

SAT 5 of 2015

**Banamali Hazra & Ors.
Vs.
Gopinath Maity & Ors.**

The appeal is defective. However, no attempt has been made to remove the defects. The appeal is of the year 2015.

The appeal appeared in the warning list on 6th March, 2023 with a clear indication that the same shall be transferred to the regular list on 21st March, 2023, since then the matter is appearing in the list. Therefore, the appellants have due notice.

The defects notified by the stamp reporter in his report dated 16.01.2015 have not yet been removed by the appellants.

The appellate decree dated 30th July, 2014 affirming the judgment and decree passed by the trial court on 25th Marcy, 2013 in a suit for declaration and permanent injunction is the subject matter of challenge in this second appeal.

We could have dismissed the appeal for non removal of defects. However, we have carefully read the judgment of the trial court as well as the first appellate court in order to ascertain whether any substantial question of law is involved in this appeal.

Briefly stated, one Gostho Behari Mondal and Upendranath Mondal are the owner of the suit property with equal share each. During their joint possession the property was orally partitioned by way of demarcation nearabout 53/54 years back. Under such oral partition Upendranath got 2 1/2 decimal share exclusively

on the Eastern side and Gostho got $2\frac{1}{2}$ decimal of land on the Western side exclusively and used to enjoy the suit property as owners of their respective shares.

Upendranath Mondal while in possession of the said property died leaving behind his sife Champa Bala Mondal as his sole legal heir who inherited $2\frac{1}{2}$ share of the suit plot of land and on 08.02.1956 she sold the said property in favour of Debendra nath Maity by virtue of registered deed of conveyance.

Said Gostho Behari Mondal who was in possession of the western $\frac{1}{2}$ side of the said plot sold the same to plaintiff nos. 1,2&3 and the predecessors-in-interest of plaintiff nos. 4 to 11 named Brindaban Maity by virtue of registered deed of sale dated 23.08.1963 and delivered possession thereon.

The plaintiffs after purchase started to possess the 'Ka' schedule property and constructed one thatched cow shed on South Western part of the 'Ka' schedule property. Similarly Debendra Nath Maity also was in possession of the Eastern portion of plot no. 407 measuring $2\frac{1}{2}$ decimal since purchase. Debendra Nath Maity died leaving behind five sons, his wife and two daughters. After the demise of Debandra Nath Maity his two daughters, namely, Rekha Rani Mondal and Sikha Rani Maity sold their inherited share in favour of their five brothers in the year 1980. The defendant no. 2 is one of the sons of Debendra Nath Maity. Subsequently, said five sons of Debendra Nath Maity and his wife effected a partition of their properties by metes and bounds and executed a registered deed of partition among themselves dated 26.06.1980 in

respect of their properties.

The plaintiffs amended the plaint on several occasions mainly to deny the averments made by the defendants in their written statement and prayed for substantial reliefs. The defendants contested the proceeding. In the written statement they had stated that after the demise of Debendra Nath Maity his five sons, wife and two daughters became the owner of $1/8^{\text{th}}$ share out of $2\frac{1}{2}$ decimal of land of plot no. 407.

Defendants stated that defendant no. 2 installed a Husking machine on the South Western part of the suit property and his brother Samiran Maity established a Poultry and grocery shop on the Eastern side thereof. There is a common pathway on the Eastern side of the suit property running from North to South. According to the defendant since all the co-sharers of the suit property were not parties in the partition deed dated 26.06.1980. Hence the suit property was not partitioned effectively. It has been further stated that defendant no. 2 transferred his share in the suit property by virtue of registered deed of gift to the defendant no. 1 in the year 2006 and since then defendant no. 1 has been possessing the same.

Defendants stated that half portion of Sabek Plot no. 407 corresponding to Hal Plot No. 460 has been recorded in the name of Debendra Nath Maity in Khatian No. 266 in L.R Record of Rights.

The plaintiffs are not the legal heirs of Debendra Nath Maity and accordingly they are the stranger to the deed of gift executed by defendant no. 2 in favour of defendant no. 1 and they have no right, title and interest to challenge the share recorded in the name of Debendra

Nath Maity in L.R Record of Rights. Defendants stated that the plaintiffs had filed the original suit on false ground and prays for dismissal of the suit with cost.

The trial court framed several issues.

The trial court decreed the suit in favour of the plaintiffs principally relying upon Exhibit-C filed by the plaintiffs from which it was established that the defendant no. 2 had no transferrable title over the suit plot.

It was held that the plaintiffs have been able to prove that the deed of gift is inoperative. The trial court also taken into consideration that the execution of the deed of partition was not denied. In order to prove their claim, the plaintiffs have produced the certified copy of the registered deed of partition which was marked as Exhibit-6. The defendant no. 2 did not deny the execution of the registration of the partition deed. The deed of partition was registered and executed in the year 1980 and since then the defendant 2 was also a party in the said deed of partition did not challenge the said deed and after lapse of almost 26 years by virtue of deed of gift executed in favour of the defendant no. 1.

The trial court has observed that a simple perusal of the certified copy of the partition deed being Exhibit-6 would reveal that the suit plot is included in the schedule of the said deed and the defendant no. 2 has executed the same as a party thereof.

The case of the plaintiffs that the suit plot no. 407 under Mouza- Shauria measuring 5 decimal of land was originally owned by Gostho and Upendra to the extent of $\frac{1}{2}$ share each has been admitted by the defendants in their pleadings as well as their evidence.

The plaintiff nos. 1 to 3 and ancestors of plaintiff nos. 4 to 11 became the owner of the share of Gostho by virtue of deed of sale dated 23.08.1963. Similarly, predecessors-in-interest of defendant no. 2, namely, Debendra Nath Maity became the owner of $\frac{1}{2}$ share of the suit plot by virtue of registered deed of purchase dated 08.02.1956 executed by Champa Bala being the wife and only legal heir of Upendra Nath Mondal. This fact is also admitted by the parties to the suit.

The first appellate court in discarding the evidence of non-mentioning of boundary observed that it is true that there is no boundary mentioned in the said sale deed in order to specify the area purchased by Brindaban Maity and others in respect of plot no. 407, mere non-mentioning of the boundary does not itself falsify the case of oral partition. This court cannot overlook the fact that the defendant no. 2 Nirapada Maity is claiming his share from his father Debendra Nath Maity, who admittedly purchased the share of the suit property from Champa Bala Mondal, wife of Upendra Nath Mondal in the year 1956. P.W 2 Samiran Maity, who is one of the legal heirs of Debendra and brother of the defendant no. 2, namely, Nirapada Maity, during examination-in-chief categorically admitted the oral partition between Upendra and Gostho. Said P.W 2, Samiran Maity faced the acid test of cross-examination but during cross-examination his evidence as regards the oral partition had remained unshaken. Moreover, during cross-examination said witness stated that in the partition deed they have demarcated the shares and sides of the suit property.

There is nothing in the record that said

Nirapada Maity ever challenged the deed of partition by instituting any suit before any competent Court of Law. Nirapada Maity himself avoid dock to depose that in this suit to say that he does not have any knowledge about the oral partition effected in between Gostho Behari Mondal and Upendra Nath Mondal and the deed of partition executed on 20.06 1980 and registered on 26.06.1980 is illegal, void and ineffective. It is evident from the registered deed of partition dated 26.06.1980 that defendant No.2 namely Nirapada Maity had no share in the suit plot No 407 on the basis of the said partition deed and accordingly the deed of gift executed by Nirapada Maity in favour of defendant No.1 is nothing but a void document and said document is void ab initio and defendant No. 1 never acquire any sort of right, title and interest in respect of Plot No.407.

Both the courts below have taken into consideration the conduct of the defendant no. 2, which clearly suggests that he was aware that the plaintiffs are the co-sharers with them in respect of $\frac{1}{2}$ share in plot no. 407.

It is well settled principle in law that as per provision of Section 8 of the Transfer of Property Act, nobody can transfer any right better than what he had in respect of the land in question. It is evident from the deed of partition executed in the year 1980 in between the legal heirs of Debendra Nath Maity that Nirapada Maity did not acquire any right, title and interest in respect of plot no. 407 and accordingly he had no right to transfer any portion of the said plot and the defendant no. 1 did not acquire any sort of right, title and interest in respect of plot no. 407 by virtue of deed of gift executed by Nirapada Maity

in favour of the defendant no.1.

It appears from a bare reading of both the judgments that the said judgments are based on cogent and reliable evidence, the findings are also based on both oral and documentary evidence and on proper appreciation of law and facts.

In view of the above, we do not find any reason to interfere with the concurrent finding of facts.

The appeal accordingly fails.

The second appeal is, therefore, summarily dismissed under Order XLI Rule 11 of the Code of Civil Procedure at the admission stage along with CAN 1485 of 2015.

There will be no order as to costs.

(Uday Kumar,J.)

(Soumen Sen, J.)

