

31.1.2024
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Ct. no. 652
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C.O. 1285 of 2020

Gangadas Gorai & Anr.
Vs.
Smt. Niyati Gorai & Ors.

Mr. Rabindra Nath Mahato
Mr. Subhas Chandra Atha
Ms. Payel Paramanik ...for the Petitioners

Mr. Shyamal Kr. Pandey
Mr. Somnath Gangopadhyay
...for the Opposite parties

The impugned order no. 30 dated 12.2.2020 passed by the learned Civil Judge (Senior Division), Bankura in Title Suit no. 32 of 2018 has been challenged in the present application.

The petitioners/defendants submits that the petitioner no. 1, Gangadas Gorai had filed the Title Suit being Title Suit no. 6 of 2003 for partition in respect of his 1/3rd share in the suit property before the learned Civil Judge (Senior Division), Bankura in the year 2003 and the petitioner further stated that during pendency of the said suit, the suit properties of that suit were amicably partitioned by and between the present petitioners and their elder brother, Tribeni Gorai since deceased, who was the husband of the opposite party no. 1, Niyati Gorai. Accordingly, they filed a solenama petition on 17.3.2003 before the learned Civil Judge (Senior Division), Bankura with a prayer for passing an

order as per terms of solenama and also prayed for making solenama petition be made part of the decree. Accordingly, solenama petition voluntarily signed by the parties and the court below after hearing the parties and in presence of the parties, decreed the said suit in terms of solenama vide order no. 9 dated 28.1.2004.

Mr. Mahato, learned counsel appearing for the petitioners submits that all the parties have accepted the said settlement before the learned court below without any protest and they have accepted the allocations made by the surveyor. He further submits that at the time of passing the said decree, the trial court was pleased to examine all the three parties and recorded their statements, who stated that they have signed the solenama and they have no objection if the solenama petition be made part of the decree. Accordingly, the final decree was passed and landed property was demarcated as per their entitlement and the partition of the properties effected conclusively among the parties.

Thereafter, one of the parties in the said compromise decree of the landed properties namely, Tribani Gorai died on 25.6.2007 leaving behind his wife, Niyati Gorai and four minor sons and daughters who are the opposite parties herein. After aforesaid partition by metes and bounds heirs of deceased Tribani Gorai sold out a portion of land allotted to their

husband/father to one Gopal Chandra Dutta on 03.06.2008. Thereafter, by another deed dated 3.6.2008, the legal heirs of Tribani Gorai sold another portion of land allotted to her husband by that compromise partition decree, in favour of one Manik Paral.

Learned counsel for the petitioners further submits that after a long lapse of 14 years, the petitioners received a notice wherefrom he came to know that the heirs of Tribani Gorai have filed the present suit being Title Suit no. 32 of 2018 seeking partition of self – same properties which have already been partitioned by way of compromise decree as above. The petitioners herein appeared in the said suit and filed written statement and they have also filed an application questioning maintainability of the present suit on the ground that the properties in the suit have already been partitioned by way of compromise decree and the said decree has already been acted upon and as such the present suit is not maintainable.

However, the learned court below had taken up said application and by the impugned order dated 12.2.2020 rejected the said petition, mainly on the ground that the preliminary issue raised by the defendant as to whether the suit is maintainable or not, involves mixed questions of law and fact which involves fair question of trial and as such without the trial

proceedings, the present suit cannot be decided on the basis of preliminary issue.

Being aggrieved by that order, Mr. Mahato further submits that the learned court below failed to understand the provision of Sections 10 and 11 of the Code of Civil Procedure and he should have allowed the application questioning the maintainability on the ground that the suit is barred by *res judicata*. Court below failed to understand that after lapse of 14 years, no suit can be filed for reopening of a decree of partition which was passed on compromise. The court below also failed to appreciate that after granting final decree on the basis of solenama in the earlier suit, there cannot be any fresh suit for partition as prayed for by the opposite parties. Accordingly, the petitioners have prayed for setting aside the order impugned and to allow the defendants/petitioner's prayer that the suit is barred by *res judicata* and is not maintainable in the eye of law.

Mr. Pandey, learned counsel for the opposite parties submits that the deed which has been referred by the petitioner herein, was executed by Niyati Gorai and therein she has also incorporated the name of four minor sons and daughters on whose behalf, she has no authority to execute any deed. Accordingly, both the deeds were executed by Niyati Gorai on behalf of herself and her minor sons and daughters, without complying the statutory provisions and accordingly, the petitioners

cannot rely upon said deeds to come to any conclusion. Moreover, parties to compromise decree can always challenge the decree passed on compromise by filing an application or by preferring appeal and as such the court below rightly held that the issue as to whether the compromise petition was lawful or not, can only be adjudicated after full-fledged trial and the issue cannot be decided in favour of defendants at its threshold since it does not involve only question of law. Accordingly, he further submits that the impugned order does not call for interference.

I have considered the submissions made by both the parties. On perusal of the decree passed in Title Suit no. 6 of 2003, it appears that suit was decreed in terms of solenama and paragraph 3 of the solenama decree states that from plot no. 327 an area measuring 35.6 satak, from plot no. 629 an area measuring 8.3 satak and from plot no. 330 an area measuring 27.5 satak, in all 71.4 satak properties were allotted to the predecessor of the present plaintiff namely, Tribani Gorai who was the defendant no. 2 in the suit. It further appears that Tribani Gorai died on 25.6.2007 and his wife, Niyati Gorai and four sons and daughters have sold 14 satak from plot no. 629 in favour of stranger purchasers. Thereafter, the said heirs of Tribani Gorai also sold another portion of the property allotted to them in favour of stranger purchaser from plot no. 327 which was

allotted to them. In both the deeds, it has clearly recited that the vendors of the deed i.e. the plaintiffs obtained the said property by way of partition decree passed on compromise in Title Suit no. 6 of 2003. Accordingly, it is very much clear that the heirs of Tribani Gorai had accepted the said deed of partition and the recitals in aforesaid sale deeds clearly show that the partition deed has also been acted upon the parties.

Needless to say that after the amendment of Order XXIII, Rule 3 and Order XLIII, Rule 1 with effect from 1st February, 1977, neither an appeal against the order recording the compromise nor remedy by way of filing a suit is available in cases covered by Rule 3A of Order XXIII, which provides that no suit shall lie to set aside a decree on the ground that the compromise, on which the decree is based was not lawful.

In the present context, while compromise entered in between petitioners herein and the predecessor of opposite parties/plaintiffs, it was not merely placed before the court just to get a seal of approval from the court but it was duly signed by the parties and the concerned court after examining all the parties to compromise, satisfied that the agreement entered into by the parties are lawful and then passed the decree after applying his judicial mind. Opposite parties herein also have no specific case that such agreement of compromise was unlawful or void or voidable. Once such compromise

agreement is accepted by court and decree is drawn on the basis of compromise, it becomes the order of the court and acquires the sanctity of a judicial order.

In such view of the matter, the impugned order dated 12th February, 2020 passed by the learned court wherein trial court held that the maintainability of the suit involves mixed question of law and fact is clearly perverse and illegal since plaintiff's present suit is clearly barred under Section 11 of the Code of Civil Procedure and the issue of maintainability does not involve any question of fact. There is no dispute in the present context that the issue involved in the present suit i.e. the prayer for partition of the suit properties was directly and substantially in issue in the earlier Title Suit no. 6 of 2003 and between the same parties or their predecessor and was decided conclusively. Section 11 of the Code does not create any right or interest but operates as a bar to try the same issue once over. Rule of res judicata is based on rules of conclusiveness. It aims to prevent multiplicity of proceedings and accords finality to an issue which directly and substantially had arisen in the former suit between the same parties, decided and became final, so that parties are not vexed twice over vexatious litigation and the valuable time of the court is saved.

Therefore, the order impugned dated 12th February, 2020 is hereby set aside. The Title Suit no. 32 of 2018 pending before learned Civil Judge (Senior Division), Bankura is held to be barred under Section 11 of the Code and hereby dismissed being not maintainable.

C.O. 1285 of 2020 is accordingly allowed.

Urgent photostat certified copy of this order, if applied for, be given to the parties upon compliance of all requisite formalities.

(Ajoy Kumar Mukherjee, J.)