

IN THE HIGH COURT AT CALCUTTA
Civil Appellate Jurisdiction
APPELLATE SIDE

Present:

The Hon'ble Justice Tapabrata Chakraborty
&
The Hon'ble Justice Partha Sarathi Chatterjee

FA 17 of 2023
FAT 308 of 2018

Sri Nirmalendu Karmakar
versus
Sri Rathindra Nath Karmakar & Anr.

For the Appellant : *Mr. Souri Ghosal,*
Mr. Prabhat Kumar Singh.

For the Respondent No.1 : *Mr. Rahul Karmakar,*
Mr. Abir Lal Chakraborty.

For the Respondent No.2 : *Ms. Gargi Goswami.*

Hearing is concluded on : *10th January, 2023.*

Judgment On : **30th January, 2023.**

Partha Sarathi Chatterjee, J.

1. Legality and propriety of the judgment and decree dated 19th April, 2018 passed by the learned Civil Judge, Senior Division, 2nd Court, Barasat, North 24 Parganas are under challenge in this appeal.

2. By the judgment and decree impugned, the suit for partition was decreed in preliminary form and parties to the suit were declared to be the

owners of 1/3rd share each in the suit property and counter-claim filed by the defendant no.1 was dismissed.

3. Capsulated form of the facts leading to this appeal is that plaintiff filed one suit for partition and separate possession in respect of the suit property. Facts depicted in the plaint, in brief, are as follows:

- i. One Gopal Chandra Karmakar, since deceased, purchased the suit property from Government of West Bengal by virtue of a registered deed of sale *vide*. no. 4773 of 1972 and thereafter, Mr. Karmakar constructed a two-storied building thereon;
- ii. By virtue of a deed of gift *vide*. no. 6066 of 1972, the suit property was gifted to Gour Hari Karmakar being the son of the Gopal Chandra Karmakar. Gopal Chandra Karmakar expired on 21.8.1973;
- iii. Gour Hari died intestate on 21.12.2010 leaving behind him the plaintiff, defendant no.1 being the two sons and the defendant no.2 being the daughter as his legal heirs and plaintiff claimed himself to be the owner of 1/3rd share of the suit property;
- iv. It was contended therein that entire ground floor of the suit property consists of ten rooms with four attached bath and four common latrine having four feet wide common passage and defendant no.1 is running one lodge, namely '*Santi Lodge*' in six rooms and another lodge, namely '*Santi Kunja*' in four rooms since 2005 and 1999 respectively and is earning Rs. 1,13,500/- per month from the aforesaid two lodges and defendant no.1 is

running one hardware business therein and plaintiff claimed himself to be entitled to 1/3rd share of the income coming from the said businesses;

- v. Since the plaintiff felt inconvenience to possess and enjoy the suit property which is a joint property, he approached the defendant no.1 to have it partitioned by giving a letter dated 18.08.11 but defendant no.1, in his reply by a letter dated 19.09.2011, claimed himself to be the exclusive owner of the ground and 1st floor of the building on the rear portion of the suit property;
- vi. It was specifically claimed that neither did their father nor did he give consent to the defendant no.1 to raise any construction on the rear portion of the suit property and the plaintiff and his father contributed major share of expenses in that construction whereas defendant no.1 incurred a paltry sum for that purpose and even plaintiff lent Rs. 2,30,000/- to the defendant no.1 for revival of his business;
- vii. However, ultimately, the defendant no.1 refused to effect partition of the suit property and hence, the suit.

4. Defendant no.1 contested the suit by filing written statement along with counter claim. Crux of the case of the defendant no.1 projected therein is as follows :

- i. Defendant no.1 constructed two-storied building on rear portion of the suit property with his own fund and with due permission

of the original owner, namely, Gour Hari Karmakar and the plaintiff;

- ii. Defendant no.1 took loan of Rs. 1.6 lakhs and 2.3 lakhs from his father and the plaintiff respectively to construct two storied building on rear portion of the suit property but he paid back those amounts to them which would be evident from the statement of his bank account;
- iii. That the front portion of the suit property was allotted to the plaintiff whereas the rear portion of the suit property was allotted to the defendant no.1 on mutual agreement and since, during the marriage of the defendant no.2 a considerable amount of money was spent, Gour Hari did not allot any share to defendant no.2;
- iv. Ultimately, he prayed for declaration that he is the absolute owner of the land and two storied structure on the rear portion of the suit property with his right to use common passage situated on the front portion of the ground floor of the suit premise facing the main road, Bonoful Sarani and the common passage situated on the southern side of the ground floor leading to the western end of the suit premises from east i.e. from main road.

5. Defendant no.2 although did not contest the suit till the end but by filing a written statement she claimed to be owner of 1/3rd share of the entire suit property.

6. Plaintiff and defendant no.2 by filing two separate written statements against the counter-claim of the defendant no.1 in the same tune emphatically denied that Gour Hari and plaintiff gave consent to the defendant no.1 to construct two storied structure on rear portion of the suit property and they also denied that defendant no.1 constructed that structure out of his own fund and it was asserted therein that in absence of any legally enforceable document, defendant no.1 cannot claim himself to be the owner of the land and structure lying on the rear portion of the suit property and lastly, prayer was made for dismissal of the counter-claim of the defendant no.1.

7. Record reveals that the learned court below framed as many as nine (9) issues and to substantiate his claim, plaintiff adduced his oral testimony and was examined as PW-1 and he tendered some documents namely, certified copies of the deed of sale *vide*. no. 4773 of 1972, certified copy of the deed of gift *vide*. no. 6066 of 1972, copies of three letters addressing to O.C., Lake Town P.S. – marked as Ext. 1(a) to 1(d), certificate of death of Gour Hari Karmakar – Ext.-2, Municipality Tax Receipts – Ext.-3, Advocate's letter dated 18.08.2011, Postal receipt and A/D card – Ext.- 4 to 4(b), Advocate's letter dated 19.9.2011 – Ext.-5.

8. On the other hand, defendant no.1 and defendant no.2 adduced their oral accounts and were examined as DW-1 and 2 respectively and no document had been produced on behalf of the defendants.

9. On scrutiny of the pleadings and evidence of the respective parties, the suit was decreed in preliminary form and counter-claim of the defendant no.1 was dismissed and parties to the suit were declared to be the owners of 1/3rd share each of the suit property.

10. Aggrieved thereby, the defendant no.1/appellant (in short, the appellant) has preferred this appeal, *inter alia*, on the grounds that there was another sister of the parties to the suit, namely, Indrani Karmakar who had not been impleaded in the array of the parties of the suit and hence, the suit is bad for non-joinder of parties and it was within the knowledge of the plaintiff that the appellant had been running business on the rear portion of the suit property and learned court below failed to appreciate that there is implied gift of rear portion of the suit property in favour of the appellant.

11. Learned advocate representing the appellant submitted that the appellant is also interested to get the suit property partitioned but it had been evident that the appellant had constructed two storied structure on the rear portion of the suit property and he had been running business from that structure with full knowledge of the plaintiff and hence, learned court below should have declared that defendant no.1 is exclusive owner of the two storied structure and land situated on the rear portion of the suit property and front portion would be partitioned in accordance with law.

12. Learned advocate appearing for the respondent no.1 strenuously denied and disputed the contention of the appellant. He added that there is no evidence to prove that the defendant no.1 had constructed the structure standing on the rear portion out of his fund and that the land and structure lying on the rear portion of the suit was allotted to defendant no.1 and that there was no previous partition and hence, claim of the defendant no.1 cannot be acceded to. He prayed for dismissal of the appeal.

13. In the given case, admitted facts are that Gopal Chandra Karmakar happened to be owner of the suit property and then, he constructed two storied building on the front portion of the suit property. Then, he gifted the suit property to his son, Gour Hari Karmakar.

14. From the cross-examination of DW-2, it transpires that Gour Hari left behind two sons, being the plaintiff and the defendant no.1 and two daughters, being the defendant no.2 and one married daughter, Indrani, since deceased. Consequently, defendant no.1 raised a plea that suit was bad for non-joinder of necessary parties.

15. Indrani died issueless and hence, the learned court below has held that the share of Indrani had devolved upon the parties to the suit, being legal heirs of her father, in view of Section 15(2)(a) of Hindu Succession Act and hence, suit is not bad for non-joinder of necessary parties and we do not find any infirmity in such decision.

16. In the present appeal, the main dispute centres around the claim of the defendant no.1 to the effect that defendant no.1 has constructed two storied structure on the rear portion of the suit property out of his own fund

with the consent of his father, Gour Hari and the plaintiff and that he has been running two lodges in the rear portion of that property and hence, the defendant no.1 has claimed himself to be absolute owner of the land and structure situated on the rear portion of the suit property and he has also claimed that the defendant no.2 has no share in the suit property since during her marriage a considerable amount of money was spent.

17. In his cross-examination, defendant no.1 admitted that he has nothing to show that rear portion was allotted to him and he admitted that he has not filed any document to show that he was given the right to make construction of two storied structure on the rear portion of the suit premises out of his fund. Defendant no.1 admitted that the building plan was sanctioned in name of his father and that no partition had taken place amongst the co-sharers before filing of the suit.

18. Gour Hari died intestate. Since, Indrani died issueless, there are only three legal heirs of Gour Hari being the parties to the suit.

19. Defendant no.1 although claimed that rear portion was allotted to him whereas front portion was allotted to plaintiff and that such allotments were made orally but both the plaintiff and defendant no.2 have vehemently disputed such contention.

20. In such sequence of facts, learned court below has rightly refused to accept such claim of the defendant no.1 and in absence of any legally enforceable document, defendant no.1 cannot be held to be exclusive owner of the land and structure situate on the rear portion of the suit property. It is axiomatic that unless and until one joint property is partitioned either by

way of execution of deed or by the intervention of the court, it cannot be held that there was severance of tenement.

21. Even if it is proved that the defendant no.1 is in occupation of the rear portion exclusively but such possession must be deemed to be a possession on behalf of all the co-sharers and in the case at hand, no case of forceful ouster of other co-sharers from that portion could be established.

22. In the absence of any document showing previous partition, defendant no.1 cannot be declared to be the exclusive owner of land and structure lying on the rear portion of the suit property and also of the common passage or passages as claimed in his counter-claim. However, the plaintiff has also failed to prove that he is entitled to get any share in the earnings from the businesses, namely, *Santi Lodge*, *Shanti Kunja* and hardware business also.

23. In view thereof, we are of the considered view that the learned court has rightly dismissed the counter-claim and has declared the parties to the suit to be the owner of 1/3rd share each of the suit property.

24. We do not find any perversity, infirmity or material irregularity in the judgment and decree impugned. Consequently, the appeal be and the same being devoid of merits is dismissed, however, without any order as to costs. Judgment and decree impugned herein are affirmed.

25. Let a decree be drawn up accordingly.

26. Let a copy of this judgment along with LCR be sent down to the learned court below forthwith.

27. Urgent Photostat copy of this judgment, if applied for, shall be granted to the parties as expeditiously as possible, upon compliance of all formalities.

(Partha Sarathi Chatterjee, J.)

(Tapabrata Chakraborty, J.)