

08.10.2021

court no. : 09
Item no. : PB-05
matter : FAT
status : APPEAL ALLOWED
transcriber : nandy

FAT 346 of 2019

with

CAN 2 of 2019

(CAN 9788 of 2019)

Ibrahim & Ors.

Vs.

Abid & Ors.

Mr. Tarak Nath Halder, Advocate

Mr. Md. M. Nazar Chowdhury, Advocate

Ms. Priyanka Saha, Advocate

.....for the Appellant

Mr. Moniruzzaman, Advocate

Mr. Md. Habibur Rahaman, Advocate

.....for the Respondent

We listed the matter today without adhering to the rules applicable for preparation of an appeal for final disposal as the point involved in the instant appeal appears to us a pure question of law, which does not require a roving enquiry into the facts nor the evidence. We decided to dispense with all such formalities and invite the respective Counsel to address us on a pivotal point emerged in the instant appeal.

Before we proceed to formulate the points, it would be apposite to adumbrate the salient facts which are more or less undisputed and discernible from the impugned judgment.

The plaintiffs/appellants filed a suit for partition and separation of shares in respect of the joint properties. The defendants/respondents appeared and took defence that the plaintiffs have no right, title and interest of the joint property having divested by the predecessors. It was further contended that there is an anomaly in the death

certificate relied in the matter. The Trial Court, after considering the documentary as well as the oral evidence adduced by the respective parties, categorically decided issue nos. 3 and 4 that deeds allegedly executed by the predecessor is void, having seen the light of the day after his death. The Court further held that the plaintiffs/defendants are the co-sharers in respect of the suit property and there is a unity of possession among themselves.

However, the issue nos. 5 and 6 took a front seat, leading to the dismissal of the suit taking shelter to Section 34 of the Specific Relief Act. The Trial Court held that since the plaintiffs are admittedly out of possession prior to the institution of the suit, the suit is bad under Section 34 of the Specific Relief Act, if the consequential relief pertaining to the recovery of possession is not prayed for in the suit.

On the conspectus of the aforesaid undisputed facts, the seminal point involved in the instant appeal pertains to the applicability to Section 34 of the Specific Relief Act in conjunction with the specific findings, returned while answering the issue nos. 3 and 4, where the Trial Court has held that the parties are co-sharers and there is a unity of possession amongst themselves.

There is no ambiguity in our mind that the learned Judge in the Trial Court has misconstrued and under the misconception of the law, held that the suit for partition simplicitor is bad and not maintainable unless the relief in the form of possession is prayed for.

The fundamental principles underlining the concept of partition leaves no room that the possession of a co-sharer in the joint property is a possession on the basis of the share held by him and on behalf of the other co-sharers, unless there is a specific case of ouster being made out.

We do not find any case of ouster having made out in the written statement as it proceeded simplicitor on an assertion that the predecessors of the plaintiffs, divested the right, title and interest in respect of the joint property by executing several deeds. The possession may be important in other suits than the partition suit. The unique feature of the partition suit is that there is no concept of plaintiff and defendant as each party is a plaintiff defending and asserting his share in the property. The moment, the Court decided the important issue and held that there is a unity of possession amongst the parties, the question of recovery of possession automatically gets obliterated and a person who is in possession is not required to claim a specific relief in this regard. Even, otherwise, once the property is declared to be a joint property of the parties to the suit, the possession is irrelevant as such possession is in-built and in-heard in the jointness and cannot be divorced or segregated by claiming a specific relief.

Fundamentally, the moment the shares are declared in the preliminary decree at the time of passing the final decree, making the allotment, apropos the shares declared therein, any co sharer who occupies the

portion, thereof, in excess of the share, is required to give up such possession.

Section 34 of the Specific Relief Act does not envisage such aspect but its applicability is restricted to a case, where mere declaration without the consequential relief would render the decree, unworkable and/or inexecutable.

In such perspective, Section 34 has to be seen and, therefore, in our opinion, applicability of such provision in a suit for partition is misplaced and there has been an apparent misconception of the legislative intent underlining the incorporation of such provision in the statute book.

Had it been a case, a person has filed a suit for declaration without a further consequential relief relating to the recovery of possession and in the event, it is found during the trial that the plaintiff is out of possession, the rigor of Section 34 may be attracted. However, in case of a partition suit, the unity of possession, which is of varied form, cannot be projected as a deterrent to the plaintiff in claiming a separation of share in terms of the shares declared in the preliminary decree. The possession may be actual, physical, constructive, symbolical and depends upon the facts of each case.

We do not delve to go deep into such aspect in determining the nature of such possession for the simple reason that the Trial Court has already held that there is a unity of possession among the parties and the moment,

such possession is found, which may be constructive or symbolical, there is no need for a separate prayer for recovery of possession, solely on such ground.

We do not find that the issue nos. 5 and 6 decided by the Trial Court can be sustained. Such findings are hereby set aside.

Since the Trial Court has held that the parties are co-sharers in respect of a joint property, the matter is remitted back to the Trial Court for determining the share on the basis of such finding.

We expect that the Learned Judge in the Trial Court would pass a preliminary decree on the basis of the findings recorded in issue nos. 3 and 4 within four weeks from the date of communication of the order in presence of the parties or their respective counsels.

The appeal being **FAT 346 of 2019** is **allowed**.

Let the order be immediately communicated to the Trial Court.

(Harish Tandon, J)

(Bibek Chaudhuri, J.)

