

Item-25.	06-12-2022	SAT 250 of 2016 CAN 1 of 2017 (old CAN 4712 of 2017)
sg	Ct. 8	Joydeb Mondal Versus Sanat Kumar Mondal & Ors.

The appeal is of the year 2016. The Additional Stamp Reporter has reported in its report dated 21st June, 2016 that the appeal is defective. The matter appeared in the warning list on 16th November, 2022 and continued to remain in the said warning list till it was transferred to regular list on 21st November, 2022. In spite of notice, the appellant is not represented nor any accommodation is prayed for on behalf of the appellant.

The appellate decree dated 17th February, 2016 affirming the decree of the Trial Court dated 26th June, 2012 is the subject matter of challenge in the second appeal.

Briefly stated; one Jogendranath Mondal was the erstwhile owner of the property under Ka schedule of the plaint. He transferred the same in favour of the plaintiff and his other son Jagadish Mondal, since deceased, by two separate deeds of gifts dated 10/01/1974 and relinquished possession in their favour. The Ka schedule property has been a joint property of the parties to the suit, in which the plaintiff has half share.

It has been further contended by the plaintiff that he and the said Jagadish Chandra Mondal together purchased the property under Ka schedule of 22/05/1985 by a registered deed of sale from one Anup Kumar Daw and others. It is been further contended by the plaintiff, that the said Jagadish Mondal constructed a one storied building with their joint fund over the Kha schedule

property. The said Jagadish Mondal died leaving behind the defendant no. 1 to 5 as his legal heirs and successions, who inherited his half share in the suit property. Therefore, the plaintiff claims 8 ans share in the suit property and further states that the defendants have 8 anans share therein and that the suit property ahs been a joint dwelling house of the parties to the suit. As there was several problems in possessing the suit property jointly the plaintiff made repeated requests before the defendants to make partition of the suit property amicably, but as they refused to do so, the plaintiff has come up with the present suit praying for partition of the suit property by metes and bounds.

The defendants in their written statement have denied that Ka schedule property was the joint dwelling house of the plaintiff. It was their contention that the dwelling house situated over the Ka and Kha schedule property was constructed by Jagadish Mondal during his lifetime with his money and the plaintiff did not pay anything for such purpose as he had no capacity to do so and at the relevant point of time the plaintiff was only a student.

The trial court on consideration of deed bearing no. 441 of 1974 (Ext. 2) and another deed bearing no. 1040 dated 22/02/1985 (Ext. 3) returned a finding in favour of the plaintiff. The deed under ext. 2 was a deed of gift by nature and it appeared from the said deed, that Jogendranath Mondal, the father of the plaintiff transferred 8 anas share in the suit property under ka schedule. The certified copy of deed no. 1040 of 1985 (Ext. 3) goes to show that the plaintiff and Jagadish Chandra Mondal, the predecessor of the defendants purchased the Kha schedule property from Anup Kumar Daw and Alok Kumar Daw. The plaintiff stated in his

evidence, that he had 8 anas share in the property under Ka schedule and by virtue of purchase on 22/01/1985 by the deed under ext. 3 he had also acquired title in respect of $\frac{1}{2}$ share in the kha schedule property. The plaintiff also relied on order of probate as well as the Will being executed by Ajay Kumar Daw, since deceased. The certified copy of the Will and the order of probate revealed, that the vendors of the plaintiff and his brother Jagadish namely, Anup and Alok were the executors of the said Will and the same was duly probated by the Hon'ble High Court. Therefore, the title of the parties is perfect.

During cross-examination of the PW-1 he stated, that his father got the suit property by way of purchase and that there has been an exchange of the ka schedule property when he was 7/8 years old. It was also revealed during his cross-examination, that there was a structure over the suit property at the time of exchange and his father started to reside in the said house after being migrated to India from Bangladesh. It was also revealed from his cross-examination, that he and Jagadish Mondal became the owners of the Ka schedule property by the said registered deed of gift being executed by their father and at the time of gift Jagadish Chandra Mondal also used to reside in the suit property. He further stated in his cross-examination, that after the death of their father he and Jagaidsh purchased the schedule Kha property and that prior to gift he had no independent income of himself.

The defendant could not produce any evidence to dislodge the claim of the plaintiff. In fact, the defendant contended that the defendants were paying rent in respect of the Kha schedule property but could not produce any document showing payment of

such rent, rather he admitted the fact that the Kha schedule property was mutated in the name of the plaintiff and his father in the office of Panihati Municipality.

The learned trial judge has relied upon the well-settled principle that one of the several joint owner is not entitled to raise pucca building over the joint property without the consent of the other co-owners. On the aforesaid consideration, this suit was decreed. The first appellate court in affirming the said decree has made the following observations:

“I have gone through the evidence adduced by the appellants/defendants in suit in his chief Satyajit Mondal, DW 1, defendant no.3 in the suit stated that the house on plaint schedule Ka land was constructed by Jagadish Chandra Mondal. He denied the suggestion that Jogendranath Mondal used to reside in Ka schedule property with his family. He said that he has no paper to show that his father constructed house on Ka schedule property. Defendants did not say where Jogendranath Mondal used to reside with his wife and children, Jagadish Mondal and Sanat Kumar Mondal if not in the house standing on plaint schedule Ka land. The want of evidence on these facts must be interpreted as failure on the part of the appellants/defendants to prove that the house standing on plaint schedule Ka property was constructed by Jagadish Chandra Mondal. It is highly probable that Jogendranath Mondal was residing in the house on plaint schedule Ka land.

As regards construction of single storied house on plaint schedule Kha land, it is an admitted fact that the land was purchased by the plaintiff and Jagdish Mondal in equal shares. Why then Jagdish Mondal would venture to construct on it to the

exclusion of his brother, the respondent/plaintiff. The case of construction by both of them on that land is probably the truth. In any case appellants did not say why and how their predecessor alone constructed on plain schedule Kha land when it belonged to the respondent as well. The finding in that respect of the Ld. Trial Judge cannot be said to be baseless or perverse the evidence on record. The points are determined accordingly.”

The findings arrived at by both the Courts based on cogent and credible evidence and in view of the fact that on the basis of such orders such conclusions can be arrived at, we decline to admit the second appeal. The second appeal is, accordingly, dismissed at the admission stage. However, there shall be no order as to costs.

The connected application stands dismissed.

(Uday Kumar, J.)

(Soumen Sen, J.)