

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

PRESENT:

THE HON'BLE JUSTICE AJOY KUMAR MUKHERJEE

S.A. 178 of 1969

**Manmatha Nath Singha, Since deceased,
rep. By Sri Chittranjan Singh & ors.
Vs.**

**Sudhir Kumar Mondal since deceased,
rep. by Alak Kumar Mondal & Ors.**

For the Appellants : Mr. Prasanta Kumar Giri
Mr. Biswaranjan Bhakat

For the Respondent : Mr Pabitra Bhowmik

Heard on : 10.09.2024

Judgment on : 24.09.2024

Ajoy Kumar Mukherjee , J.:

1. Being aggrieved and dissatisfied with the judgment and decree dated 9th September, 1968 passed by subordinate Judge 1st Court, Midnapore, in TA no.639 of 1967, present second appeal has been preferred by the defendant/appellants . By the impugned judgment learned court below has set aside the decree passed by learned trial court in TS no. 348 of 1963.

2. Plaintiffs filed the aforesaid suit with a prayer for declaration confirmation of possession and alternatively for recovery of possession and permanent injunction. According to plaintiffs, they have 14 annas 5 gonda share in the 'ka' and 'kha' schedule land, 12 annas 10 gondas share in the 'ga' schedule land 16 annas share in the 'gha' schedule land. One Nilambar Singha appears to be the common ancestor of the plaintiff who died in 1340 BS and his wife predeceased him. Nilambar was survived by his two sons Sarada and Barada. Bityamoyee is the wife of Sarada and Bindubasini is the wife of Barada. plaintiff no. 1 and 2 are the sons of Barada and Gajendra and Nagendra are the sons of Sarada. Giribala is the wife of Gajendra and defendant no. 12 to 17 are the children of Gajendra.

3. Plaintiffs further case is that on the death of Lakhu Mondal his four sons amicably partitioned the property left by Lakhu before the district settlement operation. Plot no. 656/687 and 656/660 appertaining to khatian no.8 were allotted to Kailash one of the sons of Lakhu. The rest of the land described in the 'ka' schedule were allotted to Akshoy, Krishna and Haramoni, the sons and the sons wife of Lakhu. Akshoy and Haramoni sold their $2/3^{\text{rd}}$ share in the 'ka' and 'gha' schedule land to Krishna by a deed dated 22nd Magh, 1312 BS. The 'ga' schedule land was sold by Akshoy Kailash and Krishna and Haramoni to plaintiffs predecessor Nilambar by a deed dated 25th Jaistha 1311 BS and in such land Gopal and Akshoy had interest by virtue of partition. The 'kha' schedule land was allotted to Krishna alone though it was wrongly recorded in the name of Krishna, Akshoy and Hiramani. Krishna sold 'ka' and 'kha' schedule properties in equal share to the plaintiff No.1 and 2 and Gajendra. By a deed dated

26.01.1940, the share of Gajendra devolved upon plaintiff no. 4 and defendant no. 11 to 17. Plaintiff 1 and 2 have 12 annas share in the 'ka' and khas schedule land and plaintiff no. 3 and 4 have 2 annas 5 gondas share therein. Their total share is 14 annas 5 gondas. Nilamabar possessed the 'ga' schedule property by purchase which devolved after his death upon Manmatho, Pramotho, Nagendra, Gajendra and Nityamoyee. Krishna died leaving behind his son Rashbihari, who sold the 'gha' schedule property to plaintiffs no. 1 and 2 by a deed dated 7th chaitra 1351 BS. In the RS record, the lands have not been correctly recorded in the name of the plaintiffs in accordance with their respective share. The defendants have allegedly trespassed some of the lands and their possession have been noted and as such plaintiffs filed the aforesaid suit

4. Defendant 1 to 4 contested the suit by filing written statement contending that the suit property belonged to Kailash and his brothers. They used to possess different portions of the suit land by amicable arrangement without regular partition by meters and bounds. Kailash did not sell his interest by the alleged deed dated 25th Jaistha 1311BS. Kailash had 1/4th share in khatian no. 41 and he had possession in plot no. 57-59 and 71. Plot no. 57 and 58 have been duly recorded in his name but the record in respect of plot no. 59 is erroneous. The contesting defendants are possessing the plot nos. 57 to 59 adversely to the interest of the real owners for more than 12 years. The defendant had a pan baraj on plot no. 57 and they had a tank on plot no. 58, which was subsequently converted into a baraj. The tank in plot no. 59 is converted subsequently into paddy land. In 'gha' schedule land, Kailash had 1/4th share and he was in

possession of plot no. 74 and 48. The other co-sharers left the place. Mahesh and his legal heirs including defendant no. 1 to 4 possessed the property. The defendants have a baraj in plot no. 48. In the 'kha' schedule property kailash had 1/4th share. On the death of Hirmaoni, Kailash got share and the rest remained with Akshoy and Krishna. Mahesh and thereafter his sons who are defendant no. 1 to 4 are possessing the plot no. 75 and 92 exclusively. In khatian no. 80 all the co-sharers had equal interest but by an amicable arrangement since before the District settlement, the co-sharers were in possession of separate lands. On the death of Hiramoni, her interest devolved upon Kailash, Krishna being the heir of Akshoy. On or about 1343 BS, Mahesh came in possession of the land which was in possession of Krishan, Akshoy and Hiramony. Mahesh was in exclusive possession of plot no. 656/685 and 656/686. After his death the contested defendants came into possession

5. Learned trial court framed eight issues and he scanned the documentary as well as oral evidence filed by the parties in details. He disbelieved the defendants case of acquisition of title by adverse possession. However, the trial court held that the defendants are in possession of plot no. 656/685, 656/686, 75,92,57,58 and 48. Accordingly trial court held that the plaintiffs being the sole owner of plot no. 48 is entitled to recover khas possession thereof. It was further held that in respect of other plots the plaintiffs are not the sole owner but the proforma defendants no. 11 to 17 are co sharers along with them and as such plaintiffs are not entitled to evict the defendants from the said plots. However, plaintiffs are entitled to the decree of joint possession to the

extent of their share in the said property. By its judgment the trial court specifically held that Krishan and his brothers had many lands and said lands have been recorded in the name of different brothers, which goes to show there was some sort of partition between the co sharers and as a result of which lands were separately allotted to different persons in the record of rights and as such the trial court was of the view, on the basis of materials on record that the original co sharers partitioned the properties before the preparation of the R.S record of the rights.

6. However, when the matter came up before the first appellate court the court below did not accept trial courts observation that there were some sort of partition among the co-sharers and the court below held that though some of the suit plots have been exclusively recorded but this fact by itself cannot prove the factum of partition, as direct evidence of partition is not available and the trial court committed wrong in inferring partition from the facts and circumstances of the case.

7. The court below accordingly by the impugned judgment remanded the matter before the trial court giving opportunity to the parties to adduce evidence to decide whether there was any partition by metes and bounds between Kailash and his three brothers and further to decide whether the defendants possession in the suit plots were adverse to the interest of the real owners and whether such possession ripened into title and thereafter to make calculation about the shares of the plaintiff in the suit land and he further directed the trial court to determine whether the plaintiffs are entitled to get a decree for joint possession in respect of the suit property.

8. Mr. Giri, learned counsel appearing on behalf of the appellants submits that the order of open remand passed by the court below is erroneous and the facts and circumstances of the case do not satisfy the test for open remand. In support of his arguments he submits that further adducing evidence in the present case is not possible because the dispute is pending since 1963 and the witnesses are not available. According to Mr. Giri whether there was any partition or not can very well be decided from the documentary evidence as well as from the oral evidence already brought on record and for that reason the court below was not at all justified in passing the impugned order of open remand.

9. Mr. Bhowmik, learned counsel appearing for respondent submits that some points involved in the suit requires further clarification and for which, court below rightly remanded the matter for open remand which does not call for interference.

10. This court by an order dated 08.08.2024 framed the following substantial questions of law for adjudication:

- (i)** *Whether the learned court below acted illegally in remanding the case for fresh decision when the materials on record are not found to be insufficient for decision by the first appellate court*
- (ii)** *Whether the court below has acted illegally in not holding that in view of exhibit-12 and 12 (a), the question as to whether there was an amicable partition in between the four sons of Lokhu Mondal is barred by res-judicata*
- (iii)** *Whether the court below has committed mistake in holding that as there was no sub-division of rent, the case of previous partition could not be taken as true and that the same proves the defence case of amicable arrangement for separate possession only*
- (iv)** *Whether the court below has acted illegally in holding that in considering the question of adverse possession, the learned Munsiff did not consider the Dakhilas (Exhibit A series) and also oral testimony of defence witness no. 1,2,3 in its true prospective*

11. I have considered submissions made by both the parties.

12. On perusal of the judgment impugned it appears that court below had remanded the case for fresh trial on the ground that the learned Munsiff's conclusion from the fact that some of the properties were mortgage by Kailash alone and name of Kailash's son are appearing in the sale certificate are sufficient proof about previous partition because unless kailash exclusively owned the properties, he could not have dealt with the property exclusively, is erroneous because this does not prove the factum of partition. He further observed that the trial court relied upon certified copy of judgment of the appellate court (Exhibit 12/a) where it has been observed that separate possession by each co-sharer and separate record in the name of each co-sharer go to suggest that there was some sort of partition between them is not fully correct since there was no sub division of rent and the story of previous partition without sub division of rent is not a normal feature and on the contrary it proves the defendants case of separate possession by each co-sharer through amicable arrangement

13. The second ground of remand is that the court below did not properly consider whether the defendants possession was adverse to the real owners and whether by such adverse possession defendants acquired any title to the suit lands and therefore, his finding regarding adverse possession is not sustainable.

14. The third ground for remand is that Nityamoyee (plaintiff no.4) died during the pendency of the suit and some of her heirs are defendants in the present suit and as such the plaintiffs share cannot remain same after the death of plaintiff no.4 as has been given in the plaint. Accordingly all the

legal heirs of Nityamoyee are to be impleaded and it must affect the share of the plaintiffs.

15. Finding above the court below observed that he does not like to enter deep into the matter as he is of the opinion that the trial court did not rightly decide the suit and accordingly he jumped to a conclusion that this is a fit case for remand.

16. While making such observation the court below was obliterated about the fundamental principle of remanding a case for fresh trial. The power to remand under rule 23 A of order XLI, is not to be exercised without any sufficient cause. He ought to have kept in mind that the order of re trial after setting aside the judgment of the trial court, is bound to add to miseries of the parties due to exercise of such power in a rash and negligent manner and also for his disliking in not entering deep into the matter. In fact it has been decided in various judgments that the power under order XLI rule 23A is only to be invoked in rarest of rare or most exceptional cases when the appellate court is very much convinced on cogent reason that a re-trial is necessary, failing which substantial miscarriage of justice would result.

17. In the present context as I must point out that the court below was very much in a position to adjudicate the issues raised by him in his judgement from the available documents and evidence and ought to have come to a conclusion from documentary and oral evidence as to whether there was any previous partition between the parties or not and whether defendants have succeeded in proving their case of adverse possession or

not and also whether plaintiffs share needs to have re allocated in view of death of plaintiff no.4, Nitayamoyee, during pendency of the suit.

18. From the judgment impugned I do not find any cogent reasoning that the evidence on record are not sufficient to dispose of the aforesaid issues and without recording such reasoning, the order of retrial must not have been passed. It is wholly improper, if a remand order is passed merely because appellate court considered reasoning of trial court in some respect wrong or inconsistent or insufficient. Remand order must not be taken as an empty formality merely on the ground that there might be illegality while deciding the controversial issues. Under order XLI rule 24 appellate court can always finally dispose of the case after re settling issues when the evidences are available on record regarding the points in dispute and even in such cases he is not required to frame any additional issue under order XLI rule 25 and to refer it for trial.

19. In such view of the matter I have no hesitation to conclude that where the evidence upon the records do not appear to be insufficient, to enable the court below to pronounce judgment on merit, there is no reason why the same would not have been decided on merit by the said court. Even if any issue or point like adverse possession is not decided by the trial court, by giving proper reasoning, the first appellate court has the power to decide such issue without remitting suit to the trial court for retrial. In short order of retrial in any case unless it is absolute necessary is to be avoided by the appellate court.

20. In view of above the judgment and decree passed in T.A. no. 639 of 1967 dated 9th September 1968 is hereby set aside.

21. S.A. 178 of 1969 is thus allowed.

22. The jurisdictional court below/first appellate court is hereby directed to decide the appeal afresh on the disputed issues considering the documentary and oral evidences available in record. The court below will dispose of the appeal as above after giving opportunity to both the parties to contest preferably within a period of 12 weeks from the date of the communication of this order, since the dispute between the parties is pending for more than 60 years.

Urgent Xerox certified photocopies of this Judgment, if applied for, be given to the parties upon compliance of the requisite formalities.

(AJAY KUMAR MUKHERJEE, J.)