

09.09.2022
SL No.8
Court No.8
(gc)

**SA 144 of 2001
CAN 2 of 2001 (Old No: CAN 9403 of 2001)**

**Gopi Ballav Pal
Vs.
Aftabuddin Sk. & Ors.**

The second appeal appeared in the daily list on 8th September, 2022 and no interest was shown by the appellant to move the second appeal.

The appellant is also not represented today nor any accommodation is prayed for on behalf of the appellant. Although, the appellant has sufficient knowledge and notice of the listing of this matter.

The appeal was presented on 24th November, 1999 out of time and an application for condonation of delay was filed on 2nd December, 1999. However, no attempt was made to move the said application by reason of such indication on the part of the appellant, the second appeal could not proceed only it was allowed on 14th February, 2001.

The second appeal is arising out of a decree of affirmation dated 29th June, 1999 whereby the judgment and decree passed by the learned Trial Judge on 30th May, 1998 in a suit for partition.

The partition suit was decreed in preliminary form on contest against the defendant Nos.1 and 2 and ex parte against the rest. The defendant No.1 is the appellant. The defendant No.2 appears to have accepted

the decree. Briefly stated, one Hrishikesh Koley was the original owner of the suit property who died in 1958 leaving behind five sons, two daughters and wife as his legal heirs. According to the plaintiffs, the legal heirs of Hrishikesh Koley inherited the property in equal shares in accordance with the Hindu Succession Act. The plaintiffs claimed that the State Government acquired 18 decimal of land out of the suit plot for the purpose of constructing a pump house and the same was correctly recorded in the record of rights. The plaintiff Nos.1 and 2 claimed to have purchased $2 \frac{4}{7}$ decimal from Gobinda by a registered deed dated 7th April, 1994 and 5 decimal from Netai and Kanai by a registered deed dated 10th May, 1994. The plaintiffs further claimed that the plaintiff Nos.1 to 3 purchased 9 decimal of land by a deed dated 9th June, 1994 from the son of Hrishikesh Koley, that is, Balai, the wife of Hrishikesh and two daughters of Hrishikesh Koley. According to the plaintiffs the wife died after execution of the said deed and before registration, the plaintiff No.3 acquired 2 decimal of land and plaintiff Nos.1 and 2 acquired $4 \frac{3}{4}$ decimal out of 9 decimal. The plaintiffs claimed $14 \frac{1}{2}$ decimal share in the suit property. As the defendants did not effect partition despite request the plaintiffs instituted this suit for partition.

The State of West Bengal, defendant No.8, contested the suit by filing a written statement contending inter alia that the suit has acquired 18 decimal of land out of 36 decimal in suit plot for constructing a pump house for

irrigation purpose. According to the State, acquisition of 18 decimal of land was recorded in L.R. R.O.R. The State of West Bengal challenged the maintainability of the suit because of non-service of notice under Section 80 CPC.

The defendant Nos.1 and 2 contested the suit by filing a written statement contending inter alia that the suit plot corresponds to C.S. plot Nos.64, 49 and 63 and total area of the same was 45 decimal. According to the defendants, one Korim Baksh was the original owner of the suit property who by a deed dated 21st July, 1955 sold the same in favour of Hrishikesh Koley. The defendants stated further that Hrishikesh Koley died prior to commencement of the Hindu Succession Act leaving behind five sons and wife as his legal heirs. According to the defendants these five sons and wife by a deed dated 14th June, 1957 sold the same to one Bijoy Bhusan Pal. So by purchase Bijoy Bhusan Pal became the owner of C.S. plot Nos.64,49 and 63 measuring 45 decimal. The further contention of the defendants is that the Government acquired 9 decimal of land and as such the total area of the plot was recorded as 36 decimal. According to the defendants the entry in R.S. R.O.R. is erroneous. The defendants stated further that Government acquired further 18 decimal of land and thereafter while Bijoy Bhusan Pal was in possession of the remaining 18 decimal of land he died leaving behind the defendant Nos.1 & 2 and one Anadi Kr. Pal as sons, his wife and mother as his legal heirs. According to the

defendants the plaintiffs have no right, title and interest in the suit property. The defendants asserted with vigour that Hrishikesh Koley died prior to commencement of Hindu Succession Act. The defendants pray for dismissal of the suit.

On the basis of the aforesaid pleadings, the Trial Court framed nine issues. The learned Trial Judge found inconsistency in the pleadings and evidence of defendant No.1 with regard to the possession of the family of Hrishikesh and has returned a finding that the evidence of D.W.-1 that Hrishikesh has six sons cannot be accepted. Insofar as the suit plot corresponds to C.S. plot Nos. 64, 49 and 63 is concerned, the defendants could not file any C.S. Khatian. The defendants produced a certified copy of the deed of purchase by their predecessor-in-interest. The said deed was marked as exhibit -B. The property covered by exhibit-B is not identical with the suit property. Though the property was purchased in 1957 particularly on 14th June, 1957 but there is no mention of corresponding R.S. plot in the said deed. The defendants did not produce their original deed nor there is any explanation for non-production of the original deed. The rent in respect of the suit plot is found to be Rs.4-9-4 pies. But according to exhibit-B the said rent is Rs.1-11-4 pies. No rent receipt was produced by the defendants. There is mention in the deed that the Surveyor of the State prepared CHITHA map, but no such map was produced by the defendants.

The defendants were unable to show that the suit plot corresponds to C.S. plot Nos.63,64 and 49. In absence of such evidence, the learned Court was justified in rejecting the contention of the defendants that their predecessor-in-interest, namely, Bijoy Bhusan Pal became the owner of the suit property on the strength of purchase from Hrishikesh Koley. The onus lies on the said defendants to produce cogent evidence in support of claim of ownership in respect of the said plots. The learned Trial Judge has taken into consideration the deed of purchase. It appears that by a deed dated 7th April, 1994, the son of Hrishikesh named Gobinda sold $2 \frac{4}{7}$ decimal of land in favour of the plaintiff Nos. 1 and 2. A question was raised with regard to the said sale by Gobinda in favour of the plaintiffs. The learned Trial Judge has taken into consideration the evidence of P.W.-1 in which he has stated that their mother Krishna @ Dasubala died after execution of a deed and before registration of the same. Such evidence of P.W.1 remains uncontroverted by way of cross-examination. So the unchallenged oral testimony of P.W.1 goes to show that their mother Krishna died. So the share of mother in the suit property will devolve upon the sons and daughters and thereby each son and daughter will get $2 \frac{4}{7}$ decimal out of 18 decimal. So Gobinda had salable right to the extent of $2 \frac{4}{7}$ decimal.

Similarly, in respect of Netai and Kanai, the following finding was arrived at:-

“We further find that two sons of Hrishikesh Koley, viz., Netai and Kanai sold 5 dec. of land in favour of plaintiff nos.1 & 2 by two deeds (exts. 8 & 9). On the death of mother Netai and Kanai jointly inherited $2 \frac{4}{7} \times 2 = 5 \frac{1}{7}$ dec. of land out of 18 dec. So they have salable right to the extent of 5 dec. of land. We further find that by two deeds Balai, wife of Hrishikesh and two daughters of Hrishikesh sold 6 dec. and 3 dec. of land totaling to 9 dec. of land in favour of plaintiff nos.1 & 2 and plaintiff no.3 respectively. As it is disclosed in the evidence that because of death of Krishna @ Dasubala after execution and before registration of the deeds the Registrar refused to register the deeds in respect of the share of the mother. So by such deeds the plff. Nos. 1 to 3 will not get 9 dec. but will get $6 \frac{3}{4}$ dec. land. So by purchase the plaintiffs got $2 \frac{4}{7} + 5 + 6 \frac{3}{4}$ out of 18 dec. i.e. $14 \frac{9}{28}$ dec. out of 18 decimal.”

The contention of the plaintiff that the defendant Nos.1 and 2 purchased the property from Dulal Chandra Koley was proved by Exhibit-10. From the said deed, it is clear that Dulal Chandra sold 18 decimal of land in favour of the defendant Nos.1 and 2. Dulal Chandra on the death of his mother will inherit only $2 \frac{4}{7}$ decimal of land, hence, he had no salable interest to the extent of 18 decimal of land. In terms of the said deed, the defendant Nos.1 and 2 could only get $2 \frac{4}{7}$ decimal of land. The defendant Nos.3 and 4 were competent to sell $5 \frac{1}{7}$ decimal of land and having sold 5 decimal of land out of the aforesaid ownership remaining $\frac{1}{7}$ th decimal of land remained with them. The defendant Nos.5,6 and 7 have sold $6 \frac{3}{4}$

decimal of land in favour of the plaintiffs and by reason of such sale, they would have with them the remaining $2 \frac{4}{7}$ X $3 - 6 \frac{3}{4} = 27/28$.

It was on the basis of such findings, the preliminary decree was passed reserving right of the State of West Bengal to get an allotment of 18 decimal of land at the final decree proceeding. This decree was challenged by the present appellant. All other parties have accepted the said decree. The meticulous finding of the learned Trial Judge based on oral and documentary evidence was not interfered with by the First Appellate Court on appreciation of evidence. On the basis of evidence adduced by the parties and as would reveal from the documentary evidence, we are unable to interfere with the concurrent findings of facts with regard to the entitlement of the shares by the parties in the suit.

In view thereof, we do not find any substantial question of law is involved in the second appeal.

The second appeal, accordingly, stands dismissed at the admission stage.

In view of dismissal of the second appeal, the connected application also stands dismissed.

However, there shall be no order as to costs.

In the event the final decree is still pending, we request the learned Civil Judge (Senior Division), Berhampore, Murshidabad to conclude the proceeding of Partition Suit No.221 of 1995 at the earliest.

The Registrar Administration (L&OM) is directed to communicate this order to the learned Trial Judge for information and doing the needful.

(Uday Kumar, J.)

(Soumen Sen, J.)