

**IN THE HIGH COURT AT CALCUTTA
CIVIL APPELLATE JURISDICTION
APPELLATE SIDE**

Present:

**The Hon'ble Justice Harish Tandon
&
The Hon'ble Justice Prasenjit Biswas**

FA 78 Of 2021

**Sri Bisnupada Kamillya
-Versus-
Sri Debabrata Sen & Ors**

For the Appellant : **Mr. Asit Baran Raut, Advocate
Mr. Nirmalendu Patra, Advocate
Mr. Gautam Das, Advocate
Mr. Debnarayan Patra, Advocate**

For the Respondents : **Mr. Soumik Ganguly, Advocate
Mr. Dilip Kumar Sandhu, Advocate
Mr. Avik Kumar Das, Advocate**

Hearing concluded on : 03.10.2023

Judgment on : 11.12.2023

Prasenjit Biswas, J:-

1. The instant appeal is preferred challenging the impugned judgment and decree dated 31.03.2014 and 09.04.2014 passed by the learned Trial Court in connection with Title Suit No. 25/2008 (previously Title Suit No.

119 of 2003) whereby and where under learned Trial Court decreed the suit for partition in respect of the scheduled properties.

2. Being aggrieved by and dissatisfied with the impugned judgment and decree the present appellant has preferred this appeal.

3. It is not disputed that R.S recorded tenant Narendra Nath Das was the original owner of the suit properties. It is the case of the plaintiff that the said Narendra Nath Das had two wives and his first wife died long back. After the death of his first wife Narendra Nath married with Sanaka alias Sanki for second time and out of their wedlock they were blessed with three sons and three daughters. Narendra Nath had also one daughter out of his first marriage. After demise of Narendra Nath Das on 18.02.1960 his property was devolved upon his daughter Bhabani who was born out of his wedlock with the first wife and three sons and three daughters who were born out of wedlock with his second wife Sanaka alias Sanki. So, all the heirs/legal representatives of Narendra Nath Das inherited 1/18th share each in the suit property.

4. The second wife of Narendra Nath Das died on 10.03.1980 and her respective share was devolved upon her three sons and three daughters and they became the owner of 7/48th share each. Bhabani, the daughter who was born out of wedlock of the first marriage of Narendra Nath Das and inherited 1/8th share in the suit property subsequently died and her share was devolved upon her one son Parameswar and one daughter namely, Jahnnabi and they subsequently transferred their shares to the plaintiff by dint of two sale deeds which were marked as Exhibits 9 and 10 by the Trial

Court. Thereafter, Parbati and Gouri- two daughters of the said Narendra Nath Das transferred their shares in respect of the suit property in favour of their brother Adwayta Kumar Das by virtue of two registered deeds of sale on 13.07.1984 and 19.07.1984. Subsequently, Adwayta sold his share to one Sushanta Kamila by deed No. 2898/85 which was marked as Exhibit 6 in the case and the said Susanta sold it to the plaintiff by dint of two deeds (Exhibit 7). Plaintiff also purchased the shares of Bandana and Anjana who are the daughters of Basanti (one of the daughters of Narendra Nath Das). It is the case of the plaintiff that during pendency of the suit Radhagobinda (defendant No. 2), one of the sons of Narendra Nath Das executed two agreements for sale in favour of the plaintiff in respect of his share in the case property and as he failed to execute the deed of sale in terms of agreement for sale, the plaintiff filed a suit for specific performance of contract which was decreed by the Court and the deed of sale was executed in favour of the plaintiff through Court in Execution Case No. 4 of 2007. Plaintiff also purchased the share of Dulal Das who is one of the sons of Narendra Nath Das by virtue of registered deed of sale on 22.12.2010.

5. Parbati Shao and Gouri Rani Patra, two daughters of Narendra Nath Das sold their shares in favour of this appellant by virtue of Exhibit A. This appellant as defendant No. 1 entered appearance before the Trial Court and filed written statement by taking specific plea that the said Narendra Nath Das never married for the first time and as such Bhabani was/is not of his daughter and consequently, Parameswar and Jahnabi son and daughter by Bhabani and the vendors of the plaintiffs are not the heirs or legal

representative of R.S recorded tenant Narendra Nath Das. It is also denied about the possession taken by the plaintiff through Court in connection with title execution case being No. 4 of 2007. It is the specific case of this appellant that the suit property has already been partitioned by metes and bounds and he is possessing his respective share in the North-West portion of the suit plot.

6. After appreciating the evidences both oral and documentary and on hearing the parties the Trial Court decreed the plaintiff's suit for partition. Aggrieved by the judgment and decree defendant No. 1 as appellant preferred this appeal on diverse grounds. It is stated by the appellant that the learned Trial Court acted illegally and committed an error apparent on the face of the record that the oral evidences tendered on behalf of the respondent had no personal knowledge of the date of alleged first marriage of the R.S recorded tenant Narendra Nath Das. It is also assailed by the appellant that the plaintiff/respondent failed to prove that when Bhabani was born out of the said first marriage of Narendra Nath Das. As per submission of the learned Counsel appearing on behalf of the appellant is that when there is a controversy about the two marriages of Narendra Nath Das then it is the bounden duty of the plaintiff to prove that Bhabani was born out first marriage of Narendra Nath. The ground of appeal is that the Trial Court did not appreciate the evidences correctly and the decision arrived at is perverse.

7. The learned Trial Court casted five issues viz.

1. Is the suit maintainable?

2. Is the suit bad for defect of parties?
3. Is the suit bad of partition
4. Has the plaintiff any right, title and interest in respect of the suit property and
5. Is the plaintiff entitled to any relief?

8. What attracts our attention almost immediately is that there is no issue as regard whether the plaintiff is able to prove that Bhabani was the daughter of Narendra Nath by first wife and inherited the case property as per genealogy as mentioned in the plaint. The defendant No. 1/appellant had specifically denied the first marriage of Narendra Nath Das and about inheritance of Bhabani Nayak or her heirs in respect of the suit properties left by the original owner Narendra Nath Das. So, the existence of first marriage of Narendra Nath Das was the moot question and remains vital for adjudication of the present dispute.

9. Order 41 of the Code of Civil Procedure provides for appeals from original decrees, it empowers the Appellate Court to order remand in three situations and these situations are covered by Order 41 Rule 23, Order 41 Rule 23-A and Order 41 Rule 25.

10. Retrial of the suit is necessary as required under Rule 23-A of Order 41 of CPC, which reads as under:-

“23A. Remand in other cases.- Where the court from whose decree an appeal is preferred has disposed of the case otherwise than on a preliminary point, and the decree is reversed in appeal and a retrial is considered necessary, the Appellate Court shall have the same powers as it has under rule 23”

Perusal of the aforesaid provision would show that its applicability would come into play only when the trial court has disposed of the entire suit otherwise than on a preliminary point and that a decree is reversed in appeal and that a retrial is considered necessary. In that case appellate court will have all the powers mentioned in Rule 23 of Order 41 CPC. When the material issue has not been framed by the trial court in its judgement impugned, then in such an eventuality, the appellate court should have restored Rule 25 of Order 41 CPC.

11. Rule 25 of Order 41 CPC is relevant for the purpose which reads as under-

Where Appellate Court may frame issues and refer them or trial to Court whose decree appealed from:- Where the Court from whose decree the appeal is preferred has omitted to frame or try any issue, or to determine any question of fact, which appears to the Appellate Court essential to the right decision of the suit upon the merits, the Appellate Court may, if necessary, frame issues and refer the same for trial of the Court from whose decree the appeal is preferred, and in such case shall direct such Court to take the additional evidence required; and such Court shall proceed to try such issues, and shall return the evidence to the Appellate Court together with its findings thereon and the reasons therefor within such time as may be fixed by the Appellate Court or extended by it from time to time.

12. It is profitable to quote the observation of the Hon'ble Apex Court in case of **Shanti Devi vs Daropti Devi and Others** reported in **(2006) 13 SCC 775**

"The power of remand vests in the Appellate Court either in terms of Order XLI Rules 23 & 23A or XLI Rule 25 of the Code of Civil Procedure. Issue No. 4 was held to have been wrongly framed. Onus of proof was also wrongly placed and only in that view of the matter the High Court thought it fit to remit it to the learned Trial Judge

permitting the parties to adduce fresh evidence. It, therefore, required the learned Trial Judge to determine a question of fact, which according to it was essential, upon reframing the issue.

Only, thus, additional evidences were required to be adduced upon reframing the issue and having regard to the fact that onus of proof was wrongly placed on the plaintiff.

In the aforementioned situation, in our opinion, it would have been proper for the High Court not to remit the matter in its entirety, which could have been done by the court in exercise of its jurisdiction under Order XLI Rule 23 or Order XLI Rule 23A of the Code of Civil Procedure. The impugned judgment must in the aforementioned situation be held to have been passed in terms of Order XLI Rule 25 of the Code of Civil Procedure.”

13. In view of the foregoing discussions, vis-a-vis, it would be appropriate the appellate court frame the point (issue) on which additional evidence could be adduced by the parties by providing opportunities of hearing to them and come to a logical conclusion. Insofar as the present case is concerned the Trial Court had disposed of the suit on merits and not on a preliminary issue. In the above backdrop when we revisit the evidences on record, we hold the most essential issue is as follow:

Whether the plaintiff is able to prove that Bhabani was the daughter of Narendra Nath Das by first wife and inherited shares in the scheduled property as per genealogy mentioned in the plaint.

14. We, therefore, frame the above issue. Without answering it there cannot be a proper decision in the instant case and in that view of the matter, re-trial is necessary. Since new issue has been casted, opportunity needs to be provided to the rival parties to lead evidence afresh.

15. We have already stated that the impugned judgment and decree passed by the learned Trial Court lacks sufficient reasons and does not at all analyze and appreciate the evidence on record. The issues have also not been properly casted. Hence, the impugned judgment and decree passed by the learned Trial Court in connection with Title Suit No. 25 of 2008 is liable to be set aside.

16. In the result, the impugned judgment and decree dated 31.03.2014 and 09.04.2014 passed by the Civil Judge (Senior Division), 2nd Court, Contai, District – Purba Medinipur passed in connection with Title Suit No. 25/2008 is set aside. Exercising power under Rule 25-A of Order 41 of the Code of Civil Procedure, the case is remanded back to the court below for further hearing. The learned Trial Court would recast the issues. He would add the issue which we have framed in this Appeal to the five issues which are already on record and then proceed with the suit as per procedure established. Opportunity should be given to the parties by the Trial Court to lead further evidence on the issue framed by the Court if they so desire by keeping the evidence already adduced by the parties in the record and deliver a fresh judgment. The parties to the proceeding are directed to appear before the Trial Court and no further notice is required to be sent to the either of the party.

17. The instant appeal be and the same is hereby allowed to the aforesaid extent. In the facts and circumstances of the case there shall be no order as to costs.

18. Consequently, the applications, if any, in connection with the appeal are hereby disposed of.

19. Urgent Photostat certified copy of this order, if applied for, be given to the parties on payment of requisite fees.

I agree.

(Harish Tandon, J.)

(Prasenjit Biswas, J.)