

**In the High Court at Calcutta
Constitutional Appellate Jurisdiction
Appellate Side**

**The Hon'ble Justice Sabyasachi Bhattacharyya
And
The Hon'ble Justice Uday Kumar**

F.A.T. No. 123 of 2021

**Smt. Surabala Mondal and Another
Vs.
Fakir Mondal and Another**

For the appellants : Mr. Partha Pratim Roy,
Mr. Sarbananda Sanyal,
Mr. Samrat Chakraborty

Hearing concluded on : 14.11.2024

Judgment on : 25.11.2024

Sabyasachi Bhattacharyya, J.:-

1. The present appeal has been preferred against the decree of dismissal of a suit filed by the plaintiffs/appellants for declaration that a purported sale deed dated March 20, 1989, is illegal, ineffective and void, for declaration of half share of the plaintiffs in the suit-property and for partition.
2. Learned counsel for the appellant contends that the learned Trial Judge dismissed the plaintiffs' application for appointment of an expert to examine the Left Thumb Impressions (LTIs) of the executants on the disputed sale deed, filed in the suit, by an order dated December 12, 2019, although the said expert's report would be the best evidence to prove or disprove the veracity of the LTIs. It is argued that the

defendants objected to such prayer for appointment of expert, for which adverse inference should be drawn against them. Learned counsel contends that in view of the proposed expert evidence being the best evidence to prove/disprove the validity of the disputed deed, the order dismissing the appellants' application for appointment of expert is bad in law.

3. It is next argued on behalf of the appellants that the plaintiffs no.2 was a minor at the time of execution of the deed, which is borne out by the evidence adduced by DW1, the defendant/respondent no.1. As such, the deed is vitiated on such ground alone.
4. Learned counsel appearing for the appellants next submits that there was gross discrepancy between pleading and proof inasmuch as the pleadings of both the parties state that the disputed sale deed was executed on March 20, 1989, and registered on March 28, 1989, whereas DW1 (defendant/respondent no.1) admitted in his evidence that the execution and registration took place on the same date. It is argued that such discrepancy vitiates the validity of the document.
5. In her evidence, DW2, who was supposedly one of the executants of the deed, admitted that she could not say whether one Bibhuti, who was supposed to be the attesting witness of the deed, and Gopal, who identified the executants, were present during execution of the sale deed. Thus, the execution of the deed was not properly proved. Such admission on the part of the DW2, who supported the defence case, raises a suspicion as to valid execution of the deed.

6. Again, Bibhuti, the attesting witness, was admitted by DW2 in her cross-examination to be the brother-in-law of the alleged purchaser, defendant no.1. Thus, the interests of the attesting witness lay in favour of the defendant/respondent no. 1, the alleged purchaser, and the said fact raises a presumption that the execution of the alleged deed was a concocted story.
7. It is argued that no question was put to the plaintiffs' witness in the cross-examination of the PW1 regarding the plaintiffs not being present at the execution of the deed. Thus, by applying the principle as laid down in the case of *AEG Carapiet vs. A.Y Derderian*, reported at *AIR 1961 Cal 359*, it should be deemed that if such question was asked, the same would go against the defence case.
8. Since the plaint case of the plaintiffs having knowledge of the deed within limitation period could not be demolished in evidence, nor was any contrary evidence adduced by the defence, the argument of the defendants that the suit is time-barred also cannot be accepted.
9. Learned counsel for the appellants lastly argues that the observation of the Learned Trial Judge that the suit was bad for non-joinder of all the co-owners of the joint property was contrary to law, since the relief of declaration in respect of the sale deed, the parties to which have all been impleaded in the suit, was the main relief sought in the suit. The relief of partition being consequential, could not have been a determinant of the necessary parties. At best, the court could have refused partition, although it affords a continuous cause of action, but could not dismiss the suit for non-joinder of necessary parties. In such

context, learned counsel for the appellants cites *Akkamma and ors. Vs. Vemavathi and Ors.*, reported at (2021) 18 SCC 371.

10. Since the respondents consistently chose not to appear at the hearing of the appeal despite the appeal being heard on several dates, the matter was heard *ex parte* and is being decided in the absence of the respondents.
11. The records indicate that the learned Trial Judge, vide order no.42 dated December 12, 2019, dismissed the plaintiffs' application for appointment of an expert to examine the authenticity of the LTIs found on the disputed sale deed (Exhibit-A). The ground for such dismissal was that the suit had already reached an advanced stage and the plaintiffs, despite having every opportunity to prove their case, did not avail of the same but filed such application belatedly.
12. Another ground taken by the learned Trial Judge for dismissal of the application was that the volume sought from the registration office also contains other deeds which are not the subject-matter of the suit and hence parties to such deeds may be prejudiced.
13. The said order having not been challenged in revision, as per the submission of the appellants, has been validly set up as a ground of challenge in the appeal. Section 105 (1) of the Code of Civil Procedure provides that where a decree is appealed from, any error, defect or irregularity in any order affecting the decision of the case may be set forth as a ground of objection in the memorandum of appeal. Grounds V and VI of the memorandum of the present appeal set forth the

dismissal of the expert appointment application *inter alia* as grounds of the appeal.

- 14.** Again, Order XLI Rule 27 of the Code of Civil Procedure, in Clauses (a) and (b) of sub-rule (1) thereof, provides that if the Court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted or the Appellate Court requires any document to be produced or any witness to be examined to enable it to pronounce judgment, the Appellate Court may allow such evidence or document to be produced or witness to be examined.
- 15.** In the present case, the evidence sought to be adduced by way of expert opinion on the authenticity of the LTIs is not only vital but cardinal to the proper adjudication of the issues involved in the suit. The primary challenge in the suit is to the veracity of the disputed sale deed. As such, the said expert opinion was a vital piece of evidence to clinch the issue, either to prove or to disprove the said deed.
- 16.** One of the grounds for dismissal mentioned in the order dated December 12, 2019, passed in the suit, was that the parties to other deeds contained in the same volume in the registration office could be prejudiced. However, the said ground is utterly baseless, since the volume, if called for, would not affect the rights of third parties to the suit at all, since only the LTIs on the disputed deed in the present *lis* would be the subject-matter of examination by the expert.
- 17.** The other ground of dismissal of the expert appointment application, that is, late filing of the application, cannot also be accepted. Although it was for the plaintiffs to prove their own case, once the plaintiffs have

pleaded in the plaint that the disputed deed was not executed by them at all, the onus shifted on the defendant no.1, who relied on the said document, to prove the authenticity of the same. However, not only did the defendants/respondent no.1 not pray for an expert appointment to prove the veracity of the LTIs to disprove such allegation of the plaintiffs, the defendant no.1 objected to the application for appointment of expert taken out by the plaintiffs, for which adverse interference ought to be drawn against the said defendant, who is the beneficiary of the said deed.

- 18.** Also, the defendant/respondent no.1, as DW1, categorically stated in his cross-examination that he shall not ask for expert opinion regarding genuineness of the signatures on the deed. Since there were no signatures but only LTIs involved in the present case, it would obviously be construed that the denial to seek expert opinion was in respect of the said LTIs.
- 19.** Again, DW2, who was one of the executants of the disputed deed and supported the defendant no.1, stated in her cross-examination that she does not know whether or not Gopal and Bibhuti were present during execution of the disputed sale deed by the plaintiffs. It is noteworthy that Gopal was the identifier of the executants and Bibhuti was the attesting witness in the deed. Such admission on the part of the DW2 casts a cloud on the valid execution of the Will.
- 20.** It also has to be kept in mind that all three executants put their LTIs on the deed and were illiterate, which shifted the burden on the beneficiary of the deed, that is, the defendant/respondent no.1 to prove

the authenticity of the deed and to show by cogent independent evidence that it was properly read over and explained to the executants, which was not done in the present case.

- 21.** Hence, it was only after completion of the evidence of the two defendants' witnesses that the plaintiffs/appellants could be aware of the disinclination of DW1 to call for expert opinion on the authenticity of the LTIs and to know about the stand of the DW2 who categorically admitted that she could not recollect the attesting witness and the identifier of the deed to be present at the execution.
- 22.** Such admissions on the part of the DW1 and DW2 became available to the plaintiffs only after the conclusion of the defendants' witnesses and as such, it was fully justified for the plaintiffs/appellants to file the application for appointment expert only thereafter, to make an effort of their own to disprove the deed by seeking an examination of the LTIs. Thus, mere late filing of the application could not be a ground for refusing such vital evidence.
- 23.** Such errors and illegality of the said order being amenable to the appellate jurisdiction of this Court under Section 105 of the Code of Civil Procedure, we are of the opinion that the Trial Court refused to admit evidence which ought to have been admitted and that this Appellate Court requires the expert opinion and evidence to enable it to pronounce judgment, thus bringing the matter within the fold of Order XLI Rule 27(1), Clauses (a) and (b), of the Code of Civil Procedure. Accordingly, the said order is required to be set aside and the matter ought to be remanded to the Trial Court on such ground alone, if not

also on other grounds, directing appointment of an expert to examine the authenticity of the LTIs on the disputed deed.

- 24.** We find from the examination-in-chief of DW2 dated December 6, 2018, that she, being one of the executants of the deed, admitted that the plaintiff no.2 is her younger sister. It may be mentioned here that the deed was allegedly executed by three sisters, being the two plaintiffs/appellants and the defendant no.2/respondent no.2 in favour of defendant no.1/respondent no.1, their brother.
- 25.** Again, in her cross-examination dated June 13, 2019, DW2 admitted that she was aged 48 years at that point of time. If DW2 was 48 years of age on June 13, 2019, she would approximately be 18 years old at March 20, 1989, when the disputed deed was allegedly executed. If DW2 was barely major at that point of time and the plaintiff/respondent no.2 is her younger sister, as admitted in the examination-in-chief of DW2, it is quite obvious that the plaintiff/respondent no.2 was a minor when the disputed deed was executed. This also vitiates the validity of the said deed, insofar as plaintiff no.2 is concerned. Since the deed was allegedly executed jointly by three sisters, such defect hits at the root of the validity of the dispute sale deed.
- 26.** Both in the plaint and the written statement of defendant no.1, it has been sated that the deed-in-question was purportedly executed on March 20, 1989, and apparently registered on March 28, 1989. However, the defendant no.1, while adducing evidence as DW1, in his cross-examination dated September 20, 2018, categorically stated that

the registration of the deed had taken place on the self-same date. By “the self-same date”, he refers to the date of execution, as evident from his statements in cross-examination of the immediately preceding date that is July 24, 2018, where he was referring to the execution of the deed all along.

- 27.** In his cross-examination dated July 24, 2018, DW1 states that at about 9.30 am he reached the registration office and met one Suren Sarkar, a mohorar, for “making the deed”. In the immediately previous sentence, he admits that he visited the registration office only once. Thus, from such evidence it is borne out that, as per the version of DW1, he went to the registration office for making the deed, thereby putting the date of execution at the same date as its registration, as he admittedly visit the registration office only once for making the deed. Such patent discrepancy between the pleadings of the defendant no.1 in his written statement and his statement in cross-examination also casts doubt on the authenticity of the purported deed.
- 28.** Bibhuti, the brother-in-law of the defendant no.1, as admitted by DW2 in her cross-examination, acted as the attesting witness.
- 29.** Thus, read in conjunction, we have find major loopholes on several aspects of the defence case.
- 30.** First, the defendant/respondent no.1 refused to seek appointment of an expert to prove the authenticity of the LTIs on the disputed deed. Secondly, the deed was executed in presence of an attesting witness who was the brother-in-law of the purchaser/defendant no.1, thus being an interested party in favour of the defendant no.1. Thirdly,

defendant no.2, who supported the defendant no.1, admitted in her cross-examination that she did not know whether Gopal, the identifier of the executants of the LTIs, and Bibhuti, the attesting witness, were at all present during execution of the sale deed. Again, the defendant no.1 filed a written objection to the application of the plaintiffs/appellants when they sought for appointment of an expert for examination of the LTIs. The above factors, read in conjunction, clearly create a palpable adverse inference against defendant no.1 for having resisted the best evidence, being expert witness, from being adduced in the suit.

- 31.** It cannot also be overlooked that despite the executants having all put their LTIs on the disputed sale deed, there is no clear evidence as to whether the contents of the same were read over and explained to the executants.
- 32.** Thus, the learned Trial Judge acted in a perverse manner in overlooking such vital evidence or lack of it to turn down the declaration sought by the plaintiffs regarding the disputed sale deed (Exhibit-A) being void and not binding on the plaintiffs.
- 33.** The principles laid down in *Carapiet's Case (supra)* is applicable in several respects to the present case, since the defendant failed to put across any suggestion to the PW1 as to whether the PW1 was present at the execution of the deed and/or as to whether the plaintiffs had knowledge of the deed prior to the date pleaded in the plaint, which brings the suit within the limitation period.

- 34.** Also, no case of the contents of the deed being read over and explained to the executants was put to the plaintiffs' witnesses, thereby compelling the court to draw adverse inference to the effect that if such a question was asked, the same would go against the defence case.
- 35.** Moving on to the issue of non-joinder, the frame of the suit is such that the relief of partition is dependent on the first relief sought in the plaint, for declaration that the impugned sale deed is void. Thus, the relief of declaration in respect of the sale deed is the primary relief sought in the suit and partition is a consequential relief in the circumstances. It is the primary relief which determines the necessary parties to a suit. Insofar as declaration is concerned, only the defendant no.1 and the plaintiffs were necessary parties, since the execution of the deed is denied by the plaintiffs and the defendant no.1, the beneficiary of the deed, relies on the same. Defendant no.2, the other executant, was a proper party and was accordingly impleaded as well. Hence, insofar as the primary relief of declaration regarding the sale deed is concerned, all necessary parties were impleaded and the suit cannot be said to be barred for non-joinder of necessary parties in that respect.
- 36.** However, insofar as partition is concerned, in the event the plaintiffs succeed in getting the first relief of declaration, the sale deed is vitiated and, in such case, the plaintiffs are to be declared as co-sharers in the property. Up to that stage, there could not have been any issue with the maintainability of the suit on the ground of non-joinder of necessary parties. However, for the relief of partition, the plaintiffs had to implead

all co-sharers to all the plots of land comprising the joint property; otherwise, the suit would be rendered bad for non-joinder of necessary parties.

- 37.** The principle laid down in *Akkamma's* case is not exactly apt in the context of the present case, since the same dealt with the maintainability of the suit under the proviso to Section 34 of the Specific Relief Act. In such context, the Supreme Court observed that if the primary relief was maintainable, and consequential reliefs were sought, merely because the consequential relief was held not fit to be granted, the suit could not be said to be non-maintainable at the outset. In such case, at best the consequential relief could be barred.
- 38.** In the present case, the issue is of non-joinder. Borrowing the underlying spirit of *Akkamma's* case, however, it can very well be held that the proper course of action for the Trial Court was to decide the relief of declaration and thereafter, if the same was held in favour of the plaintiffs, an opportunity ought to have been granted to the plaintiffs to implead the other co-sharers of the joint property.
- 39.** It is well-settled that the court shall not dismiss a suit on the technical ground of non-joinder without first affording an opportunity to the plaintiffs, who are the *dominus litis* of the carriage of proceedings, to implead the omitted necessary parties before proceeding further.
- 40.** Thus, in the present case, having not adopted such course of action, the judgment of the Learned Trial Judge is also vitiated on such ground.

- 41.** In view of the above observations, we dispose of the appeal in the following manner:
- 42.** F.A.T. No. 123 of 2021 is allowed, thereby setting aside the impugned judgement and decree dated February 15, 2021 passed by the Learned Civil Judge (Senior Division), First Court at District: Malda in Partition Suit No.352 of 2013 and remanding the matter to the trial Court for adjudicating the same afresh, upon appointing an expert for examining the authenticity of the LTIs on the disputed Sale Deed (Exhibit A) and affording both the contesting parties the opportunity to adduce further evidence, if they so intend, in support of their respective cases. The learned trial Judge shall also grant an opportunity to the plaintiffs/appellants to implead all other co-sharers of the suit property in the suit. The suit shall now be adjudicated afresh in the light of the above observations on the basis of the evidence already on record and on further evidence to be adduced by the parties, if any, as expeditiously as the business of the trial Court permits.
- 43.** There will be no order as to costs.
- 44.** In view of the matter being remanded, no formal decree need be drawn up.

(Sabyasachi Bhattacharyya, J.)

I agree.

(Uday Kumar, J.)

Later

After the judgment is passed, on the prayer of learned counsel for the appellants, the trial court records are directed to be sent down immediately by special messenger at the cost of the appellants, to be put in within a week from date.

(Sabyasachi Bhattacharyya, J.)

(Uday Kumar, J.)