

IN THE HIGH COURT OF TRIPURA
AGARTALA

R.S.A. No. 18 of 2014

- 1. Smti. Sabitri Rani Das,**
wife of late Nripendra Kumar Das,
Vill- Durgapur, P.S. Kailashahar,
North Tripura.
- 2. Shri Biswajit Das,**
son of late Nripendra Kumar Das,
Vill- Durgapur, P.S. Kailashahar,
North Tripura.
- 3. Smt. Ratna Das (Dey),**
daughter of late Nripendra Kumar Das,
Vill- Durgapur, P.S. Kailashahar, North
Tripura.
- 4. Shri Ranjit Das,**
son of late Nripendra Kumar Das,
Vill- Durgapur, P.S. Kailashahar,
North Tripura.
- 5. Smti. Manna Rani Das,**
daughter of late Nripendra Kumar Das,
Vill- Durgapur, P.S. Kailashahar, North
Tripura.
- 6. Shri Abhijit Das,**
son of late Nripendra Kumar Das,
Vill- Durgapur, P.S. Kailashahar, North
Tripura.

..... **Appellants**

- V e r s u s -

- 1. Shri Dilip Das,**
son of late Dharendra Kumar Das,
Vill- Durgapur, P.S. Kailashahar, North
Tripura.
- 2. Smti. Alpana Das,**
daughter of late Dharendra Kumar Das,
Vill- Durgapur, P.S. Kailashahar, North
Tripura.

3. **Smti. Swapna Das,**
son of late Dhirendra Kumar Das,
Vill- Durgapur, P.S. Kailashahar, North
Tripura.
4. **Smti. Rita Das,**
daughter of late Dhirendra Kumar Das,
Vill- Durgapur, P.S. Kailashahar, North
Tripura.
5. **Smti. Shampa Das,**
daughter of late Dhirendra Kumar Das,
Vill- Kamrangabari (Near Police Reserve),
P.S. Kailashahar, North Tripura.
At present Vill – Durgapur.

(The original defendant No.1
Dipak Kumar Das, son of late
Dhirendra Kumar Das died
bachelor leaving behind these
respondents as his legal heirs
in Class-II as per Hindu
Succession Act, 1956)

..... Respondents

B E F O R E
THE HON'BLE MR. JUSTICE S. TALAPATRA

For the appellants	:	Mr. S.M. Chakraborty, Sr. Advocate Ms. B. Chakraborty, Advocate.				
For the respondents	:	Mr. A.K. Deb, Advocate, Mr. H. Deb, Advocate.				
Date of hearing	:	06.11.2014				
Date of delivery of Judgment & order	:	30.01.2015				
Whether fit for reporting	:	<table border="1"><thead><tr><th>YES</th><th>NO</th></tr></thead><tbody><tr><td></td><td>√</td></tr></tbody></table>	YES	NO		√
YES	NO					
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JUDGMENT & ORDER

This is an appeal under Section 100 of the C.P.C. against the concurrent finding of fact. The judgment and decree dated 31.01.2014 delivered in Title Appeal No. 05 of 2006 by the District Judge, Kailashahar, North Tripura Judicial District has been questioned in this appeal.

[2] This appeal has been admitted on the following substantial questions of law by the order dated 30.04.2014:

(ii) Where the plaintiff-appellants instituted the suit for partition and the defendant-respondents set up their pleadings claiming amicable partition, burden lies on whom to prove the factum of amicable partition?

(ii) Whether the judgment and decree passed by the trial Court and first appellate Court suffers from any perversity?

[3] For critically assessing the substantial questions of law, the relevant facts leading to this appeal may briefly be introduced at the outset.

The appellants instituted the suit being Tittle Suit(Partition) No.16 of 2011 in the court of the Civil Judge, Sr. Division, North Tripura Judicial District, Kailashahar asserting that the suit properties originally belonged to Dhirendra Kumar Das and Nripendra Kumar Das. Those two full blooded brothers purchased

the properties from one Nripendra Kumar Malakar by the registered sale deed No.1-3182 dated 10.08.1979. The appellants are the legal heirs of Nripendra Kumar Das, since deceased whereas the respondents are the legal heirs of Dharendra Kumar Das, since deceased. Sometime in the year 1987, according to the plaint, Dharendra Kumar Das and Nripendra Kumar Das started a hotel business jointly. As such, the legal heirs of Dharendra Kumar Das and Nripendra Kumar Das, the defendant-respondents and the plaintiff-appellants respectively are entitled to equal share of that business. Dharendra Kumar Das died in the year 1994. On the suit land, a super market has been constructed and some tenants are inducted therein and on the remaining vacant land, the further construction is awaited. As stated in the plaint, the suit land was never partitioned.

[4] The defendant-respondents by filing the written statement has categorically asserted that the land was purchased in the name of Dharendra Kumar Das and Nripendra Kumar Das but the hotel business was exclusively from its inception owned by Dharendra Kumar Das. For purpose of that business, under the name and style of 'Sankar Hotel' when the license had been granted, it was so granted in the name of Dharendra Kumar Das showing him as the proprietor of the business. The said business used to be carried initially in the rented premises of Nripendra Kumar Malakar and others. When Nripendra Kumar Das died, the plaintiff-appellants

used to assist Dharendra Kumar Das in carrying on the business by discharging their duties as employees. In the course of time, Dharendra Kumar Das purchased that land from Nripendra Kumar Malakar and others. At the time of purchasing the said land, the said land was purchased in his name and in the name of his brother, Nripendra Kumar Das jointly. During the lifetime of Nripendra Kumar Das, the suit land was amicably partitioned on 10.09.2010 in presence of the relatives. However, the said partition was oral by way of family arrangement. Consequently, Nripendra Kumar Das took possession of 0.025 acres to the northern portion of the suit land whereas Dharendra Kumar Das took possession of the remaining land measuring 0.030 acres keeping a southern portion of the suit land vacant for common passage. Dharendra Kumar Das thereafter has constructed a building on his land and shifted his hotel business there. Some shops were also let out to some persons as the tenants by executing 'Bharatianama'. Dharendra Kumar Das used to collect the rent during his lifetime and after his death, the defendant-respondents from the tenants. Hence, there is no question of further partition.

[5] After recording the evidence of the plaintiffs and the defendants, the trial court dismissed the suit on observing that:

The plaintiffs' side only adduced one document of Khatian. They did not exhibit the purchased deed by which the predecessors' of the plaintiffs and the defendants became the joint owner of the suit land. In absence of such a document it is also

very difficult to ascertain who were the respective parties. Rather I find that the defendants' case is believable and acceptable. It is well established that under the Hindu Law, there can be an oral partition and once a partition is alleged, then the law will presume, unless something is proved to the contrary, that there was a complete partition between the members of the family.

In the instant case I find that defendants have been able to prove their case in respect of the amicable partition made between their predecessors. In the alternative I must say that plaintiffs' side failed to adduce sufficient evidence to justify their claim. Hence, I hold that the suit is not maintainable in its present form and nature as the suit land has already been partitioned between the predecessors of both the parties.

[6] It appears from the records that the amicable partition which has been caused by an oral settlement in the form of a family arrangement according to the trial court has been well proved. The defendant-respondents adduced witnesses namely, Dilip Das(DW-1), Bimal (DW-2) and Ramendra Kumar Das (DW-3), whereas only one witness has been examined for the plaintiff-appellants without any corroboration and who could not shed light on such amicable family arrangement or its probable non-existence. The judgment and decree dated 21.01.2006 delivered in T.S.(P) 16 of 2001 by the Civil Judge, Sr. Division, North Tripura Judicial District, Kailashahar had been assailed in the appeal being T.A. No.05 of 2006 by the plaintiff-appellants. The said appeal was dismissed by the impugned judgment on reassessing the evidence.

[7] It has been observed by the first appellate court while dismissing the appeal that according to DW-2 and DW-3, there was oral amicable partition and they were present at the time of such arrangement. The plaintiff-appellants could not shake the credibility of those two witnesses and also failed to show their individual interests in stating so. Moreover, DW-2 and DW-3 are the close relatives of the plaintiff-appellants and the defendant-respondents. It has been observed by the first appellate court that PW-1 (Biswajit Das, the plaintiff-appellant No.2) in his cross-examination admitted that he had no knowledge whether there was any amicable partition between Dhirendra Kumar Das and Nripendra Kumar Das in their lifetime. It has been further established that the license for the business of hotel was issued in the name of Dhirendra Kumar Das as the proprietor much before the purchase of the suit land. However, there is no dispute that the suit land had been purchased in the name of Dhirendra Kumar Das and Nripendra Kumar Das. It is evident that the registration of the hotel under the name and style of 'Sankar Hotel & Sweets' was issued by the registering authority in the name of Dhirendra Kumar Das, who expired on 09.11.1994 i.e. long after the suit property was purchased. Exbt.C evinces that the licence was issued in favour of Dhirendra Kumar Das on 03.01.1992. Exbt.D, Bharatianama was also executed by Dhirendra Kumar Das and Narayan Kumar Deb on 17.09.1993. Exbt.E, another Bharatianama was entered between Dhirendra Kumar Das and

Biswajit Das having been executed on 18.04.1993. Exbt.F, Bharatianama entered between Dhirendra Kumar Das and Nirmal Kumar Das was executed on 13.11.1993 but the plaintiff-appellants did not raise any clamour against such action. On such reassessment, analysis and also to some extent disapproving the impugned judgment as it did not take decisions properly on Issue Nos.2,3,5 & 6, the appellate court has observed as under:

In the case at hand, the parties have submitted plaint, written statement, adduced oral and documentary evidence, which are sufficient to dispose of the issue No.6(a) and other issues. The parties in the case are on this suit over the partition of joint property purchased by the predecessors in interest, which is the only property they inherited. Ext.G., i.e., Khatian No.2107, only shows that Girindra Kumar Das along with Loknath Das, Sabitri Rani Das, Biswajit Das, Ratna Das, Ranjit Das, Manna Rani Das, Abhijit Das, Anjali Das, Sikha Das, Tukurani Das were owners of some properties. Girindra Kumar Das was the father of Dhirendra Kumar Das and Nripendra Kumar Das, since deceased, the predecessors in interest of the present plaintiffs-appellants and defendants-respondents. Apart from that, nothing has been proved by the defendants-respondents that any portion of the land of Khatian No.2107 was inherited by Nripendra Kumar Das and Dhirendra Kumar Das during lifetime or that, they have left behind any such property, which has been inherited by the present plaintiffs-appellants and defendants-respondents. Therefore, there is no merit in the cross objection preferred by the defendants-respondents. Consequently, it is rejected.

It appears from the records that a cross-objection being Title Appeal No.8(Cross Objection) of 2006 was also preferred by the defendant-respondents against the judgment delivered by the trial court. The said cross objection was also dismissed. Thus, the

judgment returned by the trial court was affirmed subject to the observations made in the impugned judgement.

[8] Mr. S.M. Chakraborty, learned senior counsel appearing for the petitioner has submitted that the defendant-respondents have failed to discharge their obligation as regards the oral amicable family arrangement. This Court in **Parimal Ch. Saha & Others vs. Snehalata Saha and others**, reported in **(2013) 1 TLR 335** has observed that in the absence of any document in support thereof, burden heavily lies on the person, who claims the oral family partition, to prove that fact.

[9] Mr. Chakraborty, learned senior counsel has further submitted that even the said family partition was never reduced in writing and even that has not been acted upon in any manner at least there is no reflection in the Khatian No.1-3157 comprising the suit land, Exbt.1. Therefore, he submits that both the courts below have assumed the certain facts perversely and held that the onus of proving the oral family partition has been discharged by the defendant-respondents.

[10] From the other side, Mr. A.K. Deb, learned counsel appearing for the defendant-respondents has emphatically submitted that no substantial question is involved in this appeal and as such, this Court shall not re-appreciate the evidence for any purpose as the jurisdiction conferred under Section 100 of the C.P.C.

is circumspect to set out such re-inquiry into the concurrent finding of facts. He has relied on the celebrated decision of the apex court in **Kale and others vs. Deputy Director of Consolidation and others**, reported in **AIR 1976 SC 807**, where it has been held that the family arrangement may be even oral in which case no registration is necessary. The registration would be necessary only if the terms of the family arrangement are reduced into writing. Here also a distinction should be made between a document containing the terms and other recitals of a family arrangement made under the document and a mere memorandum prepared after the family arrangement had already been made, either for the purpose of the record or for information or for making necessary mutation. In such a case, memorandum itself does not create or extinguish any right in the immovable properties and therefore, such memorandum is also not compulsorily registrable.

[11] Mr. Deb, learned counsel has shown that the scintillating inquiry has been made by the first appellate court while affirming the finding of the trial court couched with certain additional observation and there is no perversity and as such, in view of the decision rendered in **Ganeshi (D) through L.Rs. & Ors. vs. Ashok & Anr.**, reported in **AIR 2011 SC 1340**, this Court may not interfere with the finding of the fact. In **Ganeshi (D) through L.Rs. & Ors. vs. Ashok & Anr**, it has been held that:

14. A family settlement is not a transfer of property, as rightly held by the first appellate court. The first appellate court held that the family settlement was bona fide to avoid disputes in the family. The decree in Civil Suit No. 476 of 1978 was only in pursuance of that family settlement, and hence it could not be interfered with.

15. We have carefully perused the judgment of the first appellate court which was the last court of facts and we are of the opinion that the findings of fact given by it are based on relevant evidence. Hence the High Court was not justified in interfering with those findings.

16. For the foregoing reasons, the appeal is allowed. The impugned judgment and order of the High court is set aside and that of the first appellate court is restored. There shall be no order as to costs.

[12] In **Kochukakkada Aboobacker (Dead) by LRs. and others vs. Attah Kasim and others**, reported in **(1996) 7 SCC 389**, the apex court has critically dealt with the aspect when the High Court can interfere even in the concurrent finding of fact. According to Mr. Deb, learned counsel that here is not the case where the High Court should interfere with the concurrent finding of the case. In **Kochukakkada Aboobacker (Dead) by LRs. and others vs. Attah Kasim and others**, it has been held that since the appellate court did not consider such vital documents which are affecting the right of the parties in the second appeal, the evidence may be re-appreciated. No such omission or irregularity affecting the decision itself has been demonstrated here.

[13] Mr. Deb, learned counsel in order to rebut the plea raised by Mr. S.M. Chakraborty, learned counsel that since there is

no reflection of amicable partition in the concerned Khatian, Exbt.1 a presumption has to be drawn, there was no partition at all, has submitted that Khatian does not create or extinguish the title nor should it entail any presumptive value on title. In this context, he has referred the apex court decision in **Sawarni (Smt) vs. Inder Kaur (Smt) and others**, reported in **(1996) 6 SCC 223**, where the apex court has held as under:

"Further, the lower appellate Court has not come to any positive finding that Inder Kaur was the daughter of Gurbax Singh, He has been swayed away by the so called mutation in the revenue record in favour of Inder Kaur. Mutation of a property in the revenue record does not create or extinguish title nor has it any presumptive value on title. It only enables the person in whose favour mutation is ordered to pay the land revenue in question. The learned Additional District Judge was wholly in error in coming to a conclusion that mutation in favour of Inder Kaur conveys title in her favour. This erroneous conclusion has vitiated the entire judgment. That apart, as it would be seen, the learned trial Judge had considered the oral evidence adduced on behalf of the parties to establish the respective stand as to who was the second daughter of Gurbax Singh and on perusal of the same came to the conclusion that it was Roori who was the second daughter of Gurbax Singh. The Additional District Judge has not even discussed anything about the said oral evidence and the reasoning's advanced by learned trial Judge in coming to the conclusion that it was Roori who was the second daughter of Gurbax Singh. Non consideration of the oral evidence adduced by the parties, by the lower appellate Court vitiates the ultimate conclusion on the question whether Roori was daughter of Gurbax Singh or not."

[14] Having appreciated the records for a very limited purpose whether there is any perversity in appreciating the evidence and having due regard to the submissions made by the learned

counsel for the parties, this Court does not have any hesitation to hold that the plaintiff appellants have entirely failed to prove that the suit property remained un-partitioned and after death of Nripendra Kumar Das, their predecessor in interest became entitled to half of the share of the suit property. On the contrary, the defendant-respondents have proved that during lifetime of Nripendra Kumar Das, the suit properties were amicably partitioned by way of family arrangement and the respective shares were taken over by Nripendra Kumar Das and Dhirendra Kumar Das pursuant to the said amicable partition. Thus, both the courts below had correctly held that no further partition is legally permissible inasmuch as such oral family partition has been well proved even by various documentary evidence including the 'Bharatianamas'

[15] Having held so, this appeal stands dismissed for being devoid of merit.

Prepare the decree accordingly.

Send down the LCRs thereafter.

JUDGE

Sujay