

Form No.J(2)

IN THE HIGH COURT AT CALCUTTA
Civil Appellate Jurisdiction
Appellate Side

Present : The Hon'ble Mr. Justice Sabyasachi Bhattacharyya
&
The Hon'ble Mr. Justice Uday Kumar

FAT 428 of 2018
With
CAN 4 of 2024

Sri Somnath Dey and Anr.
Vs.
Smt. Sumita Mitra (nee Dey)

For the appellants : Mr. Ratul Das,
Mr. Dyutimoy Paul,
Mr. Arindam Dey,
Mr. Shoham Sanyal

For the respondent : Mr. Tanmoy Mukherjee,
Mr. Swapan Kumar Pal

Heard on : November 20, 2024.

Judgment on : November 20, 2024.

Sabyasachi Bhattacharyya, J.:

1. Learned Advocate appearing for the appellants, having instruction to appear on change, submits that despite service of notice on the

erstwhile learned Advocate for the appellants from the end of the appellants themselves, no reply has been received from the said Advocate. It is submitted that since in the said letter it was clarified that the appellants seek to take a change from the erstwhile learned Advocate, leave may be granted to the appellants under the contemplation of Order III of the Code of Civil Procedure for the newly appointed Advocate to appear in the matter without taking any formal no-objection. We find that there are sufficient indications to indicate that the appellants have expressed their intention to take change from the erstwhile learned Advocates and having received no reply from the learned erstwhile Advocates, it is deemed that there is no objection from the erstwhile learned Advocate that the appellants be represented by their newly engaged Advocates.

2. Thus, leave is granted under Order III Rule 4 (2) to the Advocates now having instruction to appear for the appellants to so appear upon determining the appointment of the previous Advocate for the Appellants. The currently engaged Advocate-on-Record shall file his Vakalatnama in the department during the course of the day.
3. The appeal is now taken up for hearing.
4. The present challenge has been preferred against a preliminary decree passed in a partition suit, declaring the shares of the plaintiff

and defendants respectively to be 1/3rd each in respect of the suit property.

5. Learned Counsel for the defendants/appellants contends that the impugned judgment is bad for lack of reasons. It is submitted that a substantial portion of the judgment is a reproduction of the plaint case and proper issues, particularly regarding ouster and mis-joinder of properties, were not framed by the learned Trial Judge at all.
6. That apart, it is argued that the suit is hit by Article 110 of Schedule - I of the Limitation Act inasmuch as the plaintiff filed the partition suit much after 12 years from when she was excluded from the property.
7. It is argued that the construction of the two upper stories of the building, that is, the second and third floors of the premises, was made in the year 1984 exclusively by the defendants at their own cost, to substantiate which challans were exhibited in the trial Court. The plaintiff was married in the year 1985. It is submitted that at no point of time did the plaintiff, who is a sister of the defendants, objected to such construction being made by the defendants. Hence, it is submitted that it should be deemed that the said two floors, that is, the second and third floors belong exclusively to the

defendants with the implied consent of the plaintiff. The addition of such second and third floors to the hotchpot of the partition suit, it is argued, vitiates the frame of the suit as such.

8. It is further argued that a part of the joint property of the parties was not made the subject-matter of the partition suit and as such, the suit is bad for non-joinder of all the joint properties of the parties.
9. Learned Counsel for the appellants places reliance on a partition deed of the year 1981 whereby the predecessors-in-interest of the present parties, that is, the father of the parties and their grandmother, came to own a specifically allotted portion of the original joint property.
10. It is pointed out from the said partition deed that a portion of the property encircled by yellow border in the partition deed has not been included within the hotchpot of the suit. It is submitted that as such, the suit is bad on such count as well.
11. It is next contended that the plaintiff was ousted by the defendants from the suit property. Admittedly, the plaintiff/respondent married in the year 1985. It is submitted that the plaintiff only returned to the property in the year 1999 and three years after came back and also took her ornaments from the property. Apart from the same, the plaintiff has not have access to the suit property at any point of

time, which will be evident from the pleadings as well as the evidence of the defendants/appellants.

12. Such point of ouster has not been adverted to by the learned Trial Judge at all.

13. It is submitted that in the impugned judgment, the learned Trial Judge took into consideration extraneous circumstances and recorded mental cruelty having been meted out to the plaintiff by the defendants, which is not even a part of the plaint pleadings.

14. It is further argued that a perusal of the impugned judgment shows that the learned Trial Judge primarily adverted to the plaint case and without considering the above issues, went on to declare the joint share of the parties *de hors* the law.

15. In support of his contentions, learned Counsel for the appellants cites *Sheo Harakh Upadhyaya and Ors. vs. Jai Gobind Tewari and Ors.* reported at *AIR 1927 All 709* where a learned Single Judge of the Allahabad High Court had held inter alia that if a building was erected long ago, it will be presumed that the co-sharer in exclusive possession who erected the building did so with the permission of the other co-sharers.

16. It was further held that if so, there should be no interference as the other co-sharers, having allowed the appellant to occupy

exclusively in a certain way, must be deemed to have consented in advance to any use of the land consonant with the exclusive possession so permitted.

17. Learned Counsel appearing for the appellant next cites *Uttar Pradesh State Road Transport Corporation vs. Jagdish Prasad Gupta* reported at (2009) 12 SCC 609 for the proposition that reasons introduce clarity in an order and substitute subjectivity by objectivity.
18. By placing reliance in particular on Paragraph Nos. 8 and 9 of the said judgment, it is argued that reasons are the soul of a judgment and due to absence of proper reasons, the judgment impugned herein is vitiated in law.
19. Learned Counsel appearing for the plaintiff/respondent controverts the allegations levelled by the appellants and argues that the partition deed executed in 1981 conferred exclusive title of the predecessors-in-interest of the parties, being their father and grandmother respectively, in respect of the properties shown by green border in the said partition deed. The other co-sharer of such predecessors, one Dhana Ballav, was allocated the property shown by red border. The property depicted by way of yellow border in the said deed, however, was kept common, to be used by way of

easement as well, between the parties to the partition deed, that is, the said Dhana Ballav, the first party, on the one hand and the father and grandmother of the parties herein, the second party, on the other.

20. Hence, the yellow bordered portion was rightly not incorporated in the hotchpot of the suit, being common with other persons, who are third parties to the present litigation.

21. It is next contended on behalf of the respondents that it is nowhere pleaded by the defendants, nor any evidence adduced, to the effect that the other co-owners, being the grandmother and subsequently, the mother of the parties, a portion of the property also devolved on whom, had ever relinquished their right in respect of the joint property. The grandmother died in the year 1986, one year after the plaintiff being married, and the mother died in the year 2007, long thereafter. The suit has been filed in the year 2015, eight years after the demise of the mother. In the absence of any pleading or proof to the effect that the then other co-owners than the plaintiff/respondent had also granted consent for the exclusive ownership of the second and third floors of the defendants, law presumes that any addition or improvement made to the joint property would also belong to all

the co-owners and not exclusively to the co-owners who made such construction.

22. It is next argued that in Paragraph No. 10 of the plaint, it was pleaded that there are tenants in respect of the property, the rent income from whom was being exclusively usurped by the defendants. In reply thereto, the defendants/appellants have stated in Paragraph No. 10 of their amended written statement that proportionate share of rent to the tune of $1/3^{\text{rd}}$ was being paid to the plaintiff. Thus, the defendants have categorically admitted the share of the plaintiff even in their last-amended written statement. As such, the argument as to ouster is not tenable.

23. Upon hearing learned Counsel for the parties, we find that although the reasons attributed by the learned Trial Judge in the impugned judgment leave much to be desired and are at best unhappy, mere dearth of appropriate reasons or improper reasons would not vitiate a judgment and the Appellate Court can always supply further reasons, if the Appellate Court concurs with the conclusion arrived at by the learned Trial Judge.

24. This is not a case where the impugned judgment is absolutely devoid of reasons. The learned Trial Judge, in her own way, attributed reasons which may not be to the liking of the parties or

even the Appellate Court. However, the substantial issues were touched upon and dealt with, both the parties having addressed their arguments on the same.

25. Thus, the ratio of the case of *Jagdish Prasad Gupta (supra)* is not applicable in terms to the present case.

26. Insofar as *Sheo Harakh Upadhya (supra)* is concerned, the proposition laid down in the said judgment deals with the exclusive possession of some of the co-sharers in respect of a portion of a joint property by virtue of making construction there. However, nowhere in the said judgment has the proposition been laid down that in case exclusive possession is established, the co-owner in exclusive possession also automatically gets absolute title over such portion of the property in exclusion of the other co-sharers.

27. That apart, the concept of ouster of the plaintiff/respondent by the defendants/appellants is not applicable in the present case for other reasons as well, as discussed below.

28. In the present case, as rightly pointed out by the plaintiff/respondent, in Paragraph No. 10 of the plaint, a clear case of tenancy and rent being usurped by the defendants/appellants has been made out. In controverting the same, the defendants, in Paragraph No. 10 of their amended written statement, categorically

stated that proportionate share of rent was being paid to the plaintiff/respondent, in consonance with her 1/3rd share as claimed in the plaint.

29. Thus, the myth of ouster of the plaintiff from her co-ownership in the suit property is busted by such stand taken by the defendants in their own written statement.

30. Moreover, ouster of a co-sharer from the joint property has to stand on an extremely high footing, equivalent to a proper relinquishment deed which has to be registered in law. Ouster denotes the relinquishment of title of one co-owner in favour of the others and requires a conscious relinquishment of such right/title in order to qualify as "ouster" in the context of a partition suit. In the present case, the mere fact that the plaintiff was married in the year 1985 and thereafter visited the property rarely or was resisted from entry to the suit property by the defendants/appellants themselves does not *ipso facto* tantamount to her ouster as one of the co-owners from the property. The said conduct of the defendants merely go on to show that they all along resisted the plaintiff from entering the suit property physically. However, the possession of the defendants still remained notional joint possession on behalf of all the co-owners, including the plaintiff.

31. That apart, in the absence of any pleading or proof that the other co-owners, the grandmother of the parties and thereafter their mother, having consented to exclusive title of the defendants in their constructed portion, it cannot be said that the defendants/appellants acquired exclusive title in respect of the second and third floors, despite the same having been constructed by them.
32. Here also, the arguments advanced by the respondent is much more tenable in law than that of the appellants, since law presumes that if an improvement is made on a joint property, the fruits of such improvement belongs to all the co-shares of the property.
33. In the present case, we do not find any document or proof on the part of the defendants/appellants to establish that all the other co-sharers had relinquished their title to the second and third floors, which were constructed on the joint property, in favour of the defendants/appellants. Even if no objection was shown or proved to have been taken by the plaintiff in that regard, in the absence of pleading of there being no objection from the other co-sharers as well, we cannot say that the defendants acquired exclusive title in the second and third floors. Accordingly, the inclusion of such floors within the hotchpot of the partition suit was also perfectly justified,

since those floors of the property are also joint properties of the parties to the litigation.

34. The “yellow border” conundrum is easily resolved on a bare perusal of the partition deed of 1981. The deed clearly shows that the property shown by red border was given to Dhana Ballav, one of the then co-sharers (first party) and that encircled in green was allotted to the predecessors-in-interest of the present parties, being the father and grandmother of the parties, (collectively second party).
35. The yellow border portion finds place in the said partition deed as a common passage with easement rights in both the allotments of Dhana Ballav, the first party, and the joint second parties, that is, the predecessors-in-interest of the present parties. Thus, the yellow bordered common passage belongs in common not only to the present parties but also to Dhana Ballav and his branch of successors and as such, there is no unity of title and possession with regard to the said property seen in the context of the other joint properties which are the subject-matter of the suit, which are common between all the present parties. Hence, on such ground also, we cannot grant any relief to the appellants.

36. Having said so, we also find that the argument of limitation is not applicable in the present case. In the absence of any specific evidence of exclusion of the plaintiff/respondent, as discussed above, we are unable to accept the contention that the suit is barred by limitation.
37. In any event, the cause of action for a partition suit is a continuing cause of action arising *de die in diem* and as such, the present suit cannot be held to be barred by limitation.
38. In view of the above, the appeal fails. Accordingly, FAT 428 of 2018 along with the connected CAN bearing I.A. No. CAN 4 of 2024 are dismissed on contest without, however, any order as to costs, thereby affirming the impugned judgment and decree dated April 23, 2018 passed by the learned Civil Judge (Senior Division), Third Court at Howrah, District: Howrah in Title Suit No. 365 of 2015.
39. A formal decree be drawn up accordingly.
40. The trial Court records be sent down immediately.

(Sabyasachi Bhattacharyya, J.)

I agree.

(Uday Kumar, J.)