

Form No. J (1)

IN THE HIGH COURT AT CALCUTTA

(CIVIL APPELLATE JURISDICTION)

Present:

The Hon'ble Justice Biswajit Basu.

S.A. 49 of 2013

I.A. NO. C.A.N. 01 of 2011 (C.A.N. 5490 of 2011)

***PUNYABRATA DUTTA (since deceased) substituted by
his heirs and legal representatives AMITAVA DATTA***

VS.

PRATUL SAHA & ORS.

With

S.A. 50 of 2013

***PUNYABRATA DUTTA, since deceased, his heir
and legal representative AMITAVA DATTA***

VS.

PRATUL SAHA & ORS.

For the appellants:

Sri Anindya Kumar Mitra, Sr. Advocate,
Sri Arindam Banerjee,
Sri Kaustav Chandra Das,
Sri Kaushik Banerjee,
Smt Rashmita Sen,
Sri Selim Malik.

For the respondents:

Sri Jayanta Mitra, Sr. Advocate,
Smt Suchitra Saha,
Sri Chowdhury Faruk Ali,
Smt Priyanka Das,
Smt Sharmila Basu.

Heard on : (lastly on) 14.12.2022

Judgment on : 29.03.2023

Biswajit Basu, J.

1. These are the tenants’/defendants’ second appeals against the appellate decrees of eviction passed in two ejectment suits. The said two suits were heard analogously and were allowed by a common judgment but by two separate decrees both dated January 31, 2008. The appeals of the tenants against the said decrees were dismissed. S.A. 49 of 2013 is directed against the appellate decree dated April 30, 2011 passed in Title Appeal No. 111 of 2008 arising out of the Title Suit No. 70 of 1980 whereas S.A. 50 of 2013 is directed against the appellate decree dated April 30, 2011 passed in the Title Appeal No. 110 of 2008 arising out of Title Suit No. 43 of 1980.

2. The instant second appeals were admitted under Order XLI Rule 11 of the Code of Civil Procedure to answer the following five substantial questions of law.

(i) Whether any decree could at all be passed in the suit filed fraudulently by deliberately concealment of registered deed of partition under which Pratul Saha, the plaintiff had become the absolute owner of the suit premises prior to filing of the suit instead of dismissing the suit vitiated by fraud practiced upon the Court and/or parties.

(ii) Whether the decree for eviction on the ground of reasonable requirement is without jurisdiction and/or beyond the competence of Court when the owner of the suit premises did not at all require the suit premises for his own use.

(iii) Whether the decree for eviction on the ground of reasonable requirement can at all be passed in favour of an owner/landlord by taking into consideration the alleged requirement of persons who were not owners of the suit premises.

(iv) Can a registered deed of partition which has not been terminated or cancelled by any other registered document or at all be

ignored by the Court on the ground that it has not been acted upon the same in the absence of any pleading and evidence to that effect.

(v) Whether the suit was at all maintainable in its present form inasmuch as the building, the suit property, had already been partitioned and the plaintiffs other than Pratul Saha did not have share in the suit property.

3. This Court, subsequently felt necessary to formulate following two additional substantial questions of law:-

(vi) Whether both the learned Courts below have committed substantial error of law in not holding that the notices determining the tenancies of appellant in respect of the suit premises under Section 13(6) of the West Bengal Premises Tenancy Act, 1956 are not legal and valid inasmuch as all the persons joined in the said notices are not the owners of the suit premises.

(vii) Whether both the learned Courts below have committed substantial error of law in decreeing the suits under Section 13(1)(ff) of the West Bengal Premises Tenancy Act, 1956 when all the plaintiffs are not the owners/landlords of the suit premises.

4. Facts necessary to deal with the said formulated substantial questions of law are thus, Sutara Saha(since deceased), Sri Pratul Saha and Sri Subrata Saha, the plaintiffs of the connected two eviction suits, by a registered deed of conveyance dated January 16, 1976 purchased the Premises no. 2A, Dover Road, Ballygunge, Kolkata- 700009 which is comprised of more or less 1 bigha 3 cottah 13 chataks and 7 Sq. ft of land and structures thereon (hereinafter referred to as 'the suit premises' in short). The subject matter of the connected eviction suits is one of the said structures, a two storied building. The first floor and the ground floor of the said two-storied building were under two separate tenancies. The plaintiffs after purchase of the suit premises allowed the said tenancies to continue under them. Punyabrata Dutta (since deceased) alone

was the tenant in respect of the first floor of the said building which consists of three bedrooms, one drawing room, one store room, one verandah and kitchen and he along with his other family members namely Sri Kalyanbrata Datta, Nirmala Nalini Datta(since deceased) and Smt. Reba Das were the tenants in respect of the ground floor of the said building which consists of three bedrooms, one drawing room, one kitchen, one store, garage, servant's quarters etc. The properties comprised in the said two tenancies are hereinafter referred to as 'the suit properties' in short.

5. The plaintiffs in the 2nd Court of learned Civil Judge (Senior Division) at Alipore, District- 24 Parganas (South) filed two eviction suits being Title Suit no. 43 of 1980 and Title Suit no. 70 of 1980 seeking eviction of their aforesaid tenants from the suit properties on the grounds of default in payment of rent, specified under Section 13 (1)(i) of the West Bengal Premises Tenancy Act 1956 Act (hereinafter referred to as 'the said Act of 1956' in short) and that they require the suit properties for their own use and occupation, specified under sub-section (1)(ff) thereof. Tenancies of the said first floor and said ground floor are the subject-matter of the said Title Suit No. 43 of 1980 and said Title Suit No. 70 of 1980 respectively.

6. The defendants, denying the allegations of the plaintiffs, contested the suits and at the latter stage of the proceedings, they raised objection as to the maintainability of the suits on the ground that the plaintiffs by a registered deed have partitioned their respective shares in the suit premises, as such they are no longer joint owners of the suit properties, consequently cannot maintain

the said suits jointly. Neither the plaintiffs nor the defendants brought the said partition deed on record, the defendants did not bring the said challenge in their pleadings either. The learned Trial Judge though held that the defendants are defaulters in payment of rent but such being the first default and due to compliance of the orders passed under Sections 17 (2) and (2A) of the said Act of 1956, the defendants were given protection against eviction under Section 17(4) thereof. The learned Trial Judge overruled the objection of the defendants as to the maintainability of the suits holding that the defendants, being the tenants are estopped from disputing the title of their landlords and allowed both the suits holding that the plaintiffs reasonably require the suit properties for their own use and occupation.

7. The defendants, being aggrieved by and dissatisfied with the judgment and decrees of the learned Trial judge, preferred appeals out of which the present second appeals arise. The defendants in one of the said appeals, Title Appeal No. 111 of 2008 filed an application under Order XLI Rule 27 of the Code for reception of the photocopy of the said deed of partition as additional evidence. The defendants in the said application contended inter alia that they had obtained the photocopy of the said deed from the substituted plaintiff, Sri Prasanta Saha, who was later transposed to the category of 'defendant'. The 11th Court of learned Additional District Judge at Alipore, District- 24Parganas (South), received the said document as an additional evidence in the said appeal and marked it Exhibit- 'C' on admission. The appeal Court below however discarded the said exhibit holding that the plaintiffs did not give effect

to the said deed of partition and as a result thereof, the joint title of the plaintiffs over the suit properties was not severed as alleged and by the impugned decrees, dismissed the said appeals thereby affirmed the judgment and decrees of the learned Trial Judge.

8. Sri Anindya Kumar Mitra, learned senior counsel for the appellants argues as follows:-

- I. The plaintiffs' joint title over the suit premises was severed with the execution and registration of the deed of partition dated August 13, 1976. Sri Pratul Saha, the plaintiff no. 2, by virtue of the said deed, has become the sole owner of the suit properties in exclusion of other plaintiffs. Therefore, the eviction notices under Section 13(6) of the said Act of 1956 determining the tenancies since were issued on behalf of all the plaintiffs, are bad in law. In support of such contention, reliance is placed on the decision of the Hon'ble Division Bench of this Court in the case of **M/S. PAREKH BROTHERS vs. KARTICK CHANDRA SAHA AND OTHERS** reported in **AIR 1968 Cal 532**.
- II. In order to get a decree of eviction of the tenants on the ground specified under Section 13(1)(ff) of the said Act of 1956, the plaintiffs must be the owner and landlord of the tenanted premises, in support of such contention reliance is placed on the decisions of the Hon'ble Supreme Court in the case of **M.M. QUASIM vs. MANOHAR LAL SHARMA AND OTHERS** reported in **AIR 1981 (3) SCC 36, SANKARA HALI &**

SANKARA INSTITUTE OF PHILOSOPHY AND CULTURE vs. KISHORI LAL GOENKA AND ANOTHER (THROUGH LRS.) reported in **(1996) 7 SCC 55**, **SHEELA AND OTHERS vs. FIRM PRAHLAD RAI PREM PRAKASH** reported in **(2002) 3 SCC 375** and the Full Bench decision of this Court in the case of **RATANLAL BANSILAL AND OTHERS vs. KISHORILAL GOENKA AND OTHERS** reported in **AIR 1993 Calcutta 144** and the Division Bench decision in the case of **NATIONAL FILM DEVELOPMENT CORPORATION LTD vs. SHANTILAL BAKLIWAL** reported in **AIR 2008 Calcutta 157**. The plaintiffs since have partitioned their shares in the suit premises, and in consequence thereof the plaintiffs are no longer joint owners of the suit properties as such they jointly cannot maintain the suits for eviction on the ground of their personal requirement, that being the position, both the Courts below have committed substantial error of law in decreeing the suits considering the requirement of the plaintiff no. 3, when the plaintiff no. 2 is the sole owner of the suit properties.

- III. The plaintiffs suppressed the said deed of partition to justify the ground of reasonable requirement for the suit properties. Non-disclosure of a relevant document in order to gain advantage amounts to 'fraud' upon the Court, in support of the said proposition of law, reliance is placed on the decision of the Hon'ble Supreme Court in the case of **S.P. CHENGALVARAYA NAIDU (DEAD) BY LRS. vs. JAGANNATH (DEAD) BY**

LRS. AND OTHERS reported in (1994) 1 SCC 1. The suits are liable to be dismissed for practicing such fraud upon the Court.

- IV. A registered deed of partition by itself proves division of the joint property by metes and bounds, allottee becomes the sole owner of his allotted share in the joint property from the date of execution of such document. In support of the said contention, reliance is placed on the decision of the Privy Council in the case of **GIRJA BAI vs. SADASHIV DHUNDIRAJ AND OTHERS** reported in **43 Indian Appeals 151**, the decision of the Hon'ble Division Bench of this Court in the case of **SHIBA PRASAD MUKHERJEE vs. PRADIP KUMAR MUKHERJEE** reported in **AIR 1991 Calcutta 149** and the decision of the Hon'ble Division Bench of the Patna High Court in the case of **COMMISSIONER OF INCOME-TAX, BIHAR vs. GHANSHYAM DAS LAXMI NARAIN** reported in **95 Income Tax Reports 438**.
- V. The registered deed of partition has effected a complete partition of the suit premises amongst the plaintiffs, allotting their respective shares in three separate lots, being Lot A, Lot B and Lot C, each delineated in different colours in the map annexed to the said deed of partition, nonetheless, the suit properties since was tenanted at the time of execution and registration of the said deed, erection of boundary walls demarcating allotted portions of the plaintiffs for effecting partition by metes and bounds was neither possible nor necessary, in support of the said contention, reliance is placed on the decision of the learned single Judge of this Court in the case of **JAHARLAL PAUL vs. ANANDA**

CHANDRA PAUL AND OTHERS reported in **AIR 1981 Cal 424** and the decision of the Hon'ble Division Bench of the Madras High Court in the case of **M.S.M.M MEYYAPPA CHETTIAR vs. COMMISSIONER OF INCOME-TAX, MADRAS** reported in **AIR 1951 (Mad) 506**. To illustrate the meaning of the phrase 'metes and bounds', reference is made to the **Black law's dictionary, 4th Edition, Mitra's Legal, Commercial Dictionary, 6th Edition** and **electronic edition of Merriam-Webster's Dictionary**.

- VI. The co-sharers of the suit premises, by the said registered deed of partition have mutually granted, conveyed and transferred their respective sharers in the joint property to each other as such the said deed not only has severed the title of the co-sharers in the said joint property but it has also assumed the character of a deed of conveyance, therefore, the plaintiffs cannot avoid the said deed merely on the plea that it was not given effect to. The document has effected a separation in the joint estate, its legal construction and effect cannot be controlled or altered by the subsequent conduct of the parties, to give support to the said argument, reference is made to the decision of Privy Council in the case of **BALKISHEN DAS AND OTHER vs. RAM NARAIN SAHU AND OTHERS** reported in **30 Indian Appeals 139** and the decision of the Hon'ble Supreme Court in the case of **KALYANI (DEAD) BY LRS. vs. NARAYANAN AND OTHERS** reported in **AIR 1980 SC 1173**.

- VII. The terms of a registered document can be altered or varied only by another registered document, not otherwise and in support of the aforesaid contention, reference is made to the decision of the Hon'ble Supreme Court in the case of **CHANDRAKANT SHANKARRAO MACHALE vs. SMT. PARUBAI BHAIRU MOHITE (DEAD) THROUGH LRS** reported in **AIR 2008 SC 3255**. Besides, the Proviso (4) appended to Section 92 of the Evidence Act, 1872 puts a restriction to adduce oral evidence to modify and/or rescind the terms of the registered agreement, in support of the said contention, reliance is placed on the decision of the Hon'ble Supreme Court in the case of **S. SAKTIVEL (DEAD) BY LRS vs. M. VENUGOPAL PILLAI AND OTHERS** reported in **(2000) 7 SCC 104**.
- VIII. The plaintiffs have not mutated their names separately with the records of the Kolkata Municipal Corporation in respect of their shares in the suit premises allotted under the said deed of partition or they had jointly issued rent receipts to the tenants/defendants or the owelty money was not paid to the co-sharer in terms of the said deed of partition do not lead to the conclusion that the said deed has not been given effect to, therefore, the inference drawn by the appeal Court below to the said effect, particularly when the plaintiffs did not adduce any evidence to substantiate their such claim, is perverse. Reliance is placed on the Full Bench decision of the Kerala High Court in the case of **PARVATHI AMMA vs. MAKKI AMMA** reported in **AIR 1962 Ker 85** in support of the

proposition of law that non-payment of owelty money does not prevent passing of the title when the deed of partition does not provide so.

9. Sri Jayanta Mitra, learned senior counsel for the respondents, argues as follows:-

- I. The defendants neither in the original written statement nor in the additional written statements had ever alleged that the plaintiffs have lost their joint title over the suit properties due to the execution of the said deed of partition therefore in the absence of pleadings, they are not entitled to raise the plea that the plaintiffs not being the joint owners of the suit properties, cannot maintain the suits jointly. Reliance is placed on the decisions of the Hon'ble Supreme Court in the case of **UNION OF INDIA vs. IBRAHIM UDDIN AND ANOTHER** reported in (2012) 8 SCC 148 and in the case of **SRI SHIVAJI BALARAM HAIBATTI vs. SRI AVINASH MARUTHI PAWAR** reported in (2018) 11 SCC 652 for the proposition that the parties to the suit cannot travel beyond the pleadings and relief not founded on the pleadings, cannot be granted.
- II. The plaintiffs never mutated their names separately with the records of the Kolkata Municipal Corporation in respect of their shares allotted under the deed of partition, rather they allowed the suit premises to remain their joint property and they treated the defendants as their tenants and accordingly issued rent receipts. The owelty money, required to be paid under the deed of partition, has not yet been paid. These are

the instances wherefrom it can be inferred that the said deed of partition has not yet been given effect to. In support of the contention that payment of owelty money is an obligation in equity, a co-sharer cannot claim to acquire properties falling under his share without discharging the said obligation, reliance is placed on the two decisions of the Hon'ble Supreme Court in the case of **T.S. SWAMINATHA ODAYAR vs. OFFICIAL RECEIVER OF WEST TANJORE** reported in **AIR 1957 SC 577** and in the case of **M.VENKATARAMANA HEBBAR (DEAD) BY LRS. vs. M. RAJAGOPAL HEBBAR AND OTHERS** reported in **(2007) 6 SCC 401**.

- III. One of the co-sharers, Sri Prasanta Saha while transferring his share in the suit premises to a third party, has described his share as 'undivided'. This is another instance which reflects the intention of the plaintiffs to treat the suit premises as their joint property, notwithstanding execution of the said deed of partition. The sale deed executed by the said co-sharer although was not formally admitted in evidence in the suit or appeal but once the defendants have invited the Court to look into the document and the Court has considered it, the whole document is to be looked into. In support of this proposition, reliance is placed on three decisions of the Hon'ble Supreme Court; in the case of **P.C. PURUSHOTHAMA REDDIAR vs. S. PERUMAL** reported in **(1972) 1 SCC 9**, in the case of **NARBADA DEVI GUPTA vs. BIRENDRA KUMAR JAISWAL AND ANOTHER** reported in **(2003) 8 Supreme Court Cases**

745 and in the case of **ORIENTAL INSURANCE COMPANY LIMITED vs. PREMLATA SHUKLA AND OTHERS** reported in **(2007) 13 Supreme Court Cases 476**.

- IV. Punyabrata Dutta(since deceased) was the first witness for the defendants. The said witness, in spite of having knowledge of the deed of partition, in his evidence recorded on June 18, 2007 deposed that in view of the sale of 1/9th 'undivided' share by the said Sri Prasanta Saha, the plaintiffs are not the 16 anas owners of the suit premises, it is a clear admission from the side of the defendants as to the joint title of the plaintiffs over the suit properties and the joint character of the suit premises.
- V. The plaintiffs are governed by the Dayabhaga school of Hindu law, in the said school of law, unlike a family governed by the Mitakshara School of Hindu Law, for effecting partition of the joint family property something more than mere agreement is necessary, in support of the said contention, reference is made to **Paragraph 346 under Chapter XVII of the Mulla, Principles of Hindu Law, 21st Edition**. The decisions cited on behalf of the appellants on the point of severance of title of the plaintiffs over the suit premises on the execution of the deed of partition are all in respect of the joint property of the families governed by the Mitakshara School of Hindu Law, as such not applicable in the present case.

- VI. A co-owner is as much an absolute owner as sole owner with reference to the interest held by him in the immovable property, as such one of the co-owners alone can seek ejectment of the tenant in his own right. In support of such contention, reliance is placed on the decisions of the Hon'ble Supreme Court in the case of **SRI RAM PASRICHA vs. JAGANNATH AND OTHERS** reported in (1976) 4 SCC 184, in the case of **DHANNALAL vs. KALAWATIBAI AND OTHERS** reported in (2002) 6 SCC 16 and in the case of **INDIA UMBRELLA MANUFACTURING CO. AND OTEHRS vs. BHAGABANDEI AGARWALLA (DEAD) BY LRS., SAVITRI AGARWALLA (SMT) AND OTHERS** reported in (2004) 3 SCC 178.
- VII. The concept of 'owner' envisaged under Section 13(1)(ff) of the said Act of 1956 is different from the concept of 'owner' under the Transfer of Property Act, 1882. The landlord, under the said Act of 1956, can be treated as an owner if he has in his own legal right, as distinguished from and on behalf of someone else, to evict the tenant. In support of his said contention, reliance is placed on the decision of the Hon'ble Supreme Court in the case of **SHEELA & ORS vs. FIRM PRAHLAD RAI PREM PRAKASH** reported in (2002) 3 SCC 375.
- VIII. Even if there is a partition in the family and the property falls within the share of one of the co-owners, the suit for eviction is maintainable, in support of his such contention, reliance is placed on the decision of the Hon'ble Supreme Court in the case of **SUMATI JAGANNATH ALIAS**

BAPURAO AGASHE AND OTHERS vs. GAJANAN KESHAV KULKARNI

reported in **(2005) 10 SCC 490.**

- IX. In a suit for eviction of the tenant, the plaintiff is required to prove the existence of jural relationship of landlord and tenant between the plaintiff and the defendant and that the ground of eviction laid down under the relevant Rent Control Legislation. In support of the said contention, reliance is placed on the decision of the Hon'ble Supreme Court in the case of ***KANAKLATA DAS AND ORS. vs. NABA KUMAR DAS AND ORS*** reported in **(2018) 2 SCC 352.**
- X. The deed of partition was not available with the plaintiffs, it would be evident from the records that it was in the custody of a third party, as such there is no question of keeping the deed of partition away from the Court to gain advantage. The plaintiff nos. 2 and 3 admittedly did not sign in the said deed of partition, their father signed it on their behalf moreover, the plaintiff no. 3 was a minor at the time of execution and registration of the said deed. In these circumstances, the plaintiffs had no opportunity to speak about the deed of partition executed as early as 1976.
- XI. The fraud must be specifically pleaded as required under Order VI Rule 4 of the Code but there is no such pleading or even a statement and in the absence of which, it would be absurd to contend that the plaintiffs have withheld the said deed of partition in order to gain undue advantage over the defendants. In support of the said argument, reliance is placed on

the decision of the Hon'ble Supreme Court in the case of **AFSAR SHEIKH AND ANOTHER vs. SOLEMAN BIBI AND OTHERS** reported in **(1976)2 SCC 142**. In view of the limited scope of the present suits regarding investigation as to the ownership of the plaintiffs over the suit properties, the deed of partition is not a relevant document, as such the plaintiffs were not obliged to produce it, therefore, non-disclosure or non-production of it cannot be treated as an attempt of the plaintiffs to practice 'fraud' upon the Court and on this score, the decision of the Hon'ble Supreme Court in the case reported in **(1994) 1 SCC 1 (supra)** cited on behalf of the appellants on the issue, is distinguishable.

10. The Court

I have heard the learned counsel for the parties at length and have perused the records relevant to answer the formulated substantial questions of law. Let me now consider those arguments and the judgments cited in support thereof *seriatim*.

(i) The plaintiffs are seeking eviction of the defendants from the suit properties on the grounds of default in payment of rent and they require the suit properties for their own use and occupation. The defendants though were found defaulters in payment of rent but such being the first default and the defendants since had paid the defaulted amount of rent in compliance with the order passed under Sections 17(2) and (2A) of the said Act of 1956, the learned Trial Judge gave the defendants protection against eviction under Section 17(4) thereof.

(ii) The provision of Section 13(1) of the said Act of 1956 specifies the grounds, only on proof of any of such grounds the landlord can seek eviction of his tenant from the tenanted property and sub-section(ff) thereof prescribes that the landlord can seek such eviction for his personal reasonable requirement of the tenanted property, the said ground has an additional demand that the plaintiff must be the owner of the tenanted property and he alone is entitled to determine the tenancy by the mandatory notice of eviction under Section 13(6) of the said Act of 1956, no one else can join in such notice. There is no dispute with regard to the aforesaid propositions therefore, the arguments made and decisions cited on behalf of the appellants in aid of the aforesaid propositions need not be elaborately discussed.

(iii) The defendants are alleging loss of joint ownership of the plaintiffs over the suit properties due to execution of the deed of partition, for which, the plaintiffs, according to the defendants, cannot jointly maintain the said suits for eviction on the said ground of their personal requirement. The plaintiffs asserted their joint title even after the execution of the said deed of partition on the ground that it was never acted upon, consequently the said deed has no impact on their joint ownership over the suit properties. **What is the effect of the deed of partition on the joint ownership of the plaintiffs over the suit properties and on the character of the said properties** is the core issue to be investigated as the answers to the substantial questions of law formulated in the present second appeals lie in the outcome of the said investigation,

therefore *only* the facts, arguments of the parties and the decisions cited by them, relevant to the said core issue deserve consideration.

(iv) In a suit for eviction of a tenant under the provisions of the said Act of 1956, the plaintiff is required to prove existence of jural relationship of landlord and tenant between him and the defendant and the existence of at least one of the ground(s) specified under Section 13(1) of the said Act of 1956 nonetheless to succeed on the ground of personal requirement, the plaintiff has to establish his ownership over the tenanted property. But, before proceeding further, it needs to be clarified that the demand of quality and degree of proof of ownership in a suit for title is much higher than such demand in a suit for eviction of a premises tenant under the relevant rent control legislation. In this context, it is apposite to quote paragraph 14 of the decision of the Hon'ble Supreme Court reported in **(2018) 2 SCC 352 (supra)** cited on behalf of the respondents: –

"....14. In the eviction suit, the question of title or the extent of the shares held by the appellants and Respondent 1 against each other in the suit premises cannot be decided and nor can be made the subject-matter for its determination."

(v) In the present case, the defendants are admitting the joint ownership of the plaintiffs over the suit properties but alleging loss of such title post execution of the deed of partition and are inviting the Court to investigate the *inter se* title of the plaintiffs to decide the maintainability of the suits; such

investigation is beyond the scope of the suits for eviction of tenants under the said Act of 1956.

(vi) It is the case of the plaintiffs that notwithstanding execution of the said deed, their joint ownership over the suit properties remains and to demonstrate their such intention, have cited the following post-execution instances:-

- a) treated the defendants jointly as their tenants and issued rent receipts as such,
- b) kept the suit premises in their joint names with the records of Kolkata Municipal Corporation without insisting separate mutation in respect of their shares allotted by the said deed of partition,
- c) The owelty money, in terms of the said deed of partition, was not paid,
- d) jointly issued eviction notices determining the tenancies of the defendants and
- e) one of the co-sharers, while selling his share described it as his 'undivided' share in the joint property.

(vii) The argument of the defendants/appellants that the registered deed of partition proves division of joint property, consequently, the allottee becomes sole owner of his allotted share irrespective of the physical division of the joint property by metes and bounds and the decisions cited in support of the said argument reported in **43 IA 151(supra)** and **95 ITR 438(supra)** are not relevant either to the context of the present case or to the scope of the suits

inasmuch as in the present case, no challenge to the validity of the said deed is thrown by the plaintiffs, rather their unanimous stand is that the said deed was not given effect to.

In this context, it is profitable to quote the following excerpts from paragraph 37 of the decision of the Hon'ble Supreme Court in the case of **Sk. SATTAR Sk. MOHD. CHOUDHARI vs. GUNDAPPA AMABADAS BUKATE** reported in **(1996) 6 Supreme Court Cases 373:-**

“.....whether the premises, which is in occupation of tenant, shall be retained jointly by all the lessors or they would partition it among themselves, is the exclusive right of the lessors to which no objection can be taken by the tenant, particularly where the tenant knew from the very beginning that the property was jointly owned by several persons”

(viii) The proposition that a registered document can be varied or altered only by another registered document is not in dispute but in view of the aforesaid stand of the plaintiffs, it would be preposterous to suggest that the plaintiffs intended to get rid of the registered deed of partition by their conduct, therefore, the aforesaid proposition and decision of the Hon'ble Supreme Court reported in **AIR 2008 (SC) 3255(supra)** cited on behalf of the appellants in aid thereof have no application in the facts and circumstances of the present case.

(ix) Section 92 of the Evidence Act, 1872 puts a bar to the admissibility of extrinsic parole evidence contradicting, varying, adding to or subtracting from the terms of a solemn written instrument because the parties having made a complete memorial of their agreement, it must be presumed that they

have put into writing all that they consider necessary to give full expression to their meaning and intention. The restriction is only in bringing parole evidence to substitute another contract by introduction of terms, which are to be found in the document.

(x) The plaintiffs adduced documentary evidences in support of the instances of not giving effect to the deed which are the joint eviction notices, Exhibit- '3-(series)', the municipal tax receipts of the suit premises standing in the joint names of the plaintiffs, Exhibit-'4-(series)'; such evidences were tendered *not* for contradicting or varying the terms of the said deed of partition, but to substantiate their intention of suspending the operation of the said deed of partition, as such Section 92 of the Evidence Act, 1872 is no fetter to the power of the Courts below to consider the said evidences to ascertain the said intention of the plaintiffs, consequently, the decisions of the Hon'ble Supreme Court reported in **(2000) 7 SCC 104 (supra)** cited on behalf of the appellants in the aforementioned context, are of no help to the appellants.

(xi) The Privy Council in the case of **TAN CHEW HOE NEO vs. CHEE SWEE CHENG AND OTHERS** reported in **AIR 1929 Privy Council 72**, had the occasion to deal with the scope of Section 92 of the Evidence Act, 1872 and the fourth proviso appended thereto, the following excerpts from the said judgment, being relevant to the context, is quoted below:-

“.....The Section is subject to a proviso (No. 4), which has been referred to, but in their Lordships' opinion has no bearing on the present question , inasmuch as in their view, the section it self does not apply.

In the present case evidence is tendered, not for the purpose of contradicting or varying the terms of the conveyance, but of proving facts from which it may be inferred that, accepting the conveyance as creating a joint tenancy, the purchasers have subsequently so dealt with their respective interests thereunder that the joint tenancy has become a tenancy-in-common.”

(xii) The argument that the legal construction and effect of the deed of partition cannot be controlled or altered by the subsequent conduct of the parties assumes importance and deserves consideration *only* when there is a challenge to the validity of the deed by one of the co-sharers/parties to such deed but in the present case, none of the plaintiffs have raised such issue, therefore, the said argument, particularly in view of the limited scope of investigation as to the ownership of the plaintiffs in a suit on the ground specified under Section 13(1)(ff) of the said Act of 1956 and the decisions reported in **AIR 1991 (Cal) 149(supra)**, **30 Indian Appeals 139(supra)** and **AIR 1980 SC 1173(supra)** cited on behalf of the appellants, are misplaced. It would be too indulging to give the tenants premium to invite the Court to investigate the *inter se* title of the co-owners in a suit for eviction.

(xiii) The plaintiffs never claimed that non-payment of owelty money has affected the validity of the said deed of partition, they cited the said instance to demonstrate that they did not give effect to the said deed of partition *immediately* upon execution, the natural corollary of such stand is that the plaintiffs intended to postpone the obligation of payment of owelty money. The following clause of the said deed reflects such intention of the plaintiffs:-

“..The allottee of Lot “A” shall within six months arrange to pay Rs. 5,000/- to allottee of Lot “B” and Rs. 5,000/- to allottee of Lot “C” by way of owelty money, which could not be otherwise adjusted due to peculiar configuration of the topography and location of existing structures....”

The parties to the deed, when are unanimously claiming that the owelty money, in terms of the deed of partition has not been paid, the defendants being non-party to the said deed, particularly in view of the nature and the scope of the suits, cannot insist upon the proof of such non-payment of owelty money by bringing on record clinching evidences. The Full Bench of the Kerala High Court, in the decision cited on behalf of the appellants reported in **AIR 1962 (Kerala) 85 (supra)** defines and explains what is owelty money etc. of which this Court is not concerned in the present second appeals.

(xiv) The defendants/appellants have alleged that the plaintiffs, in order to gain unlawful advantage, have deliberately suppressed the deed of partition thereby have practiced fraud upon the Courts below. The plaintiffs in the present second appeals though sought to justify non-production of the said deed of partition on the ground that it was not within their knowledge at the time of filing of the suits but no such case since has been made out before the Courts below, the said argument deserves no consideration. However, the non-production of a relevant document with a view to obtain advantage has been held to be a ‘fraud’ upon the Court by the Hon’ble Supreme Court in the decision cited on behalf of the appellants, reported in **(1994) 1 SCC 1(supra)**. In the present case, the joint ownership of the plaintiffs over the suit properties is an admitted position and in view of the stand of the plaintiffs that the deed

of partition has not affected their such joint ownership, the demand of Section 13(1)(ff) of the said Act of 1956 regarding the ownership of the plaintiffs over the suit properties was satisfied, consequently the said document loses its relevance to the issues to be decided in the connected suits. The plaintiffs therefore were not obliged to disclose and bring on record the said document and non-production of it, for the said reason, cannot lead to the conclusion that the plaintiffs have practiced 'fraud' upon the Court.

(xv) Apart from the aforesaid, 'fraud' in view of Order VI Rule 4 read with Order VI Rule 2 of the Code of Civil Procedure, 1908 is required to be pleaded separately with a specificity, particularity and precision, as has been held by the Hon'ble Supreme Court in the case reported in **(1976)2 SCC 142 (supra)** cited on behalf of the respondents. In the present case, the requirement of the aforementioned provision of the Code has not been fulfilled inasmuch as the defendants though in their arguments before the learned Trial Judge, referred to the said document but no steps were taken to amend their pleadings to bring the particulars satisfying the requirement of Order VI Rule 4 of the Code on record, in the absence of pleadings, particularly, keeping in view of the restriction of Section 100 of the Code, there is no scope to consider the said case of the appellants in the present appeals.

(xvi) There is no dispute with regard to the proposition of law that a party to the suit should not be allowed to travel beyond the pleadings, as such decisions cited on behalf of the respondents in support of such proposition of law need not be referred to. It is suffice to quote the following excerpts from

paragraph 12 of the decision of the Hon'ble Supreme Court in the case of **NAGUBAI AMMAL AND OTHERS vs. B. SHAMA RAO AND OTHERS** reported in **AIR 1956 (SC) 593** cited on behalf of the appellants to appreciate the scope of the exception to the said general rule:-

“(12) It was argued for the appellants that as no plea of lis pendens was taken in the pleadings, the evidence bearing on that question could not be properly looked into, and that no decision could be given based on Exhibit J series that the sale dated 30-01-1920 was affected by lis; and reliance was placed on the observations of Lord Dunedin in Siddik Mahomed Shah v. Mt. Saran, 1930 P.C. 57 (1) (AIR V 17) (A), that “no amount of evidence can be looked into upon a plea which was never put forward.

The true scope of this rule is that evidence let in on issues on which the parties actually went to trial should not be made the foundation for decisions of another and different issue, which was not present to the minds of the parties and on which they had no opportunity of adducing evidence. But that rule has no application to a case where parties go to trial with knowledge that a particular question is in issue, though no specific issue has been framed thereon, and adduce evidence relating thereto.”

(xvii) The plaintiffs never denied the execution of the deed of partition. The said document was received as an additional evidence in appeal and was marked Exhibit- 'C' on admission. The plaintiffs participated in the argument regarding the effect of the said document on their title before the learned Trial Judge when the said document was not on record and after the said document was formally brought on record, they participated in argument in appeal on the said document, therefore they cannot object consideration of the said document in the present second appeals for want of pleadings. The defendants,

similarly, cannot object consideration of the case of the plaintiffs that the said deed of partition was not given effect to for lack of pleadings inasmuch as the parties, at all stages of the proceedings, argued on the said partition deed and its effect on the merit of the suits, the plaintiffs cited instances to demonstrate their intention not to give effect to the said deed and in support thereof, proved documents e.g. Exhibits- '3(series)' and '4(series)'.

(xviii) The decisions cited on behalf of the plaintiffs for the proposition that one of the co-owners alone can seek eviction of his tenant on behalf of other co-owners have no application in the present case for the simple reason that in the present case, all the co-owners have jointly filed the eviction suits against their tenants but the defendants sought to impeach the maintainability of the suits on the ground of loss of joint title of the plaintiffs over the suit properties.

(xix) I am unable to accept the argument made on behalf of the appellants that the co-sharers, by the registered deed of partition since have mutually granted, conveyed and transferred their respective shares in the joint property, the said deed has assumed the character of a deed of conveyance because the co-sharers, under a deed of partition come to have a definite and positive share in the joint property, it is not a transfer but only a recognition of the title already existing in them.

Conclusion

Summing up the discussions made above, I am of the opinion that no such substantial questions of law as formulated is involved in the present second appeals, consequently S.A. 49 of 2013 and S.A. 50 of 2013 are dismissed with costs of **Rs. 50,000/- (Fifty Thousand rupees only)** for each appeal to be paid by the appellants to the respondent nos. 1 and 2 within two weeks from date.

The respondent nos. 1 and 2 are permitted to apply for withdrawal of the occupational charges deposited by the appellants with the Registrar of the Court of learned District Judge at Alipore, District- 24 Parganas(South) and if such an application is made, the same shall be disposed of expeditiously in accordance with law.

I.A. NO. C.A.N. 01 of 2011 (C.A.N. 5490 of 2011) has been disposed of, as such no further order(s) need be passed on the said application, however, in view of disposal of the appeals, all connected applications, if pending, are treated to be disposed of.

Before bidding adieu, it is necessary to mention the suit premises is located in an opulent neighbourhood of Kolkata. It is disturbing to note that more than forty years have elapsed since the filing of the suits. The execution cases levied to execute the eviction decrees being Title Execution Case no. 110 of 2008 and Title Execution Case no. 111 of 2008 pending before the 2nd Court of learned Civil Judge (Senior Division) at Alipore, District- 24 Parganas (South)

are therefore also required to be disposed of as expeditiously as possible without granting any unnecessary adjournment to either of the parties.

The lower Court records be sent down to the Courts below immediately by special messenger at the costs of the respondents, such costs be put in within a week from date.

Urgent photostat certified copy of this judgment, if applied for, be supplied to the parties upon compliance with all requisite formalities.

(BISWAJIT BASU, J.)

LATER

Mr. Arindam Banerjee, learned counsel for the appellants, after delivery of the judgment, prays for stay of operation of it, the prayer is considered and refused.

Urgent photostat certified copy of this judgment, if applied for, be supplied to the parties upon compliance with all requisite formalities.

(BISWAJIT BASU, J.)