

5 SCOB [2015] AD 88

APPELLATE DIVISION

PRESENT:

Mr. Justice Md. Abdul Wahhab Miah

Mr. Justice Muhammad Imman Ali

Mr. Justice A.H.M.Shamsuddin Chowdhury

CIVIL APPEAL NO.63 OF 2006

(From the judgment and order dated the 13th day of July, 2004 passed by the High Court Division in Civil Revision No.507 of 2000)

Md. Abdus Sattar Miah : . . . Appellant

=Versus=

Sreemati Raman Sona Dashya and others : . . . Respondents

For the Appellant : Mr. Abdul Wadud Bhuiyan, Senior Advocate instructed by Chowdhury Md. Zahangir, Advocate-on-Record

For Respondent No.2 : Mr. Mahmudul Islam, Senior Advocate with Mr. Probir Neogi, Senior Advocate instructed by Mrs. Madhu Malati Chowdhury Barua, Advocate-on-Record

For Respondent Nos.1, 3-11 : None represented
Date of Hearing : 21.04.2015 and 19.05.2015
Date of Judgment : The 26th day of May, 2015

A Hindu widow or a Hindu woman having life interest can maintain a suit for partition:

If a Hindu widow or a Hindu woman having life interest is not allowed to pray for partition of the joint properties by metes and bounds, then she would be deprived of enjoying her such right, as in the absence of partition by metes and bounds, she would not be able to enjoy her life interest therein. And if it is held that a Hindu widow or a Hindu woman having life interest would not be able to file a suit for partition, then the other co-sharers of the joint properties may use such decision as lever against such Hindu woman and thus create obstructions in the enjoyment of her life interest in the joint properties. Therefore, we find no substance in the point that plaintiff No.1 not being a co-sharer in the suit khatain and having life interest only could not maintain the suit for partition. And we hold that a Hindu widow or a Hindu woman having life interest can very much maintain a suit for partition for the fullest enjoyment of her such right in the joint properties.

...(Para 13)

JUDGMENT

Md. Abdul Wahhab Miah, J:

1. This appeal, by leave, is from the judgment and order dated the 13th day of July, 2004 passed by a Single Bench of the High Court Division in Civil Revision No.507 of 2000 making the Rule absolute.

2. Facts necessary for disposal of this appeal are that respondent Nos.1 and 2 as the plaintiffs filed Title Suit No.627 of 1991 in the Court of Subordinate Judge, 4th Court, Dhaka for partition of the suit land on the averment, *inter alia*, that the suit land belonged to the C.S. recorded tenants, Piari Mohan Mondal and Rai Mohan Mondal, in equal share. Piari Mohan Mondal by amicable arrangement with Rai Mohan Mondal used to possess the land of C.S. Plot No.661 measuring 39 acre exclusively and other plots of the suit khatian in ejmali with said Rai Mohan Mondal. Piari Mohan Mondal had a son named Denguri Mondal who married Sreemati Ramon Mondal, plaintiff No.1. Denguri Mondal died during the life time of his father, Piari Mohan Mondal, leaving plaintiff No.1 as widow and a daughter plaintiff No.2. As plaintiff No.1 became a helpless widow, Piari Mohan Mondal out of love and affection gifted the entire land of C.S. Plot No.661 to her by a registered deed of gift dated 25.10.1984 and handed over possession thereof to her and since then she has been in possession thereof. Rai Mohan Mondal died leaving behind only son-Rameswar Mondal who transferred his share from C.S. Plot No.971 to defendant No.3-6. Rameswar Mondal died childless leaving a widow, defendant No.1. After her husband exhausted his shares by transfer to defendant Nos.3-6, defendant No.1 had no saleable interest, but sold some land of the suit land to defendant Nos.1 and 7. By virtue of such purchase, defendant Nos.1 and 7 did not acquire any title and interest in the suit land. Piari Mohan Mondal died leaving behind son-Nagar Bashi and a son's daughter, Priya Bala, plaintiff No.2. Nagar Bashi also died childless leaving behind plaintiff No.2 as his brother's daughter as the sole heir. In the aforesaid manner, the plaintiffs became the owner of the entire 8/-annas share of Piari Mohan Mondal and they have been possessing the same. The suit land was not partitioned among the co-shares by metes and bounds. The plaintiffs asked the co-sharers to make amicable partition of the suit land to which they did not pay heed and hence, the suit.

3. Defendant Nos.1, 2 and 8 appeared in the suit and filed separate written statements.

4. The case of defendant No.1 was that the suit land belonged to Piari Mohan Mondal and Rai Mohan Mondal in equal share. Piari Mohan Mondal used to possess the land of C.S. Plot No.661 exclusively and Rai Mohan Mondal used to possess the land of C.S. Plot Nos.937 and 971 by amicable arrangement. Piari Mohan Mondal transferred the land of C.S. Plot No. 661 to plaintiff No.1 by a registered deed of gift. Rai Mohan Mondal died leaving behind a son-Rameswar Mondal. Rameswar Mondal transferred some land from C.S. Plot No.971 to defendant Nos.3-6. Rameswar Mondal died childless leaving behind defendant No.1 as his heir to have life interest in his share, if any portion of the land remained in the suit land after transfer by Rameswar Mondal, defendant No.1 was entitled to get a separate saham for her share if the 8/-annas share of her husband had not been exhausted.

5. The case of defendant No.2 was that the suit was not maintainable in its present form, the suit was bad for defect of parties. The suit land originally belonged to Rai Mohan Mondal and Piari Mohan Mondal. Piari Mohan Mondal died leaving behind only son-Nagar Bashi. His other son Denguri Mondal died during his life time and as such, the heirs of Denguri Mondal did not inherit any property of Piari Mohan Mondal. Nagar Bashi sold out 54 acre

land from C.S. Plot No.929 and other lands. Nagar Bashi went to India in 1964 and as such, his properties became enemy properties. Rai Mohan Mondal owned and possessed the land of C.S. Plot No.661 and other lands by way of amicable arrangement. Rai Mohan Mondal died leaving behind his only son-Rameswar Mondal who subsequently died leaving behind his wife, defendant No.1. Defendant No.1 transferred $19\frac{1}{2}$ acre land from the western portion of C.S. Plot No.661 to defendant No.2 vide registered kabala dated 19.10.81, and since purchase, defendant No.2 has been possessing the same. The plaintiffs had no right, title and possession in the suit land, so the suit was liable to be dismissed with cost.

6. The case of defendant No.8 was that the suit land originally belonged to Piari Mohan Mondal. He (Piari Mohan Mondal) had two sons named Nagar Bashi Mondal and Denguri Mondal. Denguri Mondal died during the life time of his father leaving behind a widow, a daughter and brother-Nagor Bashi. Thereafter, Piari Mohan Mondal died leaving behind Nagar Bashi as his sole heir. Nagar Bashi did not have any son. He died leaving behind his daughter, defendant No.8 as his only heir. Nagar Bashi in his life time gave defendant No.8 marriage with one Jatindra Sarker who have two sons, namely, Sangram and Pintu. Defendant No.8 is entitled to get saham in respect of /8/-anas share as the heir of Nagar Bashi.

7. The trial Court by the judgment and decree dated 17.08.1992 decreed the suit in preliminary form on contest against defendant Nos.2 and 8 and *ex-parte* against the other defendants holding that the plaintiffs were entitled to get the partition in respect of /8/ annas share in the suit land. The trial Court directed the defendants to effect amicable partition within 45 days from that date and to make “allotment to the plaintiffs according to their saham.”

8. Being aggrieved by and dissatisfied with the judgment and decree of the trial Court, only defendant No.2 filed Title Appeal No.384 of 1992 before the District Judge, Dhaka. The learned Additional District Judge, 6th Court, Dhaka, hearing the appeal by his judgment and decree dated 20.09.1991 allowed the appeal and set aside those of the trial Court and dismissed the suit. Against the judgment and decree of the Appellate Court, the plaintiffs preferred Civil Revision No.507 of 2000 before the High Court Division and a learned Judge of the Single Bench by the impugned judgment and order made the Rule absolute, set aside the judgment and decree of the Appellate Court and restored those of the trial Court. Feeling aggrieved by the judgment and order of the High Court Division, defendant No.2 filed Civil Petition for Leave to Appeal No.1322 of 2004 before this Court and leave was granted to consider the submissions of his learned Advocate-on-Record as under:

“The learned Advocate-on-record submits that considering the proved facts, circumstances and evidences (sic) on record it is clear that the exhibit N0.1, a registered deed dated 25.10.1948 is not a deed of gift but admittedly a deed creating life interests only of the plaintiff No.1 and the plaintiff No.1 is not a co-sharer of the disputed properties and thus the life interest holder has no right and authority to file a suit for partition and get a decree, but the High Court Division upon misconception about the aforesaid law has allowed the partition to a life interest holder causing complete miscarriage of justice. The learned Advocate-on-record also submits that considering the proved facts, circumstances and evidences (sic) on record the High Court Division upon misconception of law has shifted the burden of proof of pleadings upon the defendants illegally and arbitrarily causing miscarriage of justice.”

9. Mr. Abdul Wadud Bhuiyan, learned Counsel, appearing for the appellant, has reiterated the submissions on which leave was granted that the suit for partition at the instance of the plaintiffs was not maintainable inasmuch as they were not the co-sharers in the case jote. Therefore, the impugned judgment and order is liable to be set aside and the appeal be allowed.

10. Mr. Mahmudul Islam, learned Counsel, for the plaintiff-respondents, on the other hand, has supported the impugned judgment and order. He has submitted that even for assuming that plaintiff No.1 had life interest only in the suit land, the suit for partition was maintainable, because if the suit land was not partitioned by metes and bounds, plaintiff No.1 who had life interest would not be able to enjoy the land in its fullest terms; the High Court Division did not commit any error of law in restoring those of the trial Court which decreed the suit. Mr. Islam has further submitted that plaintiff No.1, in the meantime, died and now plaintiff No.2 is the only heir of Piari Mohan Mondal. Therefore, she alone is entitled to get saham to the extent of /8/ annas share in the suit land and the decree passed by the trial Court needs to be modified to that effect. He has lastly submitted that so far as the right, title and interest of the appellant (defendant No.2 is the appellant) is concerned, the Appellate Court concurred with the trial Court that he did not acquire any right, title, interest and possession in the suit land on the basis of his alleged purchase vide kabala dated 19.10.1981, i.e. Ext-‘Ka’, so he is not entitled to get any relief in the appeal and the same is liable to be dismissed.

11. In the facts and circumstances of the case, the submissions of the learned Counsel of the respective party and in view of the leave granting order, the points to be decided in this appeal are: (i) whether, even if it is accepted that plaintiff No.1 had life interest in the suit land only, she was entitled to bring the suit for partition in the suit land by metes and bounds, (ii) whether the High Court Division at all shifted the burden of proving the pleading of the defendants upon them.

12. So far as the first point is concerned, Mr. Mahmudul Islam in support of his submission that a Hindu woman having life interest can maintain a suit for partition referred the case of Ranada Kishore Roy-Vs-Swarnamoyee Debi, 44 CWN 114. The facts of the case were that Swarnamayee Debi as the plaintiff filed a suit for partition by metes and bounds of her /8/ annas share in large number of properties described in the schedule to the plaint. In the suit, the plaintiff also prayed for a declaration of title to /8/ annas share in two touzis being Nos.2575 and 2576 which were known as the Syama Gram Properties and were included in item No.4 of the plaint. In that case a question was raised whether the plaintiff who had only a Hindu widow’s estate in the properties left by her adopted son and also in those properties which were subsequently acquired by Ramani on his own behalf and on behalf of the estate of his brother Nalini Kishore could maintain the suit for partition. In that case, a Division Bench of the Calcutta High Court held that a Hindu widow had a right to maintain a suit for partition against the co-sharers of her deceased husband, without making out any special *bona fide* cause or necessity such as renders partition desirable; the only consideration to be regarded by the Court is that the allotments are fair so as not to prejudice the reversioner who would be bound by the result of the partition. And the Division Bench held that the suit was maintainable. In taking the above view, the Division Bench relied upon the case of Bipin Behari Modack-Vs-Lal Mohan Chattapadhya, I.L.R. 12 cal, 209(1885) where it was held:

“That a Hindu widow has a right to partition has been established by the Full Bench decision in Janoki Nath Mukhopadhya v. Mothuranath Mukhopadhya (1) and the assignee of a Hindu widow is in the same position. All that has to be secured in favour

of the reversioners is that the partition should be so carried out as not to affect their rights.”

13. Mr. Abdul Wadud Bhuiyan could not show any contra-decision to the decision referred by Mr. Mahmudul Islam. We fully endorse the view taken by the Calcutta High Court. Because if a Hindu widow or a Hindu woman having life interest is not allowed to pray for partition of the joint properties by metes and bounds, then she would be deprived of enjoying her such right, as in the absence of partition by metes and bounds, she would not be able to enjoy her life interest therein. And if it is held that a Hindu widow or a Hindu woman having life interest would not be able to file a suit for partition, then the other co-sharers of the joint properties may use such decision as lever against such Hindu woman and thus create obstructions in the enjoyment of her life interest in the joint properties. Therefore, we find no substance in the point that plaintiff No.1 not being a co-sharer in the suit khatian and having life interest only could not maintain the suit for partition. And we hold that a Hindu widow or a Hindu woman having life interest can very much maintain a suit for partition for the fullest enjoyment of her such right in the joint properties.

14. Now coming to the factual aspects of the case, it appears that the trial Court clearly noticed that the assertion of the plaintiffs made in the plaint that Piari Mohan Mondal by amicable arrangement with Rai Mohan Mondal used to possess exclusively the land of C.S. Plot No.661 measuring an area of 39 acre and the land of other plots of the suit khatian in ejmali with Rai Mohan Mondal and that Piari Mohan Mondal out of love and affection gifted the entire land of C.S. Plot No.661 to plaintiff No.1 by a registered deed of gift dated 25.10.1941 and handed over possession thereof to her and since then she has been “holding and possessing” the same and that Rameswar Mondal transferred his entire share to defendant Nos.3 and 6 and hence the widow of Rameswar Mondal, defendant No.1 had no saleable interest in the suit land and that Piari Mohan Mondal died leaving behind a son, Nagar Bashi and a son’s daughter plaintiff No.2 and that Nagar Bashi also died childless leaving behind plaintiff No.2 as his sole heir and that in the aforesaid manner, the plaintiffs became the owner of the entire 8/ annas share of Piari Mohan Mondal and that they have been “holding and possessing” the same and that the suit land was not “effectuated partition” amongst the co-sharers were not specifically denied by the main contesting defendant, i.e. defendant No.2. The trial Court held that such non-denial of the assertions of the statements made by the plaintiff in the plaint by the defendant in his written statement amounts to admission of the assertions made in the plaint. The trial Court gave finding that defendant No.1 in her written statement admitted that Piari Mohan Mondal used to possess the land of C.S. Plot No.661 exclusively and that Piari Mohan Mondal transferred the land of C.S. Plot No.661 to plaintiff No.1 by a registered deed of gift. The trial Court also noticed that defendant No.8 in her evidence admitted that Piari Mohan Mondal transferred the land of C.S. Plot No.661 to plaintiff No.1 and since the death of Piari Mohan Mondal, plaintiff No.1 has been “holding and possessing” the same. The trial Court further noticed that though defendant No.8 in her examination-in-chief stated that Piari Mohan Mondal gave plaintiff No.1 only the right of enjoyment of C.S. Plot No.661 and that Piari Mohan Mondal did not gift the land of C.S. Plot No.661 to plaintiff No.1, but no such case was made out in the four corners of the written statement filed by her. Therefore, the said statements of PW8 in her examination-in-chief did not merit any consideration.

15. The trial Court considering the recitals of exhibit-‘1’, the deed of gift dated 25.10.1948, came to the finding that *“very version of exhibit-1 deed of gift dated 25.10.48 indicates that by virtue of it Piari Mohan Mondal made full fledged transfer of the C.S. Plot*

No.661 to the plaintiff No.1” and that a reading of the deed from top to bottom indicated that it was an out and out deed of gift. The trial Court considering the evidence of PWs1, 2 and 3 and exhibit-‘2’ rent receipt found possession of the plaintiffs in the suit land. The trial Court also found that defendant No.2 failed to prove his title by virtue of his purchase from defendant No.1 in C.S. Plot No.661. The trial Court further found that defendant No.1 by filing written statement in the suit “cut the case of the defendant No.2 from the root. As such defendant No.1 herself does not admit the case of defendant No.2, the case of the defendant No.2 does not stand.” The trial Court also found that defendant No.8 failed to prove that she was the daughter of Nagar Bashi.

16. The above factual findings of the trial Court have been affirmed by the High Court Division by the impugned judgment and order. Mr. Bhuiyan could not show from the record that the above factual findings of the trial Court as affirmed by the High Court Division were the result of any misreading of the pleading of the parties and the evidence adduced by them as well non-consideration of any material evidence. We have ourselves gone through the plaint, the written statements filed by defendant Nos.1, 2 and 8 respectively and the deposition of the witnesses; we find that the High Court Division rightly affirmed those findings of the trial Court.

17. In view of the above, we find that the second submission on which leave was granted was totally misconceived, so we find no merit in the second point as formulated hereinbefore.

18. For the discussions made hereinbefore, we find no merit in the appeal and the same is liable to be dismissed.

19. As submitted by Mr. Mahmudul Islam since plaintiff No.1 died in the meantime leaving behind plaintiff No.2 as the only heir of Piari Mohan Mondal, she (plaintiff No.2) is entitled to get partition of the entire $\frac{1}{8}$ annas share in the suit land and so the operating portion of the judgment and decree of the trial Court needs to be modified to the effect that only plaintiff No.2 is entitled to get partition in respect of $\frac{1}{8}$ annas share in the suit land as decreed by the trial Court. The appeal is dismissed with the above modification of the ordering portion of the judgment of trial Court and the decree be modified accordingly.