

17.11.2022
SL No.35
Court No.8
(gc)

FAT 230 of 2014

**Sri Santanu Dey
Vs.
Sri Pradip Kumar Debnath & Anr.**

Mr. Tapas Bhattacharyya,
Mr. Sujay Bandyopadhyay,
Mr. Shambhu Mahato,
Mr. Jagajyoti Das,
Mr. Aviroop Bhattacharya,
Mr. B.P. Singha Roy,
...for the Appellant.
Mr. Ganesh Shrivastava,
Mr. Sukanta Das,
...for the Respondent No.1.

We have heard the learned Counsel for the parties.

The appeal is arising out of a preliminary decree. The parties are the legal heirs of Srihari Debnath. The relationship between the vendor of the appellant Shyamsundar and the respondent no.1 is of uterine brothers. We initially felt that the matter should be amicably settled. However, the matter were not amicably settled.

We have been informed that the Commissioner of Partition has filed a report and is pending for acceptance due to the pendency of the appeal.

A copy of the report has been placed before us.

We have considered the agreement dated 27th April, 1996 placed before us. The said document duly signed by the respondent No.1. It is in the nature of a family settlement by which the mother of the respondent no. 1 and his brother Shyamsundar devised a settlement plan.

We are in agreement with the finding arrived at by the Trial Court that there was no evidence to show that Sri Shyamsundar Debnath has paid the consideration to Sri Pradip Kumar Debnath in terms of the said agreement or that the said agreement was acted upon. Unless there is a proof of payment of consideration by Sri Shyamsundar in favour of Sri Pradip Kumar followed by execution of a registered deed, the question of transfer of title would not arise.

Mr. Tapas Bhattacharyya, the learned Counsel appearing on behalf of the appellant has submitted that the appellant is ready and willing to pay the consideration amount at the prevailing market rate for the areas covered under the agreement dated 27th April, 1996 simultaneously with the execution of the deed of conveyance by Pradip Kumar Debnath.

Mr. Ganesh Srivastava learned Counsel representing for the respondent no.1 has submitted that the Commissioner has taken into consideration all aspects of the matter and in the event the proposal of appellant is accepted then the respondent no.1 may be dispossessed from the tin shed rooms duly constructed by him and he would have no other place to stay. In the agreement dated 27th April, 1996 which was made by the mother of Shyamsundar and Pradip with a view to avoid any future dispute with regard to the enjoyment of the properties, we find there is a mention of a vacant area which according to wish of their mother to be partitioned

equally and the respondent no.1 to be compensated for relinquishing $\frac{1}{2}$ portion of the vacant land. It is true that there is no evidence on record to show that the said agreement was acted upon. Although an agreement has been executed by Shyamsundar in favour of Santanu but in absence of any evidence of payment of consideration amount and consequent registration of the document, no title could pass in favour of Santanu. However, it is a fact that Santanu had paid consideration money for acquiring .0082 acres of land on a representation made by Shyamsundar that he became the owner of the said plot in terms of the said agreement. Shyamsundar did not come forward and depose that the said agreement was acted upon. Although the Commissioner has filed a report but we think that the said agreement between two brothers which clearly express the wish by their mother should not be totally overlooked unless in giving effect to the said agreement, any inconvenience or undue hardship is caused to Pradip.

Pradip if required can be adequately compensated in terms of money for relinquishment in his right of $\frac{1}{2}$ share in the vacant land upon demarcation.

The trial court may apply the well recognized and frequently applied principles of owelty for equalization of shares in order to have a fair division of the properties between the parties keeping in mind that as far as possible and practicable the parties may not be dispossessed from their possession and occupation,

unless it appears that it would be extremely inequitable or such division is likely to cause hardship and inconvenience to the other party.

The apprehension expressed by Mr. Srivastava should also be taken due care of while accepting the report filed by the Commissioner.

Mr. Ganesh Shrivastava, has referred to a decision of the Hon'ble Supreme Court in ***Yellapu Uma Maheswari & Anr. Vs. Buddha Jagadheeswararao & Ors.*** reported at ***2016(1) ICC 1 (S.C.)*** in order to argue that the said agreement does not create any right, title and interest in favour of the parties. We are not saying for the moment that the said agreement has the effect of creating any right, title and interest in respect of the properties as the said document was not registered. However, it cannot be denied that the respondent No.1 did not contend that the said document is forged, non-existent or that he did not sign the document. From the evidence it appears that the objection is not with regard to the admissibility of the document but towards a mode of proof alleging the same to be insufficiently stamped and not registered. The plaintiff did not say that the said document was not executed by him. The only objection is with regard to the registration of the said document and that the said document was never acted upon. No objection was raised by the respondent no.1 when this document was placed before the witness for identification of his signature. However, we make it clear that the

document by itself would not create any right, title and interest in favour of the vendor of the present appellant as it was not sufficiently stamped and registered. At the same time the intention of their mother is quite discernible from the said agreement.

The appeal being FAT 230 of 2014, accordingly, stands disposed of.

The Trial Court is requested to conclude the final decree proceeding upon taking into consideration the observation made by us in this regard while accepting the report filed by the commissioner.

The urgent Photostat certified copy of this order, if applied for, be given to the parties on usual undertaking.

(Uday Kumar, J.)

(Soumen Sen, J.)