

13.09.2023
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F. A. 46 of 2012

**Smt. Krishna Saha and another
Versus
Sri Adrishikhar Saha**

Mr. Partha Sarathi Bhattacharyya,
Mr. Arunava Maiti,
Mr. Raju Bhattacharyya,
Mr. T. Mondal

... for the appellants

1. The appeal is directed against the judgement and decree dated 31st January, 2011 passed by the learned Civil Judge (Senior Division), Alipurduar in Partition Suit No. 7 of 2007.

2. In the plaint the plaintiff claimed to be the son of late Dr. Ashoke Saha. The defendant nos. 1 and 2 being the appellants herein are the step mother and step brother of the plaintiff. The plaintiff sought partition of the suit property stating that the same was the exclusive property of his late father.

3. The plaintiff prayed for a preliminary decree of partition, appointment of Commissioner of partition. He also sought as a consequential relief, permanent and temporary injunction against the defendants to restrain

them from preventing the plaintiff to enter into the suit property.

4. The defendants filed a written statement, inter alia, contending that the suit property did not exclusively belong to the late Dr. Ashoke Saha. It was stated that the property stood in the name of Jnanendra Kumar Saha, grandfather of the plaintiff. The defendants also contended that the suit property was a leasehold land. The lease had expired and hence, the question of partition without impleading the Government could not be granted.

5. Based on the case made out by the parties, following eight issues were framed by the Court below:

- a) Is the suit maintainable in its present form and law ?
- b) Is there are cause of action to file this suit ?
- c) Has the plaintiff any right, title and interest over the suit property ?
- d) Is the suit bad for defect of parties ?
- e) Are the parties of this suit co-sharer of the joint family suit property ?
- f) Has the entire property of the parties brought into the hotchpot of the partition?
- g) Is the plaintiff entitled to get the decree of partition as prayed for?
- h) To what other relief/reliefs, if any, is the plaintiff entitled to ?

6. The plaintiff did depose evidence. PW1 is the mother of the plaintiff. Two witnesses deposed on behalf of the defendants/appellants, namely, the appellant no. 1, Krishna Saha and one Buddhadev Saha, brother of late Dr. Ashoke Saha.

7. DW2 was, therefore, the paternal uncle of the plaintiff. DW2 has deposed that Jnanendra Kumar Saha had four sons and two daughters. The oldest brother and sister were dead. He further deposed that the appellant nos. 1 and 2 were the wife and son of his deceased younger brother, Ashoke. The only other surviving brother, not named in the deposition, was stated to be a resident of Coochbehar. One other sister, Ava Saha daughter of late Jnanendra Kumar Saha of late Ashoke Saha was also residing in the same premises.

8. It further appears from the evidence of PW 2 that the late Jnanendra Kumar Saha purchased 5 ½ decimals of land. There is a three storey construction on 3½ decimals of land on the suit property. The rest of the two decimals are also constructed with interlinked separate structures.

9. In his examination-in-chief, however, DW 2 stated that the land-in-question was a leasehold land. The lease had expired and had since vested in the State. The plaintiff is the son from the first wife of late Dr. Ashoke Saha, who never resided in the said premises.

10. Based on the aforesaid evidence, the Court below inter alia, received several documents as exhibits.

11. Exhibit "A" is a certified copy of a title deed in respect of the suit property comprising of 5½ decimals of land purchased by the late Jnanendra Kumar Saha from a private person. The document is a conveyance deed. The property-in-question appears clearly to be the self acquired property with absolute ownership, of Jnanendra Kumar Saha.

12. The Court below found that the plaintiff was not entitled to preliminary decree for partition since the other legal heirs of late Jnanendra Kumar Saha were not made parties to the suit. Preliminary decree for partition was refused. The Court, however, went on and ordered decree in part restraining the defendants/appellants from preventing the respondent/plaintiff from entering into the suit property.

13. Having heard Mr. Partha Sarathi Bhattacharya, learned Senior Advocate for the appellants, the respondents not being represented, this Court finds that the decree and the judgement impugned in the appeal are erroneous and contrary to law.

14. Indeed it is true that the other legal heirs of late Jnanendra Kumar Saha were not impleaded as parties in the said suit. It is curious to note Buddhadev Saha, one of the legal heirs, came to depose on behalf of the defendants and was not yet made a party in the suit. There is also evidence that even Ava Saha, one of the daughters of Jnanendra Kumar Saha, residing in the said premises was not impleaded as a party in the suit. The plaintiff/respondent had not applied in this regard. The Court below could have done in suo moto in terms of power under Order 1 Rule 10 (2) of the Code of Civil Procedure, 1908.

15. The procedure adopted by the court below in refusing a decree for partition for non joinder of parties appears to be wholly erroneous.

16. In addition thereto, this Court finds another serious error on the part of the Court below.

17. DW 2 has stated that the plaintiff had never visited the suit property and was not in possession of any part or portion thereof. The prayer to a decree of permanent injunction is essentially consequential relief, to a preliminary decree for partition of the respective co-sharers are identified and their respective shares determined. The Court below could not have granted any consequential relief after declining the principal relief.

18. The Court below had therefore erroneously passed the order of permanent injunction restraining the defendants/appellants in the suit from preventing the plaintiff/respondent from entering into the suit property.

19. In view of the above, the impugned judgement and decree shall stand set aside as a whole. Partition Suit No. 7 of 2007 is restored to the file of the learned Civil Judge (Senior Division), Alipurduar, on remand by this Court for a de novo trial and decision.

20. The Court below shall consider and implead all legal heirs, inter alia, as indicated hereinabove in the suit forthwith. The names and whereabouts of the other legal heirs i. e. the other brothers and sisters of late Dr. Ashoke

Kumar Saha inter alia residing at Coochbehar, shall be ascertained and be impleaded in the suit by the Court below. Appropriate advertisement may be ordered by the Court below.

21. The parties may also make a formal application in the court below in this regard for impleading all necessary parties.

22. The Court shall be essentially satisfied on the basis of the documents being the Sale Deed No. 1034 dated 22.02.1954 and after receiving any evidence to the contrary as regards the title of late Jnanendra Kumar Saha in respect of said 5½ decimals of suit property. The nature of title shall also be ascertained i.e. as to whether the same is ejmali property or leasehold land.

23. It is expected that the suit is heard and disposed of within six months from the date of communication of a copy of this order.

24. F. A. 46 of 2012 is allowed and disposed of. All pending applications, if any, is also disposed of.

25. L. C. R. be sent back to the court below forthwith.

26. There will be no order as to costs.

27. All parties are directed to act on a server copy of this order duly downloaded from the official website of this Court.

(Rajasekhar Mantha, J.)

(Supratim Bhattacharya, J.)