

IN THE HIGH COURT AT CALCUTTA
Civil Appellate Jurisdiction
APPELLATE SIDE

Present:

The Hon'ble Justice Tapabrata Chakraborty
&
The Hon'ble Justice Partha Sarathi Chatterjee

FA 63 of 2017

Shivnarayan Gope
versus
Kuldeep Saraf & Ors.

For the Appellant : *Mr. Probal Kumar Mukherjee, Sr. Adv.,*
Ms. Shaoni Dey.

For the Respondents : *Mr. Pratip Kumar Chatterjee,*
Mr. Chittapriya Ghosh,
Mr. Kontal Roy,
Ms. Priyanka Saha.

Hearing is concluded on : *6th December, 2022.*

Judgment On : **16th December, 2022.**

Partha Sarathi Chatterjee, J.

1. Judgment and decree dated 30.8.2016 passed by the learned Civil Judge, Senior Division, 2nd Court, Asansol in Title Suit No. 103 of 2014 (226 of 2013) are under challenge in this instant appeal. By the judgment and decree impugned,

the learned Court below dismissed the suit being a suit for declaration and permanent injunction and alternatively for partition and also for other allied reliefs.

2. Sans unnecessary details, facts required to be adumbrated for the purpose of disposal of the appeal are :

- a) Suit property, as claimed by the plaintiff/appellant (hereinafter referred to as the appellant), is his ancestral property and names of his predecessors were duly recorded in C.S. R-O-R and he acquired absolute ownership thereof by way of inheritance;
- b) In 1962, by virtue of one registered deed of sale *vide* No. 6470, he sold out 2½ dec. of land from the suit property to defendant/respondent nos. 1 to 4 (hereinafter referred to the respondents) and there was a shop room in the suit property in which the respondents were inducted as monthly tenants by his predecessor and in 1990, the respondents sought for permission from plaintiff to renovate the tenanted shop room at their cost which would be adjusted with monthly rent and such permission was accorded and cost of such renovation was finally adjusted in December, 2012 but thereafter, respondents failed and neglected to pay monthly rent since January, 2013 and then in the last week of April, 2012, the respondents started claiming that the appellant had sold out the shop room to them and they have acquired absolute ownership over the said shop room;

- c) Upon close scrutiny of the certified copy of the deed of 1962, the appellant came to learn that there was a mistake in the butted and bounded portion mentioned in the deed. The appellant had in fact sold out only 2½ dec. from plot no. 8 and the said shop room is located in plot no. 8/566 and taking advantage of such mistake, the respondents in connivance with the proforma respondents got their names mutated in L.R.R-O-R in respect of plot nos. 8, 8/566 and 8.567 beyond their share since the respondents have never acquired any right, title, interest and possession in the plot nos. 8/566 or 8/567. The respondents thereafter sought to make construction encroaching the 'B' schedule property and as the appellant felt inconvenience in possessing and enjoying jointly with the respondents, he was forced to file the suit seeking a decree of declaration that the appellant has 85% share whereas the respondents have only 14.5% share in 'A' schedule property and that the appellant is the absolute owner of 'B' schedule property and a decree of permanent injunction and alternatively partition and other consequential reliefs were also sought for;
- d) The respondents contested the suit by filing written statement wherein it was specifically contended that R.S. plot no. 566 is part and parcel of C.S. plot no. 8 and plot no. 566 originally belonged to appellant and his mother, Domini Das and they sold out 2½ dec. along with a tile shaded room standing thereon to Maya Ram Saraf, since deceased from plot no. 566 by virtue of registered deed of sale being no. 6470 of 1962 with a specific boundary therein;

- e) In R.S. operation, C.S. plot no. 8 was divided into three plots namely, plot nos. 8, 8/566 and 8/567 and it was claimed that the respondents have been running jewellery business in the tile shaded room facing Jamuria Road which falls within the purchased portion of Maya Ram Saraf;
- f) It was contended that the appellant was not in possession of that shop room which was renovated in 1990 by the respondents and appellant did not raise any objection to such renovation work and appellant is estopped from challenging the boundary portion of the deed;
- g) State respondents being the proforma respondents left the action undefended from their end and they did not file any written statement.

3. Record speaks that upon pleadings of the respective parties, learned Court below framed as many as 7(seven) issues. To substantiate his case, the appellant adduced oral accounts of himself and of one Ranjit Maji, who were examined as PW-1 and PW-2 respectively and the appellant tendered some documents namely, the certified copy of registered deed of sale being no. 6470 of 1962, C.S. R-O-R, L.R. R-O-R, certified copy of the order sheets of B.L.& L.R. O., Jamuria, finally published L.R. R-O-R relating to Khatian no. 153, J.L. No. 21, P.S. Jamuria, Domahani, Damodarpur which were marked as Ext.1 to 5 (series) respectively. On the other hand, to resist the suit, the respondents adduced oral testimonies of Kuldip Saraf and of one Samir Nag, who were examined as D.W.1 and D.W.2 respectively. The respondents produced some documents namely, original registered deed of sale being no. 6470 of 1962, certificate of enlistment issued by Jamuria Municipality in the year 2015-16, municipal tax receipt,

telephone bill of suit premises, income tax return, challan etc., which were marked as Ext.-A to E respectively. As has been stated earlier, the learned Court below upon scrutiny of pleadings and evidence of the respective parties dismissed the suit.

4. Aggrieved thereby, the appellant has preferred this appeal, *inter alia*, on the grounds that the learned Court below ought to have considered that total area of property conveyed to the respondents was undivided 2½ dec. in C.S. plot no. 8 irrespective of the description of boundary contained in the deed and learned Court below fell in error in coming to a conclusion that the appellant only sought for relief in respect of 'A' and 'B' schedule properties measuring 17 dec. and 23 dec. respectively and that the suit does not relate to entire C.S. plot no.8 which comprises of an area of 50 dec. and the learned Court below did not consider that the respondents have failed to produce any document relating plot nos. 8/566 and 8/567. The learned Court below ought to have decreed the suit basing upon the evidence of the appellant.

5. Mr. Mukherjee, learned advocate appearing for the appellant submits that regarding tenancy of the respondents in respect of shop room in question, the appellant could not produce any convincing evidence. He argues that germane question in this appeal is interpretation of the deed. Admittedly, there were some mistakes in mentioning boundary of the portion of land transferred to the predecessor of respondents in the deed of 1962 and taking advantage of such mistake, the respondents have taken possession of shop room and he submitted that the respondents own only 2½ dec. of land from C.S. Plot no. 8 but they are possessing land beyond their share and the learned Court below has dismissed the

suit since the appellant has sought for partial partition. The C.S. plot no. 8 comprises of an area of 50 dec. but the appellant had sought for relief in respect of 'A' and 'B' schedule properties which comprises of a total area of 40 dec. The learned Court below should have presumed that the rest portion might have been encroached or somehow lost.

6. Mr. Chittapriya Ghosh, learned advocate representing the respondents submits that the appellant has stated that the respondents are in possession of plot no. 8/566 but he did not make any prayer for recovery of possession and hence, the suit is bad in view of Section 34 of the Specific Relief Act. He argues that the appellant did not specify the actual quantum of land and he asserts that there are other owners of those plots of land and he claims that the respondents purchased other portion of that plot from other persons and he submits that the appellant sold out the portion of land to different persons, who have not been brought on record and as such the suit is bad for non-joinder of necessary parties and for seeking partial partition and he submits that learned Court below has rightly dismissed the suit for justified reason and hence, there is no scope to interfere with the judgment impugned.

7. In reply, Mr. Mukherjee submits that partial partition is discouraged only to prevent future litigation but for this reason the appellant ought not to have been non-suited. He asserts that learned Court below should have added the parties left out and should have decreed the suit.

8. The appellant sought for decree of declaration to the effect that he has right, title and interest in respect of 85.5% share and whereas the respondents have 14.5% share in 'A' schedule property and hence, sought for partition and

separate possession in respect of such 'A' schedule property and for a decree of declaration to the effect that he is absolute owner of 'B' schedule property and also for a decree of permanent injunction to restrain the respondents from raising any construction encroaching 'B' schedule property till the partition of 'A' schedule property is effected. The appellant has claimed that he inherited C.S. plot no. 8 and in the year 1962 and he along with his mother sold out 2½ dec. of land from C.S. plot no. 8 to the predecessor of the respondents, Maya Ram Saraf.

9. The learned Court below observed that 2½ dec. of land was sold out by the appellant and his mother during the life time of the appellant's father. The appellant could not satisfy the Court below how the appellant and his mother inherited the land bearing C.S. plot no. 8 during life time of his father although the appellant himself claimed that C.S. plot no. 8 was originally belonged to his predecessor. C.S. R-O-R of plot no. 8 speaks that the entire C.S. plot no. 8 comprised of an area of 50 dec. but the appellant claimed that the C.S. plot no. 8 has been divided into three plots being 8, 8/566 and 8/567 and in Schedule 'A' appended to the plaint, C.S. plot no. 8 was shown to have been comprising an area of 17 dec. and in Schedule 'B' where particulars of plot nos. 8/566 and 8/567 were referred to show that the two plots were measuring an area of 23 dec. and there was no information regarding rest 10 dec. of land. In the 'A' schedule and 'B' schedule, reference has been made to Khatian nos.5 and 6 but the West Bengal Land Reforms Manual speaks after L.R. operation, in one Mouza, one man shall have one Khatian. So, from the aforesaid two schedules, it transpires that in C.S. plot 8 and in plot nos. 8/566 and 8/567 there are many co-sharers who have not been impleaded as parties to the proceeding. Thus, it is obvious that the appellant

has suppressed some facts which are material in the given case and appellant did not embrace all the joint properties in the suit. General principle of law is that in a suit for partition, all the co-sharers have to be impleaded and all the joint properties have to be made subject matter of the suit failing which the suit shall be liable to dismissed as not maintainable.

10. Ordinary rule prevalent is that the suit for partition should embrace all the joint properties and partial partition cannot be allowed except in some exceptional cases namely, i) where different portions of joint properties are situated in different districts where separate suits for separate portions may be brought; ii) where some portion of joint property is incapable of partition; iii) when property from its nature is impartible; iv) when the property is held jointly with strangers who cannot be joined as parties in suit for partition; v) co-owners by mutual agreement decide to make partition of part of the joint property retaining the rest in common; vi) in case where co-owners hold the land as tenants-in-common as distinguished from the co-sharers who hold land as joint tenants etc.

11. The case of the appellant does not fall within any of such exceptional categories. In suit for partition, all the co-sharers are necessary parties and in such suit, principle of *dominus litis* is not strictly applicable and after hearing of the suit and even after the preliminary decree is passed, a party can be added. In the present case the appellant has suppressed who are the other co-sharers and he did not make any effort to bring them on record. The appellant has himself admitted that respondents are in possession of plot no. 8/566 but he has sought for decree of declaration of his right, title and interest in respect of such plot but he did not seek any decree for recovery of khas possession. A declaratory decree

cannot be asked for as a matter of right. The Court has a discretion to grant it having regard to the circumstances of the case. However, such discretion cannot be exercised arbitrarily, rather it should be governed by the settled principles of law. The Court will not grant declaration where the relief granted would be inequitable, contrary to the accepted principles governing Court's exercise of jurisdiction.

12. The proviso to Section 34 of the Specific Relief Act, 1963 enacts that no Court shall make any declaration where the plaintiff, being able to seek further relief than a mere declaration of title, omits to do so. Such proviso is mandatory in nature and cannot be left at the discretion of the Court. The expression '*being able to seek further relief*' refers to the ability on the date of institution of the suit. However, the plaintiff cannot be non-suited by reason of any subsequent event which may entitle him to get a further relief. The legislative prohibition contained in proviso to Section 34 is not applicable in all cases, it operates as bar where Court finds that a suitor cannot get complete relief without a prayer for appropriate consequential relief and '*further relief*' is to be distinguished from '*other relief*'. Further relief must flow necessarily from the relief of declaration.

13. In the present case, on the date of institution of the suit, appellant was able to seek further relief of decree for recovery of khas possession but he omitted to seek such relief. Moreso, mere declaration cannot afford effectual and complete remedy without prayer for appropriate consequential relief and further relief of recovery of khas possession necessarily flows from the relief of declaration.

14. To get an equitable relief of decree of declaration and to get a decree for equitable distribution of the property, plaintiff must come to Court with clean

hands and must disclose all the material facts and must bring all the necessary parties on record failing which he cannot get equitable and discretionary relief from the Court. Situated thus, we are constrained to hold that the learned Court did not fall in error in refusing to exercise its discretion to grant the reliefs as were sought for by the appellant in the suit.

15. Consequently, the appeal be and the same is dismissed. Judgment and decree impugned herein are affirmed.

16. There shall, however, be no order as to costs.

17. Let a decree be drawn up accordingly.

18. Let a copy of this judgment along with the LCR be sent to the learned Court below forthwith.

19. Urgent Photostat copy of this judgment, if applied for, shall be granted to the parties as expeditiously as possible, upon compliance of all formalities.

(Partha Sarathi Chatterjee, J.)

(Tapabrata Chakraborty, J.)