

Item-7. 17-01-2023

sg Ct. 8

Asraf Hossain Biswas & Ors.
Versus
Anasur Rahaman Biswas & Ors.

Mr. Partha Pratim Roy, Adv.
Mrs. Poulami Chakraborty, Adv.
Mr. Wasim Raj Sardar, Adv.
...for the appellants

Ms. Manali Biswas, Adv.
...for respondent nos.1 & 3

We have heard the learned Counsel for the parties. The trial Court decreed the suit in part with a finding that the plaintiffs are the co-owners of the property in question. The defendants preferred an appeal.

The trial court while acknowledging that the plaintiffs are the co-owners in respect of 8 anas share, dismissed the suit on the ground that the plaintiffs did not file a suit for partition.

Mr. Partha Pratim Roy, learned Counsel appearing on behalf of the appellants has relied upon a decision of the Hon'ble Supreme Court in *Akkamma and Ors. vs. Vemavati & Ors.* in *Civil Appeal No. 5884 of 2009* decided on 25th November, 2021 and reported in *Monu/SC/1166/2021* for the proposition that the declaratory suit for possession without claiming any partition would be maintainable.

In a situation where there is a declaration to that effect that the plaintiffs are co-owners of the property, a claim for injunction may not lie and possession of a co-owner is regarded as the possession of the other co-owners who may not be in possession unless the case of clear ouster of possession is made out.

In the instant case, having regard to the fact that the plaintiffs have been declared as co-owners of the property, it was possible for the court to mould the reliefs and give the relief to the parties to amend the plaint so as to bring quibus to the litigation.

The learned Counsel for the defendants has submitted that the claim of the defendants is that the defendants are the absolute owners of the property in question.

However, the first appellate court while allowing the appeal in part, decided the said issue in favour of the plaintiffs and allowed the appeal on the ground that the plaintiffs did not pray for partition and as such, it is bar under Section 34 of the Specific Relief Act.

Considering the aforesaid, we dispose of the second appeal by permitting the plaintiffs to file a suit for partition. Any claim for exclusive possession of the defendants has not conclusively decided. However, the findings of the trial court and the first appellate court with regard to declaration of possession in favour of the plaintiffs may be taken into consideration in deciding the suit for partition.

The defendants' plea that the exclusive possession of the suit property is not finally adjudicated and may be decided in the partition suit. The appeal stands disposed of.

(Uday Kumar, J.)

(Soumen Sen, J.)