

22.11.2024
sayandeep
Sl. No. 58
Ct. No. 08

SAT 48 of 2024
With
CAN 1 of 2024
Legal heirs of deceased Madhu Molla
(defendant No. 1) Sadaraddin Molla & ors.
Vs.
Sahidul Islam Molla & ors.

Mr. Mukteswar Maity
Mr. Md. Zeeshanuz Zaman

..... for the appellants

The second appeal is filed assailing the judgment and decree passed by the first appellate Court in title appeal No. 9 of 2014 by which the decree passed by the Trial Court dismissing the suit was set aside and the right, title and interest of the plaintiffs jointly with the defendants were declared. The facts pleaded by both the parties are more or less undisputed except that the defendants took a plea that by virtue of the mutual settlement (exchange of 'ewaj'), the title of the predecessor of the plaintiffs/respondents gets divested and, therefore, the claim of the plaintiffs/respondents in this regard is untenable.

Admittedly, the suit property belongs to Akkach@Abbas Molla, Sultan Molla and Ajibor Molla being the three brothers jointly. One of the joint owners namely, Sultan Molla died leaving behind his wife, the original defendant No. 8, two daughters who are arraigned as defendant Nos. 9 and 10 along with his two brothers, namely, Akkach@Abbas Molla and Ajibar Molla. Akkach@Abbas Molla subsequently died leaving

the defendant Nos. 1 to 4 as heirs who inherited his share. Similarly, upon the death of Ajibar Molla his share devolved upon his brother Sultan Molla and the plaintiff Nos. 1 to 3 and as sons and plaintiff No. 4 as wife, the other plaintiffs, namely, plaintiff Nos. 5 and 6 also inherited as daughters.

It was a specific claim of the plaintiffs/respondents that the property was never partitioned by metes and bounds and are enjoyed and possessed by the co-sharer jointly since the time of their ancestry. The cause of action of the suit is pleaded when the defendants/appellants intended to interfere with their possession and also claiming their title on the strength of a LR record of right which stood in their name.

It is a specific case of the appellants that though the aforesaid three brothers jointly owned the said property but one Naimuddin Molla who was the uncle of the aforesaid three brothers also have some interest in the property and in terms of the personal law of inheritance, the three nephews inherited the share of the said Naimuddin Molla. Ajibar Molla married the daughter of the Naimuddin Molla and, therefore, he inherited the share of the Naimuddin Molla by virtue of such status and on the basis of a personal law of inheritance.

The aforesaid pleadings are undisputed by either of parties except when the appellants took a plea that

subsequently Ajibar Molla entered into a mutual settlement with his two other brothers and in terms thereof he relinquished his right, title and interest in favour of his two brothers in exchange of the portion of the property which they inherited from the said Naimuddin Molla. It is thus claimed that on the basis of such mutual statement, the record of right was duly corrected and, therefore, the right of the plaintiffs in respect of the suit property is untenable.

We must record that both the Courts concurrently held the right, title and interest of the plaintiffs jointly with other co-sharers in respect of the property but the trial Court proceeded to dismiss the suit solely on the ground that since the decree for partition was not claimed, the suit is liable to be dismissed. The appellate Court reversed the ultimate decision of the Trial Court and proceeded to declare the right, title and interest of the plaintiffs jointly with the defendants/appellants which is sought to be challenged before us.

The Counsel for the appellants submits that the Court ought to have considered the entry made in the LR record of right based upon the said mutual settlement having a presumptive value of possession and should not have ventured to declare the title jointly with the other defendants. It is further submitted that the record of right was duly corrected on the basis of the mutual settlement and, therefore, it is too late in a

day to claim the jointness in respect of a property. It is further submitted that the Court ought not to have declare the definite share of the plaintiffs in respect of a suit property which appears to be infirmed and/or illegal.

The facts as narrated hereinabove clearly indicates that initially the property was owned and possessed by three brothers and upon their respective death, it devolved upon the heirs. It is also not in dispute that the Naimuddin Molla had a share in the property which was infused within the joint property and the claim of the plaintiffs through the Naimuddin Molla has not been denied. However, the shelter is taken under the mutual settlement which according to the appellants is indicative of the fact that the property for which the claim is made was exclusively given to the appellants in lieu of the other properties belonging to the said Naimuddin Molla, since deceased.

It is an admitted position that the defendants could not produce any document in support of their claim that there was a mutual settlement entered between the parties by which the right, title and interest of the plaintiffs/respondents were divested. The appellate Court highlighted the said aspect and held that in absence of any document produced at the behest of the appellants, the title cannot be divested solely on the basis of the entry made in the LR record of right.

It is no longer *res integra* that the entry made in the record of right is not a determinant factor for deciding the title nor can extinguish the title of a person. The entry is made in the record of right for the purpose of collection of land revenue and making a person primarily responsible therefor. It cannot have any impact on the title which can be divested only by way of a valid document in accordance with law.

The mutual settlement as alleged by the appellants by which the parties have exchanged their respective shares in the properties cannot be permanent in absence of written documents and registering the same before the registering authority. The immovable property fetching the value more than 100 rupees can only be transferred by way of a written documents and in view of Section 17 of the Registration Act, such document is compulsorily registerable. The onus lies on the party asserting the fact and if such onus is not discharged, there is no fatter on the part of the Court in arriving at the conclusion that the said party has failed to prove the case made out in the pleading. There is a distinction between a pleading and proof which are not interchangeable. The party has to prove the case pleaded in the pleading and if he failed to discharge such primary onus, there is no fatter on the part of the Court in arriving at the conclusion that he has not proved the case so made out either by way of a defence or attack. The entire case is founded upon a mutual

settlement and not a single iota piece of paper in this regard was produced before the Court.

We are not unmindful that the entry made in the record of right has a presumptive value on possession but the moment the property is held to be joint, the possession of the co-sharers are presumed. The possession of a co-sharer is not only on the basis of the share held in the joint property but also on behalf of the other co-sharer unless such co-sharer claims exclusion.

From whatever angle we look, we do not find any infirmity in the Judgment of first appellate Court and, therefore, the instant appeal does not involve any substantial question of law under Section 100 of the Code of Civil Procedure.

The appeal and connected application are dismissed without any order as to costs.

(Harish Tandon, J.)

(Prasenjit Biswas, J.)