents have been permanently shifted to Kolkata during the life time of their predecessor?

c. Whether the Ld. Court below have not properly appreciated the evidences about the permanent settlement of the Plaintiff Respondents and their predecessor in Kolkata and construction of the building and huts on the portion of the suit land and possession by the Defendant Appellants permanently and thereby committed wrong and illegalities in giving no instruction of partition in giving allotment of the share of the suit land to the Defendant Appellants as per their possession of the portion of the suit land along with the building and structures made by them and their predecessor?

d. Whether the judgment and preliminary decree has been passed by the trial court and affirmed by the 1st Appellate Court without proper appreciation of evidences adduced by the parties?

e. Whether the Ld. Courts below in passing the preliminary decree of partition suit failed to appreciate the basic principle of ascertainment of the shares of the parties with the direction to maintain the respective possession of the parties in the suit land?

f. Whether the judgment and preliminary decree passed by the Ld. Courts below are perverse?"

9. This is a second appeal against concurrent finding of two Courts below. A second appeal shall be admitted only on a substantial question of law. Even if there is some question of

law, a second appeal should not be admitted for hearing. I agree with learned counsel, Mr. Choudhury that perversity itself is a substantial question of law. The point raised by learned counsel, Mr. Choudhury is that the issue whether the defendants should be allowed to retain portion in their possession has not been considered by both the Courts below taking into account the evidence on record.

10. Issue No.2 formulated by the trial Court is regarding the construction raised in the suit land. The trial Court after detailed discussion of the evidence on record has held that the predecessor of the plaintiffs also bore the cost of construction on the suit land. The first appellate Court upheld that finding of the trial Court. That finding is a finding of fact which has been appreciated by the trial Court as well as the appellate Court. It is submitted by learned counsel, Mr. Choudhury that if the finding of fact is perverse, in that case the High Court can interfere in second appeal. 'Perversity' means non-consideration of the evidence or consideration of something which is not in evidence.

11. In this case I cannot agree with learned counsel, Mr. Choudhury that there was total non-consideration of any particular evidence or that the trial Court or the appellate Court took into consideration certain aspect, which is not at all in the pleadings or evidence.

12. Under such circumstances, while the partition is not disputed, is it proper to say that a particular co-sharer should be

allowed to retain a particular part of the un-partitioned property without considering the location, advantage/disadvantage, potentials etc. of the un-partitioned property? Since the suit land is a joint property the defendant-appellants cannot as a matter of right claim that since they are in possession of the particular part of the suit land they shall be allowed to retain the same. The decision of the Supreme Court, referred by learned counsel, Mr. Choudhury, is on different context and the principle cannot be strictly applied in the present case since the defendant-appellants are only in possession of the particular part of the suit land to which the plaintiff-respondents had no consent and mutual agreement.

13. In the second appeal, therefore, I find no substantial question of law and hence, it stands dismissed. No costs.

JUDGE