

Form No. J(2)

In the High Court at Calcutta
Civil Appellate Jurisdiction
Appellate Side

Present: The Hon'ble Justice Sabyasachi Bhattacharyya
And
The Hon'ble Justice Uday Kumar

FA 215 of 2024
IA No: CAN 1 of 2024

Sabita Mitra
Vs.
Uma Sarkar and others

For the appellant : Mr. Probal Kr. Mukherjee, Ld. Sr. Adv.,
Ms. Shebatee Datta

Heard on : 18.03.2025

Judgment on : 18.03.2025

Sabyasachi Bhattacharyya, J.:-

1. Affidavit-of-service filed in court today be kept on record, which indicates that proper service has been effected on all the respondents. Since by our earlier order dated December 18, 2024 we had recorded that the service of copies of the application and the memo would tantamount to notice of the appeal, the appeal itself is taken up for hearing.
2. The present first appeal arises out of the dismissal of a suit filed by the plaintiff/appellant for partition, declaration of title and share and consequential reliefs.

3. By our order dated December 18, 2024, we had specifically recorded that in view of the short conspectus of the appeal, the trial court records need not be called for and we shall hear out the appeal on informal paper books. Although no informal paper books are filed till date, we find that the relevant documents are annexed to the interlocutory application filed in connection with the appeal and accordingly proceed on the said premise.
4. In her plaint, the plaintiff had categorically averred in paragraph no.1 that one Abani Mohan Ghosh, since deceased, the predecessor-in-interest of all the parties, was the sole and paramount owner of the suit property. It is also averred in paragraph nos. 2 and 3 of the plaint as to how the property devolved on the present parties.
5. In fact, in paragraph no.7 of the plaint, a genealogical chart of the entire family has been given, which clearly denotes the manner in which the property-in-dispute devolved among the parties.
6. Thus, from the plaint, there could not have been any doubt as to the devolution of the shares amongst of the parties to the suit.
7. Notably, in the written statements, the contesting defendants took a similar stand to the effect that the averments made in paragraph no.1 of the plaint are “more or less correct”. It has also been admitted by the defendants/respondents that Abani Mohan Ghosh, the original owner of the property, died intestate. Thus, the premise of the title of the predecessor-in-interest of the parties and the devolution of the shares

among the parties on the demise of their said predecessor Abani Mohan Ghosh has virtually been admitted in the written statements.

8. The defendants have only raised a *sham* dispute as to the share of the plaintiff and as to whether any cause of action arose for filing of the suit. If we go by the devolution of interest as per the plaint, which has not been substantially denied in the written statements apart from an evasive denial here and there, there remains no doubt about the title of the parties and their respective shares in the suit property.
9. The learned Trial Judge, while adjudicating the suit, framed certain issues, including Issue No.6, which is whether the plaintiff has any right, title and interest in respect of the schedule property.
10. While deciding the said issue along with others, the learned Trial Judge categorically found that the father of the defendant no.1 was the owner of the suit property and the plaintiff and other defendants are legal heirs of the father of the defendants. The suit, it is recorded, originally belonged to the father of the defendant no.1 and thus father of the defendants became owner of the suit property and they are co-sharers. The expression "father of the defendants" is unintelligible, though, since the fact that the plaintiff is a married daughter of the said father/original owner was never disputed by the defendants. The defendants/respondents merely pleaded that the plaintiff, being a married daughter, is not in physical possession of the suit property, which of course does not make much of a difference in the absence of

any proof of the plaintiff's ouster, since it is trite law that the possession of each of the co-owners is deemed to be constructive possession on behalf of the others as well.

11. It has been recorded further in the impugned judgment that the plaintiff exhibited two sets of documents, being Exhibit 2 series and 4 to prove the title of the predecessor-in-interest of the plaintiff, without the learned Trial Judge actually advertng to the said documents and/or appreciating the evidentiary value of those.
12. We find from the defendants' written statements that the denial as to the material facts of title and devolution of shares among the parties are evasive at best. The primary premise and foundational facts of the title of the parties have been virtually admitted in the written statements.
13. In fact, certain tax receipts and other collateral evidence was produced by the plaintiff in the suit to prove the title of the parties to the suit. The legal effect of those, coupled with the oral evidence led, were not assessed or even considered by the learned Trial Judge while passing the impugned judgment.
14. The learned Trial Judge went so far in the impugned judgment as to observe that it appears that the predecessor of the plaintiff and defendants got the suit property as per claim of the plaintiff, but then recorded that the defendants claimed that the share of the plaintiff was not properly proved by documents.

15. The learned Trial Judge recorded in the impugned judgment that the plaintiff failed to file any document regarding the right, title and interest over the suit property and without the document of title, right, title and interest over the suit property cannot be proved despite the admission of the defendants in that regard.
16. However, the learned Trial Judge overlooked the fact that in a partition suit, the judgment that will ultimately be passed is not in the nature of a judgment in *rem* but will be a judgment in *personam*, binding only on the parties to the suit and, as such, in view of the clear admission of the title of the plaintiff, supported by corroborative evidence such as documents pertaining to payment of tax and other collateral evidence as well as oral evidence of the plaintiff/appellant, the parties could very well prove the title of the predecessor-in-interest of themselves and in the process their own shares in the property by way of oral evidence, coupled with such circumstantial evidence as well.
17. Thus, the learned Trial Judge shirked his responsibility as a civil court in not assessing the evidentiary value of the corroborative evidence and/or entering into the merits of the deposition of the parties as well as the supporting documents in dismissing the suit altogether, in the teeth of the admission of the title of the plaintiff by the defendants, merely because sufficient title deeds have not been produced.
18. In our opinion, such approach, in a partition suit, is palpably against the law.

19. Accordingly, FA 215 of 2024 is allowed, thereby setting aside the impugned judgment and decree dated May 14, 2024 passed by the learned Civil Judge (Senior Division), Fourth Court at Alipore, District: South 24 Parganas in Title Suit No. 517 of 2021 and remanding the matter to the learned Trial Judge to grant further opportunity to the parties to adduce evidence in respect of their title and the title of their predecessor-in-interest in respect of the suit property. Upon such opportunity being given to both the parties and upon giving a fresh hearing to the parties, the learned Trial Judge shall decide the suit on its own merits by advertng to all the oral and documentary evidence adduced by the parties in the light of the observations made above.
20. In view of long pendency of the matter, it is expected that the entire process of adjudication of the suit afresh shall be completed by the learned Trial Judge at the earliest, positively within one year from the date of communication of this order to the learned Trial Judge.
21. Consequentially, IA No: CAN 1 of 2024 is disposed of as well.
22. There will be no order as to costs.
23. Urgent Photostat certified copies of this order, if applied for, be made available to the parties upon compliance with the requisite formalities.

(Sabyasachi Bhattacharyya, J.)

I agree.

(Uday Kumar, J.)